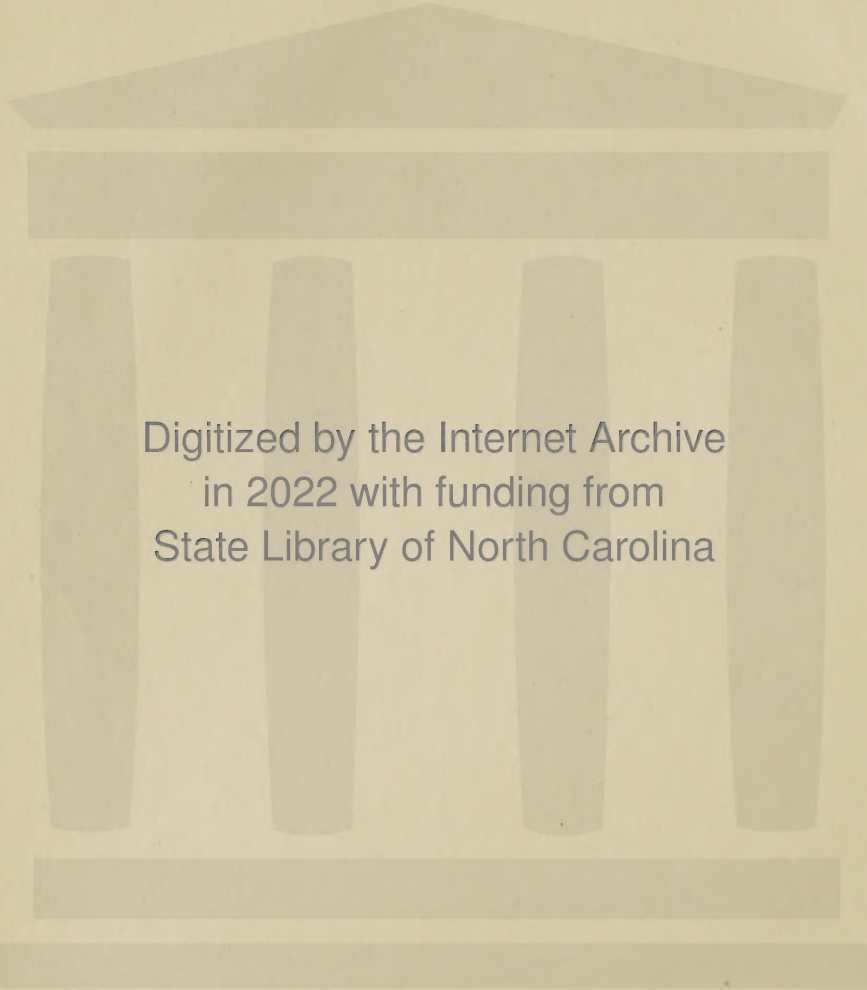


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THE GENERAL STATUTES OF NORTH CAROLINA OF 1943

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

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

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

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

IN FOUR VOLUMES
VOLUME ONE

THE MICHIE COMPANY, LAW PUBLISHERS
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1943

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BY

THE MICHIE COMPANY

Scope of Publication

Constitutions:

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

Statutes:

Full text of the General Statutes of North Carolina of 1943.

Annotations:

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

North Carolina Reports volumes 1-222.
Federal Reporter volumes 1-300.
Federal Reporter 2nd Series volumes 1-134 (p. 416).
Federal Supplement volumes 1-49 (p. 224).
United States Reports volumes 1-317.
Supreme Court Reporter volumes 1-63 (p. 861).
North Carolina Law Review volumes 1-21.

Abbreviations

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

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

Preface

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

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

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

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

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

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

At the request of the Attorney General, the following named persons also served as a part of this committee: Honorable A. A. F. Seawell, Associate Justice of the Supreme Court; Dean M. T. Van Hecke, of the University Law School; Dean H. C. Horack, of the Duke University Law School; Dean Dale F. Stansbury, of the Wake Forest Law School; and Dillard S. Gardner, Raleigh, Supreme Court Marshal and Librarian.

Full acknowledgment is made of the valuable assistance given by this committee in formulating the plans for the new code. The members of the committee very generously responded to the call for this service, giving a great deal of their valuable time to it without compensation or even reimbursement for their travel expenses.

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

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

Representatives F. E. Wallace, J. A. Pritchett, Hubert C. Jarvis, Irving Carlyle, Rupert T. Pickens, Julian R. Allsbrook, J. Q. LeGrand, O. L. Richardson, Arch T. Allen, John Kerr, Jr., George R. Uzzell, W. Frank Taylor, S. O. Worthington, J. T. Pritchett, Forrest A. Pollard, and T. E. Story; Senators Jeff D. Johnson, Jr., E. T. Sanders, J. C. Pittman, Wade B. Matheny, John W. Wallace, John D. Lar-kins, Jr., Thomas J. Gold, Archie C. Gay, Herbert Leary, and Hugh G. Horton.

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

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

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

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

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

VOLUME AND CHAPTER ARRANGEMENT

It is clearly apparent that a one-volume code is no longer practicable because of the increase in the volume of legislation, the great increase in the size of the index, the use of much heavier paper, and the inclusion of frontal tables and ad-

ditional supplemental material. After much consideration, a four-volume code was decided upon as the most practicable.

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

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

NUMBERING SYSTEM

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

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

LOCAL LAWS

The recodification has been made of the "general public statutes." North Carolina has enacted a great volume of private, special and local legislation. The problem of local legislation seems to be more serious in North Carolina than in most states. The problem of the proper disposition of these laws has harassed the preparation of the General Statutes to an even greater degree than prior revisions, which have included many local laws for convenience or to fill some gap in the general laws. However, with the great increase in the volume and complexity of legislation, it was clearly apparent that to continue to include in the code statutes which are essentially local in nature (except for necessary exceptions) would result in an over-bulky code and greatly complicate the search for the general laws.

The last official revision of the statutes was that embodied in the two volumes of the Consolidated Statutes of 1919, as brought forward by the third volume in 1924. Thus, the main basis for the present work is that revision and subsequent public session laws. However, many of the statutes in the "public laws" volumes are of local application, and it was necessary to make a decision as to which statutes should be codified. *It was finally decided that any statute or portion of a statute which did not affect at least 10 or more counties would not be placed in the code. All portions of the statutes or direct amendments to statutes affecting 9 counties or less have merely been cited in the first annotation paragraph following the statute and entitled "Local Modification."* Under this heading the affected counties, together with the appropriate session law or Consolidated Statutes citation, have been listed alphabetically without any attempt to summarize the provisions of the local laws modifying the general law. It was found that any attempt to analyze the exact effect of particular local provisions would often be not only misleading but inaccurate in the absence of a comprehensive study of all the vast body of local legislation appearing in the Public-Local and Private Law volumes since the vast majority of local laws do alter the general law without making direct references.

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

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

ANNOTATIONS

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

ADDITIONAL FEATURES

A complete table of contents is inserted at the beginning of each volume of the code and will be of considerable assistance in locating any chapter or article immediately. Frontal tables, listing the titles of each section in a chapter, are being placed at the beginning of each chapter and should be of great assistance in locating

any section desired. The code will be kept current for as long as possible by pocket supplements. The comparative tables have been expanded, and citations have been added to the State Constitution indicating the authority by which the various constitutional provisions were adopted. The appendix material has also been supplemented.

THE PUBLISHER'S EDITORIAL STAFF

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

THE CODIFICATION STAFF

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

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

CONTINUOUS REVISION

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

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

"1. Make a systematic study of the general statutes of the State, as set out in the General Statutes and as hereafter enacted by the General Assembly, for the purpose of ascertaining what ambiguities, conflicts, duplications and other imperfections of form and expression exist therein and how these defects may be corrected.

"2. Consider such suggestions as may be submitted to the Division with respect to the existence of such defects and the proper correction thereof.

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

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

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

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

SUPPLEMENTS

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

HARRY McMULLAN,
Attorney General.

August 15, 1943.

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Constitution of North Carolina

Adopted April 24, 1868, with Amendments to 1943

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PREAMBLE

We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign ruler of nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do for the more certain security thereof, and for the better government of this State, ordain and establish this Constitution: (Const. 1868.)

ARTICLE I

Declaration of Rights

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

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

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

Same—Penalty for Refusing to Accept Office.—It is a doctrine of the common law that every citizen in peace, as well as in war, owes his services to the state when they are demanded, and a legislative enactment prescribing a penalty of \$25 against any person who is duly elected or appointed town constable and who refuses to qualify is not violative of Art. I, sec. 17, which is a protective provision of the personal liberty referred to in this section. *London v. Headen*, 76 N. C. 72, 73, 75.

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

Exercise of Police Power Not Unlimited.—Compulsory vaccination is a valid exercise of governmental police power for the public welfare, health and safety, but if there are exceptional cases, where owing to the peculiar state of the health or system, vaccination would be dangerous, then the legislature cannot validly compel the person to submit to such protective measure, since this would be in violation of the rights recognized by this section as pre-existing and inherent in the individual. *State v. Hay*, 126 N. C. 999, 1006, 35 S. E. 459.

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

§ 2. Political power and government.—That

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

In General.—In construing the provisions of the constitution in regard to elections (see Art. VI, sec. 1) it should be kept in mind that this is a government of the people in which the will of the people—the majority—legally expressed, must govern and that these provisions should be liberally construed, that tend to promote a fair election, or expression of this popular will. *Quinn v. Lattimore*, 120 N. C. 426, 429, 26 S. E. 638.

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

Cited in *State v. Hickey*, 198 N. C. 45, 49, 150 S. E. 615; *State v. Pasley*, 180 N. C. 695, 104 S. E. 533; *State v. Dixon*, 215 N. C. 161, 1 S. E. (2d) 521 (dis. op.).

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

Duty to Follow Decisions of Supreme Court.—It is the duty of the Supreme Court of the state to follow the decisions of the Supreme Court of the United States, upon questions involved in interstate commerce where Congress has assumed control of the matter relating thereto, and involved in the litigation. *Norris v. Telegraph Co.*, 174 N. C. 92, 93 S. E. 465. But in intrastate cases, the decisions of the state Supreme Court are binding and will be followed in the U. S. Supreme Court though they appear "absurd and illogical." *Id.*

Regulation of Criminal Practice. — The legislature has power to shape the criminal procedure of the state to provide remedies required by the exigencies of the present time. *State v. Lewis*, 142 N. C. 626, 634, 55 S. E. 600.

§ 4. That there is no right to secede.—That this State shall ever remain a member of the American Union; that the people thereof are a part of the American nation; that there is no right on the part of this State to secede, and that all attempts, from whatever source or upon whatever pretext, to dissolve said Union or to sever said nation, ought to be resisted with the whole power of the State. (Const. 1868.)

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

§ 6. Public debt; bonds issued under ordinance of Convention of 1868, '68-'69, '69-'70, declared invalid; exception. — The State shall never assume or pay, or authorize the collection of any debt or obligation, express or implied, incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; nor shall the General As-

sembly assume or pay, or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond incurred, or issued, by authority of the Convention of the year one thousand eight hundred and sixty-eight, nor any debt or bond incurred or issued by the Legislature of the year one thousand eight hundred and sixty-eight, either at its special session of the year one thousand eight hundred and sixty-eight, or at its regular sessions of the years one thousand eight hundred and sixty-eight and one thousand eight hundred and sixty-nine, and one thousand eight hundred and sixty-nine and one thousand eight hundred and seventy, except the bonds issued to fund the interest on the old debt of the State, unless the proposing to pay the same shall have first been submitted to the people and by them ratified by the vote of a majority of all the qualified voters of the State. at a regular election held for that purpose. (Const. 1868; 1872-3, c. 85; 1879, c. 268.)

In the Constitution of 1868, this section read as follows: "Sec. 6. To maintain the honor and good faith of the State untarnished, the public debt, regularly contracted before and since the Rebellion shall be regarded as inviolable and never be questioned; but the State shall never assume or pay, or authorize the collection of, any debt or obligation, express or implied, incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave." Pursuant to Ch. 85, Public Laws of 1872-73, this section as set out in the preceding paragraphs was amended by striking out the first clause down to and including the word "but". The clause beginning with "nor" and ending with "purpose" was added pursuant to Ch. 268, Public Laws of 1879.—Ed. note.

Proceedings to settle and adjudge the legal validity of claims against the state were dismissed in *Baltzer v. State*, 104 N. C. 265, 266, 10 S. E. 153, for the reason that the general assembly was expressly forbidden by this section to pay the claim presented therein, the supreme court of North Carolina saying that "it would be idle, futile and ridiculous for this court to declare and adjudge the validity of a claim, against the state, and recommend to the general assembly to provide for its payment, when the Constitution expressly forbids it to pay or provide for the payment of such a claim." *Calkins Dredging Co. v. State*, 191 N. C. 243, 251, 131 S. E. 665.

§ 7. Exclusive emoluments, etc.—No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services. (Const. 1868.)

See § 45-52 and the note thereto.

Editor's Note.—The majority of the cases wherein the litigating parties have relied on this section as the chief factor in the case which they make out, involve the determination of the question whether the particular grant or privilege given to a certain body can be construed as a valid exercise of the police power, and if so then the case is taken beyond the operative force of this section, since its provisions are not applicable to those powers and privileges, the exercise of which is for the benefit and good of the public.

Purpose.—In summarizing the purpose of this section the court in *Simonton v. Lanier*, 71 N. C. 498, 503, speaking through Justice Bynum, says: "The wisdom and foresight of our ancestors is nowhere more clearly shown than in providing these fundamental safeguards against partial and class legislation, the insidious and ever-working foes of free and equal government."

This section is a fundamental democratic principle of "equal rights and opportunities to all, special privileges to none." *Newman v. Watkins*, 208 N. C. 675, 679, 182 S. E. 453, dissenting opinion of Justice Clarkson.

Any law which, purporting to operate on a particular class, places upon those engaged in the business in a portion of the state a burden for the privilege which is exercised freely and without additional charge by those engaged in the business in other parts of the state is arbitrary in classification because it discriminates within the class originally selected and extends to the latter a privilege and

immunity not accorded to those who must, under the law, pay the additional exaction or quit the business. *State v. Harris*, 216 N. C. 746, 753, 6 S. E. (2d) 854, 128 A. L. R. 658.

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

Public Service Corporations.—The grant of a special charter to a railroad or other like corporation is not in conflict with this section of the constitution, the decisions in this state being to the effect that the charters of public-service corporations come directly within the exception contained in this provision. *Reid v. Norfolk Sou. R. Co.*, 162 N. C. 355, 78 S. E. 306. This principle will be applied in behalf of municipal corporations, an agency of the state, created for the benefit of the public. *Kornegay v. Goldsboro*, 180 N. C. 441, 451, 105 S. E. 187.

Private Corporations.—A provision in a charter of a warehouse corporation to the effect that such corporation shall not be liable for loss or damages not provided for in its warehouse receipt or contract, attempts to confer exclusive privileges and is therefore unconstitutional under this section. *Motley v. Warehouse Co.*, 122 N. C. 347, 30 S. E. 3; *Motley v. Finishing Co.*, 124 N. C. 232, 32 S. E. 555.

A provision in a bank's charter allowing it to charge more than the legal rate of interest is void under this section of the constitution, where no public services are rendered in consideration of the grant. *Simonton v. Lanier*, 71 N. C. 498, 503.

A local public law which provides that the provisions of § 44-14, should be read into private construction bonds, is in contravention of this section and 31 of our State Constitution, the statute failing to operate uniformly and equally in giving special privilege to the residents of the particular county and imposing heavier burdens on certain sureties. *Plott Co. v. Ferguson Co.*, 202 N. C. 446, 163 S. E. 688.

Public Local Law as to Sale of Claims against Closed Banks Held Invalid.—Public-Local Laws and § 53-19, providing that depositors of certain closed banks might sell their claims for deposits to persons indebted to the banks at the date of their closing, and that the liquidation agents of such banks should accept such purchased claims as their face value in payment of the purchasers' debts to the banks, were held unconstitutional and void, being in violation of this section, in *Edgerton v. Hood*, 205 N. C. 816, 172 S. E. 481.

Regulation as to Maintenance of Market House.—It is within the power of a city or town to provide, by contract with its citizens, a market house and exclude with certain reasonable exceptions, the sale of fish at other places, it appearing that, under the contract, the market house was to remain under the full control of the municipal authorities, and that reasonable accommodation had been provided for the vendors, with reasonable charges for the stalls. *State v. Perry*, 151 N. C. 661, 65 S. E. 915.

Regulation as to the Practice of Medicine.—An act prohibiting the practice of medicine without registration is not brought within the inhibition of this section of the constitution because it contains a proviso to the effect that the act shall not apply to midwives nor to non-resident consulting physicians, as this does not constitute an exclusive privilege within the meaning of the section. *State v. Van Doran*, 109 N. C. 864, 869, 14 S. E. 32. See also, *State v. Biggs*, 133 N. C. 729, 46 S. E. 401.

Regulation as to Pilots.—The selection by a commission of persons qualified to act as pilots is not violative of this section. *St. George v. Hardie*, 147 N. C. 88, 60 S. E. 920.

Regulation of Vehicles for Hire.—A municipal ordinance requiring all operators of passenger motor vehicles for hire within the city to deposit with the treasurer of the city policies of liability insurance in responsible companies authorized to do business in the State in a stipulated amount for each car operated, or cash or securities in the sum required, is in contravention of this section and § 31, in that the ordinance fails to provide that the security required might be furnished by one or more solvent individual sureties. *State v. Sassee*, 206 N. C. 644, 175 S. E. 142. See 13 N. C. Law Rev., 222, for a note on this case.

Exemption from Jury Service.—In *State v. Cantwell*, 142 N. C. 604, 614, 55 S. E. 820, Mr. Justice Walker in a dissenting opinion says that exemption from jury service by virtue of services in a fire department for five years is within the meaning of the word "privilege" as used in the constitution, which may be conferred in consideration of public services, and is not subject to revocation by the legislature.

Applied, in dissenting opinion, in *Blevins v. Northwest*

Carolina Utilities, 209 N. C. 683, 184 S. E. 517; Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 29, 185 S. E. 482, holding § 45-34 constitutional and valid; Allen v. Carr, 210 N. C. 513, 187 S. E. 809, holding valid § 90-38, requiring a second examination of former licensed dentists returning to the state; Cowan v. Security Life, etc., Co., 211 N. C. 13, 188 S. E. 812, holding § 58-32 does not authorize insurance companies to charge more than six per cent interest; State v. Warren, 211 N. C. 75, 189 S. E. 108, holding invalid ch. 241, Public-Local Laws 1927, requiring real estate brokers and salesmen to be licensed by a special commission in designated counties.

Quoted in State v. Atlantic Ice, etc., Co., 210 N. C. 742, 188 S. E. 412; Raleigh v. Jordan, 218 N. C. 55, 9 S. E. (2d) 507 (dis. op.); State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366 (dis. op.); State v. Mitchell, 217 N. C. 244, 7 S. E. (2d) 567; State v. Dixon, 215 N. C. 161, 1 S. E. (2d) 521 (dis. op.); Woltz v. Asheville Safe Deposit Co., 206 N. C. 239, 173 S. E. 587; Little v. Miles, 204 N. C. 646, 169 S. E. 220; Dalton v. Brown & Co., 159 N. C. 175, 75 S. E. 40, 42 L. R. A. (N. S.) 506.

Cited in Bennett v. Southern Ry. Co., 211 N. C. 474, 191 S. E. 240.

§ 8. The legislative, executive, and judicial powers distinct.—The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other. (Const. 1868.)

See § 1-97 and notes.

Generally.—Each of these coordinate departments has its appropriate functions, and one cannot control the action of the other, in the sphere of its constitutional power and duty. State v. Holden, 64 N. C. 829; Person v. Tax Com'rs, 184 N. C. 499, 115 S. E. 336.

This section has been said to embody succinctly the judgment of the people of North Carolina in regard to "the great principle of the separation of the powers." Long v. Watts, 183 N. C. 99, 103, 110 S. E. 765, 22 A. L. R. 277.

From this unique political division results our elaborate system of checks and balances—a complication and refinement which repudiates all hereditary tendencies and makes the law supreme. In short, it is one of the distinct American contributions to the science of government; and the judiciary—the department of trial and judgment—of all others, without hesitation or turning, should hold fast to the basic principle upon which this government is founded. The courts are vested with judicial powers only, and it is no part of their function to change or to amend the criminal statutes enacted by the legislature. State v. Bell, 184 N. C. 701, 719, 115 S. E. 190 (dis. op.).

The propriety of ordering sales of lands upon petition of the owner is purely a judicial duty and any private act of the General Assembly attempting to regulate the same is void under this section. Miller v. Alexander, 122 N. C. 718, 30 S. E. 125.

Where Office Created by Legislature.—It is competent for the legislature in creating an office, other than purely judicial, to reserve to itself the right to remove, or to the governor to suspend, the incumbent of the office. Caldwell v. Wilson, 121 N. C. 425, 28 S. E. 554.

Creation of Board with Quasi-Judicial Functions.—The creation by the legislature of a board or municipal corporation and the conferring upon such board or municipal corporation quasi-judicial and administrative functions does not violate this provision. Cox v. Kinston, 217 N. C. 391, 8 S. E. (2d) 252.

Court Practice Regulated by Judicial Department.—Under the present constitution, the supreme judicial power being independent of the other departments, the legislature cannot prescribe rules of practice for the Supreme Court; nevertheless, the courts have copied, almost verbatim, the provisions of the Code. Bird v. Gilliam, 125 N. C. 76, 79, 34 S. E. 196; Herndon v. Insurance Co., 111 N. C. 384, 16 S. E. 465. And where there is conflict, the rules made by the court will be observed, Cooper v. Com'rs, 184 N. C. 615; 113 S. E. 569. However, Art. 4, sec. 12 of the constitution gives to the General Assembly power to regulate proceedings in all the courts "below the Supreme Court." Horton v. Green, 104 N. C. 400, 401, 10 S. E. 470.

The independence of the Supreme Court only (and not of the entire judicial department) is provided for by this section. Wilson v. Jordan, 124 N. C. 683, 705, 33 S. E. 139. But there is nothing which gives the Supreme Court supervisory control over the legislature. Id.

The supreme court has the sole right to prescribe rules

of practice and procedure therein. Lee v. Baird, 146 N. C. 361, 59 S. E. 876.

The rules prescribed by the supreme court to regulate its own procedure, including the rule as to dismissing an appeal thereto if not docketed, or a recordari prayed for in apt time, will be strictly enforced. Being under the exclusive authority therein given to the supreme court by the Constitution, Art. I, § 8, as distinguished from procedure applying to courts inferior thereto, Art. IV, § 2, a statute in conflict therewith will not be observed. State v. Ward, 184 N. C. 618, 113 S. E. 775.

Judicial Power as Aid to Legislative Act.—The judicial power can not be exercised in aid of an unfinished and inoperative act, so left upon the final adjournment, any more than in obstructing legislative action. State v. Robinson, 81 N. C. 409, 426.

Power of County to Apply Formula for Ascertaining Taxable Property.—Plaintiff county ascertained the amount of personal property of defendant nonresident corporation having a "business situs" in this state, and liable for taxation as solvent credits by the county by ascertaining the total assets of the defendant and the percentage of such assets found in the county, and allowing the same per cent of its total liabilities to be deducted therefrom. Defendant complained that defendant county had made its own rule in ascertaining the solvent credits in the county subject to taxation in violation of this section, but since defendant failed to list its solvent credits for taxation as required by law, it was not prejudiced by the assessment of its personal property for taxation as determined by the county. Mecklenburg County v. Sterchi Bros. Stores, 210 N. C. 79, 185 S. E. 454.

The creation of the Mattamuskeet Drainage District by the legislature is not violative of our Constitution. O'Neal v. Mann, 193 N. C. 153, 136 S. E. 379.

The creation by the legislature of a board or municipal corporation and the conferring upon such board or municipal corporation quasi-judicial and administrative functions does not violate this section. Cox v. Kinston, 217 N. C. 391, 8 S. E. (2d) 252.

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

Cited in Castevens v. Stanly County, 211 N. C. 642, 191 S. E. 739; State v. Casey, 201 N. C. 620, 161 S. E. 81 (dis. op.); Lacy v. State, 195 N. C. 284, 141 S. E. 886; Myers v. United States, 272 U. S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (dis. op. of McReynolds, J.); Bladen County Com'rs v. Boring, 175 N. C. 105, 95 S. E. 43 (con. op.); Humphreys v. Churchill, 217 N. C. 530, 8 S. E. (2d) 810 (dis. op.); Warrenton v. Warren County, 215 N. C. 342, 2 S. E. (2d) 463 (dis. op.); State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366; Jacobi Hardware Co. v. Jones Cotton Co., 188 N. C. 442, 124 S. E. 756; In re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L. R. A. (N. S.) 288.

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

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

Quoted in Swaringen v. Poplin, 211 N. C. 700, 191 S. E. 746.

Cited in Edgerton v. Hood, 205 N. C. 816, 172 S. E. 481.

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

As to counsel, see § 15-4 and notes.

For article discussing the limits to confrontation, see 15 N. C. Law Rev., No. 3, p. 229.

Information as to Accusation.—This section of the consti-

tution does not require that the accused be informed of the charge against him in any special form or particular words, except it must be by presentment or indictment. *State v. Carpenter*, 173 N. C. 767, 92 S. E. 373; *State v. Gibson*, 169 N. C. 318, 85 S. E. 7. As to necessity for indictment, see N. C. Const., Art. I, sec. 12, and notes thereto.

Where a defendant convicted of a criminal offense has had sentence suspended upon condition that he appear at certain times in court and show good behavior, it is required that a judgment rendered at a later time find the facts upon which a sentence has been imposed and specify the findings of a certain criminal offense the defendant is found to have committed, in order to show that the defendant had been informed of the offense before sentence. *State v. Gooding*, 194 N. C. 271, 139 S. E. 436.

A charge to the jury which virtually puts the defendant upon trial for an additional offense to that named in the bill, in this case, conspiring with others than those alleged, violates the provisions of this section that "in all criminal prosecutions every man has the right to be informed of the accusation against him." *State v. Mickey*, 207 N. C. 608, 609, 178 S. E. 220.

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

While this section gives to the accused the right to confront his accusers, such does not apply when the facts, from their very nature, can only be proved by a duly authenticated copy of a record. *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002.

The right guaranteed by this section does not mean that never under any circumstances shall a criminal charge be prosecuted except by the presence of living witnesses. *Id.*

Statute which establishes a form for a bill of indictment for perjury, and enacts in express terms that this form shall be sufficient, was sufficient to apprise the defendant with reasonable certainty of the nature of the crime of which he stands charged. *State v. Harris*, 145 N. C. 456, 59 S. E. 115.

An indictment which failed to show the causal relation between the alleged false pretense and the deceit, was held not to inform defendant of the crime charged against him. It is his constitutional right to be so informed. *State v. Whedbee*, 152 N. C. 770, 780, 67 S. E. 60, 27 L. R. A. (N. S.) 363.

In *State v. Hightower*, 187 N. C. 300, 310, 121 S. E. 616, it was said: "In all criminal prosecutions the defendant is clothed with a constitutional right of confrontation, and this may not be taken away any more by denying him the right to cross-examine the state's witnesses than by refusing him the right to confront his accusers and witnesses with other testimony. Constitution, Art. I, § 11 [this section]. 'We take it that the word confront does not simply secure to the accused the privilege of examining witnesses in his behalf, but is an affirmation of the rule of the common law that in trials by jury the witness must be present before the jury and accused, so that he may be confronted; that is, put face to face'—Pearson, C. J., in *State v. Thomas*, 64 N. C. 74. And this, of course, includes the right of cross-examination." *State v. Hartsfield*, 188 N. C. 357, 359, 124 S. E. 629; *State v. Moss*, 47 N. C. 66; *State v. Snipes*, 185 N. C. 743, 748, 117 S. E. 500; *State v. Harris*, 181 N. C. 600, 617, 107 S. E. 466; *State v. Maynard*, 184 N. C. 653, 113 S. E. 682.

"We take it that the word confront does not simply secure to the accused the privilege of examining witnesses in his behalf, but is an affirmation of the rule of the common law that in trials by jury the witness must be present before the jury and accused, so that he may be confronted; that is, put face to face." Pearson, C. J., in *State v. Thomas*, 64 N. C. 74. And this, of course, includes the right of cross-examination. *State v. Hightower*, 187 N. C. 300, 310, 121 S. E. 616.

The principle upon which dying declarations may be received in evidence in criminal cases is not in violation of the defendant's constitutional right to confront his accusers, as they have been admitted from necessity. *State v. Williams*, 185 N. C. 643, 116 S. E. 570.

Confrontation—Definition.—In *State v. Thomas*, 64 N. C. 74, 76, it is said that the word "confront" as used in this section does not simply secure to the accused the privilege of examining witnesses in his behalf, but is an affirmation of the common law rule that in trials by jury the witness must be present before the jury and the accused, so that he may be confronted, that is put face to face. It extends also to the right to require the witnesses to be placed under oath, subject to the test of a competent cross-examina-

tion. *State v. Dixon*, 185 N. C. 727, 119 S. E. 170. See also *State v. Breece*, 206 N. C. 92, 94, 173 S. E. 9.

Under this construction it is held that entries in the course of business, upon the books of a railroad company by one at the time an agent of the company, and still living, but absent from the State, are not competent evidence of the facts therein set forth, upon the trial of a third person for crime. *State v. Thomas*, 64 N. C. 74.

By construing this section, which gives the accused the right to be confronted by witnesses, with the right to be present at the trial, the conclusion reached in this state is that the prisoner does not have to accompany the jury when it views the scene of the crime. Apparently the right to accompany the jury has never been raised in this state. 12 N. C. Law Rev., 268.

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

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

The right of a defendant to confront his accusers includes the right to cross-examine them on any subject touched on in their examination-in-chief, and a witness testifying to facts incriminating defendant on his examination-in-chief may not deprive defendant of his right to cross-examine him on the ground that answers to questions asked on cross-examination might tend to incriminate the witness. *State v. Perry*, 210 N. C. 796, 188 S. E. 639.

Self-Incrimination—Scope of Protection.—For fair interpretation of the clause that the defendant "shall not be compelled to give evidence against himself" seems to be to secure one who is or may be accused of crime from making any compulsory revelations which may be given in evidence against him on his trial for the offense. *LaFontaine v. Southern Underwriters*, 83 N. C. 133, 138.

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

As to witness testifying to any unlawful gaming done by himself or others, see section 8-55 and note thereto.

Upon the trial of the defendant for violating the prohibition law the introduction in evidence of testimony of the officer making the arrest that he found a half-gallon jar of liquor on the person of the defendant is competent, and is not in violation of the constitutional provision that a defendant may not be compelled to give evidence against himself, the provision not applying to physical facts or conditions. *State v. Hickey*, 198 N. C. 45, 46, 150 S. E. 615.

The constitutional guarantee that a defendant shall not be compelled to testify against himself, as provided by this section, does not preclude testimony by a witness as to marks on defendant's body tending to identify him as the perpetrator of the crime. *State v. Riddle*, 205 N. C. 591, 172 S. E. 400.

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

Whenever the defendant in a criminal action voluntarily testifies in his own defense he assumes the position of a witness and subjects himself to all the disadvantages of that position. In doing so he acknowledges the right of the prosecution to test his credibility and he waives his constitutional privilege not to answer questions which tend to incriminate him or to prove the specific offense with which he is charged. *State v. O'Neal*, 187 N. C. 22, 23, 120 S. E. 817.

In *Smith v. Smith*, 116 N. C. 386, 21 S. E. 196, it was held that the true intent and meaning of this article is that a witness shall not be compelled to answer any question, the answer to which would disclose a fact which forms an essential link in the chain of testimony which would be sufficient to convict him of a crime. And Chief Justice Faircloth, delivering the opinion, said: "We think the provision of our Constitution ought to be liberally construed to preserve personal rights and protect the citizen against self-incriminating evidence." *State v. Medley*, 178 N. C. 710, 712, 100 S. E. 591.

Testimony that defendant was placed for identification in the relative position to a witness as the perpetrator was seen by her just before committing a criminal offense is not objectionable as forcing defendant to give evidence

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

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

Same—Demonstration of Act of Killing.—Upon trial for murder in the first degree when there is other circumstantial evidence of the prisoner's guilt, it is not duress to require the prisoner to place himself in such position as to show he could have fired the fatal shot from a window and killed the deceased, as this is not considered as making a person furnish evidence against himself, it being dependent upon physical facts and conditions and not upon confessions or statements of the prisoner. *State v. Thompson*, 161 N. C. 238, 76 S. E. 249.

Same—Forced Production of Incriminating Documents Not Allowed.—The protection afforded to defendants in criminal action by this section is a matter of absolute right to them, and extends to the forced production of letters and other papers in their possession that may tend to incriminate them upon the trial. *State v. Hollingsworth*, 191 N. C. 595, 132 S. E. 667.

Same—Waiver of Privilege.—The defendant waives his constitutional privilege not to answer questions tending to incriminate himself when he voluntarily testifies in his own behalf. *State v. Allen*, 107 N. C. 805, 11 S. E. 1016.

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

Hence Accomplice Can Not Refuse to Answer on Cross-Examination after Incriminating Defendant.—An accomplice may not testify on direct examination to facts tending to incriminate defendant and at the same time refuse to answer questions on cross-examination relating to matters embraced in his examination-in-chief, and where he refuses to answer relevant questions on cross-examination on the ground that his answers might tend to incriminate him, it is error for the court to refuse defendant's motion that his testimony-in-chief be stricken from the record, the refusal to answer the questions on cross-examination rendering the testimony-in-chief incompetent. *State v. Perry*, 210 N. C. 796, 188 S. E. 639.

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

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

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

Private Counsel May Assist Solicitor in Trial of Case.—The trial court has discretionary power to allow private counsel to assist the solicitor in the trial of a case, it being the duty of the court to permit only such assistance as fairness and justice may require, and such power does not impinge the provisions of this section of the Constitution. *State v. Carden*, 209 N. C. 404, 183 S. E. 898.

Cited in *State v. Wadford*, 194 N. C. 336, 139 S. E. 608; *State v. Goff*, 205 N. C. 545, 552, 172 S. E. 407.

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

Generally.—The words "except as hereinafter allowed"

have reference to the last clause of section 13, and are intended to harmonize the two sections and let both operate. *State v. Crook*, 91 N. C. 536, 540.

These principles are dear to every free man; they are his shield and buckler against wrong and oppression, and lie at the foundation of civil liberty; they are declared to be the rights of the citizens of North Carolina and ought to be vigilantly guarded. *State v. Moss*, 47 N. C. 66; *State v. Snipes*, 185 N. C. 743, 748, 117 S. E. 500.

A justice of the peace has no jurisdiction of an assault with a deadly weapon except to bind the defendant over, and by the provisions of this section, the Superior Court may proceed to trial only upon indictment duly found and returned, the words in this section "except as hereinafter allowed" referring to the latter clause of section 13 relating to trial of petty misdemeanors and not to an assault with a deadly weapon. *State v. Myrick*, 202 N. C. 688, 163 S. E. 803. See *State v. Clegg*, 214 N. C. 675, 200 S. E. 371.

Scope.—This section means action by the grand jury according to the practice at common law, and does not permit open hearings before the grand jury, and where the court sends for the grand jury and permits the solicitor to examine a state's witness in open court before the grand jury after the grand jury had returned two identical bills of indictment against the defendant, submitted on successive days, "not a true bill," and thereafter the solicitor submits another identical bill to the grand jury which is returned "a true bill": Held, the defendant's verified plea in abatement and motion to quash, made before pleading, should have been allowed, and upon appeal from the court's denial of the motion the judgment will be reversed, with leave to the solicitor to send another bill before a different grand jury, if so advised. *State v. Ledford*, 203 N. C. 724, 166 S. E. 917.

The word "indictment" means indictment by a grand jury as defined by the common law. *State v. Mitchell*, 202 N. C. 439, 443, 163 S. E. 581.

Necessity for Order for Grand Jury During Special Term.—Where defendant is tried at a special term of criminal court upon an indictment returned by a grand jury drawn for the special term, but there is no order by the Governor that a grand jury be drawn from such term, as provided by § 7-78, defendant's motion in arrest of judgment, made the first time in the Supreme Court upon appeal, must be allowed, pursuant to this section. *State v. Baxter*, 208 N. C. 90, 179 S. E. 450. See *State v. Boykin*, 211 N. C. 407, 191 S. E. 18.

Effect of Invalid Indictment.—When the indictment charging defendant with the commission of crime is invalid, defendant's motion to dismiss the action for want of jurisdiction should be allowed. *State v. Beasley*, 208 N. C. 318, 180 S. E. 593.

Indictment on Appeal.—See *State v. Pulliam*, 184 N. C. 681, 684, 114 S. E. 394. See also, *State v. Hyman*, 164 N. C. 411, 79 S. E. 284.

Applied in *State v. Watson*, 209 N. C. 229, 183 S. E. 286; *State v. Rawls*, 203 N. C. 436, 166 S. E. 332.

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

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

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

The essential attributes of trial by jury guaranteed by this section, are the number of jurors, their impartiality and a unanimous verdict, and § 9-21, providing that the court may order the selection of an alternate juror in those cases which seem likely to be protracted, does not infringe upon this constitutional provision. *State v. Dalton*, 206 N. C. 507, 174 S. E. 422.

Unanimous Verdict Required.—A verdict of guilty rendered by a less number than twelve is unconstitutional. *State v. Berry*, 190 N. C. 363, 130 S. E. 12. The verdict must be rendered in open court before the presiding judge. *State v. Bazemore*, 193 N. C. 336, 137 S. E. 172.

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

Poll of Jury.—The predominant purpose of the poll is

to ascertain if the verdict as tendered by the jury is the "unanimous verdict of a jury of good and lawful men in open court," as prescribed by this section. *Lipscomb v. Cox*, 195 N. C. 502, 505, 142 S. E. 779. See Art. I, § 19.

See notes to section 1-201.

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

Jury Trial Not Waivable.—A jury trial cannot be waived in a criminal action; hence where the facts were agreed upon by the state and the accused and submitted to the judge for his decision, it was held, that such a procedure is not warranted by the law. *State v. Holt*, 90 N. C. 749. The only exception being for the trial of petty misdemeanors. *State v. Stewart*, 89 N. C. 563. As to waiver in civil cases, see section 1-184 and notes thereto.

Jury Trial Can Not Be Waived after Plea of Not Guilty.—A defendant in a criminal prosecution for a felony or a misdemeanor may not waive his constitutional right to trial by jury in the Superior Court after entering a plea of "Not guilty", without changing his plea, nor may the General Assembly permit him to do so by statute, and where the court, after a plea of "Not guilty," finds the defendant guilty without a jury trial, the judgment will be stricken out and the cause remanded. *State v. Hill*, 209 N. C. 53, 182 S. E. 716. See also, *State v. Muse*, 219 N. C. 226, 13 S. E. (2d) 229.

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

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

For cause of emergency, such as illness of juror, see *State v. Wheeler*, 185 N. C. 670, 673, 116 S. E. 413; denial of partnership, see *Woodland & Co. v. Southgate Packing Co.*, 186 N. C. 116, 118 S. E. 898.

Assault and battery is not a petty misdemeanor within the proviso to this section. *State v. Stewart*, 89 N. C. 563, 564; *Schick v. United States*, 195 U. S. 65, 93, 24 S. Ct. 826, 49 L. Ed. 99.

The recorders' courts is not in violation of the right of trial by jury guaranteed by this section. *Jones v. Brinkley*, 174 N. C. 23, 25, 93 S. E. 372, citing *State v. Shine*, 149 N. C. 480, 62 S. E. 1080; *State v. Doster*, 157 N. C. 634, 73 S. E. 111; *State v. Dunlap*, 159 N. C. 491, 74 S. E. 626. See also, *State v. Rogers*, 162 N. C. 656, 659, 78 S. E. 293, 6 L. R. A. (N. S.) 38, Ann. Cas. 1914A, 867.

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

The legislature has power to designate the unlawful possession and transportation of intoxicants a petty misdemeanor and to provide means of trial for the offense other than by indictment and trial by jury. *State v. Shine*, 222 N. C. 237, 22 S. E. (2d) 447.

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

Same—Right of Appeal.—The right of appeal mentioned in the last clause of this section must be with the right in the party to appeal to the Supreme Court, and with power and jurisdiction in that court to review the decision of the court below in matters of law. *State v. Ham*, 83 N. C. 590, 591, 593.

The constitutional guaranty of a jury trial is met by the right of appeal which is given from the police court, in all cases, to the Superior Court. *State v. Lytle*, 138 N. C. 738, 51 S. E. 66. And this is true where the appeal is from a recorder's court. *State v. Hyman*, 164 N. C. 411, 79 S. E. 284.

In disbarment proceedings respondent's exception on the S. E. 92.

ground that the proceedings deprived him of his right to trial by jury is untenable when the matters in issue are determined by a jury upon his appeal to the superior court. In re West, 212 N. C. 189, 193 S. E. 134. As to right on appeal from criminal case charging misdemeanor, see *State v. Wheeler*, 185 N. C. 670, 116 S. E. 413.

Upon defendant's appeal from judgment and sentence by the court after defendant had entered a conditional plea of guilty the case will be remanded in order that a jury may pass upon defendant's guilt or innocence in accordance with defendant's constitutional right. *State v. Ellis*, 210 N. C. 170, 185 S. E. 662.

Where a defendant enters a plea of "not guilty" in the superior court, he may not thereafter, without being permitted to change his plea, waive his constitutional right of trial by jury. *State v. Rogers*, 162 N. C. 656, 78 S. E. 293, 46 L. R. A. (N. S.) 38, Ann. Cas. 1914A, 867. And this applies to misdemeanors as well as to the more serious offenses. *State v. Pulliam*, 184 N. C. 681, 114 S. E. 394. The reason for such holding is to be found in the language of this section. *State v. Hartsfield*, 183 N. C. 357, 361, 124 S. E. 629.

Same—Waiver of Right.—A person on trial for a misdemeanor in a municipal court with right of appeal to the Superior Court, may waive his constitutional right to a trial by jury by consenting to the judgment therein entered, or by not appealing therefrom, and his afterwards employing an attorney and moving for the appeal within the time allowed by the statute applicable will not affect the fact that he had personally acquiesced in the judgment entered. *State v. Lakey*, 191 N. C. 571, 132 S. E. 570. *State v. Pasley*, 180 N. C. 695, 104 S. E. 533.

It is permissible under this section for the General Assembly to provide for the trial of petty misdemeanors in inferior courts with the right of appeal to the Superior Court. *State v. Camby*, 209 N. C. 50, 52, 182 S. E. 715, citing *State v. Pasley*, 180 N. C. 695, 104 S. E. 533; *State v. Tate*, 169 N. C. 373, 85 S. E. 383; *State v. Hyman*, 164 N. C. 411, 79 S. E. 284; *State v. Brittain*, 143 N. C. 668, 57 S. E. 352; *State v. Lytle*, 138 N. C. 738, 51 S. E. 66.

Applied in *State v. Watson*, 209 N. C. 229, 183 S. E. 286.

§ 14. Excessive bail.—Excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted. (Const. 1868.)

For general provisions as to bail, see sections 15-102 et seq., of the code.

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

In General.—This section restricts the judiciary from imposing excessive punishments where the legislature has not prescribed a fixed maximum, and does not apply to the legislative power to impose the penalty for acts made an offense by them. *State v. Blake*, 157 N. C. 608, 72 S. E. 1080.

Bail—Test as to Reasonableness.—There are two things which have been looked upon as very good guides in determining the reasonableness of punishment; (1) what has formerly been expressly done in like cases, and (2) for the want of such particular discretion then to consider that which comes nearest to it. *State v. Driver*, 78 N. C. 423, 430.

It ought to be left to the judge who inflicts it under the circumstances of each case, and it ought not to be interfered with, except when the abuse is palpable. *State v. Driver*, supra; cited and approved in *State v. Reid*, 106 N. C. 714, 716, 11 S. E. 315.

It is well settled that when no time is fixed by the statute, an imprisonment for two years will not be held cruel and unusual. *State v. Farrington*, 141 N. C. 844, 53 S. E. 954, citing *State v. Driver*, 78 N. C. 423; *State v. Miller*, 94 N. C. 904.

Cruel and Unusual Punishment.—This section has been considered by the Supreme Court as an admonition to the judiciary in imposing sentence left to an extent within its discretion by the statutes, however, there is a decided intimation that in extraordinary and exceptional cases it may be held to affect legislative enactments as well. *State v. Smith*, 174 N. C. 804, 93 S. E. 910.

Where the question of punishment is left to the sound discretion of the court, the court is limited only by the prohibition against cruel or unusual punishment in this section. *State v. Richardson*, 221 N. C. 209, 211, 19 S. E. (2d) 863.

It is well settled that when no time is fixed by statute, this court will not hold imprisonment for two years cruel and unusual. *State v. Moschoures*, 214 N. C. 321, 322, 199 S. E. 92.

Defendant's contention that he was subjected to cruel and unusual punishment in that the trial court sentenced him to the maximum prison term permitted by statute for the offense of seduction of which he was convicted, and in addition dictated a letter to the parole commissioner in which he requested that no clemency be extended defendant, and also directed the solicitor to institute prosecution against defendant for failure to support his illegitimate child, is untenable, since the letter to the parole commissioner and the instructions to the solicitor are not parts of the sentence imposed. *State v. Brackett*, 218 N. C. 369, 11 S. E. (2d) 146.

Same—Punishment for Two Offenses.—Where there is a conviction of the violation of two separate criminal statutes consolidated and tried as two counts under one bill of indictment, a sentence for each offense—the one to begin upon the expiration of the other term—confining the punishment as to each within that prescribed in the statute relating to it, cannot be considered under the facts of the case as cruel and unusual within the inhibition of this section. *State v. Malpass*, 189 N. C. 349, 127 S. E. 248.

Miscellaneous Cases.—A sentence of not less than twenty-five nor more than thirty years in the state's prison, upon a plea of guilty of possession of weapons and implements for house breaking, *State v. Cain*, 209 N. C. 275, 183 S. E. 300. Sentence of hard labor for thirty years upon conviction of a male person for carnally knowing a female child thirteen years of age, *State v. Swindell*, 189 N. C. 151, 126 S. E. 417.

Upon conviction of manslaughter, punishment for nine years in the penitentiary, *State v. Lance*, 149 N. C. 551, 63 S. E. 198.

The punishment for vagrancy cannot exceed thirty days under our statute. *In re Watson*, 157 N. C. 340, 72 S. E. 1049. Fine or imprisonment for the owners of bird dogs to permit them to run at large during the closed season for quail, *State v. Blake*, 157 N. C. 608, 72 S. E. 1080. Punishment of thirty days confinement in jail for carrying concealed weapons, *State v. Woodlief*, 172 N. C. 885, 90 S. E. 137, 139. See also, *State v. Mangum*, 187 N. C. 477, 121 S. E. 765.

Cruel and Unusual Punishment—Violation of Prohibition Law.—A sentence prescribed by statute for the violation of prohibition law is held not to be cruel or unusual within the meaning of this section. *State v. Daniels*, 197 N. C. 285, 148 S. E. 244.

Cited in *State v. Parker*, 220 N. C. 416, 17 S. E. (2d) 475.

§ 15. General warrants.—General warrants, whereby any officer or messenger may be commanded to search suspected places, without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted. (Const. 1868.)

See section 15-26.

For a discussion of the statutes enacted pursuant to this provision, see 15 N. C. Law Rev., No. 2, p. 101. As to limitations on investigating officers, see 15 N. C. Law Rev., No. 3, p. 229.

This provision is a limitation on state and local officers. 15 N. C. Law Rev., No. 3, p. 232.

Judicial warrants, general in terms and unsupported by preliminary oath or sworn evidence and for conduct not committed in the immediate presence of the magistrate, are forbidden by the Federal Constitution, Amendment IV, and by this section. *Brewer v. Wynne*, 163 N. C. 319, 79 S. E. 629, Ann. Cas. 1915B, 319.

The provisions of the Turlington Act, Public Laws of 1923, did not contravene the provisions of this section. *State v. Godette*, 188 N. C. 497, 125 S. E. 24.

Cited in *Rhodes v. Collins*, 198 N. C. 23, 26, 150 S. E. 492; *State v. Campbell*, 182 N. C. 911, 110 S. E. 86; *State v. Fowler*, 172 N. C. 905, 90 S. E. 408.

§ 16. Imprisonment for debt.—There shall be no imprisonment for debt in this State, except in cases of fraud. (Const. 1868.)

See section 1-410 and the notes thereto.

What Constitutes Debt.—A fine or penalty imposed by a municipal ordinance is treated as a debt and under this section of the constitution, a person from whom it is attempted to be collected is exempt from arrest. *State v. Earnhardt*, 107 N. C. 789, 12 S. E. 426. A judgment on a note is likewise a debt and the defendant cannot be arrested therefor. *Stewart v. Bryan*, 121 N. C. 46, 28 S. E. 18.

But costs of prosecution against a prosecutor (upon acquittal of the accused or nolle prosequi entered), or against the accused upon a verdict of guilty, or a fine imposed, does not constitute a debt within the meaning of this section of the constitution, and hence the defendant may be imprisoned for non-payment of the same. *State v. Wallin*, 89 N. C. 578, 579. See section 6-45. Nor is the duty of maintaining a bastard child imposed upon the father, such a debt as is contemplated by this section. *State v. Palin*, 63 N. C. 472, cited and approved in *State v. Beasley*, 75 N. C. 211, 212.

No Imprisonment Except Where There Is Fraud.—"This section clearly means that there shall at least be no imprisonment to enforce the payment of a debt under final process, unless it has been adjudged, upon an allegation duly made in the complaint and a corresponding issue found by a jury, that there has been fraud. . . ." *East Coast Fertilizer Co. v. Hardee*, 211 N. C. 653, 657, 191 S. E. 725, quoting from *Ledford v. Emerson*, 143 N. C. 527, 55 S. E. 969, 10 L. R. A. (N. S.) 362.

The words "except in cases of fraud," in this section of the Constitution, comprehend not only fraud in attempting to hinder, delay and defeat the collection of a debt by concealing property and other fraudulent devices, but embraces also fraud in making the contract—false representations for instance, and fraud in incurring the liability; for instance, when an administrator commits a fraud by applying the funds of the estate to his own use, paying his own debts, and the like. *Melvin v. Melvin*, 72 N. C. 384. See further for arrests in cases of fraud, section 1-410, par. 4, and notes thereto.

Not Applicable to Tort Actions.—The provision of this section of the constitution has no application to actions for tort; it is confined to causes of action arising ex contractu. *Long v. McLean*, 88 N. C. 3. See *Ledford v. Smith*, 212 N. C. 447, 193 S. E. 722. As to arrest for damages arising from tort, see section 1-410, par. 1 and the notes thereto.

The Worthless Check Law is a valid exercise by the state of its police powers. *State v. Yarboro*, 194 N. C. 498, 140 S. E. 216.

Section 14-110 Constitutional.—Section 14-110 does not contravene this section of the Constitution. See the notes to section 14-110.

Section 14-358 Unconstitutional.—Section 14-358 is unconstitutional because it contravenes this section of the constitution. See the annotations under section 14-358.

Quoted in *State v. Williams*, 150 N. C. 802, 63 S. E. 949.

§ 17. No person taken, etc., but by law of land.—No person ought to be taken, imprisoned, or dispossessed of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land. (Const. 1868.)

Cross Reference.—As to qualification of term "liberty" see note of London v. Headen, under Art. I, sec. 1.

What Constitutes "Law of the Land."—It is said by Mr. Webster in Dartmouth College v. Woodward, 4 Wheat. 518, 519, 4 L. Ed. 629, "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land." *Caldwell v. Wilson*, 121 N. C. 425, 477, 28 S. E. 554; *Parish v. East Coast Cedar Co.*, 133 N. C. 478, 45 S. E. 768, 98 Am. St. Rep. 718; *State v. Collins*, 169 N. C. 323, 324, 84 S. E. 1049.

The "law of the land" is equivalent to "due process of law." *State v. Collins*, 169 N. C. 323, 84 S. E. 1049.

In *Hoke v. Henderson*, 15 N. C. 1, 16, Chief Justice Ruffin said: "The clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of rights, as determined by the laws under which is vested, according to the course, mode and usage of the common law as derived from our forefathers, are not effectually 'laws of the land' for those purposes." *State v. Cutshell*, 110 N. C. 538, 545, 15 S. E. 261.

Legislature may limit time for assertion of property right provided it affords those vested with the right a reasonable time to assert same after the enactment of the statute, since

there is no vested right in procedure. *Sheets v. Walsh*, 217 N. C. 32, 6 S. E. (2d) 817.

Revival of Barred Claims.—A state statute purporting to revive claim barred by statute of limitations violates due process clauses of state and federal constitutions, whether such claim affects vested property right or arises under contract. *Valleytown Tp. v. Women's Catholic Order, etc.*, 115 F. (2d) 459, reversing 32 F. Supp. 894.

Additional Liability Imposed by Amendment Act Must Be Prospective.—Acts 1925, c. 117, amending § 53-42 and imposing personal liability on stockholders could not be given retroactive effect. *Bank of Pinchurst v. Derby*, 218 N. C. 653, 12 S. E. (2d) 260.

Double Jeopardy.—A person cannot be tried twice for the same offense under this section. *State v. Mansfield*, 207 N. C. 233, 176 S. E. 761.

The obligation of a contract, within the meaning of the constitutional prohibition against impairment, includes all the means and assurances available for the enforcement of the contract at the time of its execution. *Bateman v. Sterrett*, 201 N. C. 59, 61, 159 S. E. 14.

Section prohibits enforcing any statute which would enable one person to evade or avoid the binding force of his contracts with another, whether executed or executory. *Booth v. Hairston*, 193 N. C. 278, 284, 136 S. E. 879, 57 A. L. R. 1186, citing *Lowe v. Harris*, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379.

An Office as Vested Property.—Whether or not an officer appointed for a definite time to a legislative office has a vested property therein or contract right thereto has given rise to conflicting views and inharmonious decisions. In the early case of *Hoke v. Henderson*, 15 N. C. 1, it is held that an office is property and is the subject of protection like any other property under the provisions of this section of the constitution. The reasoning used by the court in this case, which is to the effect that a public office exists by contracts between the state and the holder, has been the foundation for the decisions of the courts adhering to this view. See *King v. Hunter*, 65 N. C. 603; *Cotten v. Ellis*, 52 N. C. 545; *Bailey v. Caldwell*, 68 N. C. 472; *State v. Gales*, 77 N. C. 283; *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 113. The general trend of American authority appears to have always maintained the opposite view. See *Taylor v. Beckham*, 178 U. S. 548, 577, 44 L. Ed. 1187, 20 S. Ct. 890, 1009; *Butler v. Pennsylvania*, 10 How (U. S.) 402, 13 L. Ed. 472, the North Carolina doctrine being criticized in many of the cases. However, North Carolina has now gotten away from the view to which it adhered over a long period of time and is now in line with the general current of American authority, *Hoke v. Henderson* being expressly overruled in *Mial v. Ellington*, 134 N. C. 131, 46 S. E. 961. See historical treatment of this question contained in the Editor's Note to section 128-1.—Ed. Note.

Minimum Retail Prices on Trade-Marked Goods.—The North Carolina Fair Trade Act, permitting the establishment of minimum retail prices on trade-marked goods by agreement, does not deprive a retailer not a party to a contract with the manufacturer or distributor of any property right in preventing such retailer from selling the trade-marked article at a price less than that stipulated by contract, since such retailer acquires title with knowledge and subject to the stipulations relative to the minimum retail price permitted by the law in protecting the property right of the manufacturer or distributor in his trade-mark and good will, which property right subsists while the goods bear his trade-mark, even after he has parted with title of commodity itself. *Lilly & Co. v. Saunders*, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308.

Vested Right in Dedicated Property.—Lots in a subdivision were sold with reference to a plat showing the street in question to be 99 feet in width. At the time the charter was granted to a municipality embracing the lands, the only plat recorded was a revised one showing the street as 80 feet wide. The granting of the charter cannot be construed as having the effect of limiting the width of the street to 80 feet so as to defeat the vested right of purchasers of lots with reference to the original plat to compel the owner to abide by its dedication of the street for the full width as shown by the plat. *Home Real Estate Loan, etc., Co. v. Carolina Beach*, 216 N. C. 778, 7 S. E. (2d) 13.

Infringement of Rights of Litigating Party.—The discretion of the trial judge given him over the trial of a cause is rarely interfered with, though his action may be set aside for such gross abuse as would invade the legal rights to the prejudice of the appealing party. *State v. Sauls*, 190 N. C. 810, 130 S. E. 848. However, the right of appeal is not always essential to the "due process" clauses of the state or Federal constitutions. *Gunter v. Sanford*, 186 N. C. 452, 120 S. E. 41.

The question as to whether the defendant in a criminal

action has sufficient time to prepare his defense before trial, and has thereby been deprived of his rights under the provisions of Article I, section 17, of our State Constitution, is one addressed to the sound discretion of the trial judge, which will not be reviewed on appeal when it is not made to appear that this discretionary power has been abused by him. *State v. Burnett*, 184 N. C. 783, 784, 115 S. E. 57.

Right of Cross Examination.—The right of the defendant in a criminal action to cross-examine expert witnesses who have testified their opinion against him is a material one, guaranteed by this section of the Constitution and a denial thereof may not be held as merely a technicality and harmless; or is this error cured by the fact that he has an opportunity to cross-examine one of these witnesses in refutation of the correctness of the facts upon which his conclusions was based, especially when the other witness is to be regarded as the most important one. *State v. Hightower*, 187 N. C. 300, 301, 121 S. E. 616.

License of Attorney Protected.—This section constitutes the basis of the decision in those cases holding that an attorney who has been duly licensed to practice law cannot be disbarred or deprived of his license and right to practice, except upon conviction for a criminal offense, or after confession in open court. See *Ex-Parte Schenck*, 65 N. C. 353, 354 and cases there cited.

A contingent remainderman in lands acquires his interest therein subject to the payment of testator's debts, and in that respect can acquire no vested interest therein, and a sale thereof in good faith and at a fair price by the executrix, for the payment of decedent's debts, as authorized by statute, when by proper proceedings the land could have been sold for the purpose, though the executrix has mistaken therein the authority given her under the will, cannot be held as contrary to the provision of this section. *Charlotte Consolidated Constr. Co. v. Brockenbrough*, 187 N. C. 65, 121 S. E. 7.

Classification for Tax: Purposes.—The legislature may levy a sales tax or a tax on the business of selling tangible personal property, levied as a license or privilege tax, and classify trades, callings, and occupations for the imposition of a tax, and classify articles sold as the basis for computing the tax, exempting certain classes of articles and providing a graduated tax as to other classes of articles, or differentiate in the method of collecting the tax as to some of the classes, provided the levy applies equally and uniformly to all who fall within each particular classification, and provided the classifications are reasonable and based upon some real distinction. *Leonard v. Maxwell*, 216 N. C. 89, 3 S. E. (2d) 316. See also, *Caldwell Land, etc., Co. v. Smith*, 146 N. C. 199, 59 S. E. 653.

Taxation Exemptions.—The provision of Art. V, Schedule E, of the Revenue Act of 1937, making a distinction between wholesale and retail merchants, and exempting sales of ice, medicines on a prescription, fish and farm products when sold in the original or unmanufactured state, commercial fertilizer, agricultural lime and plaster, public school books, sale of used or repossessed articles, and sales to the government or governmental agencies, etc., constitute classifications based upon reasonable and real distinctions, and an allegation that the act is void as imposing arbitrary discriminations in making such classifications is untenable. *Leonard v. Maxwell*, 216 N. C. 89, 3 S. E. (2d) 316.

Irregular Taxation.—"In *Commissioners v. Lacy*, 174 N. C. 141, 93 S. E. 482, the court said: 'It is a fundamental principle in the law of taxation that taxes may only be levied for public purposes and for the benefit of the public on whom they are imposed, and to lay these burdens upon one district for benefits appertaining solely to another is in clear violation of established principles of right and contrary to the express provisions of our Constitution, Art. I, sec. 17, which forbids that any person shall be diseized of his freehold liberties and privileges or in any manner deprived of his life, liberty or property but by the law of the land.'" Cited and approved in *Board v. Hanchett Bond Co.*, 194 N. C. 137, 139, 138 S. E. 614; *Hinton v. Lacy*, 193 N. C. 496, 137 S. E. 669.

Inheritance Tax upon Nonresident Distributees Held Valid.—*Rhode Island Hospital Trust Co. v. Doughton*, 187 N. C. 263, 121 S. E. 741.

Act Licensing the Hauling of Lumber Held Valid.—*State v. Bullock*, 161 N. C. 223, 75 S. E. 942. See also, *Dalton v. Brown & Co.*, 159 N. C. 175, 75 S. E. 40, 42 L. R. A. (N. S.) 506; *Southeastern Exp. Co. v. Charlotte*, 186 N. C. 668, 674, 120 S. E. 475.

Unemployment Compensation Tax.—Imposition of the unemployment compensation tax does not deprive an individual who operates three places of business, employing in the aggregate more than 8 employees, of property without due process of law or deny him of the equal protection of the

laws. *State v. Willis Barber, etc.*, Shop, 219 N. C. 709, 15 S. E. (2d) 4.

Eminent Domain by Park Commission.—The exercise of the power of eminent domain by the North Carolina National Park Commission under Public Laws 1927, ch. 48, is not contrary to the "due process" clause of the State Constitution. *Yarbrough v. Park Commission*, 196 N. C. 284, 145 S. E. 563. See also, *Suncrest Lbr. Co. v. North Carolina Park Comm.*, 30 F. (2d) 121, 123.

Only those whose interests in the particular lands sought to be taken for the national park contemplated by chapter 48, Public Laws of 1927, sec. 27, may sue in equity for injunctive relief on the ground that their lands are about to be taken contrary to the provisions of the Fourteenth Amendment to the Federal Constitution and of this section. *Yarbrough v. Park Commission*, 196 N. C. 284, 145 S. E. 563.

Eminent Domain by County Commission.—See *Hill v. Board of Com'rs*, 190 N. C. 123, 129 S. E. 154.

Just Compensation Required if Private Property Is Taken.—The principle, forbidding the taking of private property for public use without just compensation, is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina. *Yancey v. North Carolina State Highway, etc.*, Comm., 222 N. C. 106, 22 S. E. (2d) 256.

The exercise of the power of eminent domain by a corporation authorized by its charter to generate and sell electricity, and given power of eminent domain to acquire the necessary rights of way and lands for its dams cannot be said to be exercising this power in a private capacity in contravention of this section. *Whiting Mfg. Co. v. Carolina Aluminum Co.*, 207 N. C. 52, 175 S. E. 698.

Drainage Laws.—See generally, *Lang v. Carolina Land, etc.*, Co., 169 N. C. 662, 86 S. E. 599.

Approval of Law Authorizing Issue of Bonds.—Where a valid act authorizing a county to issue bonds has been passed in accordance with the provisions of the State Constitution, Art. II, sec. 14, leaving out the requirement that the question must first be submitted to the qualified voters, and another act ratified a few days later makes this requirement, the two acts will be construed in pari materia, and the later as not having a retroactive effect, and the county does not acquire a vested right under the first ratified act. *Graham County v. Terry*, 194 N. C. 22, 138 S. E. 443.

Sale of Land for Taxes.—For a valid sale of land for taxes, the tax list and notice of sale must contain a sufficiently definite description of the land to allow the land to be identified, and to be notice to those persons whose interest is to be affected, and if the description is not so definite, a sale thereunder will be void as not complying with the statute, and as taking property without giving notice and as not affording those whose property is sold an opportunity to be heard. *Bryson v. McCoy*, 194 N. C. 91, 138 S. E. 420.

Sale of Property at Foreclosure.—This section is not violated by section 45-32 regulating the sale of real property upon the foreclosure of mortgages or deeds of trust. *Woltz v. Asheville Safe Deposit Co.*, 206 N. C. 239, 173 S. E. 587.

The State may proceed directly or by authorization to others to sell lands for taxes upon proceedings to enforce a lien for the taxes thereon, and a publication of notice to all interested in the lands to appear and defend their rights is not a taking of property inhibited by this section. *Orange County v. Jenkins*, 200 N. C. 202, 156 S. E. 774.

The statute, authorizing the State Highway Commission to enter upon and take possession of lands before bringing condemnation proceedings and before making compensation, is not an infringement of constitutional rights and does not deprive an owner of notice and opportunity to be heard. *North Carolina State Highway Comm. v. Young*, 200 N. C. 603, 158 S. E. 925.

Statute Providing Service of Summons by Publication on Taxpayers Is Valid.—The statute (§ 159-52 et seq.), conferring jurisdiction upon the Superior Courts of the counties over citizens and owners of taxable property within the county without requiring each such owner or citizen to be named as a party in the complaint or summons and providing for service of summons by publication, is not a violation of this section. *Castevens v. Stanly County*, 211 N. C. 642, 191 S. E. 739.

Freedom to contract is both a liberty and a property right within the protection of the due process clauses of the Federal Constitution and this section of the State Constitution. See *Morris v. Holshouser*, 220 N. C. 293, 17 S. E. (2d) 115, 137 A. L. R. 733, discussing law pertaining to employee's right to assign future wages.

Section 45-34 is constitutional and valid, since it recognizes the obligation of the debtor to pay his debt and the

right of the creditor to enforce payment by action in accordance with the terms of the agreement, but provides merely for judicial supervision of sales under power to the end that the price bid at the sale shall not be conclusive as to the value of the property, and that the creditor may not recover any deficiency after applying the purchase price to the notes without first accounting for the fair value of the property in accordance with well settled principles of equity. *Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co.*, 210 N. C. 29, 185 S. E. 482.

The 1933 amendment to § 1-512 is constitutional, since it does not impair the obligations of a contract under this section, the effect of the statute being merely to alter the method of procedure in which there can be no vested right. *Sovereign Camp, W. O. W. v. Board of Com'rs*, 208 N. C. 433, 181 S. E. 339.

Defendants Are Not Twice Put in Jeopardy by Second Arraignment.—Where each defendant has been separately arraigned and has pleaded to the bill of indictment, following which the cases are continued to the next term of court, defendants are not twice put in jeopardy by a second arraignment when the cases are called for trial the following term. *State v. Watson*, 209 N. C. 229, 183 S. E. 286.

Waiver of Rights of Defendant in Criminal Case.—*State v. Bazemore*, 193 N. C. 336, 137 S. E. 172.

The right of appeal is not always essential to the "due process" clauses. *Gunter v. Sanford*, 186 N. C. 452, 120 S. E. 41; *State v. Hardy*, 189 N. C. 799, 123 S. E. 152.

Search and Seizure.—See *State v. Fowler*, 172 N. C. 905, 90 S. E. 408, 411.

Assessments without Notice, etc., Are Void.—Street assessments made under charter provisions failing to provide notice and an opportunity to be heard to those assessed are void as violating due process of law, and may not be validated by curative acts of the Legislature. *Lexington v. Lopp*, 210 N. C. 196, 185 S. E. 766.

Right to Pursue Occupation.—Historically and fundamentally the constitutional guaranties of individual liberty protect the individual in the selection and pursuit of the ordinary occupations against the unwarranted invocation of the police power. *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658.

The statute providing for regulating and licensing photographers, codified as § 92-1 et seq., sets up sufficiently definite standards of competency, ability and integrity, and requires the licensing board to issue licenses to all applicants who meet these qualifications without discrimination, an applicant having recourse at law for any arbitrary acts of the board, and the statute does not violate due process of law, as provided by this section, nor deprive any person of fundamental, inalienable rights, nor create a monopoly in contravention of Art. I, § 31, of the State Constitution. *State v. Lawrence*, 213 N. C. 674, 197 S. E. 586.

Section 19-1 et seq., providing for the abatement of public nuisances by temporary order without bond, and the sale of the personalty and the closing of the property for one year upon the finding of the jury, is constitutional, and does not impinge this section of the Constitution, or art. XIV, § 1, of the Federal Constitution. *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850.

Exclusion of Women from Grand Jury.—The male defendant moved to quash the bill of indictment on the ground that it was returned by a grand jury composed entirely of men and that women had been unlawfully excluded therefrom. Held: There had been no discrimination against the class or sex to which defendant belongs, and he could not have been prejudiced by the alleged discrimination, and therefore he may not raise the question of the qualification of women to serve as jurors or maintain that the proceeding constituted a violation of the equal protection guaranteed by the Fourteenth Amendment of the federal constitution and by this section. *State v. Sims*, 213 N. C. 590, 197 S. E. 176.

The fact that a justices' compensation is fixed upon a fee basis, which he will receive only in the event of conviction, does not result in depriving the defendant of trial under due process of law. *Ex parte Steele*, 220 N. C. 685, 18 S. E. (2d) 132.

New Trial for Error upon Second Appeal.—Where defendant has been granted a new trial for error in the charge appearing of record and upon appeal from a second conviction the record discloses a kindred error in the charge upon the second trial, a new trial must nevertheless be awarded upon the second appeal, since no person may be deprived of life or liberty except by the law of the land. *State v. Starnes*, 220 N. C. 384, 17 S. E. (2d) 346.

Applied in *Thomson v. Harnett County*, 209 N. C. 662, 184 S. E. 490, holding ch. 342, Public-Local Laws 1935 valid.

Quoted in *Armstrong v. Polakavetz*, 191 N. C. 731, 133 S. E. 16.

Stated in *Parker v. Board of Com'rs*, 178 N. C. 92, 100 S. E. 244 (dis. op.).

Cited in *Allen v. Carr*, 210 N. C. 513, 187 S. E. 809; *State v. Lawrence*, 213 N. C. 674, 197 S. E. 586; *Kenilworth v. Hyder*, 197 N. C. 85, 147 S. E. 736; *Ward v. Howard*, 217 N. C. 201, 7 S. E. (2d) 625; *State v. Johnson*, 218 N. C. 604, 12 S. E. (2d) 278 (dis. op.); *Bell's Dept. Store v. Guilford County*, 222 N. C. 441, 23 S. E. (2d) 897; *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 73 F. (2d) 555; *State v. Mitchell*, 217 N. C. 244, 7 S. E. (2d) 567; *State v. Newsome*, 195 N. C. 552, 143 S. E. 187 (con. op.); *Hicks v. Kearney*, 189 N. C. 316, 127 S. E. 205; *State v. Sauls*, 190 N. C. 810, 130 S. E. 848.

§ 18. Persons restrained of liberty.—Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed. (Const. 1868.)

Stated in *State v. Herndon*, 107 N. C. 934, 12 S. E. 268; *Harkins v. Cathy*, 119 N. C. 649, 26 S. E. 136; *In re Schenck*, 74 N. C. 607.

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

Cross Reference.—As to waiver of jury trial see section 1-184 and note thereto.

In General.—This section guaranteeing the right of trial by jury in "controversies at law regarding property," includes equitable and legal elements involved in the determination of the issues made by the pleadings, but it is not required that a trial by jury be had at each stage of the proceedings when this right has elsewhere therein been properly safeguarded by statute. *Commissioners v. George*, 182 N. C. 414, 109 S. E. 77.

Every litigant has the constitutional right of trial by jury unless he voluntarily waives it, and, in case of a compulsory reference made to facilitate the trial of a cause, he can renew his demand for a jury trial by excepting to the report of the referee and pointing out the findings so expected to as a basis for issues. *State v. Featherstone*, 120 N. C. 446, 27 S. E. 124.

The rules of law as to the burden of proof between the parties to litigation respecting damages to property resulting from negligence is one of substantial right guaranteed by the Federal Constitution, and more emphatically by this section of the State Constitution. *McDowell v. Norfolk Southern R. Co.*, 186 N. C. 571, 120 S. E. 205, 42 A. L. R. 857.

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

Right to a jury trial is guaranteed by this section, and where the parties do not consent to trial by the court, it may not determine, prior to the introduction of evidence, an issue of fact joined by the pleadings. *Hershey Corp. v. Atlantic Coast Line R. Co.*, 207 N. C. 122, 176 S. E. 265.

The policy for the preservation of the right to a trial by jury provided for by this section of the constitution is ordinarily for the Legislature to declare. *Board v. Forrest*, 193 N. C. 519, 137 S. E. 431.

But the right to trial by jury guaranteed by this section, does not apply to matters concerned with the administration of the tax laws and the machinery for the collection of taxes, unless the statute affords express authority for this method of determining questions of fact. *State v. Willis Barber, etc., Shop*, 219 N. C. 709, 15 S. E. (2d) 4.

Right Not Unqualified.—This section does not confer the right to demand the intervention of a jury absolutely and unqualifiedly, but only in cases involving issues of fact. *McQueen v. People's Nat. Bank*, 111 N. C. 509, 513, 515, 16 S. E. 270.

This constitutional provision applies only to cases in which the prerogative existed at common law or by statute at the time the constitution was adopted. *Groves v. Ware*, 182 N. C. 553, 109 S. E. 568; *Chowan & Southern R. Co. v.*

Parker, 105 N. C. 246, 11 S. E. 328; *Bell's Dept. Store v. Guilford County*, 222 N. C. 441, 447, 23 S. E. (2d) 897.

In *Groves v. Ware*, 182 N. C. 553, 109 S. E. 568, it was held that the right to a trial by jury as provided in this section applies only to cases in which the prerogative existed at common law or was procured by statute at the time the Constitution was adopted, and not to those in which the right and the remedy are thereafter created by statute. The section cannot be invoked to deprive a public official of the discretion with which he is clothed by legislative enactment. *McInnish v. Board of Education*, 187 N. C. 494, 496, 122 S. E. 182.

The "right of trial by jury" is guaranteed without any exceptions wherever a recovery is sought which will transfer money or property of one person to another by order of a court, and the amount thus sought to be recovered depends upon issues of fact, as in this case, the value of the services rendered, which is denied by the defendant guardian. *In re Stone*, 176 N. C. 336, 348, 97 S. E. 216 (dis. op.).

Under *Workmen's Compensation Act* trial by jury is not a constitutional right. *Hagler v. Mecklenburg Highway Comm.*, 200 N. C. 733, 734, 158 S. E. 383.

"Trial" refers to a dispute and issue of fact, and the expression "trial by jury," as used in this section does not necessarily signify that every legal controversy is to be determined by a jury. *Com'rs v. George*, 182 N. C. 414, 417, 109 S. E. 77.

Controversies between Board of Education and County Commissioners.—See *Board of Education v. Board of Com'rs*, 182 N. C. 571, 109 S. E. 630; *Board of Education v. Board of Com'rs*, 174 N. C. 469, 93 S. E. 1001, cited and applied.

Criminal Cases.—The right to trial by jury is beyond controversy, both in civil and criminal cases. *State v. Rogers*, 162 N. C. 656, 660, 78 S. E. 293, 46 L. R. A. (N. S.) 38, Ann. Cas. 1914A, 867 (dis. op.).

Proceedings before the judge to remove a prosecuting attorney from office "for willful misconduct or maladministration in office," do not require an issue to be submitted to the jury, such office is not a property right under the provisions of this section. *State v. Hamme*, 180 N. C. 684, 104 S. E. 174.

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

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

When in proceedings for alimony without divorce the pleadings raise the issues of the validity of marriage between the parties, or whether the husband had separated himself from the wife and failed to provide her suitable or reasonable sustenance, or the husband is a drunkard or spendthrift (§ 50-16), the right of trial by jury arises to the defendant, and the case should be transferred by the judge to the civil issue docket for the purpose. *Crews v. Crews*, 175 N. C. 168, 95 S. E. 149.

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

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

Effect of Fourteenth Amendment of Federal Constitution.—A trial by jury in suits at common law pending in the State Courts is not a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge, and the requirements of the Federal Constitution that no person shall be deprived of his property without due process of law does not imply that all trials in the State Courts affecting property must be by jury, but it is met if the trial be had according to the settled course of Judicial Proceedings. *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554.

Subsistence Pendente Lite.—Provisions of section 50-16 empowering the court to allow subsistence and counsel fees pendente lite to plaintiff in an action for alimony without divorce do not violate this section. *Peele v. Peele*, 216 N. C. 298, 4 S. E. (2d) 616.

This section does not require court review of the valuation

of land for taxation, or determination of such value by a jury in a de novo hearing, and will not support resort to certiorari for that purpose. *Belk's Dept. Store v. Guilford County*, 222 N. C. 441, 23 S. E. (2d) 897.

Quoted in *Silvey v. Seaboard Air Line R. Co.*, 172 N. C. 110, 90 S. E. 4 (dis. op.); *Lyman v. Southern Coal Co.*, 183 N. C. 581, 112 S. E. 242; *Green Sea Lbr. Co. v. Pemberton*, 188 N. C. 532, 125 S. E. 119; *Shuford v. Scruggs*, 201 N. C. 685, 161 S. E. 315.

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

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

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

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

Applied in *Pentuff v. Park*, 194 N. C. 146, 138 S. E. 616; *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811.

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

See § 17-3 and notes thereto.

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

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

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

§ 24. Militia and the right to bear arms.—A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power. Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice. (Const. 1868; Convention 1875.)

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

Generally.—This provision of the constitution plainly observes the distinction between the "right to keep and bear arms," and "the practice of carrying concealed weapons." The first, it is declared, shall not be infringed, while the latter may be prohibited. *State v. Speller*, 86 N. C. 697, 700. The court in this case say that even without this constitutional provision, the Legislature may by law regulate the right to bear arms in a manner conducive to the public place. Cited and approved in *State v. Reams*, 121 N. C. 556, 27 S. E. 1004. As to code provision regulating concealed weapons, see sec. 14-269 and notes thereto.

Power of Legislature Limited.—The last clause of this provision, constitutes an exception to the first and indicates the extent to which the right of the people to bear arms can be restricted; that is, the Legislature can prohibit the carrying of concealed weapons, but no further. *State v. Kerner*, 181 N. C. 574, 107 S. E. 222.

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

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

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

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

Applied in *Hinton v. Lacy*, 193 N. C. 496, 137 S. E. 669; *Rodman v. Robinson*, 134 N. C. 503, 47 S. E. 19.

Quoted in *State v. Beal*, 199 N. C. 278, 154 S. E. 604.

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

Applied in *Mecklenburg County v. Piedmont Fire Ins. Co.*, 210 N. C. 171, 185 S. E. 654.

Stated in *Bear v. Commissioners*, 124 N. C. 204, 32 S. E. 558; *Collie v. Commissioners*, 145 N. C. 170, 171, 59 S. E. 44.

Cited in *Lowery v. Board of Graded School Trustees*, 140 N. C. 33, 52 S. E. 267.

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

Stated in *State v. Yarboro*, 194 N. C. 498, 140 S. E. 216 (con. op.).

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

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

Liberal Construction.—The constitution must be construed in the light of its history, and must be liberally construed in aid of progress, but a liberal construction is especially required in interpreting those provisions safeguarding individual liberty. *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658.

Applied in *State v. Hardy*, 189 N. C. 799, 128 S. E. 152, as to conviction, in a criminal action, of defendant except by the law of the land or under a unanimous verdict of guilty by the jury, and as to presumption of innocence upon denial of guilt, with the statutory right to request to go on the stand as a witness in his own behalf, in not exercising which no prejudice shall be created against him, and as to the further right to have counsel for his defense who may argue the matters of law as well as of fact to the jury; and as to defendant's right to have the trial judge in his instructions to the jury not give his opinion whether a fact is fully or sufficiently proven.

Quoted in *Clinton v. Standard Oil Co.*, 193 N. C. 432, 137 S. E. 183, 55 A. L. R. 252; *State v. Sassee*, 206 N. C. 644, 175 S. E. 142; *Brewer v. Valk*, 204 N. C. 186, 167 S. E. 638, 87 A. L. R. 237.

Cited in *Beaufort v. Mayo*, 207 N. C. 211, 214, 176 S. E. 753; *State v. Lawrence*, 213 N. C. 674, 197 S. E. 586.

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

Editor's Note.—This provision is usually construed in connection with section 31 of this article. Reference is here made to the cases placed under that section.

§ 31. **Perpetuities, etc.**—Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed. (Const. 1868.)

Cross Reference.—See Art. I, sec. 7.

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

Early Vesting of Estates Favored.—Where, by a correct interpretation of the will, it will reasonably be allowed, the law will favor the early vesting of estates against the interests of a contingent remainderman. *Walker v. Trollinger*, 192 N. C. 744, 135 S. E. 871.

This section is a fundamental democratic principle of "equal rights and opportunities to all, special privileges to none." *Newman v. Watkins*, 208 N. C. 675, 679, 182 S. E. not confer exclusive emoluments and privileges on continu-453. dissenting opinion of Justice Clarkson.

Failure to Provide for Successors to Office.—The general assembly having failed to appoint or provide for the election of successors to the highway and sinking fund commissioners of Madison county, who were appointed for a four or six-year term by ch. 341, Public-Local Laws of 1931, the general assembly is presumed to acquiesce in their continuance in office, and the general assembly having power to terminate, change or continue the appointments, it will not be held that it intended to create perpetuities or exclusive emoluments in violation of any of the provisions of this article, and said commissioners continue to hold office with power to discharge the duties thereof. *Freeman v. Board of Com'rs*, 217 N. C. 209, 7 S. E. (2d) 354.

Prohibitive Regulations upon Engaging in Business.—See *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658.

Miscellaneous Cases.—Selection by a commission of persons qualified to act as pilots, *St. George v. Hardie*, 147 N. C. 88, 60 S. E. 920; ordinance granting the exclusive privilege to construct and maintain water-works within the corporate limits of the town, *Elizabeth City Water, etc., Co. v. Elizabeth City*, 188 N. C. 278, 288, 124 S. E. 611; in *Standard Oil Co. v. United States*, 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619, and *United States v. American Tobacco Co.*, 221 U. S. 106, 31 S. Ct. 632, 55 L. Ed. 663, stipulations in partial restraint of trade were held not to be obnoxious to the law unless they were unreasonable and likely to become monopolies, which are obnoxious to this section, *Tobacco Growers' Cooperative Ass'n v. Jones*, 185 N. C. 265, 273, 117 S. E. 174, 33 A. L. R. 231; *North Carolina Fair Trade Act, Lilly & Co. v. Saunders*, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308; police power to regulate those engaged in the business of operating cleaning and pressing plants, *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658.

Statute Requiring Examination of Former Dentists Returning to State Is Valid.—Section 90-38 providing that a licensed dentist who retires or removes from the state must pass an examination upon returning to the state does not confer exclusive emoluments and privileges on continuously practicing dentists contrary to the provisions of this and the preceding section. *Allen v. Carr*, 210 N. C. 513, 187 S. E. 89.

Applied in State v. Warren, 211 N. C. 75, 189 S. E. 108, holding ch. 241, Public-Local Laws 1927 unconstitutional; *Bennett v. Southern Ry. Co.*, 211 N. C. 474, 191 S. E. 240. Applied to right to operate a public ferry in *Robinson v. Lamb*, 126 N. C. 492, 36 S. E. 29; and to right to operate filling station in certain designated districts, in *Clinton v. Standard Oil Co.*, 193 N. C. 432, 137 S. E. 183; and to right to tax a bakery in *Hilton v. Harris*, 207 N. C. 465, 177 S. E. 411.

Quoted in State v. Atlantic Ice, etc., Co., 210 N. C. 742, 188 S. E. 412; *Security Nat. Bank v. Sternberger*, 207 N. C. 811, 820, 178 S. E. 595; *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187 (dis. op.); *State v. Cantwell*, 142 N. C. 604, 55 S. E. 820 (dis. op.), 8 L. R. A. (N. S.) 498.

Cited in Cowan v. Security Life, etc., Co., 211 N. C. 18, 188 S. E. 812; *Patterson v. Southern Ry. Co.*, 214 N. C. 38, 198 S. E. 364; *State v. Lawrence*, 213 N. C. 674, 197 S. E. 586; *State v. Mitchell*, 217 N. C. 244, 7 S. E. (2d) 567; *Hinton v. Lacy*, 193 N. C. 496, 137 S. E. 669; *Allen v. Carr*, 210 N. C. 513, 187 S. E. 809.

§ 32. **Ex post facto laws.**—Retrospective laws, punishing acts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore no ex post facto law

ought to be made. No law taxing retrospectively sales, purchases, or other acts previously done, ought to be passed. (Const. 1868.)

See annotations to § 49-2.

Definition.—An ex post facto law is one which either makes that a crime which was not a crime when the offense was committed or which imposes a heavier sentence than that which was prescribed by law at that time. *State v. Broadway*, 157 N. C. 598, 72 S. E. 987. But a retrospective statute is not necessarily void. *Tabor v. Ward*, 83 N. C. 291.

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

Applies only to Criminal Statutes.—An ex post facto statute prohibited by this section relates only to criminal statutes, and though vested rights may not be affected by retroactive laws, contingent interests may be affected thereby, and where there is a voluntary trust estate with the limitation over upon a contingent determinable at some future time as to the persons who take thereunder, the power of revocation of the trust given by § 39-6, is not objectionable as falling within the Constitutional inhibition. *Stanback v. Citizens Nat. Bank*, 197 N. C. 292, 148 S. E. 313.

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

Miscellaneous Cases.—Validation of proceedings for the improvement of streets and sidewalks which were begun and which have been concluded without an initial petition, is proper and such act cannot be successfully attacked because it is retroactive or retrospective. *Holton v. Mocksville*, 189 N. C. 144, 150, 126 S. E. 326; *Unemployment Compensation Comm. v. Wachovia Bank, etc., Co.*, 215 N. C. 491, 2 S. E. (2d) 592; prosecution for wilful failure to support illegitimate child born after the passage of the act although the child was begotten before the effective date of the statute, *State v. Mansfield*, 207 N. C. 233, 176 S. E. 761.

Unemployment Compensation Taxes.—Taxes levied for the year 1936 under the Unemployment Compensation Act, section 96-1 et seq., are void as violating this section. *Unemployment Compensation Comm. v. Wachovia Bank, etc., Co.*, 215 N. C. 491, 2 S. E. (2d) 592.

Cited in State v. Hester, 209 N. C. 99, 182 S. E. 738.

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

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

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

Scope and Effect.—See *Pentuff v. Park*, 194 N. C. 146, 158, 138 S. E. 616, 53 A. L. R. 626, quoting *Osborn v. Leach*, 135 N. C. 628, 639, 47 S. E. 811, 66 L. R. A. 648.

The salutary principle set forth in this section does not justify the use of the courts, by the assertion of fanciful rights or by complaints based upon imaginary wrongs to hinder or delay others in the enjoyment of rights founded upon the law and in accord with justice and fair dealing among men. *Carson v. Fleming*, 188 N. C. 600, 602, 125 S. E. 259.

Delay Caused by Irregular Pleading.—Under the provisions of this section an adversary party ought not to be delayed in the final adjudication of the controversy by the fact that the exceptions taken by the opposite party are so drawn as to take two chances, first of a favorable decision by the court, and then of a finding in his favor by the jury. *Driller Co. v. Worth*, 118 N. C. 746, 747, 748, 24 S. E. 517.

Nor ought he to be delayed because the demand for a jury trial fails to point out the precise issue as to which testimony must be offered. *Id.* So also, the rights of the appellee will be protected when the appellant failed to print the record as required, and motion to reinstate the case, after dismissal, came too late. *Cowan v. Layburn*, 116 N. C. 526, 20 S. E. 965.

A motion for a continuance is addressed to the discretion of the trial judge to be determined by him upon the facts in the exercise of his duty to administer right and justice without sale, denial, or delay. *State v. Godwin*, 216 N. C. 49, 3 S. E. (2d) 347.

The creation of inferior courts by the legislature has been useful in having justice administered without "delay" in accordance with this section. *Albertson v. Albertson*, 207 N. C. 547, 551, 178 S. E. 352.

Foreclosure of Mortgages.—This section is not violated by sections 45-32 and 45-33 regulating the sale of real property upon the foreclosure of mortgages or deeds of trust. *Woltz v. Asheville Safe Deposit Co.*, 206 N. C. 239, 173 S. E. 587.

The establishment of a cartway involves the taking of private property by eminent domain, and land therefor may not be taken without giving the owner notice and an opportunity to be heard, with right of appeal according to the due course of law. *Waldroup v. Ferguson*, 213 N. C. 198, 195 S. E. 615.

Section 45-34 is constitutional and valid, since it recognizes the obligation of the debtor to pay his debt and the right of the creditor to enforce payment by action in accordance with the terms of the agreement, but provides merely for judicial supervision of sales under power to the end that the price bid at the sale shall not be conclusive as to the value of the property, and that the creditor may not recover any deficiency after applying the purchase price to the notes without first accounting for the fair value of the property in accordance with well settled principles of equity. *Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co.*, 210 N. C. 29, 185 S. E. 482.

Applied in *Myers v. Barnhardt*, 202 N. C. 49, 161 S. E. 715.

Quoted, in dissenting opinion, in *Lucas v. Midgett*, 208 N. C. 699, 182 S. E. 328; *Jacobi Hardware Co. v. Jones Cotton Co.*, 188 N. C. 442, 124 S. E. 756.

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

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

Stated in *Nichols v. McKee*, 68 N. C. 429, 431; *State v. Lewis*, 142 N. C. 626, 646, 55 S. E. 600; *State v. Williams*, 146 N. C. 618, 61 S. E. 61, 17 L. R. A. (N. S.) 299.

Cited in *Best & Co. v. Maxwell*, 216 N. C. 114, 3 S. E. (2d) 292; *State v. Knight*, 169 N. C. 333, 85 S. E. 418, L. R. A. 1915F, 898, Ann. Cas. 1917D, 517.

ARTICLE II

Legislative Department

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

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

But Legislature May Delegate to Local Political Subdivisions Power to Find Determinative Facts.—While the legislature may not delegate its power to make laws, it may delegate to local political subdivisions the power to find facts determinative of whether a particular law should become effective in the locality, and therefore it may delegate to county commissioners the power to establish a county court when necessary in the public interest, and, a fortiori it may also delegate to the county commissioners similar authority to abolish a county court established by the legislature. *Efrid v. Board of Com'rs*, 219 N. C. 96, 12 S. E. (2d) 889.

And Power to Fix Salary of Judge of County Court.—The fixing of the salary of the judge of a county court is es-

entially a local matter which the general assembly may delegate to the commissioners of the county, and therefore subsec. 14 of sec. 1, ch. 519, Public-Local Laws of 1939, providing that the board of county commissioners of Forsyth county should have the power to fix the salary of the judge of the county court, is a constitutional delegation of the power of the legislature. *Efrid v. Board of Com'rs*, 219 N. C. 96, 12 S. E. (2d) 889.

Standards Must Be Set Up for Administrative Board.—Chapter 30, Public Laws of 1937, as amended by chapter 337, Public Laws of 1939, providing for the licensing of those engaged in the business of dry cleaning by the commission set up in the act, is an unconstitutional delegation of legislative authority, in that the act fails to set up the standards or provide reasonable limitations to guide the administrative board in admitting or excluding persons from the business, but leaves such power in unlimited discretion of the administrative board. *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658.

And Industrial Commission May Award Compensation for Bodily Disfigurement.—Section 97-31 authorizing the industrial commission to award compensation for bodily disfigurement is not void as a delegation of legislative authority. *Baxter v. Arthur Co.*, 216 N. C. 276, 4 S. E. (2d) 621.

The North Carolina Fair Trade Act is not unconstitutional as a delegation of legislative authority, since the act is complete in itself and requires no action on the part of any agency to put it into operation. *Lilly & Co. v. Saunders*, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308.

Cited in *Wilson v. Jordan*, 124 N. C. 683, 719, 33 S. E. 139; *Saluda v. Polk County*, 207 N. C. 180, 183, 176 S. E. 298; *State v. Brockwell*, 209 N. C. 209, 183 S. E. 378; *In re Applicants for License*, 143 N. C. 1, 55 S. E. 635, 10 L. R. A. (N. S.) 288; *Gunter v. Sanford*, 186 N. C. 452, 120 S. E. 41.

§ 2. Time of assembly.—The Senate and House of Representatives shall meet biennially on the first Wednesday after the first Monday in January next after their election; and when assembled, shall be denominated the General Assembly. Neither house shall proceed upon public business unless a majority of all the members are actually present. (Const. 1868; 1872-3, c. 82; Convention 1875.)

In the Constitution of 1868, the first clause of this section read as follows: "The Senate and House of Representatives shall meet annually on the third Monday in November, and when assembled shall be denominated the General Assembly." The word "annually" was changed to "biennially" in pursuance of Ch. 82, Public Laws of 1872-73. The Convention of 1875 changed the time of meeting to the first Wednesday after the first Monday in January next after their election."—Ed. note.

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

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

Editor's Note.—This was formerly section 5 of the Constitution of 1868 which was as follows: "Sec. 5. An enumeration of the inhabitants of the State shall be taken under the direction of the General Assembly in the year one thousand eight hundred and seventy-five, and at the end of every ten years thereafter; and the said Senate districts shall be so altered by the General Assembly, at the first session after the return of every enumeration taken as aforesaid, or by order of Congress, that each Senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens and Indians not

taxed, and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a Senate district, unless such county shall be equitably entitled to two or more Senators." Sec. 4 of the Constitution of 1868, which divided the Senate into Senatorial districts pending a division by the first General Assembly after 1871, was omitted by the Convention of 1875. So was Sec. 8 which made the temporary apportionment for the House of Representatives.

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

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

See note to the next preceding section of this article.

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

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

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

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

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

Presumption of Regularity.—Where a certificate shows that there was a legislative election of an officer and nothing else appearing, the law presumes a quorum and that the election was regular. *Cherry v. Burns*, 124 N. C. 761, 766, 33 S. E. 136.

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

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

Only Limitation on Legislative Power.—The only limitation on powers in enacting statutes relating to divorce is found in this section. *Cooke v. Cooke*, 164 N. C. 272, 80 S. E. 178; *Long v. Long*, 206 N. C. 706, 175 S. E. 85.

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

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

Notice Presumed to Be Given.—The courts will conclusively presume from the ratification of a private act that the notice required by this section has been given. *Matthews v. Blowing Rock*, 207 N. C. 450, 177 S. E. 429; *Galimore v. Thomasville*, 191 N. C. 648, 132 S. E. 657.

In *Cox v. Commissioners of Pitt County*, 146 N. C. 584, 585, 60 S. E. 516, 16 L. R. A. (N. S.) 253, is the following: The courts will not go behind the ratification of the act to ascertain whether notice has been given in accordance with this section, but will conclusively presume, from ratification, that the notice has been given. *State v. Holmes*, 207 N. C. 293, 299, 176 S. E. 746.

When Testimony Heard.—Except in case of bills coming within the provisions of section 14, the Supreme Court will not hear testimony for the purpose of showing that the notice required by this section was not given. *Brodnax v. Groom*, 64 N. C. 244; *Gatlin v. Tarboro*, 78 N. C. 119; *Wilson v. Markley*, 133 N. C. 616, 45 S. E. 1023; *Bray v. Williams*, 137 N. C. 387, 390, 49 S. E. 887.

No Ground for Collateral Impeachment.—Where an act granting a charter to a private corporation has been duly ratified, it may not be collaterally impeached in an action between it and another on the ground that the notice had not been made as required by this section. *Carolina-Tennessee Power Co. v. Hiawasse River Co.*, 175 N. C. 668, 669, 96 S. E. 99.

The act creating the North Carolina National Park Commission (Laws 1927, ch. 48) is a public act and does not fall within the purview of this section requiring notice that application to the General Assembly for the passage of a private act be made. *Yarborough v. Park Commission*, 196 N. C. 284, 145 S. E. 563.

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

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

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

readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal. (Const. 1868.)

- I. Editor's Note.
- II. General Consideration.
- III. Necessity of Following Section.
- IV. The Journal—Speakers' Certificates.
- V. Substituted Bills—Amendments.

Cross Reference.

As to subscription to railroad stock by counties, see §§ 60-21, 60-22.

I. EDITOR'S NOTE.

Editor's Note.—The authorities as to the power of county taxation are thus analyzed and summarized in *Tate v. Commissioners*, 122 N. C. 812, 815, 30 S. E. 352.

A. For necessary expenses, the county commissioners may levy up to the constitutional limitation without a vote of the people or legislative permission.

B. For necessary expenses, the county commissioners may exceed the constitutional limitation by special legislative authority, without a vote of the people.

C. For other purposes than necessary expenses, a tax cannot be levied either within or in excess of the constitutional limitation except by a vote of the people under special legislative authority.

II. GENERAL CONSIDERATION.

Section Mandatory.—This section is mandatory. *Commissioners v. Snuggs*, 121 N. C. 394, 28 S. E. 539; *Union Bank v. Commissioners*, 119 N. C. 214, 25 S. E. 966; and must be strictly complied with. *Smothers v. Com.*, 125 N. C. 480, 34 S. E. 554.

The adoption of this section, annulled all special powers remaining unexecuted, and not granted in strict conformity with its requirements. *Commissioners v. Payne*, 123 N. C. 432, 31 S. E. 711.

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

Section Not Retroactive.—See *Board v. Travelers' Ins. Co.*, 128 Fed. 817.

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

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

Issuing bonds for road purposes is a necessary expense to which the section does not apply. *Leonard v. Commissioners*, 185 N. C. 527, 117 S. E. 580. See *Woodall v. Western Wake Commission*, 176 N. C. 377, 97 S. E. 226.

An act authorizing treasurer to deliver state bonds is not within this section. *Battle v. Lacy*, 150 N. C. 573, 64 S. E. 505.

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

A statute for the revaluation of property is not in its strict sense a revenue act within the meaning of this section. *Hart v. Com.*, 192 N. C. 161, 134 S. E. 403.

The filing fee required by the primary law, §§ 163-120 et seq., is in no sense a tax within the meaning of this section. *McLean v. Durham County Board of Elections*, 222 N. C. 6, 21 S. E. (2d) 842.

Changing of County Agencies.—The Legislature has the power and authority to change the county tax agencies without further observing the requirements of the section. *State v. Jennette*, 190 N. C. 96, 129 S. E. 184.

Submission to People Not Required.—An act of the Legislature authorizing a bond issue for public roads is valid if conforming to this section of the State Constitution, without submitting the proposition to a vote of the people. *Hargrave v. Commissioners*, 168 N. C. 626, 84 S. E. 1044.

Cited in *Nixon v. Asheville*, 199 N. C. 217, 218, 154 S. E. 93; *Penland v. Bryson City*, 199 N. C. 140, 154 S. E. 88; *Starmount v. Hamilton Lakes*, 205 N. C. 514, 518, 171 S. E. 909; *Newman v. Watkins*, 208 N. C. 675, 182 S. E. 453.

III. NECESSITY OF FOLLOWING SECTION.

No Authority Conferred Unless Section Followed.—An act not having been passed with the formalities required by this

section is void, and confers no authority upon a city to create the debt and issue the bonds therein provided for. *Charlotte v. Shepard & Co.*, 122 N. C. 602, 29 S. E. 842; *Glenn v. Wray*, 126 N. C. 730, 36 S. E. 167; *Cottrell v. Lenoir*, 173 N. C. 138, 91 S. E. 827.

Valid and Invalid Act on Same Subject.—An act passed according to the requirements of this section cannot be construed with an act not so passed. *Pritchard v. Com.*, 160 N. C. 476, 76 S. E. 488.

Where a town charter is not passed in accordance with this section, such town cannot levy any tax under said charter, but it may levy taxes for necessary expense. *Rodman-Heath Cotton Mills v. Waxhaw*, 130 N. C. 293, 41 S. E. 488.

Effect on Bonds of Failure to Comply with Section.—This section is mandatory; and, not having been complied with in the passage of certain laws authorizing certain counties, to subscribe for stock in a railroad company and issue bonds in payment therefor, bonds issued by a city pursuant thereto were void. *Burlingham v. New Bern*, 213 Fed. 1014.

A town may not pledge its faith or credit for the issuance of bonds for municipal purposes, unless under statutory authority given in conformity with the requirements of this section, or unless for necessary expenses. *Storm v. Wrightsville Beach*, 189 N. C. 679, 127 S. E. 17.

Estoppel To Deny Invalidity of Bonds.—Where township bonds are invalid because issued without authority, the township is not estopped from asserting such fact by recitals in the bonds that they are issued in compliance with the constitution and laws of the state. *Debnam v. Chitty*, 131 N. C. 657, 43 S. E. 3.

The payment of interest does not preclude the inquiry as to the validity of the bonds. *Glenn v. Wray*, 126 N. C. 730, 36 S. E. 167.

Who May Enjoin Bond Issue.—It is competent for a taxpayer to file a complaint on behalf of himself and all other taxpayers in the State, whereby to enjoin the issue of State bonds under an unconstitutional act of Assembly. *Galloway v. Jenkins*, 63 N. C. 147.

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

IV. THE JOURNAL—SPEAKERS' CERTIFICATES.

See notes under § 23 of this article.

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

Omission of Negative Vote.—Where the journal of the house does not give the names of any members, as voting in the negative on a bill authorizing a township to issue bonds, and it does not affirmatively appear that there were none so voting, the statute is invalid. *Debnam v. Chitty*, 131 N. C. 657, 43 S. E. 3.

As this section requires that on the voting of a bill before the legislature the yeas and nays shall be entered on the journals, either the nays must be on the journal, or it must affirmatively appear that there were none. *Commissioners v. De Rosset*, 129 N. C. 275, 40 S. E. 43.

Where the House Journal showed that a certain law, authorizing the issuance of county bonds, was passed by the following vote: "Ayes 94, nays . . . ; total . . ."—such record sufficiently showed that there was no negative vote cast, under the presumption that the clerk of the House charged with the recording of the vote performed his duty, and hence such record constituted a sufficient compliance with this section. *Commissioners v. Tollman*, 145 Fed. 753, 754.

A bill to authorize a county to pledge its faith and credit by issuing bonds for road purposes, and duly ratified, is not invalid for the failure to meet the requirements of this section, by reason of the failure to record on the journal on the second reading in one of the branches of the legislature the "no" vote, when it is made to appear from the entries of the names of those voting in the affirmative that a majority of the voters had so voted, the absence of the entries of the names of those voting in the negative showing that there were none. *Leonard v. Commissioners*, 185 N. C. 527, 117 S. E. 580, citing *Commissioners v. Trust Co.*, 143 N. C. 110, 55 S. E. 442.

Journals Conclusive.—The journals of the General Assembly, when competent as evidence, import absolute verity, and cannot be explained or altered by parol evidence. *Wilson v. Markley*, 133 N. C. 616, 45 S. E. 1023. They are the sole evidence as to whether the ayes and noes on a vote on

a bill were entered on such journals. *Commissioners v. De Rosset*, 129 N. C. 275, 40 S. E. 43; *Com'rs v. Coles*, 96 Fed. 284; *Allen v. Raleigh*, 181 N. C. 453, 107 S. E. 463. And are conclusive as against not only a printed statute published by authority of law, but also against a duly enrolled act. *Union Bank v. Commissioners*, 119 N. C. 214, 25 S. E. 966; *Commissioners v. Snuggs*, 121 N. C. 394, 28 S. E. 539. See especially the concurring opinion of J. Furches in *Commissioners v. Snuggs*.

It appears from the Journal of each house of the General Assembly that the last paragraph of § 153-152 was enacted in accordance with the requirements of this section. *Martin v. Board of Com'rs*, 208 N. C. 354, 365, 180 S. E. 777.

Correction of Journals.—A subsequent special session of the same Legislature may correct its journals of the regular session so as to show in point of fact that a bill of this character was properly passed in accordance with these provisions. *Commissioners v. Farmers Bank*, 152 N. C. 387, 67 S. E. 969.

Certificate of Speakers.—The certificate of the speakers of each house of the legislature is conclusive evidence that a bill was read and passed three several readings in each house. *Commissioners v. De Rosset*, 129 N. C. 275, 40 S. E. 43.

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

V. SUBSTITUTED BILLS—AMENDMENTS.

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

Where a valid charter of a municipality authorizing the issuance of its bonds has been subsequently amended with regard thereto, but upon condition that the proposition be submitted to the voters, which was never done, and the Legislature attempts to pass a still later law amending the former act but which has not been done in accordance with the requirements of this section, the later acts are of no effect, leaving the charter of the town as to these provisions open, under the terms of which the bonds may yet be issued. *Cottrell v. Lenoir*, 173 N. C. 138, 91 S. E. 827.

Validation by Later Act.—Where a statute, pledging the faith and credit of the State in issuing State bonds, has not been passed in accordance with the provisions of this section is therefore invalid, its invalidity may be cured by a later statute passed as the Constitution requires, referring to the former statute, and supplying the omissions, and the bonds thereunder issued after the question has been submitted to and approved by the voters of the State, as the statute required, are valid. *Hinton v. Lacy*, 193 N. C. 496, 497, 137 S. E. 669.

When Amendment will Affect Constitutionality.—An act passed in accordance with this section is not rendered invalid by an amendment not passed in accordance with the constitutional provision, when it does not affect the taxing or other financial features of the act, or increase either the taxes or impose any additional burden on the taxpayer. *Wagstaff v. Central Highway Commission*, 174 N. C. 377, 93 S. E. 908.

No Change Effected.—Where the Legislature has passed an act authorizing a county to pledge its faith and credit in the issuance of bonds upon its several readings, upon its aye and no vote in accordance with this section, and by later ratification of an act requiring the question to be submitted to the qualified voters: Held, it is not required that the later ratified act be also passed in accordance with the constitutional requirement, and in the absence of a proper election, the bond issue will be declared invalid. *Graham County v. Terry & Co.*, 194 N. C. 22, 138 S. E. 443.

Where the Legislature has passed an act authorizing a county to issue bonds according to the provisions of this section it is within its power to add a provision that the question be first submitted to the electorate of the county. *Graham County v. Terry & Co.*, 94 N. C. 22, 138 S. E. 443.

No Presumption of Materiality.—Where the journal does not show the effect of the amendment there is no pre-

sumption that it was material. *Frazier v. Board of Com'rs*, 194 N. C. 49, 138 S. E. 433.

Evidence of Materiality.—Slips of paper attached by a rubber band to the cover of the original bill when it was engrossed are not admissible in determining whether an amendment was material. *Frazier v. Board of Com'rs*, 194 N. C. 49, 138 S. E. 433.

Material Amendment.—A material amendment made by one branch of the Legislature to a bill passed by the other, allowing a county to pledge its credit in issuing bonds for the improvement of the highways therein, must be concurred in according to the requirements of this section. *Claywell v. Commissioners*, 173 N. C. 657, 92 S. E. 481; *Glenn v. Wray*, 126 N. C. 730, 36 S. E. 167. This rule applies with greater force, when the amendment is by separate act. *Guire v. Com'rs*, 177 N. C. 516, 99 S. E. 430.

An amendment which made a material change in the valid act it proposed to amend is unconstitutional, and the commissioners are without authority to levy the tax specified in the later act. *Township Road Commissioners v. Commissioners*, 178 N. C. 61, 62, 100 S. E. 122.

Same—Increasing Interest Rate.—An amendment to an act authorizing a county to issue bonds for road construction, which increases the rate of interest from 5 per cent to 6 per cent, is to effect a material change in the former law. *Guire v. Commissioners*, 177 N. C. 516, 99 S. E. 430.

Same—Increasing Tax Rate.—When an act has been passed by the Legislature authorizing a graded school district to vote on the question of issuing school bonds in a certain amount, and amended at a subsequent session so as to authorize bonds to a larger amount and to run a longer time, both acts having been passed upon their several readings, with aye and no vote according to this section, an issue of bonds under a still later and similar act for a larger amount and upon a greater rate of taxation is invalid in toto when the later act is not likewise passed in accordance with this section. *Russell v. Troy*, 159 N. C. 366, 74 S. E. 1021.

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

Same—Curtailing Territory to Which Applicable.—Where a bill is introduced in one branch of the Legislature for the issuance of bonds, and amendments have been made by the other branch, withdrawing certain of the more wealthy and popular townships from the liability for the indebtedness to be created, except under condition requiring the approval of the voters, the amendment is a material one, requiring for the validity of the act that it be passed in accordance with the requirements of this section. *Claywell v. Commissioners*, 173 N. C. 657, 92 S. E. 481.

But an act empowering special school districts of the State to issue bonds which followed the requirements of this section except that upon its last reading, by amendment, it was made to apply only to one district in the State, the effect of the amendment being to exclude the other districts, and the act being regularly enacted as to the one district retained, is valid as to that district. *Gregg v. Commissioners*, 162 N. C. 479, 78 S. E. 301.

Immaterial Amendment.—When an act has been passed in accordance with this section, an amendment, which does not increase the amount of the bonds or the taxes to be levied or otherwise materially change the original bill, may be adopted by the concurrence of both houses of the General Assembly. *Commissioners v. Stafford*, 138 N. C. 453, 50 S. E. 862.

An amendment which does not increase the amount of the bonds or tax to be levied, or otherwise materially change the bill is immaterial. *Gregg v. Commissioners*, 162 N. C. 479, 78 S. E. 301.

It is only when a material amendment is affected that a rereading is necessary. *Frazier v. Board of Comm'rs*, 194 N. C. 49, 138 S. E. 433.

Same—Substituting Name of Commissioner.—An amendment in the second branch of the Legislature substituting the name of a commissioner does not broaden the scope of the act or affect its financial feature, and the failure in the first branch to comply with this section will not alone affect its validity. *Brown v. Commissioners*, 173 N. C. 598, 92 S. E. 502.

Same—Charge in Caption.—A slightly different caption retaining the number of the original bill is an immaterial amendment. *Brown v. Commissioners*, 173 N. C. 598, 92 S. E. 502.

Materiality a Judicial Question.—Whether an amendment is material and required to be passed in accordance with this section is a question of law for the court, under the facts, and not controlled by an agreement between the par-

ties. *Wagstaff v. Central Highway Commission*, 174 N. C. 377, 93 S. E. 908.

Cited in *Fortune v. Commissioners*, 140 N. C. 322, 329, 52 S. E. 950; *Hinton v. Lacy*, 193 N. C. 496, 137 S. E. 669.

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

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

Cited in *Frazier v. Board of Com'rs*, 194 N. C. 49, 138 S. E. 433.

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

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

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

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

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

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

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

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

Effect of Section.—This section withdraws from the consideration of our courts the question of title involved in a contest for a seat in the General Assembly. *State v. Pharr*, 179 N. C. 699, 103 S. E. 8; *Bouldin v. Davis*, 197 N. C. 731, 150 S. E. 507.

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

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

Where an office was created by an act of the General Assembly but was not signed by the presiding officers until the three days data, an election in the interim to fill such office was void. *State v. Meares*, 116 N. C. 582, 583, 21 S. E. 973.

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

In the absence of the signature journals are not compe-

tent to prove compliance with this section. *Frazier v. Board of Com'rs*, 194 N. C. 49, 138 S. E. 433.

Effect of Signature.—When an act is certified to by the speakers as having been ratified, it is conclusive of the fact that it was read three several times in each house and ratified. *Union Bank v. Commissioners*, 119 N. C. 214, 222, 25 S. E. 966.

The usual certificate of ratification is conclusive only of the fact of ratification, but not of a compliance with Art. II, sec. 14, of the Constitution. *Smathers v. Commissioners*, 125 N. C. 480, 34 S. E. 554; *Commissioners v. DeRassett*, 129 N. C. 275, 40 S. E. 43.

Effect of Certificate.—The certificate is not sufficient to show that the bill was passed in compliance with section 14 of this article. *Frazier v. Board of Com'rs*, 194 N. C. 49, 138 S. E. 433.

But the signature is conclusive of passage according to this section. *Frazier v. Board of Com'rs*, 194 N. C. 49, 138 S. E. 433.

And the journals are not admissible to contradict such signature. *Frazier v. Board of Com'rs*, 194 N. C. 49, 138 S. E. 433.

Cited in *Russell v. Ayer*, 120 N. C. 180, 211, 27 S. E. 133; *Commissioners v. Snuggs*, 121 N. C. 394, 400, 28 S. E. 539; *State v. Patterson*, 134 N. C. 612, 620, 47 S. E. 808.

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

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

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

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

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

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

This section constituted the first part of Sec. 29 of the Constitution of 1868. The following additional sentence of Sec. 29 was omitted by the Convention of 1875: "The first election shall be held when the vote shall be taken on the ratification of this Constitution by the voters of the State, and the General Assembly then elected shall meet on the fifteenth day after the approval thereof by the Congress of the United States, if it fall not on Sunday, but if it shall so fall, then on the next day thereafter; and the members then elected shall hold their seats until their successors are elected at a regular election." Under authority of this section, the General Assembly changed the time of holding the election to Tuesday next after the first Monday in November, Ch. 275, Public Laws of 1876-77.—Ed. note.

§ 28. **Pay of members and officers of the Gen-**

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

Editor's Note.—Sec. 28 added to the Constitution by the Convention of 1875, read as follows: "The members of the General Assembly for the term for which they have been elected shall receive as a compensation for their services the sum of four dollars per day for each day of their session, for a period not exceeding sixty days; and should they remain longer in session they shall serve without compensation. They shall also be entitled to receive ten cents per mile, both while coming to the seat of government and while returning home, the said distance to be computed by the nearest line or route of public travel. The compensation of the presiding officers of the two houses shall be six dollars per day and mileage. Should an extra session of the General Assembly be called, the members and presiding officers shall receive a like rate of compensation for a period not exceeding twenty days." The section was made to read as at present by Ch. 203, Public Laws of 1927, ratified by the people on November 6, 1928.

Special Committee of Investigation.—In as much as per diem of members of the General Assembly is allowed only during its session, which is limited to sixty days, the members of the legislative committee appointed to investigate certain facts and report to the General Assembly before its adjournment if possible, otherwise to the superior court, are not entitled to per diem for services rendered after adjournment when the resolution appointing them only provided for the necessary expenses of the committee while engaged in the investigation. Commercial, etc., Bank v. Worth, 117 N. C. 147, 23 S. E. 160. This case was decided prior to the amendment to this section fixing a salary for the members of the general assembly.—Ed. Note.

Cited in Kendall v. Stafford, 178 N. C. 461, 101 S. E. 15 (dis. op.).

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

special laws enacted by it. Any local, private or special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section. (1915, c. 99.)

This section is remedial in its nature and was intended not only to free the Legislature of petty detail but also to require uniform and coordinated action under general laws in regard to the matters therein stipulated which are related to the welfare of the people of the whole State, and the application of the section should not be denied on any unsubstantial distinction which would defeat its purpose. Board of Health v. Board of Com'rs, 220 N. C. 140, 16 S. E. (2d) 677, holding Pub. Laws 1941, chs. 6 and 193 to be local laws relating to health.

What Are Local Laws.—The interpretation of a statute, as to whether it is a local one, prohibited by this section of our Constitution should be largely left to the facts and circumstances of each particular case, giving significance to the rule that legislative acts are presumed to have been rightfully passed from proper motives, and that a classification of this kind, when made by them, should not be disturbed unless it is manifestly arbitrary, and invalid. In re Harris, 183 N. C. 633, 112 S. E. 425.

In no sense is the filing fee required by § 163-120 and § 163-129 a local law as condemned by this section. McLean v. Durham County Board of Elections, 222 N. C. 6, 10, 21 S. E. (2d) 842.

Courts Look beyond Form of Statutes.—In determining whether a statute relating to matters enumerated in this section is a "local, private, or special" act inhibited by this section or a "general law" which the general assembly has the "power to pass," the courts will look beyond the form of the act and ascertain whether the statute, in fact, is generally and usually applicable throughout the area comprising the state. State v. Dixon, 215 N. C. 161, 1 S. E. (2d) 521.

Scope of Legislative Power.—See generally Webb v. Port Comm., 205 N. C. 663, 172 S. E. 377.

Establishment of Recorders' Courts.—A general law permitting the establishment of Recorders' courts in the State, excepting certain counties to the number of 44, leaving 56 within the provisions of the statute, is not a local law within the intent and meaning of this section nor is a statute amending the former general law taking a certain county and two others out of the excepted class enumerated in the general statutes, unconstitutional as a local or special act as to those counties, the effect of this statute being a reenactment of the general law including the particular counties. In re Harris, 183 N. C. 633, 112 S. E. 425.

Ch. 286, Public-Local Laws of 1925, providing for the establishment of township recorder's courts in one specified county is unconstitutional and void as being a local act relating to the establishment of courts inferior to the Superior Court, prohibited by this section. State v. Williams, 209 N. C. 57, 182 S. E. 711.

Increasing Jurisdiction of Certain Court.—An act which authorizes the county commissioners to increase the jurisdiction of a certain recorder's courts in civil matters is unconstitutional. Durham Provision Co. v. Daves, 190 N. C. 7, 8, 128 S. E. 593.

Same—Courts Already Established.—This section does not apply to increasing the jurisdiction of such courts as are already established. State v. Horne, 191 N. C. 375, 131 S. E. 753.

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

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

National Park Act.—The provisions of the statute (Laws 1927, ch. 48) for the acquisition of lands for a national park affects the interest of the people of the State, and though local as to location, is for a public use in contemplation of its acquisition by the State for the purpose outlined in the act. Yarbrough v. Park Commission, 196 N. C. 284, 145 S. E. 563.

Extending Limits of School.—It is true that the boundaries of a "district" may be coterminous with those of

a city or town but it does not follow that an act extending the limits of a city or town in which public schools may be maintained is necessarily a special act establishing or changing the lines of school districts in violation of the constitutional provision. *Hailey v. Winston-Salem*, 196 N. C. 17, 22, 144 S. E. 377.

Sanitary Districts.—An act of the Legislature (Private Laws 1927, c. 229) attempting to create a sanitary district within certain lines within a county for the construction and maintenance of sewer and water systems with certain assessments or taxing powers for the purpose is void, being in violation of the provisions of this section. *Drysdale v. Prudden*, 195 N. C. 722, 143 S. E. 530.

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

While authority given by statute to a county or other political agency of a state, to issue bonds for highways in aid to their maintenance or construction is not direct, local or special legislation as is prohibited by this section, it is otherwise where the statute directs the building of a bridge at a specified place across a stream between two counties, and as an incident permits the issuance of bonds or the levying of taxes for the purpose, pledging the faith and credit of the State. *Day v. Commissioners*, 191 N. C. 780, 133 S. E. 164.

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

Formation of Sewerage Districts.—A statute authorizing the formation of sanitary sewerage districts within county-wide limits, the boundaries of these to be fixed by certain designated local authorities in a specified manner, and done without previous notice to the voters, the statute is not a "local, private or special act relating to health, sanitation, etc." *Reed v. Howerton Engineering Co.*, 188 N. C. 39, 40, 123 S. E. 479.

Drainage District.—A statute creating and designating the boundaries of a drainage district and providing taxation for its construction and maintenance is for a necessary purpose and does not fall within the purview of Art. VII, § 7, requiring its submission to the voters within the district, nor is it a local, private or special act relating to health or sanitation inhibited by this section. *Kenilworth v. Hyder*, 197 N. C. 85, 86, 147 S. E. 736.

Establishing or Changing Lines of School Districts.—Since the enforcement of this section, special act of the Legislature to establish or change the lines, etc., of a school district, and any proceedings under it, are null and void. *Galloway v. Board*, 184 N. C. 245, 114 S. E. 165.

A statute which lays off or defines by boundary a certain territory as a graded school district within a county, and provides for an issue of bonds upon the approval of the voters therein, for the necessary buildings and maintenance, comes within the provision of this section. *Board v. Mutual Loan, etc., Co.*, 181 N. C. 306, 107 S. E. 130.

This section prohibits the legislature from passing any special, private or local act which ex proprio vigore undertakes to establish or change the boundaries of a school district, but the section does not proscribe the legislature from setting up machinery under which a county, as the administrative unit charged with making provisions for necessary capital outlay, may create school districts or special bond tax units within the county to accomplish this purpose, and therefore chapter 279, Public-Local Laws of 1937, which provides the machinery under which the county of Buncombe may establish school districts or special bond tax units in the county, is not in contravention of this section. *Fletcher v. Collins*, 218 N. C. 1, 9 S. E. (2d) 506; *Hinson v. Board of Com'rs*, 218 N. C. 13, 9 S. E. (2d) 614.

Same—Creation of Public School District.—A statute which creates a public school district and allows a bond issue, upon the approval of voters, for its equipment and maintenance, is a local or special act, prohibited by this section. *Robinson v. Board*, 182 N. C. 590, 109 S. E. 855.

Same—Incorporation of Existing Districts.—Incorporating existing local school districts for all purposes relating to the issuance or payment of bonds upon the approval of the voters of a district, is valid, and not in contravention to this section. *Board v. Mutual Loan, etc., Co.*, 181 N. C.

306, 107 S. E. 130; *Paschal v. Johnson*, 183 N. C. 129, 110 S. E. 841.

Same—Increase of Bonds by Existing District.—Where a school district has been defined as to its boundaries, etc., and created under the provisions of a statute valid before the adoption of the amendment to our State Constitution, this section, and which authorized a bond issue in a certain sum, a statute passed since the adoption of this constitutional amendment authorizing an increase of the bonds to be issued, upon the approval of the voters according to the statutory amendment, does not contravene the provision of this section. *Roebuck v. Board*, 184 N. C. 144, 113 S. E. 676.

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

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

Creating and Naming County Health Board.—Chapter 322, Public-Local Laws of 1931, which undertakes to create and name the members of a county board of health for Madison county alone, which board is charged with the duty to inspect county institutions and see that they are kept in a sanitary condition, and to select a physician to vaccinate against disease, is a local act relating to health and sanitation prohibited by this section. *Sams v. Board of Com'rs*, 217 N. C. 284, 7 S. E. (2d) 540.

Fair Trade Act.—The North Carolina Fair Trade Act, in limiting its application to commodities bearing a trademark and in exempting from its operation such commodities when sold to particular classes of persons, sets up reasonable classifications and applies uniformly to all persons or things coming therein, and therefore is a general act regulating trade and does not contravene this section. *Lilly & Co. v. Saunders*, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308.

Machinery to Effect Void Act.—Where an act to create a public school district is unconstitutional, because it violates this section, the provision for bonds and taxation to carry out the purpose of the act are likewise void. *Sechrist v. Commissioners*, 181 N. C. 511, 107 S. E. 503.

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

Ratifying Ordinance to Issue Bonds.—An act for the purpose of ratifying an ordinance, of county commissioners, to issue bonds and levy taxes for school purposes passed since the adoption of this section of the Constitution, is a local, private, or special act thereby prohibited; and the issuance of such bonds and levy of such taxes, will be permanently enjoined. *Woosley v. Commissioners*, 182 N. C. 429, 109 S. E. 368.

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

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

Maintenance of County Highways.—A public-local law applicable to the maintenance of the public highways of a county and authorizing taxation or issuance of bonds for this purpose, with certain specific supervision and control, is not such local or special act as falls within the inhibition of this section, where it does not affect the "laying out, opening, altering, maintaining or discontinuing" the then existing highways, etc. *State v. Kelly*, 186 N. C. 365, 119 S. E. 755.

Closing Public Roads.—Part of land in a private development was added to the playground of a public school. The General Assembly, by private act (ch. 72, Private Laws of 1933), declared that certain roads dedicated in the registered plot of the development were no longer needed, and declared that the roads should be closed and added to

the playground space for the school. This act is void as being a private or special act inhibited by this section. *Glenn v. Board of Education*, 210 N. C. 525, 185 S. E. 781.

Chapter 216, Priv. Laws 1925, is not a special statute relating to roads inhibited by this section, the act not relating to the laying out, opening, altering, or discontinuance of any particular and designated highway, street, or alley. *Deese v. Lumberton*, 211 N. C. 31, 188 S. E. 857.

Substitution of Road Control.—A statute that abolishes two boards of road commissioners in a county and gives to another board, created by the same act, entire control and management of the public roads and bridges of the county, does not violate this section of our State Constitution. *Honeycutt v. Commissioners*, 182 N. C. 319, 109 S. E. 4.

A public-local law authorizing the commissioners of a county to take over a specified highway within the county, constituting one of the principal highways within the county, connecting two important State highways, transferring to the said commissioners the bridges of the various townships for their care and supervision, is not violative of this section. *Hill v. Commissioners*, 190 N. C. 123, 129 S. E. 154. See *Thomson v. Harnett County*, 209 N. C. 662, 184 S. E. 490.

Issuance of County Road Bonds.—An act of the legislature authorizing the road commissioners of a county to issue bonds, upon the approval of its electors, to obtain moneys for the expenditure upon certain particularly designated objects in respect to its public roads, and which does not contain any provision for the laying out, altering or discontinuing any road or highway, does not contravene this section. *Road Comm'rs v. Bank*, 181 N. C. 347, 107 S. E. 245.

An act of the legislature authorizing the issuance of county bonds for public roads is not in contravention of this section of the Constitution. *Commissioners v. Wachovia Bank & Trust Co.*, 178 N. C. 170, 100 S. E. 421.

An act of the legislature authorizing the road commissioners of a county to issue bonds, upon the approval of its electors, to obtain moneys for the expenditure upon certain particularly designated objects in respect to its public roads, and which does not contain any provision for the laying out, altering or discontinuing any road or highway, does not contravene this section. *Road Commissioners v. Bank*, 181 N. C. 347, 107 S. E. 245.

Same—May Provide for Distributor of Fund.—An act of the legislature may prescribe a rule by which the proceeds of the sales of bonds it authorizes a county to issue for road purposes, shall be disbursed and distributed in order to effect the best results, when it is confined to the control and management of the funds, and leaves to the local authorities the power given them by this section over "the laying out, opening, or discontinuance of highways." *Commissioners v. Pruden & Co.*, 178 N. C. 394, 100 S. E. 695.

Collection of Tax Liens.—An act relating to establishment and collection of tax liens, which applies to only one county of the State, is void as a violation of this section. *Wake Forest v. Holding*, 207 N. C. 808, 178 S. E. 594.

Applied, in dissenting opinion, in *Sprunt v. Hewlett*, 208 N. C. 695, 182 S. E. 655.

Cited in *Albertson v. Albertson*, 207 N. C. 547, 551, 178 S. E. 352; *Edgerton v. Hood*, 205 N. C. 816, 821, 172 S. E. 481; *Newman v. Watkins*, 208 N. C. 675, 182 S. E. 453; *Efrd v. Board of Com'rs*, 219 N. C. 96, 12 S. E. (2d) 889; *State v. High*, 222 N. C. 434, 23 S. E. (2d) 343.

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

Sum Erroneously Placed in Sinking Fund.—While sinking funds provided for the retirement of municipal bonds may not be diverted from that purpose to other municipal requirements by a city, a sum erroneously placed on the books of the city in a sinking fund by a clerk without authorization, which sum was actually derived from profits from the municipal electric plant, does not fall within the constitutional or statutory inhibitions, and the city may by ordinance correct the error of the clerk and use the funds for other lawful municipal purposes. *Mewborn v. Kinston*, 199 N. C. 72, 154 S. E. 76.

ARTICLE III

Executive Department

§ 1. Officers of the executive department; terms of office.—The executive department shall

consist of a Governor (in whom shall be vested the supreme executive power of the State) a Lieutenant-Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, and an Attorney-General, who shall be elected for a term of four years by the qualified electors of the State, at the same time and places and in the same manner as members of the General Assembly are elected. Their term of office shall commence on the first day of January next after their election, and continue until their successors are elected and qualified: Provided, that the officers first elected shall assume the duties of their office ten days after the approval of this Constitution by the Congress of the United States, and shall hold their offices four years from and after the first day of January. Const. 1868; 1872-73, c. 84.)

See Art. 1, § 8 and the note thereto.

Editor's Note.—In this section as found in the Constitution of 1868, the words "a Superintendent of Public Works" followed "Treasurer". These words were stricken out and the office of Superintendent of Public Works abolished pursuant to Ch. 84, Public Laws of 1872-73.

Proposed Amendment.—Session Laws 1943, c. 57, § 1, proposed that this section be amended to read as follows:

"The executive department shall consist of a Governor, in whom shall be vested the supreme executive power of the State; a Lieutenant Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, an Attorney General, a Commissioner of Agriculture, a Commissioner of Labor, and a Commissioner of Insurance, who shall be elected for a term of four years by the qualified electors of the State, at the same time and places and in the same manner as members of the General Assembly are elected. Their term of office shall commence on the first day of January next after their election, and continue until their successors are elected and qualified: Provided, that the officers first elected shall assume the duties of their office ten days after the approval of this Constitution by the Congress of the United States, and shall hold their offices four years from and after the first day of January."

Duty of Governor.—The Governor as the constituted head of the executive department is charged with the duty of seeing that legislative acts are carried into effect. *Winslow v. Morton*, 118 N. C. 487, 490, 24 S. E. 417.

Cited in *People v. McKee*, 65 N. C. 257; *Pemberton v. McRae*, 75 N. C. 497, 504; *Caldwell v. Wilson*, 121 N. C. 425, 476, 28 S. E. 554 (Dissenting opinion of C. J. Faircloth); *Wilson v. Jordan*, 124 N. C. 683, 719, 33 S. E. 139.

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

§ 3. Returns of elections.—The return of every election for officers of the executive department shall be sealed up and transmitted to the seat of government by the returning officer, directed to the Secretary of State. The return shall be canvassed and the result declared in such manner as may be prescribed by law. Contested elections shall be determined by a joint ballot of both houses of the General Assembly in such manner as shall be prescribed by law. (Const. 1868; 1925, c. 88.)

Editor's Note.—In the Constitution of 1868, that portion of this section after the word "directed" and before "con-

tested" read as follows: "to the Speaker of the House of Representatives, who shall open and publish the same in the presence of a majority of the members of both houses of the General Assembly. The persons having the highest number of votes respectively, shall be declared duly elected; but if two or more be equal and highest in votes for the same office, then one of them shall be chosen by joint-ballot of both Houses of the General Assembly." The section was amended to its present form pursuant to Ch. 88, Public Laws of 1925. For the laws governing the canvassing of returns, see §§ 163-93 to 163-106; Ch. 260, Public Laws of 1927.

Where Returns Have Been Acted on.—In a proceeding to compel by mandamus a reassembling of a Board of County Canvassers and a recount of the votes cast in the county for candidates for the House of Representatives, where, since the institution of the action, the Board of State Canvassers has acted upon the returns transmitted to them, and issued a commission to the person elected on the face of the return, judicial action in the premises would be wholly unavailing, as the matter has passed beyond the jurisdiction of the court. *O'Hara v. Powell*, 80 N. C. 104.

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

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

Cited in *Watson v. North Carolina R. Co.*, 152 N. C. 215, 67 S. E. 502.

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

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

Editor's Note.—The word "biennially" was substituted for "annually" in this section of the Constitution of 1868, pursuant to Ch. 82, Public Laws of 1872-73.

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

The governor may grant a pardon upon a condition precedent that the prisoner pay costs of trial; and upon condition subsequent, that he remain of good character, and be sober and industrious. *In re Williams*, 149 N. C. 436, 63 S. E. 168, 22 L. R. A. (N. S.) 238.

Pardon Pending Appeal.—The term "conviction," in this section denotes a verdict of guilty rendered by a jury: Therefore, when defendant, after verdict and judgment in the court below, appealed to the supreme court and, pend-

ing such appeal, was pardoned by the Governor, such pardon is authorized by this section and is valid. *State v. Alexander*, 76 N. C. 231; *State v. Mathis*, 109 N. C. 815, 13 S. E. 917.

Quoted in *State v. Casey*, 201 N. C. 620, 161 S. E. 81 (dis. op.).

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

Cited in *State v. Mooney*, 74 N. C. 98. *In re McMahon*, 125 N. C. 38, 34 S. E. 193; *Herring v. Pugh*, 126 N. C. 852, 862, 36 S. E. 287.

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

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

Cited in *Nichols v. McKee*, 68 N. C. 429, 435; *Walker v. Bledsoe*, 68 N. C. 457, 463.

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

Supremacy of Governor's Control.—Under this section the Governor's control is supreme, in the absence of legislation, "to provide for the organization," etc., of the militia, enacted pursuant to Article XII, section 3 of this constitution. *Winslow v. Morton*, 118 N. C. 486, 24 S. E. 417.

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

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

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

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

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

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

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

Appointment Limited to Constitutional Affairs.—The in-

herent right of the Governor to appoint is now restricted to constitutional offices and where the Constitution itself so provides; and all offices created by statute, including directorates in State institutions—in this case, the State Hospital at Raleigh—the power of appointment, either original or to fill vacancies, is subject to legislative provision as expressed in this section. *Salisbury v. Croom*, 167 N. C. 223, 83 S. E. 354.

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

Same—When Legislature Assumes Appointment.—The Legislature having assumed to take the appointment of Directors for the State of the Western North Carolina Railroad from the Governor, it thereby dispensed with the necessity of his sending nominations to those officers to the Senate and left the Governor to pursue the law as far as he could. *Howerton v. Tate*, 68 N. C. 546. See also *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265.

Creation of New Office.—Where the General Assembly established a Court and, provided that the General Assembly should "elect a person to fill the vacancy in said office, which shall be caused by the ratification of this Act," the act was ratified, but the election of plaintiff to fill the office of Judge was not held until four days later, and the Governor refused the application of the plaintiff for a commission as Judge and appointed the defendant to the office between the time of the ratification of the Act and the election of the plaintiff to fill the office no such vacancy existed as is contemplated in this section. *Ewart v. Jones*, 116 N. C. 570, 21 S. E. 787.

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

Trustee's of University, Etc.—The trustees of the University, the Directors of the Penitentiary and of the Lunatic Asylum are public officers. *Walker v. Bledsoe*, 68 N. C. 457.

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

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

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

Cited in State v. Baskerville, 141 N. C. 811, 55 S. E. 742. Concurring opinion of Rodman in *University Railroad Co. v. Holder*, 63 N. C. 421; *Kendall v. Stafford*, 178 N. C. 461, 101 S. E. 15. Dissenting opinion of C. J. Faircloth in *Caldwell v. Wilson*, 121 N. C. 425, 474, 28 S. E. 554; *Rodwell v. Rowland*, 137 N. C. 617, 626, 50 S. E. 319.

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

Proposed Amendment.—Session Laws 1943, c. 497, proposed that this section be amended to read as follows: "The Lieutenant Governor shall be President of the Senate, but shall have no vote unless the Senate be equally divided. He shall receive such compensation as shall be fixed by the General Assembly."

§ 12. In case of impeachment of Governor, or vacancy caused by death or resignation.—In

case of the impeachment of the Governor, his failure to qualify, his absence from the State, his inability to discharge the duties of his office, or, in case the office of Governor shall in anywise become vacant, the powers, duties and emoluments of the office shall devolve upon the Lieutenant-Governor until the disabilities shall cease or a new Governor shall be elected and qualified. In every case in which the Lieutenant-Governor shall be unable to preside over the Senate, the senators shall elect one of their own number president of their body; and the powers, duties and emoluments of the office of Governor shall devolve upon him whenever the Lieutenant-Governor shall, for any reason, be prevented from discharging the duties of such office as above provided, and he shall continue as acting Governor until the disabilities be removed, or a new Governor or Lieutenant-Governor shall be elected and qualified. Whenever, during the recess of the General Assembly, it shall become necessary for the president of the Senate to administer the government, the Secretary of State shall convene the Senate, that they may elect such president. (Const. 1868.)

§ 13. Duties of other executive officers.—The respective duties of the Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, and Attorney-General shall be prescribed by law. If the office of any of said officers shall be vacated by death, resignation, or otherwise, it shall be the duty of the Governor to appoint another until the disability be removed or his successor be elected and qualified. Every such vacancy shall be filled by election at the first general election that occurs more than thirty days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired term fixed in the first section of this article. (Const. 1868; 1872-73, c. 84.)

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

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

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

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

cio, the legal adviser of the executive department. (Const. 1868; 1872-73, c. 84.)

Proposed Amendment.—Session Laws 1943, c. 57, § 3, proposed that this section be amended to read as follows:

"The Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance shall constitute, ex officio, the Council of State, who shall advise the Governor in the execution of his office, and three of whom shall constitute a quorum; their advice and proceedings in this capacity shall be entered in a journal, to be kept for this purpose, exclusively, and signed by the members present, from any part of which any member may enter his dissent; and such journal shall be placed before the General Assembly when called for by either house. The Attorney General shall be, ex officio, the legal adviser of the executive department."

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

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

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

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

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

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

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

Editor's Note.—Sec. 17 in the Constitution of 1868 was as follows: "There shall be established in the office of Secretary of State, a Bureau of Statistics, Agriculture and Immigration, under such regulations as the General Assembly may provide." The section was changed to its present form in the Convention of 1875.

Section Mandatory.—This section is not self-executing, but is mandatory upon the Legislature. *Cunningham v. Sprinkle*, 124 N. C. 638, 33 S. E. 138.

Act Enlarging Board of Agriculture.—An act which enlarges the number of the board of agriculture, naming the additional members, is not in conflict with this section. *Cunningham v. Sprinkle*, 124 N. C. 638, 33 S. E. 138.

Cited in *Nantahala Power, etc., Co. v. Clay County*, 211 N. C. 698, 197 S. E. 603.

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

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

ARTICLE IV

Judicial Department

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

Effect of Section.—This section abolished the distinction between actions at law and suits in equity, leaving such rights and remedies to be enforced in the one court, which theretofore had administered simply legal rights. *Peebles v. Gay*, 115 N. C. 38, 39, 41, 20 S. E. 173. See *Reynolds v. Reynolds*, 208 N. C. 578, 182 S. E. 341.

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

Legal and equitable rights and remedies are now determined in one and the same action. *Woodall v. North Carolina Joint Stock Land Bank*, 201 N. C. 428, 160 S. E. 475.

Feigned Issues.—Under the provisions of this section feigned issues are abolished. *Hyatt v. McCoy*, 194 N. C. 25, 138 S. E. 405.

Distinction between Principles Not Abolished.—Equity is now administered in the same courts as matters of law, but the distinction between equitable and legal principles have not been abolished. *Waters v. Garris*, 188 N. C. 305, 124 S. E. 334; *Page Trust Co. v. Godwin*, 190 N. C. 512, 130 S. E. 323; *Furst v. Merritt*, 190 N. C. 397, 130 S. E. 40.

This section abolishing the distinctions between actions at law and suits in equity, does not imply that the distinctions as between law and equity, are abolished. Principles of law, principles and doctrines of equity, remain the same they have ever been; the change wrought is in the method of administering them and, in some degree, the extent of the application of them. The abolition does not destroy equitable rights and remedies, nor does it merge legal and equitable rights. *Scales v. Wachovia Bank, etc., Co.*, 195 N. C. 772, 775, 143 S. E. 868.

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

Rights of Prior Lienor Not Affected.—This section does not affect the rights of a prior lienor by a registered chattel mortgage in favor of a judgment creditor who has sold the personal property by execution under a judgment subsequent to the mortgage lien, or give the creditor a right to levy his execution instead of pursuing the equitable remedy. *Rowland Hardware, etc., Co. v. Lewis*, 173 N. C. 290, 92 S. E. 13.

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

tion," or the "State v. A. B.—Indictment." *State v. Simons*, 68 N. C. 378.

Defendant's Right to Know Nature of Demand.—The necessity for drawing pleadings in civil actions according to a prescribed or established precedent, ceased when the form of suits was abolished by this section. But one who is brought into Court to answer a demand for damages or for specific property, has the same fundamental right to know the nature of the demand sufficiently well to enable him, with the aid of competent counsel, to prepare his defense, that he has to be informed of the accusation for which he has to answer criminally. *Conley v. Richmond, etc., Ry. Co.*, 109 N. C. 692, 693, 14 S. E. 303.

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

Pleadings Amended by Court.—Where a good cause of action is stated for equitable relief, but defective in form, the court may require the pleadings to be made definite and certain by amendment, the distinction between suits in equity and actions at law as to jurisdiction matters being abolished by this section. *Green v. Harshaw*, 187 N. C. 213, 121 S. E. 456.

Justices of the Peace.—This section does not give to courts of justices of the peace jurisdiction over the equity of correcting an account and settlement stated and had between the parties, so as to surcharge or falsify it for fraud or specified error, nor will the Superior Court acquire jurisdiction on appeal. *Morganton v. Miller*, 181 N. C. 364, 107 S. E. 209. But see the dissenting opinion of J. Clark.

Enforcement of Contracts.—The remedy for the enforcement of all kinds of contracts is now a civil action. *Boles v. Caudle*, 133 N. C. 528, 533, 45 S. E. 835.

This section providing that legal and equitable remedies be administered in the same court, does not abolish the recognized distinction in the principles applicable to each; and an action to force the provisions of a contract, being one at law, the equity that time is not the essence of the contract has no application. *Makuen v. Elder*, 170 N. C. 510, 87 S. E. 334.

Action for Seduction.—To give this constitutional provision its common sense construction, it would see that the "feigned issue" in actions for seduction, of a loss of services and for damages based thereon, was abolished, and the action should and does rest on the true issue of damages for the wrong done. *Hood v. Sudderth*, 111 N. C. 215, 219, 16 S. E. 397.

This fictitious relation denied to a woman the right to maintain an action under the common law for her seduction. In some of the States the right has been conferred by statute; with us it has been recognized by judicial decision on the theory that feigned issues are abolished and that the woman is the real party in interest. *Hyatt v. McCoy*, 194 N. C. 25, 27, 138 S. E. 405.

Action for Money Had and Received.—Under this section an exception to a complaint that by its form it is for money had and received, and that the action cannot be maintained unless the money has been actually received, is untenable. *Staton v. Webb*, 137 N. C. 35, 36, 49 S. E. 55.

Action for Claim and Delivery.—There is no such thing as an action for claim and delivery. Under this section there is but one form of action in civil cases. *Hargrove v. Harris*, 116 N. C. 418, 419, 21 S. E. 916.

Mandamus.—There is now in this state, but one form of action, and the writ of mandamus is but a process of the court in that action. *Belmont v. Reilly*, 71 N. C. 260, 262.

Applied in Wolfe v. Galloway, 211 N. C. 361, 190 S. E. 213.

Cited in Mitchell v. Henderson, 63 N. C. 643; *Harkey v. Houston*, 65 N. C. 137, 139; *Abrams v. Cureton*, 74 N. C. 523; *Jones v. Mial*, 79 N. C. 164, 167; dissenting opinion of Justice Walker in *Turner v. McKee*, 137 N. C. 251, 259, 49 S. E. 330; *Henrietta Mills v. Rutherford County*, 32 F. (2d) 570.

§ 2. Division of judicial powers.—The judicial power of the State shall be vested in a court for the trial of impeachments, a Supreme Court, Superior Courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law. (Const. 1868; Convention 1875.)

Editor's Note.—Sec. 4 of the Constitution of 1868 was as follows: "The judicial power of the State shall be vested in a court for the trial of impeachment, a Supreme Court, Superior Court, Court of Justices of the Peace, and special Courts." This was amended to become Sec. 2 of the pres-

ent Constitution by the Convention of 1875. Sections 2 and 3 of the Constitution of 1868, providing for a commission to report to the General Assembly rules of practice and procedure and a code of North Carolina law, were omitted by the Convention of 1875.

Judicial Power Vested in These Courts.—By this section the judicial power of the State is vested in a court for the trial of impeachments, a Supreme Court, Superior Court and special courts; the jurisdiction of special courts is defined by section 19 of this Article. *State v. Pender*, 66 N. C. 314.

General county courts must be ranked among the "other courts" alluded to in this section and Art. 4, § 30. *Meador v. Thomas*, 205 N. C. 142, 146, 170 S. E. 110.

The office of justice of the peace is provided for and vouchsafed in this section of the Constitution. *Ex parte Steele*, 220 N. C. 685, 18 S. E. (2d) 132.

The Industrial Commission is primarily an administrative agency of the State in the administration of the Compensation Act and its judicial powers are but incidental thereto, and the administration of the powers conferred by the statute is not in contravention of this section and Art. IV, § 12, of the Constitution. *Heavner v. Lincolnton*, 202 N. C. 400, 162 S. E. 909.

Assembly May Abolish Courts Created by It.—The general assembly has the power to create county, municipal, and recorders' courts, and a fortiori has the power to abolish or suspend a court created by it, even during the term of office of the judge of such court. *Efird v. Board of Com'rs*, 219 N. C. 96, 12 S. E. (2d) 889.

Assembly Cannot Abolish Superior Courts or Courts of the Justices of Peace.—The Superior Courts and Courts of Justices of the Peace were created by the Constitution, and the General Assembly cannot abolish them. *Rhyné v. Lipscombe*, 122 N. C. 650, 29 S. E. 57.

Legislature Can Establish Criminal Courts.—Under this section, the Legislature can establish criminal courts. *State v. Weddington*, 103 N. C. 364, 9 S. E. 577.

An act of the General Assembly establishing a criminal court for a certain county, is constitutional. *State v. Gales*, 77 N. C. 283.

Power to Determine Validity of Statute.—The courts of this state have the power and in a proper case it is their duty, in the exercise of the judicial power vested in them by the Constitution of this state to decide whether or not a statute is valid. *State v. Brockwell*, 209 N. C. 209, 211, 183 S. E. 378.

Cited in State v. Davis, 69 N. C. 495; *State v. Spurtin*, 80 N. C. 362; *Ewart v. Jones*, 116 N. C. 570, 21 S. E. 787; *McDonald v. Morrow*, 119 N. C. 666, 670, 26 S. E. 132; dissenting opinion of C. J. Faircloth in *Caldwell v. Wilson*, 121 N. C. 425, 476, 28 S. E. 554; *Mott v. Commissioners*, 126 N. C. 866, 869, 36 S. E. 330; *State v. Baskerville*, 141 N. C. 811, 813, 53 S. E. 742; *Belk's Dept. Store v. Guilford County*, 222 N. C. 441, 23 S. E. (2d) 897.

§ 3. Trial court of impeachment.—The court for the trial of impeachments shall be the Senate. A majority of the members shall be necessary to a quorum, and the judgment shall not extend beyond removal from and disqualification to hold office in this State; but the party shall be liable to indictment and punishment according to law. (Const. 1868.)

Cited in State v. Hamme, 180 N. C. 684, 104 S. E. 174. Dissenting opinion of C. J. Faircloth in *Caldwell v. Wilson*, 121 N. C. 425, 476, 28 S. E. 554.

§ 4. Impeachment.—The House of Representatives solely shall have the power of impeaching. No person shall be convicted without the concurrence of two-thirds of the senators present. When the Governor is impeached, the Chief Justice shall preside. (Const. 1868.)

Cited in Jones v. Standard Oil Co., 202 N. C. 328, 162 S. E. 741. Dissenting opinion of C. J. Faircloth in *Caldwell v. Wilson*, 121 N. C. 425, 476, 28 S. E. 545; dissenting opinion of J. Clark in *Mott v. Commissioners*, 126 N. C. 866, 878, 36 S. E. 330.

§ 5. Treason against the State.—Treason against the State shall consist only in levying war against it, or adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two

witnesses to the same overt act, or on confession in open court. No conviction of treason or attainer shall work corruption of blood or forfeiture. (Const. 1868.)

§ 6. Supreme Court.—The Supreme Court shall consist of a Chief Justice and four Associate Justices. The General Assembly may increase the number of Associate Justices to not more than six when the work of the Court so requires. The Court shall have power to sit in divisions, when in its judgment this is necessary for the proper dispatch of business, and to make rules for the distribution of business between the divisions and for the hearing of cases by the full Court. No decision of any division shall become the judgment of the Court unless concurred in by a majority of all the Justices; and no case involving a construction of the Constitution of the State or of the United States shall be decided except by the Court en banc. All sessions of the Court shall be held in the city of Raleigh. This amendment made to the Constitution of North Carolina shall not have the effect to vacate any office or term of office now existing under the Constitution of the State, and filled or held by virtue of any election or appointment under the said Constitution, and the laws of the State made in pursuance thereof. (Const. 1868; Convention 1875; 1887, c. 212; 1935, c. 444.)

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

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

Editor's Note.—Sec. 9 in the Constitution of 1868 was as follows: "There shall be two terms of the Supreme Court held at the seat of government of the State in each year, commencing on the first Monday in January, and the first Monday in June, and continuing as long as the public interests may require." This section was changed to the present Sec. 7 by the Convention of 1875. Subsequently the General Assembly changed the time of holding the two terms to the first Monday in February and the last Monday in August. Ch. 178, Public Laws of 1881; Ch. 49, Public Laws of 1887; Ch. 660, Public Laws of 1901; Revisal, 1905, s. 1535.

Cited in dissenting opinion of J. Walker in State v. Marsh, 134 N. C. 184, 197, 47 S. E. 6.

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

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

Editor's Note.—Sec. 10 of the Constitution of 1868, changed to Sec. 8 of the present Constitution by the Convention of 1875, read as follows: "The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the Courts

below, upon any matter of law or legal inference; but no issue of fact shall be tried before this Court; and the Court shall have power to issue any remedial writs necessary to give it a general supervision and control of the inferior court."

What Reviewable.—On appeal to the Supreme Court, only error as to the law or legal inferences are reviewable upon the record in the case. *Merchants Nat. Bank v. Howard*, 188 N. C. 543, 125 S. E. 126. See also, *Barnes v. Teer*, 218 N. C. 122, 10 S. E. (2d) 614 (petition to rehear granted, 219 N. C. 823, 15 S. E. (2d) 379); *McKay v. Bullard*, 219 N. C. 589, 14 S. E. (2d) 657.

The Supreme Court on appeal in a criminal action can review only matters of law or legal inference. *State v. Brewer*, 202 N. C. 187, 152 S. E. 363. See *State v. Anderson*, 208 N. C. 771, 182 S. E. 643.

The competency, admissibility and sufficiency of the evidence in a criminal action is for the court, the weight, effect and credibility is for the jury, and on appeal the Supreme Court can review only matters of law or legal inference. *State v. Harrell*, 203 N. C. 210, 165 S. E. 551; *Debnam v. Rouse*, 201 N. C. 459, 160 S. E. 471; *Carter v. Mullinax*, 201 N. C. 783, 161 S. E. 486; *State v. Casey*, 201 N. C. 185, 159 S. E. 337; *Woody Brothers Bakery v. Greensboro Life Ins. Co.*, 201 N. C. 816, 161 S. E. 554; *State v. Whiteside*, 204 N. C. 710, 169 S. E. 711.

This section empowers the Supreme Court to review on appeal any decision of the courts below, upon any matter of law or legal inference; and this is to be presented in accordance with the mandatory rules of the Supreme Court. *State v. Bitings*, 206 N. C. 798, 801, 175 S. E. 299. See *State v. Jackson*, 211 N. C. 202, 189 S. E. 510.

Theory of Trial in Lower Court Is Adhered to.—The principle that an appeal will be determined in accordance with the theory of trial in the lower court, is enforced by this court because of its limited jurisdiction as an appellate court under this section. *Apostle v. Acacia Mut. Life Ins. Co.*, 208 N. C. 95, 179 S. E. 444. See *Ammons v. Fisher*, 208 N. C. 712, 182 S. E. 479.

"Issues of Fact" Defined.—Issues of fact has been defined by the Court to mean "such matters of fact as are put in issue by the pleadings, and a decision of which would be final and conclude the parties upon the matters in controversy in the issue." *Battle v. Mayo*, 102 N. C. 413, 435, 9 S. E. 384.

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

This prohibition of trials of "issues of fact" by the Supreme Courts extends to issues of fact as heretofore understood, and does not hinder that tribunal from trying such questions of fact as may be involved in a consideration of the propriety of continuing or vacating an order for a provisional injunction. *Heilig v. Stokes*, 63 N. C. 612.

The Supreme Court cannot consider a paper which, unrelated to the trial, purports upon its face to have raised an issue of facts after the adjournment as to the recitals set forth in the commission given the presiding judge. *State v. Graham*, 194 N. C. 459, 465, 140 S. E. 26.

Habeas Corpus.—No appeal to the Supreme Court lies upon the refusal of the judge, having jurisdiction, to release the petitioner in habeas corpus proceedings, except in cases concerning the care and custody of children, the remedy being by application for the writ of certiorari which lies in the discretion of the appellate court. *State v. Hooker*, 183 N. C. 763, 111 S. E. 351; *State v. Yates*, 183 N. C. 753, 111 S. E. 337. In re *Blake*, 184 N. C. 278; 114 S. E. 294.

A decree in habeas corpus proceedings to determine the custody of a child as between its divorced parents is not appealable, the sole remedy being by certiorari to invoke the constitutional power of the Supreme Court to supervise and control proceedings of inferior courts. In re *Ogden*, 211 N. C. 100, 189 S. E. 119.

Writ of Certiorari.—Where an application for writ of certiorari in the nature of a writ of error is made for the purpose of bringing up an appeal when the right of appeal is lost in the trial court by failure to file statement of case on appeal within the time allowed, applicant must negative laches and show merit. *State v. Moore*, 210 N. C. 686, 188 S. E. 421.

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

matters of law and legal inference. In re Will of Brown, 194 N. C. 583, 140 S. E. 192.

Reduction of verdict by the trial court involves a matter of law reviewable by the Superior Court. Hyatt v. McCoy, 194 N. C. 760, 140 S. E. 807.

Applied in Hardy v. Heath, 188 N. C. 271, 277, 124 S. E. 564; *King v. Taylor*, 188 N. C. 450, 124 S. E. 751; *Caldwell v. Caldwell*, 189 N. C. 805, 128 S. E. 329; *Newton v. State Highway Commission*, 194 N. C. 303, 139 S. E. 613; *State v. Leonard*, 195 N. C. 242, 141 S. E. 736; *Gross v. Williams*, 196 N. C. 213, 145 S. E. 169; *Lacy v. State*, 195 N. C. 284, 141 S. E. 886; *State v. Lawrence*, 199 N. C. 481, 154 S. E. 741; *Mehaffey v. Provident Life, etc., Ins. Co.*, 205 N. C. 701, 172 S. E. 331; *Misskelley v. Home Life Ins. Co.*, 205 N. C. 496, 171 S. E. 862; *Lightner v. Raleigh*, 206 N. C. 496, 174 S. E. 272; *Alston v. Southern Ry. Co.*, 207 N. C. 114, 176 S. E. 922.

Cited in Bledsoe v. Nixon, 69 N. C. 82, 85; *State v. Swenson*, 82 N. C. 541; *State v. Garrell*, 82 N. C. 581, 583; *McDonald v. Morrow*, 119 N. C. 666, 670, 26 S. E. 132; dissenting opinion of J. Clark in *Wilson v. Jordan*, 124 N. C. 683, 705, 33 S. E. 139; *Seaboard Air Lnie Railway Co v. Brunswick County*, 198 N. C. 549, 152 S. E. 627; *Tallassee Power Co. v. Peacock*, 197 N. C. 735, 736, 150 S. E. 510; *State v. Freeman*, 197 N. C. 376, 148 S. E. 450; *McGuinn v. High Point*, 219 N. C. 56, 13 S. E. (2d) 48; *Warren v. Pilot Life Ins. Co.*, 217 N. C. 705, 9 S. E. (2d) 479.

§ 9. Claims against the State.—The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action. (Const. 1868.)

See notes under § 7-8.

Purpose of Section.—The original jurisdiction conferred upon the supreme court by this section, is for the benefit only of such plaintiffs, and to be used only in such cases, as cannot otherwise obtain a footing in court by reason of the State's being a party. *Bain v. State*, 86 N. C. 49.

It was intended by the provision of this section that persons who asserted that they held legal claims against the sovereign State, should here find a tribunal before which they might have, in proper cases, the legality of their claims adjudicated—a tribunal before which the sovereign State would, for a certain purpose, abdicate the privilege of exemption from liability to be sued and appear as any other litigant, to the end that its liability to the petitioner might be determined by the law. *Cowles v. State*, 115 N. C. 173, 174, 179, 20 S. E. 384.

Only Way State Can Be Sued.—The State cannot be sued, except as provided in this section. *Burton v. Furman*, 115 N. C. 166, 171, 20 S. E. 443; *Carpenter v. Atlantic, etc., R. Co.*, 184 N. C. 400, 114 S. E. 693.

Neither the State nor its subordinate agencies of government may be subject to suits or actions against it or them in its own courts or the courts of other states unless it has expressly consented to such suit. *Dredging Company v. State*, 191 N. C. 243, 131 S. E. 665.

The jurisdiction of the Supreme Court to hear claims against the State is confined to the powers given by this section and is not enlarged by the rules of procedure prescribed by statute, and where the complaint presents only an issue of fact the proceeding will be dismissed. *Cahoon v. State*, 201 N. C. 312, 160 S. E. 183.

Jurisdiction Recommendatory Only.—The original jurisdiction given the Supreme Court to pass upon claims against the State or its subordinate agencies of government, which are not subject to suit or execution under judgment, are recommendatory to the Legislature only, as to the matters of law involved upon facts agreed to, or made to appear, and this Court does not pass upon conflicting evidence to determine the facts at issue. *Dredging Co. v. State*, 191 N. C. 243, 131 S. E. 665. See also, *Rotan v. State*, 195 N. C. 291, 141 S. E. 733.

What Examination Confined To.—The jurisdiction conferred upon the Supreme Court by this section to hear claims against the State is confined to an examination of and adjudication of the legal validity of such claims; no power to enforce its judgment is given the court; its decisions are merely recommendatory to the Legislature, who may provide for the judgment of the claims, if it sees proper to do so. *Baltzer v. State*, 104 N. C. 265, 10 S. E. 153.

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

Necessity of Question of Law.—The Supreme Court has not original jurisdiction to hear claims against the State in cases in which no question of law is involved. *Miller v. State*, 134 N. C. 270, 46 S. E. 514; *Bledsoe v. State*, 64 N. C. 392.

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

A claimant against the State is not entitled to the recommendatory jurisdiction of the Supreme Court upon petition presented to it under the provisions of this section when no question of law is presented by the facts in the petition. *Warren v. State*, 199 N. C. 211, 153 S. E. 864.

Repeal of Statute.—The repeal of statute under which a contract has been made between the plaintiff and the State in no way affects the plaintiff's rights under the contract. *Clements v. State*, 76 N. C. 199.

Matters of Small Value.—This section ought not to be invoked in matters of small value, particularly when there is no doubt about the law. The claimant should apply at once to the Legislature for relief. *Sinclair v. State*, 69 N. C. 47.

Suit against Agent of State.—A suit prosecuted against an officer or agent who represented the State in conduct and liability, and wherein the State is the real party whose action will be controlled by the judgment and against which relief is sought, is a suit against the State, and not against its officer or agent, whose acts are alleged to have caused the injury complained of. *Carpenter v. Atlanta, etc., R. Co.*, 184 N. C. 400, 114 S. E. 693.

Action by Clerk for Fees.—The Supreme Court has not original jurisdiction of an action against the State by a clerk of the Superior Court for fees in an action instituted by the State and for which it has been adjudged liable. *Miller v. State*, 134 N. C. 270, 46 S. E. 514.

Holder of State Bonds.—An owner and holder of a bond of the State and coupons past due thereon has a right to invoke the recommendatory jurisdiction of the Supreme Court to pass upon the validity of the coupons as a claim against the State, under this section. *Horne v. State*, 82 N. C. 382.

Issues of Fact.—The Supreme Court in the exercise of its recommendatory original jurisdiction to hear claims against the State will dismiss any action brought against the State where the sole issue is one of fact. *Lacy v. State*, 195 N. C. 284, 141 S. E. 886.

A claim against the State Highway Commission for damages arising from an alleged breach of contract in the building of a State highway is a claim against the State, but when the only issues presented therein are ones of fact, the Supreme Court will not exercise its recommendatory original jurisdiction, and the action will be dismissed. *Lacy v. State*, 195 N. C. 284, 141 S. E. 886.

Applied in Rand v. State, 65 N. C. 194. *Newton v. State Highway Commission*, 194 N. C. 303, 139 S. E. 613.

Stated in O'Neal v. Wake County, 196 N. C. 184, 189, 145 S. E. 28; *Yancey v. North Carolina State Highway, etc., Comm.*, 222 N. C. 106, 22 S. E. (2d) 256.

Cited in Battle v. Thompson, 65 N. C. 406; *Boner v. Adams*, 65 N. C. 639, 644; *Baltzer v. State*, 109 N. C. 187, 13 S. E. 724; *Blount v. Simmons*, 119 N. C. 50, 25 S. E. 789; *Pate v. Wilmington, etc., R. Co.*, 122 N. C. 877, 881, 29 S. E. 334; dissenting opinion of J. Clark in *Atlantic & N. C. R. Co. v. Dortch*, 124 N. C. 663, 675, 33 S. E. 1014. Concurring opinion of J. Clark in *Capital Printing Co. v. Hoey*, 124 N. C. 767, 795, 33 S. E. 160; dissenting opinion of J. Clark in *White v. Auditor*, 126 N. C. 570, 598, 36 S. E. 132.

§ 10. Judicial districts for Superior Courts.—The State shall be divided into nine judicial districts, for each of which a judge shall be chosen; and there shall be held a Superior Court in each county at least twice in each year to continue for such time in each county as may be prescribed by law. But the General Assembly may reduce or increase the number of districts. (Const. 1868; Convention 1875.)

Editor's Note.—Sec. 12 of the Constitution of 1868, changed to the present Sec. 10 by the Convention of 1875, read as follows: "The State shall be divided into twelve judicial districts, for each of which a judge shall be chosen, who shall hold a Superior Court in each county in said district at least twice in each year, to continue for two weeks, unless the business shall be sooner disposed of." Sec. 13 made the apportionment of the twelve districts. There are

now twenty-one judicial districts in the State. G. S. §§ 7-68, et seq.

Stated in *Reid v. Reid*, 199 N. C. 740, 155 S. E. 719.
Cited in *Shepherd v. Commissioners*, 90 N. C. 115; *McAdoo v. Banbow*, 63 N. C. 461; *State v. Adair*, 66 N. C. 298; *State v. Taylor*, 76 N. C. 64; *Rhyne v. Lipscomb*, 122 N. C. 650, 29 S. E. 57; *State v. Stewart*, 189 N. C. 340, 127 S. E. 260. Dissenting opinion of J. Clark in *Wilson v. Jordan*, 124 N. C. 683, 705, 33 S. E. 139.

§ 11. Residences of judges; rotation in judicial districts; and special terms.—Every judge of the Superior Court shall reside in the district for which he is elected. The judges shall preside in the courts of the different districts successively, but no judge shall hold the courts in the same district oftener than once in four years; but in case of the protracted illness of the judge assigned to preside in any district, or of any other unavoidable accident to him, by reason of which he shall be unable to preside, the Governor may require any judge to hold one or more specified terms in said district, in lieu of the judge assigned to hold the courts of the said district; and the General Assembly may by general laws provide for the selection of special or emergency judges to hold the Superior Courts of any county, or district, when the judge assigned thereto, by reason of sickness, disability, or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same. Such special or emergency judges shall have the power and authority of regular judges of the Superior Courts, in the courts which they are so appointed to hold; and the General Assembly shall provide for their reasonable compensation. (Const. 1868; Convention 1875; 1915, c. 99.)

As to judgment authorized to be entered by the clerk, see section 1-209 and notes thereto.

Editor's Note.—Sec. 14 of the Constitution of 1868 was as follows: "Every judge of a Superior Court shall reside in his district while holding his office. The judges may exchange districts with each other with the consent of the Governor, and the Governor, for good reasons, which he shall report to the Legislature at its current or next session, may require any judge to hold one or more specified terms of said courts in lieu of the judge in whose district they are." This section was re-written to read as the present Sec. 11 through the clause ending with "court of the said district." The remainder of the present Sec. 11 was added by Ch. 99, Public Laws of 1915, ratified by the people in November, 1916, and effective Jan. 10, 1917.

Proper Interpretation of Section.—The proper interpretation of this section is, that while the Governor is taking a reasonable time for deliberation and acquiring information that will aid him in choosing a competent and worthy officer, he may require an unoccupied judge to hold a specified term or terms of the courts of the district to which the successor of the deceased judge will be assigned by the general law immediately upon such successor's qualification. *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247.

Creation of Extra Term of Court.—The provisions of this section requiring the Judges to preside in the different districts successively, and prohibiting them from holding the courts in the same district oftener than once in four years, applies to the series of successive courts constituting a circuit or riding, and does not restrict the Legislature from creating an extra term of the superior court of a county and designating the resident judge to hold the same. *State v. Monroe*, 80 N. C. 373.

An act authorizing the Governor of the State to appoint special terms of the superior courts, is not unconstitutional. *State v. Ketchey*, 70 N. C. 621.

Inhibition Does Not Apply to Exchange Judges on Special Terms.—The inhibition contained in this section applies neither to the holding by any judge of the superior court of one or more regular terms of said court by exchange with some other judge, and with the sanction of the governor nor to the holding of special terms under the order

contemplated in said provision. *State v. Turner*, 119 N. C. 841, 25 S. E. 810.

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

Appointment upon Death of Judge.—Upon the death of one of the judges of the superior courts, the governor has the authority under this section to require one of the other judges to hold one or more specified terms of the courts in the district assigned to the deceased judge. *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247.

When Regular Judge Able to Hold Court.—Objection by the defendant charged with a capital felony to the authority of the judge assigned by the governor of the state to hold a special term of the superior court, upon the ground that the judge assigned to hold the courts of the district was in good health, and holding a term of the court in another county within the district, cannot be sustained as repugnant to or unauthorized by this section. *State v. Montague*, 190 N. C. 841, 130 S. E. 838.

Emergency judges, appointed under the provisions of our statute as to Supreme and superior court judges who have retired from active service in pursuance of the provisions of our Constitution, have no jurisdiction to hear and determine, at chambers, a matter of mandamus, or when not holding a term of court assigned to them. *Dunn v. Taylor*, 186 N. C. 254, 119 S. E. 495. Const. Art. IV, sec. 11.

Under the system of rotation prescribed by this section, the judge holding the courts of a judicial district has jurisdiction to act in all matters within the jurisdiction of the Superior Court, and by consent of parties, such judge may, out of term and in or out of the county and out of the district, sign a judgment affecting any matter within such jurisdiction. *Edmundson v. Edmundson*, 222 N. C. 181, 186, 22 S. E. (2d) 576, and cases cited therein.

While this section provides for the appointment of emergency judges by statute, and our statute confers the power of their appointment upon the governor under the restrictions of the Constitution that it may be done when the judge assigned thereto, by reason of sickness, disability or other cause, is unable to attend and hold the court, and when no other judge is available, the validity of the trial for a homicide during the designated term may not be maintained by the defendant upon his affidavit filed subsequent to the trial, raising an issue as to whether the resident judge of the district was available at the time of the trial. *State v. Graham*, 194 N. C. 459, 140 S. E. 26.

The power of special and emergency judges is defined and bounded by the words "in the court which they are so appointed to hold," and if not holding, they are without authority to approve special proceedings. *Ipock v. North Carolina Joint Stock Land Bank*, 206 N. C. 791, 796, 175 S. E. 127.

Residence Requirement Does Not Confer Jurisdiction.—No jurisdiction is conferred upon a resident judge by the requirement of this section that every judge of the Superior Court shall reside in the district for which he is elected. *Howard v. Queen City Coach Co.*, 211 N. C. 329, 331, 190 S. E. 478. See also, *Collins v. Wooten*, 212 N. C. 359, 193 S. E. 385.

Stated in *Reid v. Reid*, 199 N. C. 740, 155 S. E. 719; *Greene v. Stadiem*, 197 N. C. 472, 149 S. E. 685.

Cited in *State v. McGimsey*, 80 N. C. 377; *Delafield v. Mercer Construction Co.*, 115 N. C. 21, 20 S. E. 167; *McDonald v. Morrow*, 119 N. C. 666, 670, 26 S. E. 132; *Rhyne v. Lipscomb*, 122 N. C. 650, 29 S. E. 57; *Mott v. Commissioners*, 126 N. C. 866, 869, 36 S. E. 330; *Ward v. Agriello*, 194 N. C. 321, 139 S. E. 451; *Watson v. North Carolina R. Co.*, 152 N. C. 215, 67 S. E. 502.

§ 12. Jurisdiction of courts inferior to Supreme Court.—The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a coordinate department of the government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution or which may be established by law, in such manner as it may deem best; pro-

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

Cross References.—As to jurisdiction of superior courts, see § 7-63 and notes thereto; as to jurisdiction of justices, see § 7-121 et seq.; as to criminal jurisdiction of Recorder's Court, see § 7-190; jurisdiction in municipal court, see § 7-223; civil jurisdiction, § 7-246 et seq.

As to constitutionality of Compensation Act under this section see Art. IV, § 2 and notes thereto.

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

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

"Sec. 16. The Superior Courts shall have appellate jurisdiction of all issues of law or fact, determined by a Probate Judge or a Justice of the Peace, where the matter in controversy exceeds twenty-five dollars, and of matters of law in all cases."

"Sec. 17. The clerks of the Superior Courts shall have jurisdiction of the probate of deeds, the granting of letters testamentary and of administration, the appointment of guardians, the apprenticing of orphans, to audit the accounts of executors, administrators and guardians, and of such other matters as shall be prescribed by law. All issues of fact joined before them shall be transferred to the Superior Courts for trial, and appeals shall lie to the Superior Courts from their judgment in all matters of law."

For the law distributing this power and jurisdiction to the inferior courts, see G. S., Ch. 7.

In General.—The Constitution of North Carolina vests the General Assembly with power to allot and distribute in such manner as it may deem best, that portion of the power and jurisdiction of the judicial department, "which does not pertain to the Supreme Court among the other courts prescribed in this Constitution, or which may be established by law." *Edmondson v. Edmondson*, 222 N. C. 181, 185, 22 S. E. (2d) 576.

The General Assembly may create inferior courts to Superior Court if provision is made for appeal to the Superior Court, subject to review by the Supreme Court upon further appeal, there being no conflict with other provisions of the Constitution. *Jones v. Standard Oil Co.*, 202 N. C. 328, 162 S. E. 741.

Cannot Delegate Power.—The provisions of this section giving the Legislature the authority to distribute that portion of the judicial power and jurisdiction of courts not pertaining to the Supreme Court, among other courts is restricted in its exercise to the Legislature itself, and may not be delegated by it; and where a recorder's court has been already established, an act which authorizes the county commissioners to increase its jurisdiction in civil matters is unconstitutional. *Durham Provision Co. v. Daves*, 190 N. C. 7, 128 S. E. 593.

Under the authority of this section, the General Assembly may create courts inferior to the Supreme Court by private act or by general statute which does not delegate its discretion, and provided such inferior courts do not have substantially the same powers as those of the Superior Courts, and are given a less extensive jurisdiction, with provisions for appeal from such inferior court to the Superior Courts, so that the constitutional powers and provisions relative to the Superior Courts are not invaded. *Albertson v. Albertson*, 207 N. C. 547, 178 S. E. 352.

Acts Must Not Interfere with Vested Rights.—This section provides for the establishment of inferior courts by the Legislature; the acts passed for such purpose must not interfere with vested rights, or the constitutional rights of other parties. *State v. Webb*, 125 N. C. 243, 34 S. E. 430.

Assembly May Abolish Courts Created by It.—The general assembly has the power to create county, municipal, and recorders' courts, a fortiori has the power to abolish or suspend a court created by it, even during the term of office of the judge of such court. *Efrid v. Board of Com'rs*, 219 N. C. 96, 12 S. E. (2d) 889.

The superior court is the court of final jurisdiction and has power to completely determine a controversy properly before it, and its judgment is final as to all matters of fact established in accordance with procedure and is subject to

appeal and review only on matters of law. *State v. Carolina Scenic Coach Co.*, 218 N. C. 233, 10 S. E. (2d) 824.

Recorder's Court.—The jurisdiction of the recorder's court is bestowed by the legislature under the authority of this section. *Jones v. Brinkley*, 174 N. C. 23, 25, 93 S. E. 372.

Supreme Court Rules.—The Supreme Court is given, by this section of the Constitution, exclusive power to make its own rules of practice, without legislative authority to interfere, and in case of conflict the rules made by the Court will be observed. *Cooper v. Commissioners*, 184 N. C. 615, 113 S. E. 569; *State v. Ward*, 184 N. C. 618, 113 S. E. 675; *Hardy v. Heath*, 188 N. C. 271, 124 S. E. 564.

The Supreme Court is an organic branch of the State government, and not bound by acts of the Legislature undertaking to regulate its rules of practice. *Herndon v. Imperial Fire Ins. Co.*, 111 N. C. 384, 16 S. E. 465.

This section gives to the General Assembly power to regulate proceedings in all the courts "below the Supreme Court," but confers on the supreme court the exclusive power to regulate its own procedure. *Horton v. Green*, 104 N. C. 400, 10 S. E. 470.

An allotment or division of jurisdiction is within the contemplation of this section. The Legislature may therefore allot inferior courts a portion of the jurisdiction of the Superior Court, providing also for the right of appeal. *Essex Inv. Co. v. Pickelsimer*, 210 N. C. 541, 543, 187 S. E. 813, quoting *Jones v. Standard Oil Co.*, 202 N. C. 328, 162 S. E. 741.

Cited in *State v. Waldrop*, 63 N. C. 507, 508; *State v. Jarvis*, 63 N. C. 556; *Wilmington v. Davis*, 63 N. C. 582; *Simpson v. Jones*, 82 N. C. 323; *State v. Moore*, 82 N. C. 660; *State v. Moore*, 104 N. C. 743, 751, 10 S. E. 183; dissenting opinion of C. J. Faircloth in *Caldwell v. Wilson*, 121 N. C. 425, 476, 28 S. E. 554; dissenting opinion of J. Clark in *Wilson v. Jordan*, 124 N. C. 683, 689, 33 S. E. 139; concurring opinion of J. Clark in *In Re Gorham*, 129 N. C. 481, 491, 40 S. E. 311; *Brinkley v. Smith*, 130 N. C. 234, 41 S. E. 106; *Rockwell v. Rowland*, 137 N. C. 617, 626, 50 S. E. 319; *State v. Lytle*, 138 N. C. 738, 745, 51 S. E. 66; *Settle v. Settle*, 141 N. C. 553, 564, 54 S. E. 445; *State v. Baskerville*, 141 N. C. 811, 813, 53 S. E. 742; *Castevens v. Stanly County*, 211 N. C. 642, 191 S. E. 739; *Allen v. Allemania Fire Ins. Co.*, 213 N. C. 586, 197 S. E. 200.

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

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

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

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

Manner of Waiver Controlled by Statute.—*Holmes Elec. Co. v. Carolina Power, etc., Co.*, 197 N. C. 766, 150 S. E. 621. See also, *Green Sea Lbr. Co. v. Pemberton*, 188 N. C. 532, 125 S. E. 119.

Attachment Proceedings.—In attachment and other ancillary proceedings it is competent for the court to find the facts from the affidavits and other evidence; and a party consenting to this mode of trial cannot afterwards demand a jury trial. *Pasour v. Linberger*, 90 N. C. 159.

Findings of Court Are Conclusive.—Where a jury trial is waived, the findings by the court upon conflicting evidence are conclusive under this section, and are not subject to review upon appeal. *Barringer v. Wilmington Sav., etc., Co.*, 207 N. C. 505, 177 S. E. 795.

Cited in *Lee v. Pearce*, 68 N. C. 76, 89; *Wilson v. Featherstone*, 120 N. C. 446, 27 S. E. 124; *Rodwell v. Rowland*, 137 N. C. 61, 617, 626, 50 S. E. 319; *Williamson v. High Point*, 213 N. C. 96, 195 S. E. 90.

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

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

See sections 7-185 et seq.

In General.—This section was construed with Art. IV, § 2 and Art. IV, § 30 in determining the meaning of "other courts" in the case of Meador v. Thomas, 205 N. C. 142, 170 S. E. 110.

This section held to modify Art. IV, § 27 in the cases of State v. Doster, 157 N. C. 634, 73 S. E. 111; Farmers' Cotton Oil Co. v. Blue Ridge Gro. Co., 169 N. C. 521, 86 S. E. 338.

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

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

Appeal.—The legislature cannot give to courts established under this section a right of appeal direct to the Supreme Court. State v. Lytle, 138 N. C. 738, 51 S. E. 66.

Quoted in Durham Provision Co. v. Davis, 190 N. C. 7, 128 S. E. 593.

Cited in Wilmington v. Davis, 63 N. C. 582; Delafield v. Mercer Construction Co., 115 N. C. 21, 20 S. E. 167; State v. Higgs, 126 N. C. 1014, 1019, 35 S. E. 473; Singer Sewing Mach. Co. v. Burger, 181 N. C. 241, 107 S. E. 14; State v. Abernathy, 190 N. C. 768, 130 S. E. 619; Jones v. Standard Oil Co., 202 N. C. 328, 162 S. E. 741.

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

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

See section 2-2.

When Term Begins.—The term of office of a superior court clerk, elected in August, 1878, began on the first Monday of September following. Clarke v. Carpenter, 81 N. C. 309.

Cited in Trustees v. McIver, 75 N. C. 76, 86; Rhyne v. Lipscombe, 122 N. C. 650, 29 S. E. 57; Rodwell v. Rowland, 137 N. C. 617, 621, 50 S. E. 319; In re Styers' Estate, 202 N. C. 715, 164 S. E. 123.

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

See section 2-2.

Cited in Rodwell v. Rowland, 137 N. C. 617, 621, 50 S. E. 319; In re Styers' Estate, 202 N. C. 715, 164 S. E. 123; In re Wright's Estate, 200 N. C. 620, 158 S. E. 192.

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

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

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

Legislature May Delegate Power to Fix Salary of County Court Judge.—The fixing of the salary of the judge of a county court is essentially a local matter which the general assembly may delegate to the commissioners of the county, and therefore subsec. 14 of sec. 1, ch. 519, Public-Local Laws of 1939, providing that the board of county commissioners of Forsyth county should have the power to fix the salary of the judge of the county court, is a constitu-

tional delegation of the power of the legislature. Efrd v. Board of Com'rs, 219 N. C. 96, 12 S. E. (2d) 889.

Prohibition of Salary Diminution Applies to Constitutional Courts.—The provision of this section that the salaries of judges shall not be diminished during their continuance in office applies only to judges of courts existing by virtue of the constitution and not to those established by legislative enactment. Efrd v. Board of Com'rs, 219 N. C. 96, 12 S. E. (2d) 889.

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

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

See Note in 1 N. C. Law Rev. 39.

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

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

Same—Compensation for Holding Extra Term.—The additional compensation of one hundred dollars given to a Superior Court Judge for services in holding a special term is a part of his salary. Buxton v. Commissioners, 92 N. C. 91.

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

Cited in State v. Hairston, 63 N. C. 451; State v. Baskerville, 141 N. C. 811, 53 S. E. 742.

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

As to Superior Courts becoming the successors of Courts of Equity see § 1 of this Article and notes thereto.

Applied in Johnson v. Sedberry, 65 N. C. 1.

Cited in Foard v. Alexander, 64 N. C. 69; Patton v. Shipman, 81 N. C. 347; Reynolds v. Reynolds, 208 N. C. 578, 182 S. E. 341.

§ 21. Elections, terms of office, etc., of justices of the Supreme and judges of the Superior courts.—The justices of the Supreme Court shall be elected by the qualified voters of the State, as is provided for the election of members of the General Assembly. They shall hold their offices for eight years. The judges of the Superior Courts, elected at the first election under this amendment, shall be elected in like manner as is provided for justices of the Supreme Court,

and shall hold their offices for eight years. The General Assembly may, from time to time, provide by law that the judges of the Superior Courts, chosen at succeeding elections, instead of being elected by the voters of the whole State, as is herein provided for, shall be elected by the voters of their respective districts. (Const. 1868; Convention 1875.)

See section 7-2.

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

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

"Sec. 27. The General Assembly may provide by law that the Judges of the Superior Courts, instead of being elected by the voters of the whole State, as is herein provided for, shall be elected by the voters of their respective district."

Cited in *Trustees v. McIver*, 72 N. C. 76, 86; Opinion of judges, 114 N. C. Appx. 992, 927; *Rhyne v. Lipscombe*, 122 N. C. 650, 29 S. E. 57; *Rodwell v. Rowland*, 137 N. C. 617, 626, 50 S. E. 319.

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

Does Not Apply to Terms of Courts.—This section must be construed in connection with section 11 of this article, and does not apply to the terms of courts and matters connected therewith. *Delfield v. Mercer Construction Co.*, 115 N. C. 21, 20 S. E. 167.

Court of Clerk Not Included.—The phrase "superior court" in this section does not mean the court of the clerk. *McAdoo v. Benbow*, 63 N. C. 461.

Rendition of Judgment After Term.—Where the issues of fact had been disposed of by a consent verdict, and the court having jurisdiction of the case, clearly, and being always open, there is nothing in this clause of the Constitution which forbids the rendition of a judgment upon verdict after the expiration of the term, as well as during the term. *Harrell v. Peebles*, 79 N. C. 26, 31. See, also, *Shackelford v. Miller*, 91 N. C. 181.

Quoted in *Edmundson v. Edmundson*, 222 N. C. 181, 22 S. E. (2d) 576.

Cited in *Foard v. Alexander*, 64 N. C. 69; dissenting opinion of *Rodman v. Keener v. Finger*, 70 N. C. 35, 52; *Blue v. Blue*, 79 N. C. 69, 73; *Mott v. Commissioners*, 126 N. C. 866, 869, 36 S. E. 330; *Marshall v. Kemp*, 190 N. C. 491, 130 S. E. 193.

§ 23. Solicitors and Solicitorial Districts.—The State shall be divided into twenty-one solicitorial districts, for each of which a solicitor shall be chosen by the qualified voters thereof, as is prescribed for members of the General Assembly, who shall hold office for the term of four years, and prosecute on behalf of the State in all criminal actions in the Superior Courts, and advise the officers of justice in his district. But the General Assembly may reduce or increase the number of solicitorial districts, which need not correspond to, or be the same as, the judicial districts of the State. (Const. 1868; 1941, c. 261.)

Editor's Note.—Section 29 of Article IV of the Constitution of 1868 read as follows prior to its amendment pursuant to Chapter 261 of the Public Laws of 1941 ratified by vote of the people in November, 1942: "A solicitor shall be elected for each judicial district, by the qualified voters thereof, as is prescribed for members of the General Assembly, who shall hold office for the term of four years,

and prosecute on behalf of the State, in all criminal actions in the Superior Courts, and advise the officers of justice in his district."

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

Issuance of Capias.—A solicitor is the most responsible officer of the court and has been spoken of as "its right arm." He is a constitutional officer and his duties are presented by the constitution. The court has not authority to give the solicitor discretion as to when a capias shall issue, this not being within his duties. *State v. McAfee*, 189 N. C. 320, 127 S. E. 204; *State v. Carden*, 209 N. C. 404, 183 S. E. 898.

Cited in *Rhyne v. Lipscombe*, 122 N. C. 650, 29 S. E. 57; *Wilson v. Jordan*, 124 N. C. 683, 691, 33 S. E. 139; *Rodwell v. Rowland*, 137 N. C. 617, 626, 50 S. E. 319; *State v. Palmore*, 189 N. C. 538, 127 S. E. 599.

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

As to sheriffs and constables, see sections 162-1, 151-1. As to coroners, see section 152-1.

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

A sheriff occupies a constitutional public office, and a sheriff takes office, not by contract, but by commission subject to the power of the legislature to fix fees and compensation for which the Constitution does not provide. *Borders v. Cline*, 212 N. C. 472, 193 S. E. 826.

The term of office of sheriffs-elect begins on the first Monday in December next ensuing their election, and the constitutional amendment changing the term of office of sheriffs from two to four years, approved by the voters in the election of 1938, being in effect on the first Monday in December, the date of the beginning of the term of the sheriffs elected in the 1938 election, their term of office is four years in accordance with the amendment then in effect. *Freeman v. Cook*, 217 N. C. 63, 6 S. E. (2d) 894.

Deputy Sheriffs.—While the office of sheriff is provided for by this section, the right of the sheriff to appoint deputies is a common law right and deputies appointed by the sheriff are public officers, but their duties and authority relate only to ministerial duties imposed by law upon the sheriff, in the performance of which they act for the sheriff in his name and right. *Gowens v. Alamance County*, 216 N. C. 107, 3 S. E. (2d) 339.

Intention Was Not to Restrict Powers of Constables.—The intention of those who drafted this section, when they wrote, "In each township there shall be a constable elected in like manner by the voters thereof, who shall hold his office for two years," was not to restrict the powers and duties of the constables to the township in which they were elected, but to intersperse the constables throughout every part of the county. *State v. Corpening*, 207 N. C. 805, 806, 178 S. E. 564.

Vacancy after Expiration of Term.—Where a constable was elected in 1875 for two years, and no election was had in 1877 a vacancy occurred which the county commissioners had the power to fill under this section. *State v. McLure*, 84 N. C. 153.

Where, before the expiration of his term a sheriff is re-elected but dies before the expiration of that term, the commissioners are entitled to appoint someone to fill the vacancy for the remainder of the first term and at the beginning of the next term should fill by appointment that vacancy also. *People v. Smith*, 81 N. C. 304.

Cited in *Boyle v. New Bern*, 64 N. C. 664; *Loflin v. Sowers*, 65 N. C. 251; *State v. Sigman*, 106 N. C. 728, 730, 11 S. E. 520; *Rodwell v. Rowland*, 137 N. C. 617, 621, 50 S. E. 319.

§ 25. Vacancies.—All vacancies occurring in

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

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

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

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

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

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

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

Cited in *State v. Lewis*, 107 N. C. 967, 976, 12 S. E. 457; 13 S. E. 247; *Ewart v. Jones*, 116 N. C. 570, 21 S. E. 787; *Rodwell v. Rowland*, 137 N. C. 617, 621, 50 S. E. 319; *State v. Baskerville*, 141 N. C. 811, 53 S. E. 742.

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

Time of First Election.—The next regular election for members of the General Assembly is to be held on the first Thursday in August 1870. Legislative Term of Office, 64 N. C. Appx. 787.

Cited in *Loflin v. Sowers*, 65 N. C. 251; *People v. McKee*, 65 N. C. 257; Opinion of Judges, 114 N. C. Appx. 922, 927.

§ 27. Jurisdiction of justices of the peace.—The several justices of the peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of civil actions, founded on contract, wherein the sum demanded shall not exceed two hundred dollars, and wherein the title to real estate shall not be in controversy; and of all criminal matters arising within their counties where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days. And the General

Assembly may give to the justices of the peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed fifty dollars. When an issue of fact shall be joined before a justice, on demand of either party thereto he shall cause a jury of six men to be summoned, who shall try the same. The party against whom the judgment shall be rendered in any civil action may appeal to the Superior Court from the same. In all cases of a criminal nature the party against whom the judgment is given may appeal to the Superior Court, where the matter shall be heard anew. In all cases brought before a justice, he shall make a record of the proceedings, and file the same with the clerk of the Superior Court for his county. (Const. 1868; Convention 1875.)

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

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

Jurisdiction of Justice.—A justice of the peace can only exercise such powers as are conferred upon him by this section of the Constitution, and the statutes in harmony therewith. His jurisdiction is special, not general, and his authority is not to be enlarged by principles of law applicable to courts of general jurisdiction; nor can he adopt methods of procedure not strictly allowed by law. *State v. Jones*, 100 N. C. 438, 6 S. E. 655.

Same—Jurisdiction Concurrent.—The jurisdiction conferred upon justices of the peace to try civil actions, where the property in controversy does not exceed fifty dollars, is concurrent with that possessed by the superior court. *Montague v. Mial*, 89 N. C. 137.

Same—Waiver of Objection by Appearance.—Where the defendant is sued on two accounts before a justice of the peace separately stated, each appearing to be in amount coming within his jurisdiction, but together exceeding it, by his appearing and acknowledging his liability for the sum total he thereafter waives his right on appeal to set up the defense that in fact the two accounts were but one. *Honig v. Hawa*, 194 N. C. 208, 139 S. E. 222.

Section Does Not Embrace Damages.—The provisions in this section, authorizing the General Assembly to give the Justices of the Peace "jurisdiction of other civil actions wherein the property in controversy does not exceed fifty dollars," is not a restriction, even by implication, to forbid conferring jurisdiction where damages and not property is in controversy. *Malloy v. Fayetteville*, 122 N. C. 480, 29 S. E. 880.

Contempt.—The constitutional restriction imposed by this section applies only to the administration of the law in the trial of criminal cases, and were not intended to affect the inherent or statutory powers possessed by these courts and conferred upon them as necessary to enable them to transact business and maintain a proper respect for their authority. *C. S.*, 981, 983. *State v. Hooker*, 183 N. C. 763, 111 S. E. 351.

Criminal Appeals.—The clause of this section providing that in criminal cases in a justice's court, "the party against whom judgment is given may appeal to the superior court, where the matter shall be heard anew," is for the benefit only of the party accused. *State v. Powell*, 86 N. C. 640.

Appeal May Be Direct to Superior Court.—It is not required that an appeal from a judgment of the justice of the peace be first taken to the general county court of the county, but the appeal may be taken directly to the Superior Court. *McNeely v. Anderson*, 206 N. C. 481, 174 S. E. 305.

"Thirty Days."—"Thirty days," as used in this section, is not synonymous with "one month." It may be more or less. *State v. Upchurch*, 72 N. C. 146.

Legislature Cannot Confer Justice's Powers on Mayor.

—The Legislature cannot confer on the Mayor of a town the judicial powers of a justice of the peace in civil actions. This section confers exclusive original jurisdiction on justice of the peace wherever the sum demanded does not exceed two hundred dollars. *Edenton v. Wool*, 65 N. C. 379. But see *Editor's Note*, supra.

Establishment of Special Courts.—This section should be construed with section 12 and 14, and the latter sections modify the first named so as to authorize and empower the Legislature to establish special courts in cities and towns and confer jurisdiction upon them without regard to its provisions and limitations. *Farmers Cotton Oil Co. v. Blue Ridge Grocery Co.*, 169 N. C. 521, 86 S. E. 338; *State v. Baskerville*, 141 N. C. 811, 53 S. E. 742. See also, *State v. Doster*, 157 N. C. 634, 73 S. E. 111.

Justice's Courts are Not Courts of Record.—Justice's courts are not courts of record. *Williams v. Bowling*, 111 N. C. 295, 16 S. E. 176.

Applied in *State v. Vermington*, 71 N. C. 264; *State v. Dudley*, 83 N. C. 660; *Froelich v. Southern Express Co.*, 67 N. C. 1; *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

Cited in *Wilmington v. Davis*, 63 N. C. 582; *State v. Deaton*, 65 N. C. 496; *Froelich v. Express Co.*, 67 N. C. 1, 5; *State v. Perry*, 71 N. C. 522; *State v. Buck*, 73 N. C. 630; *Pullen v. Green*, 75 N. C. 215; *State v. Threadgill*, 76 N. C. 17; *Hyer v. Beatty*, 76 N. C. 28; *London v. Headen*, 76 N. C. 72; *State v. Edney*, 80 N. C. 360; *State v. Moore*, 82 N. C. 660; *State v. Watts*, 85 N. C. 517; *State v. Crook*, 91 N. C. 536, 541; *Durham v. Wilson*, 104 N. C. 595, 598, 10 S. E. 683; *State v. Burton*, 113 N. C. 655, 661, 13 S. E. 657; *State v. Ivie*, 118 N. C. 1227, 1230 24 S. E. 539; *McDonald v. Morrow*, 119 N. C. 66, 26 S. E. 132; *Wilson v. Jordan*, 124 N. C. 683, 689, 3 S. E. 39; *Mott v. Commissioners*, 126 N. C. 866, 880, 36 S. E. 330; *State v. Lytle*, 138 N. C. 738, 745, 51 S. E. 66; *Higgs-Loft Furniture Co. v. Clark*, 191 N. C. 369, 131 S. E. 731; *Roebuck v. Short*, 196 N. C. 61, 144 S. E. 515; *Miles v. Powell*, 205 N. C. 30, 31, 169 S. E. 828.

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

Conferring Authority on Governor.—A statute, conferring authority upon the Governor to fill vacancies in the office of justices of the peace, caused by the failure of the appointees of the General Assembly to qualify within the time therein prescribed, is not unconstitutional. *Gilmer v. Holton*, 98 N. C. 26, 3 S. E. 812.

Appointments Must Be Made by Clerk of Superior Court.—An examination of the Constitution reveals the fact that the only power or duty of a clerk of the Superior Court mentioned therein is in this section, which provides that vacancies in the office of justice of the peace shall be filled by appointment by the clerk of the Superior Court, and this function of the office, we apprehend, must still be performed by the clerk alone. In *re Barker*, 210 N. C. 617, 619, 188 S. E. 205.

§ 29. Vacancies in office of Superior Court clerk.—In case the office of clerk of a Superior Court for a county shall become vacant otherwise than by the expiration of the term, and in case of a failure by the people to elect, the judge of the Superior Court for the county shall appoint to fill the vacancy until an election can be regularly held. (Const. 1868.)

Term of Appointee.—Under this section the appointee of the judge holds only until the next election at which members of the General Assembly are chosen. *Rodwell v. Rowland*, 137 N. C. 617, 50 S. E. 319.

Cited in *Rodwell v. Rowland*, 137 N. C. 617, 621, 50 S. E. 319.

§ 30. Officers of other courts inferior to Supreme Court.—In case the General Assembly shall establish other courts inferior to the Supreme Court, the presiding officers and clerks thereof shall be elected in such manner as the General Assembly may from time to time prescribe, and they shall hold their offices for a

term not exceeding eight years. (Convention 1875.)

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

Legislature May Elect Clerk.—Where a criminal court is created the legislature could either elect the clerk itself or devolve his election upon the people, or other constituency. *White v. Murray*, 126 N. C. 153, 157, 35 S. E. 256.

May Provide for Election of Officers of County Courts.—Under the provisions of this section, the Legislature is authorized to provide for the election of officers and clerks of General County Courts established by it, such courts being "other courts inferior to the Supreme Court" referred to in Art. IV, §§ 2 and 14. *Meador v. Thomas*, 205 N. C. 142, 170 S. E. 110.

The word "election" does not necessarily import a popular election by the qualified electors, and the delegation of the power to elect judges of the general county courts to the county commissioners is not an unlawful delegation of legislative power, this section providing that they "shall be elected in such manner as the general assembly may prescribe." *Meador v. Thomas*, 205 N. C. 142, 170 S. E. 110.

Deprivation of Inferior Judge's Office.—Where the Legislature has abolished a court inferior to the superior court of this state, the incumbent judge takes subject to this legislative right, and cannot successfully maintain that during the term of his office he has been thus deprived of his right of property guaranteed him by this section. *Queen v. Comm'rs*, 193 N. C. 821, 138 S. E. 310.

Cited in *Ewart v. Jones*, 116 N. C. 570, 21 S. E. 787.

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

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

Cited in *People v. Smith*, 81 N. C. 304.

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

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

Quoted in *Stephens v. Dowell*, 208 N. C. 555, 181 S. E. 629, wherein city commissioners were held without authority to dismiss clerk of municipal court without notice and opportunity to be heard.

§ 33. Amendments not to vacate existing of-

fices.—The amendments made to the Constitution of North Carolina by this convention shall not have the effect to vacate any office or term of office now existing under the Constitution of the State, and filled, or held, by virtue of any election or appointment under the said Constitution and the laws of the State made in pursuance thereof. (Convention 1875.)

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

Legislature May Diminish Emoluments.—The Legislature has the constitutional power to diminish the emoluments of an office by the transfer of a portion of its duties to another office, and in such case the incumbent must submit. *State v. Gales*, 77 N. C. 283.

Cited in Opinion of Judges, 114 N. C. Appx. 922, 928.

ARTICLE V

Revenue and Taxation

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

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

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

Effect of Amendment on Bonds Purchased Prior Thereto.—The amendment will not have the effect of relating back and invalidating taxation on the polls in a school district which had met the constitutional requirement before the amendment had become the law; for such would have the effect of impairing vested rights existing under a valid contract. *Board v. Bray Bros. Co.*, 184 N. C. 484, 115 S. E. 47; *Hammond v. McRae*, 182 N. C. 747, 110 S. E. 102.

The amendment will invalidate taxation of the polls in a township where the electors therein voted for the levy of a poll tax of six dollars in addition to the regular poll tax of two dollars although the election was held and the tax in question was voted before the amendment of this section. *Dixon v. Board of County Com'rs*, 200 N. C. 215, 156 S. E. 852.

Taxation for State and County Purposes Limited.—Taxation, for State and county purposes combined, for the current and necessary expenses of the county government and new debts, cannot exceed the constitutional limitation. *French v. Board*, 74 N. C. 692; *Southern R. Co. v. Board*, 148 N. C. 220, 61 S. E. 690.

No Limit on Taxation for Payment of Debts.—There is no limitation, however, of the power of taxation, upon either State or county, for the payment of their lawful debts, created before the adoption of the Constitution. *French v. Board*, 74 N. C. 692; *Brothers v. Commissioners*, 70 N. C. 726.

When Limitation May Be Exceeded.—Without special legislation a county may not authorize a levy of tax, exceeding the constitutional limitation upon the poll or property, to provided for a sinking fund to pay the principal and interest on bonds to be issued by it for highway purposes. It is otherwise as to a six months period of public schools required by Article IX, sec. 3. *Bennett v. Board*, 173 N. C. 625, 92 S. E. 603. See, also, *Ballou v. Board*, 182 N. C. 473, 475, 109 S. E. 628.

The limitation as to the levy on poll tax prescribed by this

section, does not apply to the levy of a special tax by a county for road purposes, authorized by the Legislature submitted to the vote of the electors of the county and duly approved by them. *Moose v. Board*, 172 N. C. 419, 90 S. E. 441.

Section Does Not Apply to Municipal Corporations.—The restriction that the State and county tax combined shall never exceed \$2 on the poll, applies only to State and county taxation, and not to municipal or quasi public corporations other than counties. *Perry v. Commissioners*, 148 N. C. 521, 62 S. E. 608.

Cited in concurring opinion of J. Dick in University R. Co. v. Holden, 63 N. C. 410, 431; *Street v. Board*, 70 N. C. 664; *Clifton v. Wynne*, 80 N. C. 146; *Cromartie v. Commissioners*, 85 N. C. 211, 217; *Parker v. Board*, 104 N. C. 166, 168, 10 S. E. 137; *Redmond v. Tarboro*, 106 N. C. 122, 137, 10 S. E. 845; *Board v. Commissioners*, 137 N. C. 310, 313, 49 S. E. 353; *Face v. Raleigh*, 140 N. C. 65, 52 S. E. 277; *Kitchen v. Wood*, 154 N. C. 565, 70 S. E. 995; *Ingram v. Johnson*, 172 N. C. 676, 90 S. E. 805; *Parvin v. Board*, 177 N. C. 508, 99 S. E. 432; *Director General v. Commissioners*, 178 N. C. 449, 101 S. E. 91.

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

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

Percentage Denoted to School Purpose.—Not less than 75 per cent of the capitation tax must be devoted to school purposes. *Board v. Board*, 127 N. C. 263, 37 S. E. 261.

Power of Legislature as to Indigents.—It is the exclusive right of the Legislature to determine and declare by whom and how the indigent of the State entitled to support shall be ascertained, and from what fund and by whom allowances for their support shall be made. *Board v. Commissioners*, 113 N. C. 379, 18 S. E. 661.

Cited in Parker v. Board, 104 N. C. 166, 168, 10 S. E. 137; *Redmond v. Tarboro*, 106 N. C. 122, 137, 10 S. E. 845; *Board v. Commissioners*, 137 N. C. 310, 311, 49 S. E. 353; *County Board v. Board*, 150 N. C. 116, 63 S. E. 724, concurring opinion of C. J. Clark in *Waystaff v. Central Highway Comm.*, 177 N. C. 354, 358, 99 S. E. 1.

§ 3. **State taxation.**—The power of taxation shall be exercised in a just and equitable manner, and shall never be surrendered, suspended or contracted away. Taxes on property shall be uniform as to each class of property taxed. Taxes shall be levied only for public purposes, and every act levying a tax shall state the object to which it is to be applied. The General Assembly may also tax trades, professions, franchises, and incomes: Provided, the rate of tax on income shall not in any case exceed ten per cent (10%), and there shall be allowed the following exemptions, to be deducted from the amount of annual incomes, to wit: for a married man with a wife living with him, or to a widow or widower having minor child or children, natural or adopted, not less than \$2,000; to all other persons not less than \$1,000, and there may be allowed other deductions (not including living expenses) so that only net incomes are taxed. (Const. 1868; 1917, c. 119; Ex. Sess. 1920, c. 93; Ex. Sess. 1924, c. 115; 1935, c. 248.)

Editor's Note.—Sec. 3 of the Constitution of 1868 read as follows: "Sec. 3. Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise; and, also, all real and personal property according to its true value in money. The General Assembly may also tax trades, profession fran-

chises, and incomes, provided that no income shall be taxed when the property, from which the income is derived, is taxed."

The first amendment was made pursuant to Ch. 119, Public Laws of 1917, by the addition of the following proviso after the word "money": "Provided, notes, mortgages, and all other evidence of indebtedness given in good faith for the purchase price of a home, when said purchase price does not exceed three thousand dollars, and said notes, mortgages, and other evidence of indebtedness shall be made to run for not less than five nor more than twenty years, shall be exempt from taxation of every kind: Provided, that the interest carried by such notes and mortgages shall not exceed five and one-half per cent."

The second amendment was made pursuant to Ch. 93, Public Laws of 1920, extra session, by the repeal of the clause "provided that no income shall be taxed when the property, from which the income is derived, is taxed" and the addition of the proviso beginning with the words "Provided, the rate of tax on incomes."

The third amendment was made pursuant to Ch. 115, Public Laws of 1924, extra session. The proviso added in 1917 was repealed and for it was substituted the three provisos now appearing as the second paragraph of Sec. 3.

Chapter 248, Public Laws of 1935, repealed the entire section except for the last sentence and provisos, and substituted the present first three sentences in lieu thereof.

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

The power to levy taxes is the exclusive province of the legislature, and the superior court has no jurisdiction of an action the nature and purpose of which is to discover, to list and assess for taxation, property which has escaped taxation. *Henderson County v. Smyth*, 216 N. C. 421, 5 S. E. (2d) 136.

Taxes can be levied only for public purposes. *Palmer v. Haywood County*, 212 N. C. 284, 193 S. E. 668, 113 A. L. R. 1195.

What May Be Taxed.—All taxes must be levied upon the poll or upon property; or, in the nature of a license, upon "trades, professions, franchises and incomes." *State v. Ballard*, 122 N. C. 1024, 1026, 29 S. E. 899.

Under this section all property, real and personal, is subject to taxation, unless exempt from taxation by the Constitution. *Hardware Mut. Fire Ins. Co. v. Stinson*, 210 N. C. 69, 185 S. E. 449.

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

The words "all real and personal property," in this section are to be taken in their most comprehensive legal import, and include every kind of real and personal property whatever, not excepting the several classes of personal property expressly mentioned in the first clause of the section. *Redmond v. Commissioners*, 106 N. C. 123, 10 S. E. 845.

This section includes both tangible property, and taxes on "trades, professions, franchises, and incomes." *Great Atlantic & Pacific Tea Co. v. Doughton*, 196 N. C. 145, 144 S. E. 701.

Property Is Taxable without Regard to Ownership.—In *Latta v. Jenkins*, 200 N. C. 255, 156 S. E. 857, it is said: By virtue of the provisions of this section, all property, real and personal, in this State, is subject to taxation, in accordance with a uniform rule, under laws which the General Assembly is required by the Constitution to enact, without regard to its ownership, and without regard to the purposes for which specific property is held, unless exempted by or under the provisions of section 5 of this article. *Salisbury Hospital v. Rowan County*, 205 N. C. 8, 10, 169 S. E. 805.

Equality in Levying of Excise Tax.—Section 11, ch. 127, Public Laws 1937, cannot be construed as imposing an excise tax upon the receipt of proceeds of life insurance policies issued to the beneficiary who retains all rights and liabilities thereunder, in addition to imposing an inheritance tax on the proceeds of policies issued to the insured or in which he retains some incidents of ownership, since such excise tax would have to be computed in accordance with graduated scale on the basis of the amount of insurance together with the value of the estate or the legacy or the distributive share, and thus would produce inequality in the levying of such excise tax in contravention of this section. *Wachovia Bank, etc., Co. v. Maxwell*, 221 N. C. 528, 20 S. E. (2d) 840.

The tax on income, imposed by the Revenue Acts of this State, is not a tax on property, within the meaning of the requirement of this section that property shall be taxed according to its true value in money. *State v. Kent-Coffey Mfg. Co.*, 204 N. C. 365, 371, 168 S. E. 397.

Under this section which limits income taxes to a maximum of six per cent, any attempted increase in productivity of this field of revenue had to come at the expense of the small income man, and this is what has happened. See 11 N. C. Law Rev., 255.

Tax Must Be Uniform.—This section imperatively requires that all real and personal property be taxed by a uniform rule according to its true value in money. *Pocomoke Guano Co. v. Biddle*, 158 N. C. 212, 73 S. E. 996.

The only constitutional restriction upon the power of the Legislature in classifying vocations and laying a tax of a different amount upon the different occupations is that the tax shall be uniform upon all in each classification. *Dalton v. Brown*, 159 N. C. 175, 75 S. E. 40.

Chapter 30, Public Laws of 1937, providing for the licensing of dry cleaners and pressers by the commission set up in the act, construed in pari materia with chapter 337, Public Laws of 1939, exempting from the provision of the act fourteen counties of the state, is held unconstitutional, whether the license fee therein imposed in addition to the license prescribed by the Revenue Act be considered a state tax or not, since it places a burden upon those engaged in the specified business in a portion of the state which is not imposed upon those engaged in the same business in other parts of the state without any reasonable basis of classification, and therefore discriminates within the class and accords a privilege and immunity to some not accorded to others. *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658.

When Tax Is Uniform.—A tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed. *Gatlin v. Tarboro*, 78 N. C. 119; *State v. Danenberg*, 151 N. C. 718, 66 S. E. 301, 26 L. R. A. (N. S.) 890; *Leonard v. Maxwell*, 216 N. C. 89, 3 S. E. (2d) 316.

A tax is uniform and consistent with this section when it is equal on all persons in the same class, and hence a tax imposed on hotel keepers, which exempts from taxation those whose yearly receipts are less than \$1,000, is not unconstitutional. *Cobb v. Commissioners*, 122 N. C. 307, 30 S. E. 338.

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

Whom Tax on Occupation Must Reach.—A tax upon an occupation must reach all who follow it—all of a class, either of persons or things. *Worth v. Petersburg R. Co.*, 89 N. C. 301, 302.

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

The power of the Legislature to classify subjects for the purpose of taxation is flexible, and the reasonableness of any classification will generally be construed with reference to the facts of the particular case, the predominant limitation on the power to classify being that the classification must be reasonable and not arbitrary and must rest upon some substantial difference between the classes, and that the burden must be equal upon all in the same class, and a special classification by statute of wholesale grocers operating a cold storage chamber of some character for the preservation of fresh meats, as distinguished from those who handle only canned meats not requiring refrigeration, is a reasonable classification imposing an equal burden upon all of the class, and is constitutional and valid. *Southern Grain Provision Co. v. Maxwell*, 199 N. C. 661, 155 S. E. 557.

The classification must not be arbitrary or unjust, but must be based on substantial and reasonable differences between such classes. *Great Atlantic & Pacific Tea Co. v. Doughton*, 196 N. C. 145, 144 S. E. 701.

While the provisions of this section do not expressly apply to taxes on trades, professions, franchises and incomes, it does apply to such taxes from its inherent justice, but the General Assembly has the power to classify trades, professions, franchises and incomes for taxation where the classifications are reasonable and not arbitrary and are based upon substantial differences between the classes and apply equally to all within the classification. *Great A. & P. Tea Co. v. Maxwell*, 199 N. C. 433, 154 S. E. 838.

The classification of subjects for taxation must be based upon reasonable distinctions and must apply equally to all within each class defined. *Snyder v. Maxwell*, 217 N. C. 617, 9 S. E. (2d) 19. This rule applies to municipal cor-

porations taxing trades or professions. *Kenny Co. v. Breward*, 217 N. C. 269, 7 S. E. (2d) 542.

Classification of Mechanical Vending Devices.—While the legislature may not classify mechanical vending machines in accordance with the kinds of merchandise sold by such machines in levying privilege taxes on their use, since the manner in which the article is sold is the same in all instances and the economic advantages in this method of sale may be regarded as the same, it may classify mechanical vending devices for the purpose of taxation and make a further classification or sub-classification in accordance with the quantity or kind of commodities sold by such method when such classifications are based upon real and reasonable distinctions. *Snyder v. Maxwell*, 217 N. C. 617, 9 S. E. (2d) 19.

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

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

Tax Based on Counties in Which a Firm Does Business.—An act taxing every meat packing house doing business in the State \$100 for each county in which such business is carried on is valid. *Lacy v. Armour Packing Co.*, 134 N. C. 567, 47 S. E. 53.

Basing Taxes on Size of City in Which Business Located.—In act imposing an annual graduated license tax on the business of buying and selling fresh meats from offices, stores, vehicles, etc., in cities of 12,000, 8,000, and under 8,000 inhabitants, respectively, is not unconstitutional, as not being uniform and in not imposing a license if the business is carried on outside a city or town; it being uniform as to all within each class. *State v. Carter*, 129 N. C. 560, 40 S. E. 11.

Taxing Shares of Stock in a National Bank.—Shares of stock in a National Bank are proper subjects of State, county and municipal taxation. Such shares owned by non-residents are to be taxed in the city or town where the Bank is located and not elsewhere. *Kyle v. Commissioners*, 75 N. C. 445.

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

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

Inheritance Tax.—An inheritance tax is in the nature of an excise tax, or one on acquiring property or inheriting from a decedent, and does not come within the prohibition as to taxing an income upon property when the property itself is taxed and its imposition rests with the legislative power. In *re Davis*, 190 N. C. 358, 130 S. E. 22.

License on Business of Hauling Timber.—An act requiring a license of anyone who carried on the business of hauling timber in a certain county, grading the license with reference to the number of horses driven to the wagon used is not repugnant to this section. *State v. Bullock*, 161 N. C. 223, 75 S. E. 942.

Zoning Cities.—An act authorizing the division of a city into several zones for the purpose of fixing an ad valorem basis of real estate for taxation, uniform within each zone, but classified in accordance with destiny of population, character of building, etc., violates the mandatory provisions of our Constitution that within its corporate limits all taxable property shall be by a uniform rule and ad valorem. *Anderson v. Asheville*, 194 N. C. 117, 138 S. E. 715.

Exception of Farm Products.—The exception of "farm products purchased from the producer" from the return required to be made by merchants and other dealers as the basis for a license tax in not a discrimination against the products or citizens of other States; nor is it in violation of the provisions of this section which requires uniformity of taxation. *State v. Stevenson*, 109 N. C. 730, 14 S. E. 385; *Ex Parte Brown*, 48 Fed. 435.

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

property by the Corporation Commission, is not in conflict with this section providing that such assessment be uniform and ad valorem. *Atlantic, etc., R. Co. v. New Bern*, 147 N. C. 165, 60 S. E. 925.

Requiring Railroads to Pay State Taxes Earlier.—The provisions requiring railroads and other like corporations to pay their State taxes within a shorter period than those to the counties, is a uniform legislative classification applying equally to all within its terms and not objectionable as a discrimination or a denial of the equal protection of the laws prohibited by this section. *Norfolk Southern R. R. Co. v. Lacy*, 187 N. C. 615, 122 S. E. 763.

Exemptions from Taxation.—The legislature in exempting property from taxation, Art. V, sec. 5, is required to observe the basic principle of equality, and exemptions allowed by it must be uniform within the class as required by this section, both before and after its amendment in 1936. *Sir Walter Lodge, etc. v. Swain*, 217 N. C. 632, 9 S. E. (2d) 365.

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

Exemption of Property and Bonds of Municipality.—A legislative provision exempting the property and bonds of a city from taxation is valid when the bonds are to be issued for a public purpose, and certainly the bonds are exempt from taxation if sold to and held by an agency of the United States Government, or are held by a purchaser from such Federal agency. Any doubt as to the validity of this provision under this section must be resolved in favor of its validity. *Webb v. Port Comm.*, 205 N. C. 663, 172 S. E. 377. See § 5 of this article.

Taxes Reduced if Assets Returned for Taxes.—An act imposing license taxes on the business of selling automobiles reducing the rate if three-fourths of the entire assets of the manufacturer are invested and returned for taxes herein, applies indiscriminately to the manufacturers of every state, and being for the object of reducing the license tax for selling automobiles in this state when the seller is already paying a tax here on three-fourths of his assets, is not violative. *Bethlehem Motors Corp. v. Flynt*, 178 N. C. 399, 100 S. E. 693.

Local Assessment Based on Benefits.—The constitutional provision that taxation shall be equal, uniform, and within certain limits, does not apply to local assessments imposed upon owners of property, who in respect to such ownership are to derive a special benefit in the local improvements for which the tax is expended. *Cain v. Commissioners*, 86 N. C. 8.

While assessments on lands abutting on streets improved are not required to be uniform with all other subjects of taxation, and in view of the particular benefits, such must be uniform as to all property owners within that class to meet the constitutional requirements. *Gastonia v. Cloninger*, 187 N. C. 765, 123 S. E. 76.

Charter Making Taxing District of Each Improved.—Where the charter of a city provides that each street or portion of a street improved shall be a taxing district, by requiring the total cost of improvement on each street or portion of street improved to be ascertained and one-third thereof assessed on the property abutting on each side of the street, according to the frontage of each lot, and also provides methods whereby each lot owner may contest the assessment, such charter is not in violation of this section, requiring a uniform rule of taxing an estate according to its value in money. *Hillard v. Asheville*, 118 N. C. 845, 24 S. E. 738.

Providing for Collection of Taxes for Past Years.—A law to provide for the collection of taxes for past years does not violate the provisions of this section in regard to uniformity of taxation. *North Carolina R. Co. v. Commissioners*, 82 N. C. 260.

The tax levied under § 105-167, subsec. 13, was held not void as discriminatory in amount because of the provision of the section that such tax need not be paid when the owner furnishes a certificate from a dealer in this state to the effect that the tax has been paid, and that such dealer will be responsible therefor to the Commissioner of Revenue, since the section requires the same amount to be paid regardless of whether the car is purchased from a dealer within or outside the state. *Powell v. Maxwell*, 210 N. C. 211, 186 S. E. 321.

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

ment of a license fee in addition to the state-wide license required, is unconstitutional as it applies only to the real estate brokers in the designated counties and is therefore discriminatory. *State v. Warren*, 211 N. C. 75, 189 S. E. 103.

When Lien Attaches.—The lien for the payment of taxes assessed against personal property attaches only from the date of levy thereon. *Carstarphen v. Plymouth*, 186 N. C. 90, 118 S. E. 905.

Enjoining Collection of Income Tax.—A bill of equity to restrain the assessment and collection of the income tax provided by this section, and the collection and enforcement of certain franchise or privilege taxes as unconstitutional, does not warrant interlocutory injunctions. *Southern R. Co. v. Watts*, 289 Fed. 301.

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

Applied in *Hilton v. Harris*, 207 N. C. 465, 177 S. E. 411; *State v. Bridgers*, 211 N. C. 235, 189 S. E. 869.

Quoted in *Mecklenburg County v. Piedmont Fire Ins. Co.*, 210 N. C. 171, 185 S. E. 654.

Cited in *Carolina Cent. R. Co. v. Wilmington*, 72 N. C. 73; *Wilson v. Board*, 74 N. C. 748; *Albertson v. Wallace*, 81 N. C. 479, 481; concurring opinion of C. J. Smith in *Richmond, etc., R. Co. v. Commissioners*, 84 N. C. 504, 512; *Raleigh v. Peace*, 110 N. C. 32, 38, 14 S. E. 521; *Wiley v. Board*, 111 N. C. 397, 399, 16 S. E. 542; *Charlotte Bldg., etc., Ass'n v. Commissioners*, 115 N. C. 410, 413, 20 S. E. 526; *Schaul v. Charlotte*, 118 N. C. 733, 24 S. E. 526; dissenting opinion of J. Clark in *Collins v. Pettitt*, 124 N. C. 726, 32 S. E. 975; *State v. Roberson*, 136 N. C. 587, 588, 48 S. E. 595; *Wolfender v. Board*, 152 N. C. 83, 67 S. E. 319; *State v. Williams*, 158 N. C. 610, 73 S. E. 1000; *Southern R. Co. v. Watts*, 260 U. S. 519, 43 S. Ct. 192, 67 L. Ed. 375; *Leonard v. Sink*, 198 N. C. 114, 150 S. E. 813; *Hickory v. Catawba County*, 206 N. C. 165, 173 S. E. 56; *Saluda v. Polk County*, 207 N. C. 180, 184, 176 S. E. 298; *Raleigh v. Jordan*, 218 N. C. 55, 9 S. E. (2d) 507 (dis. op.); *Rockingham County v. Elon College*, 219 N. C. 342, 13 S. E. 618; *Belk's Dept. Store v. Guilford County*, 222 N. C. 441, 23 S. E. (2d) 897.

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

completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon. (Const. 1868; 1923, c. 145; 1935, c. 248.)

As to the purpose of this section, see dissenting opinion of C. J. Clark in *Pennington v. Tarboro*, 180 N. C. 438, 105 S. E. 199.

Editor's Note.—This section as contained in the Constitution of 1868 was as follows: "Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon." This section was Section 5 of Article V of the original Constitution, but with the repeal of the original Section 4 pursuant to Chapter 85 of the Laws of 1872-73 this section was renumbered to be Section 4. By virtue of an amendment adopted pursuant to Chapter 145 of the Public Laws of 1923, the first sentence was stricken out and the following inserted in lieu thereof: "Except for refunding of valid bonded debt, and except to Supply a casual deficit, or for suppressing invasions or insurrections, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State to an amount exceeding in the aggregate, including the then existing debt recognized by the State, and deducting sinking funds then on hand, and the par value of the stock in the Carolina Railroad Company and the Atlantic and North Carolina Railroad company owned by the State, seven and one-half per cent of the assessed valuation of taxable property within the State as last fixed for taxation." Pursuant to Chapter 248 of the Public Laws of 1935 this section was entirely rewritten in its present form. For article discussing that amendment, see 16 N. C. Law Rev. 329. Many of the cases cited below were decided prior to the amendment.

The language of this section is unambiguous, and by its plain terms the power of the state, or any county or municipality to contract debts in any biennium or fiscal year, respectively, without submitting the matter to a vote of the people, except for those purposes specifically enumerated in the amendment, is definitely prescribed to two-thirds of the amount by which its outstanding indebtedness was decreased during the prior biennium or fiscal year. *Hallyburton v. Board of Education*, 213 N. C. 9, 195 S. E. 21.

Refunding Bonds.—Defendant county proposed to issue bonds to refund bonds of several of its townships, which bonds constituted a valid existing debt of the county, the county having received the benefit of the proceeds of the bonds and having agreed to assume the indebtedness prior to the adoption of the amendment to this section. Plaintiff contended that the county bonds could not be issued without a vote by mandate of this section as amended. It was held that the proposed county bond issue was to refund a valid existing debt of the county within the meaning of this section, as amended, and under the exception therein provided a vote is unnecessary, nor could the means for the repayment of the bonds be adversely affected by any constitutional change. *Thompson v. Harnett County*, 212 N. C. 214, 193 S. E. 158.

During the prior fiscal year defendant county began refunding operations, and during that year issued its refunding bonds, but did not retire the bonds refunded until the first day of the present fiscal year. Plaintiff contended that since both the refunding bonds and the bonds refunded were outstanding during the prior fiscal year, there had been an increase rather than a decrease in the county's outstanding indebtedness during the prior fiscal year. It was held that the failure of the county to complete its refunding operations during the prior fiscal years is immaterial, and the refunding bonds should not be included in determining the amount by which the county had reduced its outstanding indebtedness during the prior fiscal year within the meaning of the constitutional limitation on an increase of debt by counties and municipalities. *Royal v. Sampson County*, 214 N. C. 259, 199 S. E. 15.

Bonds in excess of two-thirds of amount by which taxing unit decreased its outstanding debt during prior fiscal year may be issued upon the approval of a majority of those voting under this section. *Twining v. Wilmington*, 214 N. C. 155, 200 S. E. 416.

When a proposed bond issue is in excess of two-thirds of the amount by which the issuing county reduced its outstanding indebtedness during the prior fiscal year, the question must be submitted to a vote and issuance approved by a majority of the voters who shall vote thereon regardless of the purpose of the bonds, unless the purpose is within the specific exceptions enumerated in this section. *Sessions v. Columbus County*, 214 N. C. 634, 200 S. E. 418.

In determining the amount of debt contracted in any fiscal year within the provision of this section, limiting the power of a taxing unit to contract debts to two-thirds the amount by which the taxing unit's outstanding debt was decreased during the prior fiscal year, the total amount of bonds issued during the fiscal year, by the taxing unit, whether with or without the approval of its voters, should be included, except bonds issued by it to fund or refund a valid existing debt, to supply a casual deficit, to suppress riots or insurrections, or to repel invasions, and except tax anticipation notes issued in an amount not exceeding fifty per centum of the taxes for the fiscal year. *Hallyburton v. Board of Education*, 213 N. C. 9, 195 S. E. 21.

Bonds for Purpose Other Than Necessary Expense.—A proposed bond issue which is not only in excess of the amount by which the county reduced its outstanding indebtedness during the prior fiscal year, but also for a purpose other than a necessary expense, must be approved not only by the majority of voters voting in the election under the provisions of this section, but also by a majority of the qualified voters of the county under the provisions of art. VII, § 7, there being no conflict between the constitutional provisions, and both being applicable. *Sessions v. Columbus County*, 214 N. C. 634, 200 S. E. 418.

Bonds for Streets and Sewage.—A municipality may not issue bonds for street and sewerage construction or extension without a vote when, during the fiscal year, such city has issued bonds with the approval of the voters in excess of the amount by which it had reduced its outstanding indebtedness during the prior fiscal year, the purpose of the amendment being to limit the existing power of the governing authorities to issue bonds for necessary expenses so that the net indebtedness of the taxing unit should not be increased beyond the limits prescribed in the amendment, except with the approval of its voters. *Gill v. Charlotte*, 213 N. C. 160, 195 S. E. 368.

Bonds for Municipal Power Plant.—A contract of a municipality to construct a municipal electric power plant and to issue its bonds to pay for same, with provision that principal and interest of the bonds should be paid exclusively from the profits from the plant without resort to funds raised by taxation, does not create a "debt" of the municipality within the meaning of this section as amended, which prohibits the contraction of a debt by a municipality in any fiscal year in excess of two-thirds of the amount by which its debt was decreased during the prior fiscal year. *Williamson v. High Point*, 213 N. C. 96, 195 S. E. 90. See also, *McGuinn v. High Point*, 219 N. C. 56, 13 S. E. (2d) 48.

Year Debt Contracted.—The debt is contracted during the fiscal year following that in which the debt was reduced, even though the certificate of the secretary of the local government commission required by section 159-18 was not executed within that time. *Board of Education v. State Board of Education*, 217 N. C. 90, 6 S. E. (2d) 833.

Issuing Bonds to Aid War Veterans.—A statute for the purpose of issuing bonds, passed by the Legislature and which has been approved by the vote of the people of the State at an election duly had for the purpose, providing for an issuance and sale of State bonds for the purpose of lending the proceeds on mortgage to a certain amount of the value of the land to the veterans of the World War to help them in providing homes for themselves, is the pledging of the credit of the State for a public purpose, and is a valid exercise of statutory authority. *Hinton v. Lacy*, 193 N. C. 496, 137 S. E. 669.

Section Does Not Apply to School System.—This section is an inhibition on giving or lending the credit of the State to third persons, individual or corporate, and of the kind contemplated in the provision; and cannot be construed to affect the mandatory provisions of Article IX as to the maintenance of a State-wide school system by legislative enactment. *Lacy v. Fidelity Bank*, 183 N. C. 373, 111 S. E. 612.

Vote of People Necessary to Aid New Railroad.—The General Assembly has no power to contract a debt, without a vote of the people, to aid in the construction of, or build a new railroad. *University R. Co. v. Holden*, 63 N. C. 410, 412.

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

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

Test of Bonds Being at Par.—The test of bonds being at par is, whenever in the particular transaction the State receives in legal money the sum which she becomes liable to pay. Concurring opinion of J. Rodman in *Galloway v. Jenkins*, 63 N. C. 147.

National Park Act.—The statute establishing the North Carolina National Park Commission (Laws 1927, ch. 48) with the certain powers therein enumerated is for the benefit of the public of the State and not that of some third person, and does not fall within the provision of this section. *Yarbrough v. Park Commission*, 196 N. C. 284, 145 S. E. 563.

Section Does Not Apply to Insuring School Property.—A county board of education has the authority to insure school property in a mutual fire insurance company authorized to do business in this state, and assume the contingent liability limited to the amount of the cash premium, and the execution of such policy does not lend the credit of the state to a private corporation under this section. *Fuller v. Lockhart*, 209 N. C. 61, 182 S. E. 733.

Cited in Northwestern North Carolina R. Co. v. Jenkins, 65 N. C. 173; **Commissioners v. Snuggs**, 121 N. C. 394, 402, 28 S. E. 539; **Williamson v. High Point**, 213 N. C. 96, 195 S. E. 90.

§ 5. Property exempt from taxation.—Property belonging to the State or to municipal corporations, shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, charitable or religious purposes; also wearing apparel, arms for muster, household and kitchen furniture, the mechanical and agricultural implements of mechanics and farmers, libraries, and scientific instruments, or any other personal property, to a value not exceeding three hundred dollars. The General Assembly may exempt from taxation not exceeding one thousand dollars (\$1,000.00) in value of property held and used as the place of residence of the owner. (Const. 1868; 1872-73, c. 83; 1935, c. 444.)

For article, "The Battle of Exemptions," see 19 N. C. Law Rev. 154.

Editor's Note.—This section, which was Sec. 6 of the Constitution of 1868, was amended by the insertion of the phrase "or any other personal property," in pursuance of ch. 83, Public Laws of 1872-73. The amendment, which added the last sentence of this section, was proposed by Public Laws 1935, c. 444, s. 2, and adopted at the general election held in November 1936.

The amendment of 1936 is only permissive in terms and not self-executing. The power of exemption, to the extent therein mentioned, is exercisable, in whole or in part, or not at all, as the General Assembly, in its wisdom, shall determine. *Nash v. Board of Com'rs*, 211 N. C. 301, 304, 190 S. E. 475.

Legislative Exemptions Must Be Considered with This Section.—The provisions of the Revenue Act exempting property from taxation must be considered in connection with this section, since the general assembly has no power to exempt property from taxation beyond the permissive power granted it by this section. *Sir Walter Lodge, etc. v. Swain*, 217 N. C. 632, 9 S. E. (2d) 365.

Municipal Bonds to Provide Schoolhouses and Equipment Are Exempt.—Bonds issued by a municipality to provide schoolhouses and equipment were for a public purpose, and since the bonds, although the property of a private corporation, were issued for a necessary public purpose and purchased in reliance upon the statutory provision exempting them from taxation, they stand upon the same footing as the school buildings erected with the proceeds of the bonds,

Mecklenburg County v. Piedmont Fire Ins. Co., 210 N. C. 171, 185 S. E. 654.

Municipal property acquired by tax foreclosure and subsequently rented is liable for county taxes, since it is not used by the city for a governmental purpose, and therefore does not come within the constitutional provision for the exemption of property from taxation. *Benson v. Johnston County*, 209 N. C. 751, 185 S. E. 6. See also, in this connection, *Board of Financial Control v. Henderson County*, 208 N. C. 569, 181 S. E. 636, 101 A. L. R. 783.

Excise taxes on municipal property are not prohibited. *Stedman v. Winston-Salem*, 204 N. C. 203, 167 S. E. 813.

Property Exempted by Constitution.—Only one class of property is exempted from taxation by the Constitution itself, to-wit, "property belonging to the State or to municipal corporations." *Charlotte Bldg., etc., Ass'n v. Commissioners*, 115 N. C. 410, 413, 20 S. E. 526.

The power to grant exemptions under authority of the second sentence in this section, which may be exercised in whole, or in part, or not at all, as the General Assembly shall elect, is limited to property held for one or more of the purposes therein designated. *Rockingham County v. Elon College*, 219 N. C. 342, 345, 13 S. E. (2d) 618. See also, *Guilford College v. Guilford County*, 219 N. C. 347, 13 S. E. (2d) 622.

All property is subject to taxation unless exemption is authorized by the Constitution and laws of the State. *Piedmont Memorial Hospital v. Guilford County*, 221 N. C. 308, 20 S. E. (2d) 332.

The power of the Legislature to exempt from taxation property not owned by the State or its political subdivisions is perforce limited and restricted by the scope of the constitutional grant of the permissive power of exemption. *Rockingham County v. Elon College*, 219 N. C. 342, 13 S. E. (2d) 618. See also, *Guilford College v. Guilford County*, 219 N. C. 347, 13 S. E. (2d) 622.

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

Property owned by a church and rented by it for commercial purposes, and the rent used for religious purposes, is not exempt from taxation. *Sparrow v. Beaufort County*, 221 N. C. 222, 19 S. E. (2d) 861.

Statutes Exempting Specific Property Are Construed Strictly.—Statutes enacted by the General Assembly exempting specific property from taxation, because of the purposes for which such property is held and used, are and should be construed strictly, when there is room for construction, against exemption and in favor of taxation. *Salisbury Hospital v. Rowan County*, 205 N. C. 8, 11, 169 S. E. 805; *Piedmont Memorial Hospital v. Guilford County*, 218 N. C. 673, 12 S. E. (2d) 265; *Harrison v. Guilford County*, 218 N. C. 718, 12 S. E. (2d) 269.

Same—Corporation Composed of Stockholder Not a Municipal Corporation.—A municipal corporation is one designed to create within a prescribed territory a local government of the people therein, as a part of that exercised by the State, with certain and defined restrictions and this section, exempting municipal corporations from taxation, does not include within its meaning or intent a corporation composed of shareholders which in its form and controlling features is a business enterprise upon which municipal powers have been incidentally conferred in promotion of its primary purpose. *Southern Assembly v. Palmer*, 116 N. C. 75, 82 S. E. 18.

Same—Drainage Districts Are Not Municipal Corporations.—Drainage districts are not regarded as municipal corporations in purview of this section and a legislative act exempting their bonds from taxation violates the uniform rule as to taxation required by section 3 of this article. *Drainage Comm. v. Webb & Co.*, 160 N. C. 594, 76 S. E. 552.

Same—Local Assessment for Paving Street.—Local assessments against lands along the streets of a city for paving and improving the streets do not fall within the intent and meaning of this section. *Tarboro v. Forbes*, 185 N. C. 59, 116 S. E. 81.

Realty acquired for purposes of rural housing authority under §§ 157-1 to 157-39 is exempt from taxation under this section. *Mallard v. Eastern Carolina Regional Housing Authority*, 221 N. C. 334, 20 S. E. (2d) 281.

Interest of State in Business Enterprises Not Included.—The provision contained in this section exempting property belonging to the State from taxation, does not embrace the interest of the State in business enterprises, such as railroads

and the like, but applies to the property of the State held for State purposes. *Atlantic R. Co. v. Board*, 75 N. C. 474. See also, *Warrenton v. Warren County*, 215 N. C. 342, 2 S. E. (2d) 463.

Section Permissive.—Under this section the Legislature may exercise, to the full extent or in part, the power to exempt from taxation property held for educational, scientific, literary, charitable or religious purposes, or may decline to exempt at all. The constitutional provision being in the disjunctive, the Legislature can exempt the property up to a certain value and tax all above it, and may also tax property held for one of the purposes named and exempt that held for others. *United Brethren v. Commissioners*, 115 N. C. 489, 20 S. E. 626. See also *Salisbury Hospital v. Rowan County*, 205 N. C. 8, 169 S. E. 805.

It Is Self-Executing.—The provisions of this section that property belonging to or owned by the State or municipal corporations, shall be exempt from taxation, is self-executing and requires no legislation to make it effective. *Salisbury Hospital v. Rowan County*, 205 N. C. 8, 10, 169 S. E. 805. See also, *Piedmont Memorial Hospital v. Guilford County*, 218 N. C. 673, 12 S. E. (2d) 265.

When Exemption Attaches.—The quality of exemption attaches to property, as soon as it is lawfully acquired and remains with such property so long as it is owned by the municipal corporation, without regard to the purpose for which it was acquired or was held. *Andrews v. Clay County*, 200 N. C. 280, 283, 156 S. E. 855.

Exemption of Property Used for Religious, etc., Purposes Is Not Self-Executing.—The provision of this section that the general assembly may exempt from taxation property held for educational, scientific, literary, charitable or religious purposes, is a grant of power and is not self-executing, and the power of the legislature to prescribe such exemptions is limited by the terms of the grant. *Piedmont Memorial Hospital v. Guilford County*, 218 N. C. 673, 12 S. E. (2d) 265.

Use to Which Property Is Devoted.—Under this section it is the use to which the property is devoted and to the extent of the interest so dedicated which should control, rather than the title or other tenure by which it is held, and its provisions are broad and comprehensive enough to uphold the legislative exemption as to all property used exclusively for educational purposes. *Corporation Comm. v. Oxford Seminary Constr. Co.*, 160 N. C. 582, 76 S. E. 640.

A lot purchased by trustee of a church for the purpose of erecting a new church and Sunday school thereon adequate for the needs of the congregation, and, pending the accumulation of sufficient funds to build the new church, used exclusively for open air Sunday school and church meetings, is property held for religious purposes within the meaning of this section and the legislature has power to exempt such property from taxation. *Harrison v. Guilford County*, 218 N. C. 718, 12 S. E. (2d) 269.

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

Lands in Hands of Trustee.—Where in construing a devise of various property in a city the courts have decreed that the lands be sold within a period of five years and fifty-five per cent of the proceeds distributed among several beneficiaries of the class exempted by this section, the property itself is not held by the beneficiaries designated, but by the trustee in trust for the purpose of sale and distribution of part of the proceeds of the sale to them, and the exemption does not apply except to the proceeds of the sale when received by the beneficiaries in accordance with the decree, and the lands in the hands of the trustee are subject to taxation under Art. V, § 3. *Latta v. Jenkins*, 200 N. C. 255, 156 S. E. 857.

Weight of Fact that Institution Has Not Been Paying.—The fact that an educational incorporation had gone for a long period of time without paying taxes unchallenged by both the legislative and executive department of the Government is deserving of great weight by the court in construing this section. *Corporation Comm. v. Oxford Seminary Constr. Co.*, 160 N. C. 582, 76 S. E. 640.

No Distinction Between Public and Private Institutions.—The provisions of this section make no distinction between public and private educational corporations, or between institutions which are in part conducted for the personal profit of the owner and those which are run on a salary basis, using any profits which may arise in the extension of the

work. *Corporation Comm. v. Oxford Seminary Constr. Co.*, 160 N. C. 582, 76 S. E. 640.

Cited in dissenting opinion of C. J. Merrimon in *Redmond v. Commissioners*, 106 N. C. 122, 147, 10 S. E. 845; *Board v. Commissioners*, 137 N. C. 310, 314, 49 S. E. 353; *Davis v. Salisbury*, 161 N. C. 56, 76 S. E. 687. **Concurring opinion of C. J. Clark in** *Wagstaff v. Central Highway Comm.*, 177 N. C. 354, 358, 99 S. E. 1; *Wells v. Housing Authority*, 213 N. C. 744, 197 S. E. 693; *Weaverville v. Hobbs*, 212 N. C. 684, 194 S. E. 860.

§ 6. Taxes levied for counties.—The total of the State and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by special or general act: Provided, this limitation shall not apply to taxes levied for the maintenance of the public schools of the State for the term required by article nine, section three, of the Constitution: Provided, further, the State tax shall not exceed five cents on the one hundred dollars value of property. (Const. 1868; Ex. Sess. 1920, c. 93.)

For article on property and poll tax limitations under this section and section 1 of this article, see 18 N. C. Law Rev. 275.

Editor's Note.—Pursuant to ch. 93, Public Laws of 1920, extra session, this section was substituted for the old Sec. 6 (Sec. 7 of the Constitution of 1868), which was as follows: "The taxes levied by the Commissioners of the several counties for county purposes, shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

Ordinarily Expenses of Holding Courts and Maintaining Jails Are General Expenses.—Only under exceptional circumstances may the expenses of holding courts and maintaining the county jail and caring for jail prisoners be classified as expenses for special purposes, since ordinarily the holding of courts is a general expense recurring in the ordinary course of and as necessary steps in the operation of the county government, and the maintenance of the county jail and the caring for prisoners is a general expense, continuous and ever present, and a tax levy therefor in addition to the 15c. levy made for general county purposes in another item is invalid, and plaintiff is entitled to recover the amount paid under the additional levy in his suit therefor instituted in accordance with the statutory procedure. *Southern Ry. Co. v. Cherokee County*, 218 N. C. 169, 10 S. E. (2d) 607.

General or Special Act Suffices.—The legislative authority necessary to the validity of an assessment of taxes by a county for a special purpose in excess of the constitutional limit for general county purposes may be conferred by special or general act. *Atlantic Coast Line R. Co. v. Lenoir County*, 200 N. C. 494, 157 S. E. 610.

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

The last paragraph of § 153-152, authorizing a county to levy a tax to pay a public hospital for the care and hospitalization of the indigent sick of the county under a contract with a hospital does not violate this section since the tax contemplated is for a special, necessary purpose, with special approval of the General Assembly. *Martin v. Board of Com'rs*, 208 N. C. 354, 180 S. E. 777.

County Tax for Necessary Expenses.—Within the limitations of this section the county commissioners of the respective counties may levy a tax for necessary expenses without a vote of the people or special legislative authority. *Glenn v. Board of County Com'r*, 201 N. C. 233, 159 S. E. 439; *Sessions v. Columbus County*, 214 N. C. 634, 200 S. E. 418.

And a county may levy taxes for necessary expenses in excess of the limitation fixed in this section, without a vote when the levy is also for a special purpose with the special approval of the legislature. *Sessions v. Columbus County*, 214 N. C. 634, 200 S. E. 418.

The limitation of art. V, § 4, on the contraction of debt by counties and municipalities is in addition to the limitations prescribed by art. VII, § 7, and this section, and such local units may not create debts and issue bonds without a vote of the people, even for necessary expenses within the limitation prescribed by this section without the approval of the legislature, or in excess of the limitation prescribed by this section with the special approval of the legislature, unless such bonds, together with such other bonds as may have been issued during the fiscal year, do not exceed two-thirds of the amount by which such unit decreased its outstanding indebtedness during the prior fiscal year. *Hallyburton v. Board of Education*, 213 N. C. 9, 195 S. E. 21.

While ordinarily when a statute is constitutional in part and unconstitutional in part, only the unconstitutional provisions will be disregarded, when an item for the levy of taxes includes both general and special expenses, the entire item in excess of the constitutional limitation, must fail, or if an item combines both a special and an unnecessary expense, the item must fail in its entirety. *Mantahala Power, etc., Co. v. Clay County*, 213 N. C. 698, 197 S. E. 603.

Incidental Expenses.—Defendant county levied taxes up to the 15-cent limitation for general county purposes, and in addition thereto levied a tax for "upkeep of county buildings, courthouse, county home, poor and paupers, and incidental purposes." It was held that the court may not determine whether the "incidental expenses" are for a necessary or unnecessary purpose, or for a general or special purpose, or how much of the tax is for "incidental expenses," and therefore the entire item is void as not being for a special purpose with special approval of the legislature within the meaning of this section. *Mantahala Power, etc., Co. v. Clay County*, 213 N. C. 698, 197 S. E. 603.

Attorney's Fees.—Defendant county levied taxes up to the 15-cent limitation for general county purposes and in addition thereto levied taxes for the purposes of "commissioners' pay, expense and board, courthouse and grounds, and county attorney's fees." It was held that no special approval of the legislature being shown for county attorney's fees, the entire item must fail, and furthermore, the other purposes included in the item are for general county expenses and not for a special purpose within the meaning of this section. *Nantahala Power, etc., Co. v. Clay County*, 213 N. C. 698, 197 S. E. 603.

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

Supremacy of Legislative Power.—The constitutional power conferred on the Legislature to authorize counties to levy a special tax upon the property and poll for special county purposes is essential to the existence of the State, and in the exercise of this power the Legislature is supreme. *Moose v. Board*, 172 N. C. 419, 90 S. E. 441.

When Vote and Legislative Authority Necessary.—Cities and towns may levy a tax for necessary expenses up to the constitutional limitation without a vote of the people and without legislative permission; for necessary expenses they may exceed the constitutional limitation by legislative authority, without the approval of the voters: but for purposes other than necessary, a tax cannot be levied either within or in excess of the constitutional limitation except with the approval of the voters under special legislative authority. *Henderson v. Wilmington*, 191 N. C. 269, 132 S. E. 25.

Levy Beyond Limitation Void.—A levy beyond the limitation is void. *County Board v. Commissioners*, 107 N. C. 110, 12 S. E. 190.

Levy Partly for Special and Partly for General Purposes.—Where a statute authorizing the levy of a tax beyond the constitutional limit for a special purpose is *infra vires*, the taxes collected beyond the requirements of the special purposes may be turned into the general fund and used for general purposes, but where the act authorizes the levy partly for a "special purpose" and partly for general purposes it is *ultra vires* and no part of the levy can be collected. *Williams v. Commissioners*, 119 N. C. 520, 26 S. E. 150.

Where Act Severable, Valid Part Effective.—An act that attempts to authorize a county to supplement to any extent its fund for general county expenses by special tax beyond the limitations by this section of the Constitution, is to that extent unconstitutional and void; but where the valid portion of the act is distinctly severable from the invalid part, and may alone be enforced by the methods prescribed, without being affected by the invalid part, the entire statute will not be declared invalid by the courts. *Norfolk Southern R. Co. v. Reid*, 187 N. C. 320, 121 S. E. 534.

Giving County Commissioners Authority to Issue Bonds.—The authority conferred upon the board of county commis-

sioners to build its road and bridges in any way that may seem practicable, and issue bonds not to exceed the actual cost, and to levy sufficient tax on real and personal property to pay interest, and create a sinking fund, is not necessarily inconsistent with this section excepting from the limitation of 15 cents on the \$100 valuation of property a levy on county property for "a special purpose, and with the approval of the General Assembly, which may be done by special or general act." *Norfolk Southern R. Co. v. McArtan*, 185 N. C. 201, 116 S. E. 731.

Special Approval for Necessary Expenditures.—This section, of the State Constitution, authorizes the Legislature to give special approval of taxation by a county for necessary expenditures by either a special or general statute. *Norfolk Southern R. Co. v. Reid*, 187 N. C. 320, 121 S. E. 534. As to necessary expenses see note to Art. VII, sec. 7.

Tax for Road Purposes.—Authority may be given by the Legislature to a county to levy a special tax for road purposes upon the approval of its electors lawfully ascertained, to exceed the general tax limitation, by special or general acts. *State v. Kelly*, 186 N. C. 365, 119 S. E. 755.

An act authorizing counties to issue bonds for the purpose of laying out and operating, altering and improving the public roads of the county, etc., is for a special purpose within the intent and meaning of this section. *Parvin v. Board*, 177 N. C. 508, 99 S. E. 432.

Details Unnecessary.—An act giving the special approval of the Legislature to county taxation for special purposes need not specify the sum to be raised by such taxation, nor a limit beyond which it cannot be carried; details are not proper in such statutes—these should be left to the commissioners. *Brodnax v. Groom*, 64 N. C. 244.

A tax levied by the county commissioners for the aged and infirm, to pay jurors, for feeding and caring for the county prisoners are expenses to be paid from the general county fund as current expenses, and fall within the limitations of this section. *Southern Ry. Co. v. Cherokee County*, 195 N. C. 756, 143 S. E. 467.

Statutory Validation of Excessive Levy.—Where a county has levied a tax for general purposes in excess of that permitted by our Constitution, Art. V, sec. 6, which a property owner has paid under protest, and has reserved his right under the provisions of § 105-406, it may not be validated by an act passed after the assessment had been passed upon or levied under the former statute. *Southern Ry. Co. v. Cherokee County*, 195 N. C. 756, 781, 143 S. E. 467.

Correction of Minutes of Levy.—The board of commissioners of a county may correct the minutes of a levy of taxes formerly made by it to show separately the items relating to current county expenses and the items of levy for unauthorized special purposes when no change in the former levies are thereby made. *Southern Ry. Co. v. Cherokee County*, 195 N. C. 756, 143 S. E. 467.

Public-Local Laws 1927, ch. 201, applicable to Cherokee County, cannot validate a void levy. *R. R. v. Cherokee*, 194 N. C., 781. It may be that the General Assembly could pass a special act or general law allowing a levy for special purposes of this kind in emergency cases. *Southern Ry. Co. v. Cherokee County*, 195 N. C. 756, 759, 143 S. E. 467.

Bonds for Erection of Jail.—Where the erection of a new jail was a public necessity, bonds necessary to provide funds for the erection are for a special necessary county expense under §§ 153-9, 153-49, and the taxes necessary to pay principal and interest of such bond issue are not subject to limitation on the tax rate. *Castevens v. Stanly County*, 209 N. C. 75, 183 S. E. 3.

Bonds Issued to Refund Other Bonds.—Where the municipal finance act does not apply to refunding certain bonds of a county, issued prior to its operating effect, and the bonds become due and payable, and there is no provision made for their payment, the act of the board of county commissioners in paying them out of the general county fund as a temporary arrangement, using the bonds as collateral to secure the repayment by refunding bonds to be authorized by the Legislature: Held, the bonds later authorized by the Legislature and issued by the county to refund the indebtedness to the general county fund are for a special purpose and do not fall within the general limitation of fifteen cents on the one hundred dollars valuation prescribed by the Constitution. *Barbour v. Wake County*, 197 N. C. 314, 148 S. E. 470.

Under ch. 342, Public-Local Laws 1935, defendant county proposed to issue county bonds to refinance bonds issued by the townships of the county. The proceeds of the township bonds were used in the construction of highways which were later taken over by the county and thereafter by the state. The proposed county bond issue is for a county pur-

pose within the meaning of this section. *Thomson v. Harnett County*, 209 N. C. 662, 184 S. E. 490.

A county has authority, to issue funding and refunding bonds with the approval of the local government commission to take up valid, outstanding indebtednesses of the county which were incurred for necessary county expenses. *Brooks v. Avery County*, 206 N. C. 840, 175 S. E. 199. See *Thomson v. Harnett County*, 209 N. C. 662, 184 S. E. 490.

Cited in *Cromartie v. Commissioners*, 85 N. C. 211, 217; *Parker v. Board*, 104 N. C. 166, 168, 10 S. E. 137; *Redmond v. Commissioners*, 106 N. C. 122, 130, 145, 10 S. E. 845; *Board v. Board*, 111 N. C. 578, 579, 16 S. E. 621; *Herring v. Dixon*, 122 N. C. 420, 423, 29 S. E. 368; *Jones v. Commissioners*, 135 N. C. 218, 224, 47 S. E. 753; *Board v. Commissioners*, 137 N. C. 310, 311, 49 S. E. 353; *Director-General v. Commissioners*, 178 N. C. 449, 101 S. E. 91; *Board v. Assell*, 194 N. C. 412, S. E. 580; *Castevens v. Stanly County*, 211 N. C. 642, 191 S. E. 739; *Gill v. Charlotte*, 213 N. C. 160, 195 S. E. 368; *Palmer v. Haywood County*, 212 N. C. 284, 193 S. E. 668, 113 A. L. R. 1195; *Board of Education v. Wilson*, 215 N. C. 216, 1 S. E. (2d) 544.

§ 7. Acts levying taxes shall state objects, etc.—Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose. (Const. 1868.)

Section Does Not Apply to Counties or Towns.—The provisions of this section does not extend to taxes levied by counties or incorporated cities or towns for general municipal purposes. *Cabe v. Board*, 185 N. C. 158, 116 S. E. 419.

This section has not application to taxes levied by the county authorities for county purposes. *Parker v. Board*, 104 N. C. 166, 10 S. E. 137.

Act Providing for Levy to Pay County Bonds.—Where an act authorizes the levy and collection of a special tax for the payment of certain county bonds; and a later act directed that the special tax collected under the first act should be turned into the general county fund, the first act is in conflict with this section which provides that every act of the General Assembly levying a tax shall state the special object to which it is to be applied. *McCless v. Meekins*, 117 N. C. 34, 35, 23 S. E. 99.

Statute Authorizing County to Impose Tax.—Where the statute authorizes a county to impose a tax for necessary expenses, it is a delegation of the power to be exercised by the county as an agency for the State for the convenience of local administration, and the statute is not void in failing to state the special object to which it is to be applied, nor is the tax itself invalid if this constitutional requirement has been observed by the county authority in the imposition of the special tax. *Norfolk Southern R. Co. v. Reid*, 187 N. C. 320, 121 S. E. 534.

Cited in *University R. Co. v. Holden*, 63 N. C. 410; *Kyle v. Commissioners*, 75 N. C. 445; *Board of Education v. Wilson*, 215 N. C. 216, 1 S. E. (2d) 544.

ARTICLE VI

Suffrage and Eligibility to Office

§ 1. Who may vote.—Every male person born in the United States, and every male person who has been naturalized, twenty-one years of age, and possessing the qualifications set out in this article, shall be entitled to vote at any election by the people in the State, except as herein otherwise provided. (Const. 1868; Convention 1875; 1899, c. 218; 1900, c. 2.)

Cross References.—See annotations under section 2. For statutory provisions regarding elections and the qualifications of voters therein, see section 163-1 et seq.

Editor's Note.—Article VI was re-drafted and submitted to a popular vote, August 2, 1900, to become effective July 1, 1902. Ch. 218, Public Laws of 1899; Ch. 2, Public Laws of 1900.

Sec. 1 of this article originally was as follows: "Every male person born in the United States, and every male person who has been naturalized, twenty-one years old, or upward, who shall have resided in this State twelve months next preceding the election, and thirty days in the county in which he offers to vote shall be deemed an elector." The Convention of 1875 changed "thirty" to "ninety" and added the sentence: "But no person who, upon conviction or confession in open court, shall be adjudged guilty of a felony, or any other crime infamous by the laws of this State,

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

The 19th amendment to the Constitution of the United States, ratified August 26, 1920, provided that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." The General Assembly of North Carolina provided for the registration and voting of women by ch. 18, Public Laws of 1920, extra session.

Cited in *Chester, etc., R. Co. v. Commissioners*, 72 N. C. 486, 493; *Foard v. Hall*, 111 N. C. 369, 372, 16 S. E. 420; *Quinn v. Lattimore*, 120 N. C. 426, 26 S. E. 638; *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27; *Gill v. Board of Com'rs*, 160 N. C. 176, 76 S. E. 203, 43 L. R. A. (N. S.) 293; *State v. Knight*, 169 N. C. 333, 85 S. E. 418, L. R. A. 1915F, 898, Ann. Cas. 1917D, 517 (right of women to vote); *Harris v. Watson*, 201 N. C. 661, 161 S. E. 215, 79 A. L. R. 441.

§ 2. Qualifications of voters.—He shall reside in the State of North Carolina for one year and in the precinct, ward or other election district in which he offers to vote four months next preceding the election: Provided, that removal from one precinct, ward or other election district to another in the same county shall not operate to deprive any person of the right to vote in the precinct, ward or other election district from which he has removed until four months after such removal. No person who has been convicted, or who has confessed his guilt in open court upon indictment, of any crime the punishment of which now is, or may hereafter be, imprisonment in the State's Prison, shall be permitted to vote, unless the said person shall be first restored to citizenship in the manner prescribed by law. (Convention 1875; 1899, c. 218; 1900, c. 2, s. 2; Ex. Sess. 1920, c. 93.)

Editor's Note.—This section was added pursuant to ch. 218, Public Laws of 1899 and ch. 2, Public Laws of 1900. The first sentence read: "He shall have resided in the State of North Carolina for two years, in the county six months, and in the precinct, ward or other election district in which he offer to vote, four months next preceding the election." This sentence was changed to read as at present, pursuant to ch. 93, Public Laws of 1920, extra session.

Qualifications Same for Municipal Election.—The qualification of voters in a municipal election is the same as in a general one. *State v. Carter*, 194 N. C. 293.

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

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

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

A person, in order to become a qualified elector in this State, must have come into the State a year (now two years) before the election, or have been domiciled within it for twelve months after forming the purpose to remain, and the same intent must be concurrent with the actual occupation of a domicile in the county in order to entitle him to the rights of an elector within its limits. *Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665.

In order to acquire a residence for the purpose of exercising the right to vote in a given locality, the "residence" must be of a permanent, and not of a temporary character, corresponding with the word domicile. *State v. Carter*, 195 N. C. 697, 143 S. E. 513.

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

Conviction of Crime.—In a contested election case, a con-

viction of an offense under a local law prescribing punishment in the State's Prison, renders void the vote of the one so convicted, whether the indictment charged or failed to charge that the alleged offense was "feloniously" committed. *State v. Jackson*, 183 N. C. 695, 110 S. E. 593.

Vote of Escaped Prisoner.—If a person in jail for misdemeanor (not infamous), and sentenced to imprisonment, escapes, and, before he is recaptured, his term or sentence expires, and he votes in his own precinct, in which he resided before he was sentenced, such vote is valid if the voter be otherwise qualified; but, if the voter is a fugitive from justice, and hiding from one part of the county to another, and voted in the precinct he happened to be in, and not in the precinct of his residence when sentenced, such vote is illegal. *Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665.

Where Voter Resides Near Precinct Line.—When a voter resides on or so near the precinct line, or the line be so uncertain that it is doubtful in which precinct the voter lives, and the voter, honestly and in good faith, bona fide, registers and votes in the precinct he, in good faith, alleges and believes he lives in, and has good reason to believe he is correct, and registers and votes in no other precinct, such vote is legal. *Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665.

Mere Failure to Administer Oath.—The mere failure of the registrars to administer the oath to the electors, and allowing them to vote where not challenged, will not affect the result of the election held for the establishment of a special road district under valid legislative authority, when the electors so voting are qualified. *Woodall v. Highway Commission*, 176 N. C. 377, 97 S. E. 226.

Oath Does Not Embrace All Qualifications.—The oath prescribed for electors by section 163-29, omits some of the essential requisites to voting contained in the Constitution, and is confined to those indispensable qualifications set out in this section. The oath does not extend to disqualification incident upon conviction for crime. *State v. Houston*, 103 N. C. 383, 9 S. E. 699.

Same—Increasing Length of Residence.—The General Assembly cannot in any way change the qualifications of voters in State, county, township, city or town elections; an act which requires a longer residence in the county than this section requires, is unconstitutional. *People v. Canaday*, 73 N. C. 198.

Provision That Commissioners Come from Different Parties.—A provision in a statute that township highway commissioners shall be selected for their fitness, and not for political faith, and to remove the position from partisan politics, one each of the two members to be elected shall, "so far as feasible and practicable, come from each of the two leading political parties of the township," is too indefinite and uncertain to affix a qualification to the position, being recommendatory only to the voters, whose action is not reviewable by the courts. *State v. Sanders*, 174 N. C. 112, 93 S. E. 476.

Cited in *Quinn v. Lattimore*, 120 N. C. 426, 2 S. E. 638; *Cox v. Com'rs of Pitt County*, 146 N. C. 584, 60 S. E. 516, 16 L. R. A. (N. S.) 253; *State v. Windley*, 178 N. C. 670, 673, 100 S. E. 116; *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27.

§ 3. Voters to be registered.—Every person offering to vote shall be at the time a legally registered voter as herein prescribed, and in the manner hereafter provided by law, and the General Assembly of North Carolina shall enact general registration laws to carry into effect the provisions of this article. (Const. 1868; 1899, c. 218; 1900, c. 2, s. 3.)

For statutory provision as to registration, see section 163-28 et seq.

Editor's Note.—Sec. 2 of the Constitution of 1868 was as follows: "It shall be the duty of the General Assembly to provide from time to time, for the registration of all electors, and no person shall be allowed to vote without registration, or to register, without first taking an oath or affirmative to support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina, not inconsistent therewith." This was amended to read as the present Sec. 3 pursuant to ch. 218, Public Laws of 1899 and ch. 2, Public Laws of 1900. For the present registration laws, see §§ 163-29 to 163-52.

Power of General Assembly.—While the General Assembly cannot add to the qualifications prescribed by the Constitution for voters, it has the power, and, it is the duty, to enact such registration laws as will protect the rights of duly qualified voters, and no person is entitled to vote un-

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

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

Act Requiring Proof of Ability to Read and Write Is Valid.—The provisions of § 163-28 providing that a person presenting himself for registration shall, before he is registered, prove to the satisfaction of the registrar his ability to read and write any section of the Constitution, was held valid, since the authority was granted the Legislature by this section to enact general legislation to carry out the provisions of this article. *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27.

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

Editor's Note.—This section was added in pursuance of ch. 218, Public Laws of 1899 and ch. 2, Public Laws of 1900. The following changes were made pursuant to ch. 93, Public Laws of 1920, to make the section read as at present: the clause "and before he shall be entitled to vote, he shall have paid on or before the first of May, of the year in which he proposes to vote, his poll tax for the previous year as prescribed by Article V, Section 1, of the Constitution," immediately following the word "language," was stricken out; the proviso, "Provided, such person shall have paid his poll tax as above required," was stricken from the end of the Section.

The language of this section is mandatory. *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27.

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

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

Registrar Is Logical Person to Carry Out Requirements of Section.—As this section of the Constitution says "presenting himself for registration," someone has to determine whether or not the person shall be able to read and write any section of the Constitution in the English language. Section 163-28, putting this duty on the registrar is unquestionably a reasonable provision, and the registrar is the logical person to carry out the provisions of the Constitution. *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27.

What Registrars May Ask.—Registrars may ask the elector his age and residence, the township or county from whence he removed, in case of such removal since the last election, and whether he has resided in the State two years, and in the county in which he proposes to vote four months, preceding the election. If, in reply to such questions, the elector answers that he is twenty-one years old, and has resided in the State two years and in the county four months preceding the election, it is the duty of the registrars, upon his taking the prescribed oath, to record his name as a

voter; but bystanders may require him to be sworn as to his residence. *In re Reid*, 119 N. C. 641, 26 S. E. 337.

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

Permanent Roll Does Not Dispense with Further Registration.—The fact that a voter is registered on the permanent roll as provided by the Constitution does not dispense with the necessity of his registering anew in order to become a qualified voter, whenever required by the statutes regulating the registration of voters. *Clark v. Statesville*, 139 N. C. 490, 52 S. E. 52.

Purpose of Permanent Roll.—The making of a permanent roll of record was intended to be done for the sole purpose of furnishing convenient and easily available evidence of the fact that those whose names appear thereon are not required to have the educational qualification. *Clark v. Statesville*, 139 N. C. 490, 52 S. E. 52.

Registration Book Lost.—Where the registration book of an election precinct had been lost, and could not be replaced, but the registrar procured a new book, in which he entered the names of such persons as he knew had theretofore been registered, and also the names of those who applied for registration subsequently and it appeared that, at the election following, no one voted whose name did not appear on the registration book, that no one voted who was not entitled to vote, and no one who was entitled to vote was excluded the election was valid. *State v. Waldrop*, 104 N. C. 453, 10 S. E. 694.

When No Registration at All.—Where there has been no registration at all, the votes cast cannot be counted by proving that none but duly qualified electors voted; possibly this principle might be relaxed where a fraudulent conspiracy to deprive the voters of the right of suffrage is shown; and it does not apply where the Legislature has failed to provide means for registration. *State v. Scarborough*, 110 N. C. 232, 14 S. E. 737.

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

Necessity of Having Paid Taxes.—Where the validity of a special tax depends upon whether certain persons who had voted had paid their taxes for the previous year according to the requirements of this section the constitutional requirements must be met in order that they may exercise the privilege of voting, though they are permitted to wait until May 1st to pay them, if they so choose. *Ingram v. Johnson*, 172 N. C. 676, 90 S. E. 805.

Cited in *State v. Grizzard*, 89 N. C. 115, 119; *Pace v. Raleigh*, 140 N. C. 65, 67, 52 S. E. 277; *Collie v. Franklin County Com'rs*, 145 N. C. 170, 59 S. E. 44; *Cox v. Com'rs of Pitt County*, 146 N. C. 584, 60 S. E. 516, 16 L. R. A. (N. S.) 253.

§ 5. Indivisible plan; legislative intent.—That this amendment to the Constitution is presented and adopted as one indivisible plan for the regulation of the suffrage, with the intent and purpose to so connect the different parts, and to make them so dependent upon each other, that the whole shall stand or fall together. (1900, c. 2, s. 5.)

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

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

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

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

A voter at an election does not waive his constitutional right to a secret ballot by not protesting, unless he has been made aware of his rights under the facts and circumstances of the balloting. *Withers v. Commissioners of Harnett*, 196 N. C. 535, 146 S. E. 225.

§ 7. **Eligibility to office; official oath.**—Every voter in North Carolina, except as in this article disqualified, shall be eligible to office, but before entering upon the duties of the office he shall take and subscribe the following oath:

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

Editor's Note.—Sec. 4 of the Constitution of 1868 amended to become the present Sec. 7 pursuant to ch. 218, Public Laws of 1899 and ch. 2, Public Laws of 1900, was as follows: "Every voter, except as hereinafter provided, shall be eligible to office; but before entering upon the discharge of the duties of his office, he shall take and subscribe the following oath: 'I,, do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office. So help me God.'"

Legislature Cannot Increase Qualifications.—This section provides "every voter in North Carolina, except in this article disqualified, shall be eligible to office," and the Legislature cannot add to the constitutional disqualifications to hold office by requiring candidates for the position of recorder in a municipal court to be "a licensed attorney at law." State v. Bateman, 162 N. C. 588, 77 S. E. 768.

Women as Public Officers.—A woman is qualified to act as a notary public since the adoption of the 19th amendment to the Constitution of the United States, and also to pass upon the proper probate of a deed to lands, and make a valid certificate for its registration, when thereto deputized by the clerk of the superior court under the provisions of our statute. Preston v. Roberts, 183 N. C. 62, 110 S. E. 586. For the former rule, see State v. Knight, 169 N. C. 333, 85 S. E. 418.

Cited in Harris v. Watson, 201 N. C. 661, 161 S. E. 215, 79 A. L. R. 441.

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

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

Disqualification Not Part of Judgment.—The disqualification for office and the loss of the right of suffrage imposed by this section upon persons convicted of infamous offenses constitute no part of the judgment of the court, but are mere consequences of such judgment. State v. Jones, 82 N. C. 685.

Removal of Prosecuting Attorney.—A prosecuting attorney is removable from office as a matter of law or legal inference upon findings of his willful misconduct or maladministration in office, supported by evidence. State v. Hamme, 180 N. C. 684, 104 S. E. 174.

Same—Appeal.—An appeal from the judgment of the superior court judge that a prosecuting attorney be removed for "willful misconduct or maladministration in office," etc., is

upon questions of law and legal inference, if justified by the findings of facts supported by evidence. State v. Hamme, 180 N. C. 684, 104 S. E. 174.

Cited in dissenting opinion of C. J. Clark in Bank v. Redwine, 171 N. C. 559, 572, 88 S. E. 878; State v. Windley, 178 N. C. 670, 673, 100 S. E. 116.

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

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

ARTICLE VII

Municipal Corporations

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

Cross References.—As to municipal corporations generally, see section 160-1 et seq.; as to the register of deeds, see section 161-1 et seq.; as to the county surveyor, see section 154-2 et seq.; as to the county commission, see section 153-1 et seq.

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

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

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

Stated in Harris v. Watson, 201 N. C. 661, 161 S. E. 215, 79 A. L. R. 441.

Cited in People v. McKee, 65 N. C. 257; People v. Canaday, 73 N. C. 198, 221; Perry v. Franklin County Com'rs, 148 N. C. 521, 62 S. E. 608.

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

See section 153-1 et seq. and notes thereto.

The General Assembly can give almost unlimited power to the counties to carry out this provision. Thomson v. Harnett County, 209 N. C. 662, 667, 184 S. E. 490.

Fiscal Powers Are Subject to Modification.—The general assembly has power to appoint a tax collector or manager for a county of the state, the fiscal powers granted the county commissioners by this section being subject to modification or abrogation by statute by express provision of Art. VII, sec. 13. Freeman v. Board of Com'rs, 217 N. C. 209, 7 S. E. (2d) 354.

Supervision and Control of Roads.—Under this section the commissioners of a county have the duty to exercise a general supervision and control of the roads and levying of taxes as prescribed by law in reference to roads. Thomson v. Harnett County, 209 N. C. 662, 667, 184 S. E. 490.

Authority to Borrow from General County Fund.—The board of county commissioners, having the supervision and control of roads, bridges, and the levying of taxes and the finances of the county, have the authority by proper res-

olution to borrow from the general county fund moneys with which to pay maturing bonds of the county when due, being necessary to preserve the credit of the county, and to issue refunding bonds for the purpose of repaying this loan under a valid statute providing therefor and declaring itself to be a special statute validating and legalizing the transaction. *Barbour v. Wake County*, 197 N. C. 314, 315, 148 S. E. 470.

How School Fund Disbursed.—This section gives the "supervision of schools" to the county commissioners; they levy the school tax, and in their treasury is kept the school fund, and their treasurer disburses the fund, upon the order of the school committee. *Lane v. Stanly*, 65 N. C. 153, 156. See note to § 153-9, par. 2.

When Commissioners Fail to Qualify.—If from any cause the newly elected commissioners of a county fail to qualify at the time prescribed by law, the old board, as de facto officers, have the power to qualify a county treasurer-elect and induct him into office; or upon his default in filing the required bond, they have the power to declare a vacancy and fill the same by appointment. *State v. Jones*, 80 N. C. 127.

General Assembly May Authorize Ferry.—This section does not deprive the general assembly of the power to pass an act authorizing the establishment of a public ferry at a certain point. In *re Spease Ferry*, 138 N. C. 219, 50 S. E. 625.

As to the power of General Assembly to abrogate the provisions of the section, see section 14 of the article and annotations thereunder.

Cancellation of Official Bond.—In the absence of a statute specifically authorizing the board of commissioners of a county to cancel an official bond, which the board has taken, accepted and filed, in the performance of its official duty, the duty imposed by this section upon such board, with respect to the finances of the county, does not confer upon the board such power. *State v. Inman*, 203 N. C. 542, 554, 166 S. E. 519.

Applied in *Reen v. Farmer*, 211 N. C. 249, 189 S. E. 882.

Cited in *Flat Swamp, etc., Co. v. McAllister*, 74 N. C. 159, 163; *Board v. Commissioners*, 111 N. C. 578, 586, 16 S. E. 621; *Crocker v. Moore*, 140 N. C. 429, 53 S. E. 229; *Southern Audit Co. v. McKensie*, 147 N. C. 461, 61 S. E. 283; *Bunch v. Randolph County Com'rs*, 159 N. C. 335, 74 S. E. 1048; *Commissioners v. Road Com'rs*, 165 N. C. 632, 81 S. E. 1001; *Wilson v. Holding*, 170 N. C. 352, 86 S. E. 1043; *Holmes v. Bullock*, 178 N. C. 376, 378, 100 S. E. 530; *Lenoir County v. Taylor*, 190 N. C. 336, 130 S. E. 25; *Day v. Commissioners*, 191 N. C. 780, 133 S. E. 164.

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

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

Cited in *Wilson v. Board*, 74 N. C. 748, 754; *Wallace v. Board*, 84 N. C. 164; *Wittkowsky v. Board*, 150 N. C. 90, 94, 63 S. E. 275; *Road Comm. v. Commissioners*, 178 N. C. 61, 100 S. E. 122.

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

Township Powers Must Be Conferred.—Townships are corporate bodies and have no corporate powers when not specially conferred by statute. *Wittkowsky v. Board*, 150 N. C. 90, 63 S. E. 275. See notes to section 153-9, par. 33.

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

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

Townships Not Given Power of Taxation.—This section

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

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

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

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

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

Justice Elected.—This section requires that justices of the peace shall be elected by townships. *Edenton v. Wool*, 65 N. C. 379.

Same—Power Cannot Be Conferred.—An attempt to confer the power of a justice of the peace on the Judge of a Special Court cannot avail, for this section requires justices of the peace to be elected by the several townships, and the Legislature cannot change the mode of their appointment. *Wilmington v. Davis*, 63 N. C. 582.

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

Trustees without Authority to Build Bridges.—Township trustees have no authority to contract for building bridges; when such a contract is entered into without the sanction and supervision of the County Commissioners, it is a nullity. *Paine v. Caldwell*, 65 N. C. 488.

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

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

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

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

When Appeal Lies From Commissioners Decision.—The County Commissioners have exclusive original jurisdiction to grant relief against excessive valuation of property for taxation; and from their decision, upon a petition for that purpose, there is no appeal, unless it appears from the facts found by them as to the valuation of property, that they have proceeded upon some erroneous principle; for the reason that the statute give no appeal. *Wade v. Commissioners*, 74 N. C. 81.

Legislative Power when Section Abrogated.—The general assembly, during the abrogation of this section could consti-

tute other agencies to perform the duties herein imposed upon the township board of trustees. *North Carolina R. Co. v. Commissioners*, 82 N. C. 260.

Cited in *Carolina Cent. R. Co. v. Wilmington*, 72 N. C. 73, 75; *Richmond, etc., R. Co. v. Commissioners*, 84 N. C. 504, 508; *Jones v. Commissioners*, 107 N. C. 248, 261, 12 S. E. 69; *Board v. Commissioners*, 111 N. C. 578, 586, 16 S. E. 621; *Road Com. v. Commissioners*, 178 N. C. 61, 64, 100 S. E. 122.

§ 7. No debt or loan except by a majority of voters.—No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein. (Const. 1868.)

- I. Editor's Note.
- II. General Consideration.
- III. Necessary Expenses.
 - A. General Consideration and Application.
 - B. School Taxation.

Cross References.

As to municipal taxation, see section 160-56; as to election on question of county aid to railroads, see section 60-22.

For article on "Necessary Expenses," see 18 N. C. Law Rev. 93.

I. EDITOR'S NOTE.

Municipal corporations may levy a tax for necessary expenses to the constitutional limitation without a vote of the people and without legislative permission; for necessary expenses they may exceed the constitutional limitation by legislative authority, without the approval of the voters; but for purposes other than necessary, a tax cannot be levied either within or in excess of the constitutional limitation except with the approval of the voters under special legislative authority. The constitutionality of a legislative act exceeding the constitutional limitation depends upon whether or not the bill passed each branch of the legislature on three separate days, with the "aye" not "no" vote both entered on the journals of the second and third readings. See *Henderson v. Wilmington*, 191 N. C. 269, 132 S. E. 25.

II. GENERAL CONSIDERATION.

Intent of Section.—This section was intended to present another check to the imprudence of county and municipal officers. *Paine v. Caldwell*, 65 N. C. 488, 491.

This section is an absolute prohibition. It is cumulative and adds another restraint to section 7 of article V. *Brodnax v. Groom*, 64 N. C. 244.

Cannot Be Evaded by Legislature.—This section prohibits any county, city, town or other municipal corporation, from contracting any debt, etc., without the affirmative consent of a majority of the people of the county who are qualified to vote and a Legislative Act which attempts to evade the restriction which this section puts on counties, etc., to contract debts, is unconstitutional and void. *Chester, etc., R. Co. v. Commissioners*, 72 N. C. 486.

No Vested Right by Former Construction of Section.—A public service corporation, which was granted a franchise and entered into a contract with a city when, under this section as then construed, the city was without power to construct competing works, but which constitutional provision was subsequently construed to grant such power, held to have no standing, after its franchise and contract had expired by limitation, to invoke the rule that one acquiring rights under one construction of the state law may not be deprived of them by a subsequent different construction. *Hill v. Elizabeth City*, 298 Fed. 67.

The only way to preserve the vitality of this section and § 6 of article 5 is to adhere to the construction, that the 'special purpose' for which the 'special approval' of the General Assembly is essential must be for a 'necessary expense' in contemplation of the constitutional provision. *Castevens v. Stanly County*, 209 N. C. 75, 82, 183 S. E. 3, citing *Glenn v. Board of County Com'rs*, 201 N. C. 233, 159 S. E. 439.

The term "municipal corporation" should not be construed narrowly to include only cities, towns, counties and school districts, as the Constitution contemplates a broader construction of the term, and in its broader sense the term includes all public corporations exercising governmental functions within the constitutional limitations. *Wells v. Housing Authority*, 213 N. C. 744, 197 S. E. 693.

The State is not a municipality within the meaning of

the Constitution, and since a city or county, in the operation of public schools within its territory, is not a municipality but an administrative agency of the State, such administrative units, in imposing taxes necessary to the maintenance of public schools, is not required to submit the question to a vote, the limitations imposed by this section being applicable solely to municipalities. *Bridges v. Charlotte*, 221 N. C. 472, 26 S. E. (2d) 828.

Although an administrative unit of the State public school system is required by the statute to submit to its voters the question of supplementing State funds to conduct schools of higher standards and longer terms, the provision for a vote is not in deference to this section and the establishment of such supplement in no wise affects the character of the unit as a State agency for the administration of the public school system. *Id.*

School Districts as Municipal Corporation.—School districts are public quasi-corporations, included in the term municipal corporations as used in this section. *Smith v. School Trustees*, 141 N. C. 143, 53 S. E. 524. See post, this note, "School Taxation," III, B.

A legally qualified board of trustees of the graded schools of a town is a municipal corporation within the meaning and purport of this section. *Hollowell v. Borden*, 148 N. C. 255, 61 S. E. 638.

Debt.—This section and the amended art. V, § 4, will be considered in *pari materia*, and the word "debt" in art. V, § 4, will be given the same construction as has been given the word in construing this section since the legislature in framing the amendment must have had in mind the construction which has been given the word as used in this section. *Williamson v. High Point*, 213 N. C. 96, 195 S. E. 90. See also, *McGuinn v. High Point*, 219 N. C. 56, 13 S. E. (2d) 48.

Majority of Qualified Voters Necessary.—An issue of county bonds is invalid, though a majority of those voting thereon have expressed themselves by ballot in their favor, if such majority be not also that of the qualified voters of the county. *Sprague v. Board*, 165 N. C. 603, 81 S. E. 915; *Long v. Commissioners*, 181 N. C. 146, 106 S. E. 481.

By this section, bonds for other than necessary purposes must be approved by a majority of the qualified voters of the taxing unit. *Twining v. Wilmington*, 214 N. C. 655, 200 S. E. 416; *Sessions v. Columbus County*, 214 N. C. 634, 200 S. E. 418.

Even within the exercise of its powers a municipality may not bind itself by contract which incurs a debt, except for necessary expenses, unless by a vote of the majority of its qualified voters as provided by this section. *Madry v. Scotland Neck*, 214 N. C. 461, 199 S. E. 618.

This section and art. V, § 4, of the State Constitution are not in conflict, and bonds for other than necessary expenses which are also in excess of two-thirds of the amount by which the taxing unit decreased its outstanding indebtedness during the prior fiscal year, must be approved not only by a majority of those voting in the election under the provisions of art. V, § 4, but also by a majority of the qualified voters of the taxing unit under the requirement of this section although but one referendum is required. *Twining v. Wilmington*, 214 N. C. 655, 200 S. E. 416.

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

General Districts Debts Voted for in One Ballot Box.—An issue of municipal bonds, when approved by the majority of the qualified voters, under the authority of a statute passed according to the constitutional requirements, is not invalid because there were several distinct debts provided and voted for in one ballot box. This section does not require that the vote upon each distinct proposition must be in a separate ballot box. *Smith v. Bellhaven*, 150 N. C. 156, 63 S. E. 610.

But a legislative act which authorizes an election to be held upon the question of levying a special school tax providing that if any township should cast a majority of its votes in its favor it should apply only to the township, should the county as a whole reject the proposition, and requiring but a single ballot upon two propositions, is contrary to this section and void. *Hill v. Lenoir County*, 176 N. C. 572, 97 S. E. 498.

When Act Does Not Limit Bond Issue.—An exception to the constitutionality of an act submitting the question of a bond issue to the voters cannot be sustained on the ground that it does not limit the amount of the bonds that may be

issued for the purposes therein authorized. *Waters v. Board*, 186 N. C. 719, 120 S. E. 450.

When Funds Are Already on Hand.—This provision, has no application where, the funds to be applied are already on hand and the proposed expenditure will impose no further liability on the municipality, nor involve the imposition of further taxation upon it. *Adams v. Durham*, 189 N. C. 232, 126 S. E. 611, 612. See note of this case under section 160-1 of the code.

The acquisition of the land for a municipal airport from surplus funds was not beyond the power of the city and it in no way offended the provisions of this section. *Goswick v. Durham*, 211 N. C. 687, 689, 191 S. E. 728.

When Indebtedness Already Voted on.—That part of this section forbidding the levy of any taxes by a municipal corporation except for necessary expenses, unless by a vote of the majority of the qualified voters, applies only to such indebtedness as has not been submitted to a vote of the people. *Charlotte v. Shepard & Co.*, 122 N. C. 602, 29 S. E. 842.

Endorsement of Township Bonds by County.—Where townships are permitted to call an election for the purpose of voting upon the issuance of township bonds for the roads of the township, the proceeds to be turned over to the sole management and control of the township commissioners, with further provision that the county endorse the bonds upon being satisfied of the validity of the issuance, the endorsement by the county of the township bonds is a loan of the credit of the county, without benefit to the other townships, and contrary to this section. *Commissioners v. Boring*, 175 N. C. 105, 95 S. E. 43.

Authorization of Bonds without Tax to Pay Them.—The power given by a statute to a city to issue bonds with the approval of a majority of the qualified voters of the city does not confer, by implication, the power to levy a tax to pay them unless the power to levy such tax has been conferred by the act authorizing the issue and ratified by a vote of the people, as required by this section. *Charlotte v. Shepard*, 120 N. C. 411, 412, 27 S. E. 109.

Taxes to Pay New Debts.—The commissioners of a town have no authority to collect taxes to pay "new debts" unless the proposition is submitted to the voters of the town, even though commanded by mandamus. *Weinstein v. Commissioners*, 71 N. C. 535.

Railroad Aid Bonds.—It is essential to the validity of bonds issued in aid of railroads, or other similar enterprises, by counties, townships and other municipal organizations, that the proposition shall have first had the assent of a majority of the qualified voters in the territory affected, to be duly ascertained by an election regularly held for that purpose. *Lynchburg, etc., R. Co. v. Board*, 109 N. C. 159, 13 S. E. 783. See section 60-22. As to constitutional provision regarding state aid of railroads, see Art. V, sec. 4.

Bonds to Refund Bonds.—A municipal corporation does not contract a debt, within the meaning of this section, when under statutory authority it issues bonds to refund bonds which at the date of the issuance of the refunding bonds are valid and enforceable obligations of the corporation. *Bolich v. Winston-Salem*, 202 N. C. 786, 788, 154 S. E. 361.

Local Assessments to Drain Land.—No vote of the people is required on the proposition of apportioning the burden of draining lands by local assessments. *Sanderlin v. Luken*, 152 N. C. 738, 68 S. E. 225.

Appropriation of Taxes by Chamber of Commerce.—This section refers to the county, city, or town as a State governmental agency, and does not authorize an appropriation of a certain per cent of taxes levied upon their taxpayers for the use or disposition of a chamber of commerce of a city, without the approval of the qualified voters therein. *Ketchie v. Hedrick*, 186 N. C. 392, 119 S. E. 767.

Where a city sells land used for recreation purposes and turns the proceeds of the sale over to its park and recreation commission the action is not a pleading of its faith and credit so as to involve the application of this section. *Hall v. Redd*, 196 N. C. 622, 146 S. E. 583.

Applied in *Sessions v. Columbus County*, 214 N. C. 634, 200 S. E. 418, treated under art. V, § 4.

Cited in *Lane v. Stanley*, 65 N. C. 153; *People v. Canada*, 73 N. C. 198, 221; *Parker v. Board*, 104 N. C. 166, 168, 10 S. E. 137; *Goldsboro Graded School v. Broadhurst*, 109 N. C. 228, 13 S. E. 781; *Railroad Co. v. Commissioners*, 116 N. C. 563, 21 S. E. 205; *McCless v. Meekins*, 117 N. C. 34, 35, 23 S. E. 99; *Vaughn v. Board*, 117 N. C. 429, 432, 23 S. E. 354; *Commissioners v. Payne*, 123 N. C. 432, 31 S. E. 711; *Slocum v. Fayetteville*, 125 N. C. 362, 34 S. E. 436; *State v. Irvin*, 126 N. C. 989, 992, 35 S. E. 430; *Rodman-Heath Cotton Mills v. Waxhaw*, 130 N. C. 293, 295, 41 S. E. 488; *Commissioners v. MacDonald*, 148 N. C. 125, 61 S. E. 690; *Com-*

missioners v. Road Comm'rs, 165 N. C. 632, 81 S. E. 1001; *Moran v. Board*, 168 N. C. 289, 84 S. E. 402; *Bickett v. State Tax Comm.*, 177 N. C. 433, 99 S. E. 415; *Waters v. Board*, 186 N. C. 719, 120 S. E. 450; *Yarbrough v. Park Commission*, 196 N. C. 284, 293, 145 S. E. 563; *Castevens v. Stanly County*, 211 N. C. 642, 191 S. E. 739; *Weaverville v. Hobbs*, 212 N. C. 684, 194 S. E. 860. See also, *McGuinn v. High Point*, 219 N. C. 56, 13 S. E. (2d) 48.

III. NECESSARY EXPENSES.

A. General Considerations and Applications.

In General.—This section does not require that a debt, to be contracted for necessary expenses by a city or town, shall be submitted to a vote of the qualified voters therein. *Tucker v. Raleigh*, 75 N. C. 267; *Jones v. New Bern*, 152 N. C. 64, 67 S. E. 173.

Under this section as construed with Art. V, § 6 a municipality may issue valid bonds for its necessary expenses without the approval of its voters within the constitutional limitation in the absence of statutory authority, and with statutory authority and the approval of its voters it may issue bonds in excess of this limitation. *Burleson v. Spruce Pine*, 200 N. C. 30, 156 S. E. 241.

For purposes other than necessary expenses, whether special or not, taxes may not be levied by a county either within or in excess of the limitation fixed by our Constitution, Art. V, § 6, except by a vote of the people under special legislative authority. *Glenn v. Board of County Com'r*, 201 N. C. 233, 159 S. E. 439; *Sessions v. Columbus County*, 214 N. C. 634, 200 S. E. 418.

Legislative Discretion.—It is within the discretion of the Legislature to authorize a county to issue bonds for necessary expenses, either with or without the approval of its voters, or to require only the approval by a majority of the votes cast at a special election authorized for the purpose, and the approval by the majority of the qualified voters is not required for their validity. *Davis v. Lenoir County*, 178 N. C. 668, 101 S. E. 260.

Same—Presumption.—Under legislative authority a county may issue bonds to refund its existing floating debt for necessary county expenses, in excess of the 15 cents limitation upon the \$100 valuation of its taxable property according to Art. V, sec. 6, when coming within the provisions of the municipal Finance Act, ch. 81, sec. 8, Public Laws of 1927, and where the record on appeal states that the issuance of the bonds is for necessary county purposes, and for taking care of its floating indebtedness, it will be assumed on appeal that the excess over the 15 cents valuation was for necessary county expenses, coming within the provision of this section, not requiring the question of the issuance of the bonds to be submitted to the voters of the county. *Board v. Assell*, 194 N. C. 412, 140 S. E. 34.

Legislative Declaration and Municipal Commissioners Finding That Tax Is for Necessary Expense Is Not Controlling.—The declaration of the General Assembly in a statute authorizing a municipality to levy a tax and the finding of the municipal commissioners that the tax is for a necessary municipal expense within the meaning of this section, is not controlling, but, when made in good faith, such declaration and finding are persuasive, and are entitled to serious consideration by the courts in determining whether the purpose for which the tax is proposed to be levied is for a necessary municipal expense within the meaning of term as used in the Constitution. *Martin v. Raleigh*, 208 N. C. 369, 180 S. E. 786.

What Are "Necessary Expenses."—The term, "necessary expenses" is not confined to expenses incurred for purposes absolutely necessary to the very life and existence of a municipality, but it has a more comprehensive meaning. *Storm v. Wrightsville Beach*, 189 N. C. 679, 128 S. E. 17, 18.

The county commissioners are the sole judges of what are "necessary expenses." *Evans v. Commissioners*, 87 N. C. 154; *Williams v. Commissioners*, 119 N. C. 520, 26 S. E. 150.

Bonds issued for the following purposes have been held to have been issued for necessary expenses: For the payment of interest on bonds already issued for necessary purposes (*Wilson v. Board*, 74 N. C. 748); the building and maintenance of public roads (*Lassiter v. Board*, 188 N. C. 379, 124 S. E. 738; *Ellis v. Greene*, 191 N. C. 761, 133 S. E. 395; *Woodall v. Western Wake Highway Commission*, 176 N. C. 377, 97 S. E. 226; *Hill v. Board*, 190 N. C. 123, 129 S. E. 154); Paving streets (*Brown v. Hillsboro*, 185 N. C. 368, 117 S. E. 41; *Hendersonville v. Jordan*, 150 N. C. 35, 63 S. E. 167); lighting streets (*Ellison v. Williamston*, 152 N. C. 147, 67 S. E. 255) to the extent of furnishing a plant for that purpose. (*Fawcett v. Mt. Avy*, 134 N. C. 125, 45 S. E. 1029; *Swindell v. Belhaven*, 173 N. C. 1, 91 S. E. 369); furnishing sidewalks (*Storm v. Wrightsville Beach*, 189 N. C. 679, 128 S. E. 17, 18); building bridges (*Herring v. Dixon*, 122 N. C. 420, 29 S. E. 368; *Norfolk South-*

ern R. Co. v. Reid, 187 N. C. 320, 121 S. E. 534) even though the bridge is interstate (Emery v. Commissioners, 181 N. C. 420, 107 S. E. 443); Brockenhough v. Board, 134 N. C. 1, 46 S. E. 28; Greensboro v. Scott, 138 N. C. 181, 50 S. E. 589; Underwood v. Asheboro, 152 N. C. 641, 68 S. E. 147; Reed v. Howerton Engineering Co., 188 N. C. 39, 123 S. E. 479; erection of a courthouse (Halcumb v. Commissioners, 89 N. C. 346); erection of a municipal building in a large city (Hightower v. Raleigh, 150 N. C. 569, 65 S. E. 279); and the building of county homes (Norfolk Southern R. Co. v. Reid, 187 N. C. 320, 121 S. E. 534). See Board of Financial Control v. Henderson County, 208 N. C. 569, 181 S. E. 636, 101 A. L. R. 783, as to municipal electric plant being a necessary expense.

Bonds for the construction of a municipal electric power plant are for a public purpose and a necessary municipal expense, and may be issued up to the constitutional limitation without a vote of its electors and without legislative authority, and in excess of the constitutional limitation by legislative authority without a vote of the people. Williamson v. High Point, 213 N. C. 96, 195 S. E. 90.

Other projects which have sustained the issuance of bonds as necessary expenses, tho of less frequent occurrence than those just enumerated, are: For the installation of an electric fire-alarm system (Kinston v. Security Trust Co., 169 N. C. 207, 85 S. E. 399); purchase of an incinerator for the destruction of garbage (Storm v. Wrightsville Beach, 189 N. C. 679, 128 S. E. 17, 19); erection of an abattoir (Moore v. Greensboro, 191 N. C. 592, 132 S. E. 565); and of jetties (Storm v. Wrightsville, supra.)

The establishment of a wharf is not a necessary expense, Henderson v. Wilmington, 191 N. C. 269, 132 S. E. 25. Nor is the erection a maintenance of a dispensary such an expense. Garsed v. Greensboro, 126 N. C. 159, 355 S. E. 254.

The building of a county fence by a county having the free-range law, between it and an adjoining county having the stock law, is not a necessary expense within the meaning of this section. Keith v. Lockhart, 171 N. C. 451, 88 S. E. 640.

But laying an assessment for building a stock-law fence in territory where the law is effective is not taxation requiring its submission to a vote of the people of the district. Tripp v. Commissioners, 158 N. C. 180, 73 S. E. 896; Shuford v. Commissioners, 86 N. C. 552.

It has long been decided that water and sewer are "necessary expenses," within the meaning of section 7, Article VII, Constitution of North Carolina, and "a vote of the majority of the qualified voters" is not necessary. Storm v. Wrightsville Beach, 189 N. C. 679, 128 S. E. 17. So, also, are roads. See Davis v. Lenoir, 178 N. C. 668, 101 S. E. 260; Drysdale v. Prudden, 195 N. C. 722, 143 S. E. 530. See also Starmount Co. v. Hamilton Lakes, 205 N. C. 514, 171 S. E. 909; Lamb v. Randleman, 206 N. C. 837, 175 S. E. 293; Burt v. Biscoe, 209 N. C. 70, 183 S. E. 1.

The building of a drilling tower to train the city's firemen is not a necessary expense within the meaning of this section. Wilson v. Charlotte, 206 N. C. 856, 175 S. E. 306.

Borrowing money to pay judgments for salaries owing to the employees of a city school in anticipation of collection of taxes levied thereon is not in contravention of this section. Hammond v. Charlotte, 206 N. C. 604, 175 S. E. 148.

The sale of refunding bonds under § 153-77, subsection (j), is a necessary expense. Morrow v. Durham, 210 N. C. 564, 187 S. E. 752. So also is the issuance of bonds by a county to refinance highway bonds issued by its townships. Thomson v. Harnett County, 209 N. C. 662, 184 S. E. 490. The expense of providing for the medical treatment and hospital care of the indigent sick and afflicted poor under § 160-229 is a necessary expense of a city. Martin v. Raleigh, 208 N. C. 369, 377, 180 S. E. 786. See also Martin v. Board of Com'rs, 208 N. C. 354, 180 S. E. 777.

The sale of intoxicating liquor is not a "necessary expense," nor is it a public purpose or undertaking. Newman v. Watkins, 208 N. C. 675, 685, 182 S. E. 453.

While there is no contention that the construction, equipment, and maintenance of an airport and landing field is a necessary municipal expense within the meaning of this section, yet it may not be improper to say that man's constantly advancing progress in the conquest of the air as a medium for the transportation of commerce and for public and private use indicates the practical advantage and possible future necessity of adequate landing facilities to the same extent that paved streets and roads are now regarded for the purposes of communication and transportation on land. Goswick v. Durham, 211 N. C. 687, 689, 191 S. E. 728, citing Hargrave v. Board of Com'rs, 168 N. C. 626, 84 S. E. 1044; Dysart v. St. Louis, 321 Mo. 514, 11 S. W. (2d) 1045.

What May Be Included in Tax for Expense.—A municipal

platform is not a public market and such platform erected for the purpose of obtaining revenue for the town by the imposition of a fee for the sale of cotton therefrom is not a necessary municipal expense and the town may not issue its notes for the purchase price of such platform without a vote of its electors. Walker v. Faison, 202 N. C. 694, 163 S. E. 875.

Where a vote of the qualified electors is not necessary to the validity of the bonds proposed to be issued if an election should be called and the tax approved by the qualified electors of the town, such tax would be valid regardless whether it was levied for a necessary expense. Webb v. Port Comm., 205 N. C. 663, 172 S. E. 377.

Province of Court.—It has become the accepted meaning of this section that it is the province of the courts to decide whether a particular municipal expense falls within the category of necessary expenses, leaving to the municipal authorities the power to determine whether a proposed expense within that category is necessary in a given case. Starmount Co. v. Ohio Sav. Bank, etc., Co., 55 F. (2d) 649, 653.

The courts determine whether a given project is a necessary expense of a municipality, but the governing authorities of the municipality determine in their discretion whether such given project is necessary or needed in the designated locality. Starmount Co. v. Hamilton Lakes, 205 N. C. 514, 520, 171 S. E. 909; Nantahala Power, etc., Co. v. Clay County, 213 N. C. 698, 197 S. E. 603.

Expansion of City's Power Lines.—Where an incorporated city under authority of statute furnishes through its own transmission lines electricity for its citizens for hire within a circumscribed territory adjoining its limits, and the expenses incident thereto are paid out of its surplus profits, the proposition is not one that requires the approval of the voters as it does not fall within the provisions of this section, nor is it in violation of the Fourteenth Amendment to the Federal Constitution. Holmes v. Fayetteville, 197 N. C. 740, 741, 150 S. E. 624.

Bonds issued by a county for the construction and maintenance of its highways are for a necessary county expense within the intent and meaning of this section, and may be validly authorized by general or special statute and issued by the county thereunder without submitting the question of their issuance to the approval of the voters of the county. Barbour v. Wake County, 197 N. C. 314, 148 S. E. 470.

Operating and Improving Airport.—Since a municipality may not levy a tax directly for the purpose of operating, maintaining and improving an airport without a vote of the people, it may not levy a tax for a contingent fund and thereafter in the same year appropriate money from the contingent fund thus created for the purpose of operating, maintaining, and improving the airport, since it may not do indirectly what it is without power to do directly. Sing v. Charlotte, 213 N. C. 60, 195 S. E. 271.

The construction of an annex to a county hospital, to be used principally for the care of the indigent sick of the county, is not a necessary expense of the county within the meaning of this section. Palmer v. Haywood County, 212 N. C. 284, 193 S. E. 668, 113 A. L. R. 1195.

B. School Taxation.

Editor's Note.—It has been held in several cases that the erection of school buildings is not a necessary expense within the purview of this section, and therefore a county cannot be brought under this indebtedness without the approval of the qualified voters. Jones v. Board, 185 N. C. 303, 117 S. E. 37; Davis v. Board, 186 N. C. 227, 119 S. E. 372. However these cases did not involve an indebtedness incurred by legislative authority in carrying on the public school system of the state and the necessary maintenance of a six month's school term, as required by section 3 of art. 9 of the Constitution, and it has been held that the question of taxation for this purpose need not be submitted to the voters. Tate v. Board, 192 N. C. 516, 135 S. E. 336; Hartsfield v. Craven County, 194 N. C. 358, 139 S. E. 638.

The better reason advanced for this distinction is that each part of the Constitution is of equal weight and merit and this section should be construed so as not to nullify any other portion of the Constitution. In Lacy v. Fidelity Bank, 183 N. C. 373, 111 S. E. 612, the court said: "The restrictions contained in this section . . . must be understood to refer to the debts and taxes in furtherance of local measures and do not extend to a state-wide measure . . . undertaken in obedience to a separate provision of the Constitution, and in which the counties are . . . expressly recognized as the governmental units through which the general purpose may be made effective." See annotations under section 115-99.

As to estoppel of taxpayers to deny the invalidity of a special school tax, see Carr v. Little, 188 N. C. 100, 123 S. E. 625.

The limitations of this section are not applicable to bonds or notes issued by a county, as an administrative agency of the State, under authority conferred by the County Finance Act (§ 153-77), for the purpose of erecting schoolhouses, and equipping same, or purchasing land necessary for school purposes. *Hall v. Commissioners*, 194 N. C. 768, 770, 140 S. E. 739.

This section applies to local matters relating to the affairs of the county separately considered, and not to a State-wide system of education, in which the counties are acting as governmental agencies for the carrying out of the entire scheme, made mandatory by the Constitution, Art. IX, secs. 1, 2, 3, requiring the maintenance of a six month term of public schools. *Owens v. Wake County*, 195 N. C. 132, 141 S. E. 546.

But the power is not giving the county to issue bonds for the erection and purchase of schoolhouses without a popular vote except where such schoolhouses and necessary land therefor are required for the establishment and maintenance of a six months school term as provided by the Constitution. *Lovelace v. Pratt*, 187 N. C. 686, 122 S. E. 661; *Frazier v. Commissioners*, 194 N. C. 49, 138 S. E. 433; *Owens v. Wake County*, 195 N. C. 132, 141 S. E. 546; *Hall v. Commissioners*, 195 N. C. 367, 369, 142 S. E. 315.

The findings of fact disclosed that defendant county had not reduced its outstanding indebtedness during the prior fiscal year, and that it proposed to borrow money and issue its bonds to erect a schoolhouse necessary for the maintenance of the constitutional school term in the county, without submitting the question of borrowing the money to the qualified voters of the county. It was held that the limitation prescribed by art. V, § 4, as amended, is in addition to other constitutional limitations relating to taxation, and the county may not borrow money, even for a necessary expense, without submitting the question to a vote, when its outstanding indebtedness has not been reduced during the prior fiscal year, and plaintiff taxpayer is entitled to injunctive relief restraining the issuance of the proposed bonds. *Hallyburton v. Board of Education*, 213 N. C. 9, 195 S. E. 21.

Where by special act the Legislature grants a charter to an existing city, enlarging the city limits to take in territory within one or more nonlocal tax districts, it is not necessary, nor contrary to this section, that a vote of the people within the added territory be had either upon the question of annexing such territory or upon the question of levying school taxes therein, the object of the charter being to provide for the government, welfare and improvement of the city, and not primarily for the mere maintenance of schools. *Hailey v. Winston-Salem*, 196 N. C. 17, 144 S. E. 377.

Premiums for insurance of its public school buildings is a necessary public expense of a county. *Fuller v. Lockhart*, 209 N. C. 61, 182 S. E. 733.

Liability for bonds for unnecessary school buildings is not a necessary expense. *Greensboro v. Guilford County*, 209 N. C. 655, 661, 184 S. E. 473.

§ 8. No money drawn except by law.—No money shall be drawn from any county or township treasury, except by authority of law. (Const. 1868.)

Cited in *Faison v. Commissioners*, 171 N. C. 411, 88 S. E. 761; *Winslow v. Commissioners*, 64 N. C. 218; *Reed v. Farmer*, 211 N. C. 249, 189 S. E. 882; *Wilson v. Farmer*, 211 N. C. 254, 189 S. E. 885.

§ 9. When officers enter on duty.—The county officers first elected under the provisions of this article shall enter upon their duties ten days after the approval of this Constitution by the Congress of the United States.) (Const. 1868.)

Editor's Note.—Section 9 of Article VII of the original Constitution of 1868 read as follows: "All taxes levied by any county, city, town, or township shall be uniform and ad valorem upon all property in the same, except property exempted by this Constitution." The original Section 9 was repealed pursuant to Chapter 248 of the Public Laws of 1935 which also proposed amendments, subsequently adopted, to Article V, Section 3, and Article V, Section 4. With the repeal of the original Section 9, it was provided that Sections 10 through 14 of Article VII be appropriately renumbered. Thus, the present Section 9 of this Article was originally Section 10 of Article VII.

§ 10. Governor to appoint justices.—The Governor shall appoint a sufficient number of justices

of the peace in each county, who shall hold their places until sections four, five, and six of this article shall have been carried into effect. (Const. 1868; 1935, c. 248.)

See note under preceding section. And see sections 7-112 et seq.

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

Cited in *Nichols v. McKee*, 68 N. C. 429, 433.

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

See note under § 9 of this article.

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

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

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

See *Southern R. Co. v. Board*, 148 N. C. 220, 232, 61 S. E. 690; *Brickwell v. Commissioners*, 81 N. C. 240; *Weith v. Wilmington*, 68 N. C. 24; *Poindexter v. Davis*, 67 N. C. 112; *Leake v. Commissioners*, 64 N. C. 133; *Logan v. Plummer*, 70 N. C. 388, 392; *Davis v. Board*, 72 N. C. 441; *Wingate v. Parker*, 136 N. C. 369, 48 S. E. 774; *Jones v. Commissioners*, 137 N. C. 579, 600, 50 S. E. 291; *Smith v. School Trustees*, 141 N. C. 143, 157, 53 S. E. 524; *Board v. Webb*, 155 N. C. 379, 71 S. E. 520.

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

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

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

And the General Assembly may, at its discretion, abolish municipal as well as other corporations. *Ward v. Elizabeth City*, 121 N. C. 1, 27 S. E. 993.

Control of Municipal Contract.—The power conferred by its charter upon a city to provide water and lights, and to contract for same, provide for cleaning and repairing the streets, regulate the market, take proper means to prevent and extinguish fires, is subject to the police power of the state, with respect to rates to be charged under such contracts as the city may make under its charter with a public service corporation. *Corporation Comm. v. Henderson Water Co.*, 190 N. C. 70, 128 S. E. 465.

Dividing County into Three Districts.—Chapter 526, Public-Local Laws 1935, providing that Cherokee County be divided into three districts and a commissioner elected from each district falls well within the full power given the General Assembly by this section. *Watkins v. Johnson*, 210 N. C. 449, 451, 187 S. E. 584.

See §§ 7-112 et seq. of the code.

Act Need Not Be General.—It is not required that the power conferred in this section should be general in its operation, or that it should in terms formally abrogate any given section therein, and substitute another in its stead, for the

act making such change, local in its operation, must be given effect under its provisions, if otherwise valid. *Tyrrell County v. Holloway*, 182 N. C. 64, 108 S. E. 337; *Smith v. School Trustees*, 141 N. C. 143, 53 S. E. 524.

Charters and Ordinances Entrusted to Legislature.—Under this section all charters, ordinances and provisions relating to municipal corporations are entrusted to the discretion of the Legislature. *Harriss v. Wright*, 121 N. C. 172, 28 S. E. 269.

Creation of Highway Commission.—The Legislature has authority under this section to create a highway commission for a county, and give it control over its bridges and highways, their maintenance and supervision, etc., or subdivide this agency into several parts over defined territory. *Ellis v. Greene*, 191 N. C. 761, 133 S. E. 395; *Commissions v. Road Comm'rs*, 165 N. C. 632, 81 S. E. 1001.

The powers given to county commissioners over public highways, may be taken away from them and conferred by statute upon other political agencies of the State. *Day v. Commissioners*, 191 N. C. 780, 133 S. E. 164.

Appointing City Alderman.—The delegation by the legislature to the Governor of the State of the power of appointing a portion of the alderman of a city is within the scope of the power entrusted to the discretion of the Legislature by this section. *Harriss v. Wright*, 121 N. C. 172, 28 S. E. 269.

Compelling County to Issue Bonds.—The Legislature has power to pass an act compelling a county to issue bonds to fund its existing indebtedness incurred for necessary expenses. *Jones v. Commissioners*, 137 N. C. 579, 50 S. E. 291.

Establishment of School District.—The establishing a school district relates to public municipal corporations, which may be done by special legislative enactment under this section. *Dickson v. Brewer*, 180 N. C. 403, 104 S. E. 887.

Creating County Board of Audit and Finance.—The Legislature has constitutional power to provide a board of audit and finance for a particular county and to direct that payment of an expert accountant authorized thereunder be made by the county treasurer as a charge against the county's public funds, upon an order made by said board in a certain prescribed manner. *Southern Audit Co. v. McKensie*, 147 N. C. 461, 61 S. E. 283.

Quoted in Board of Trustees v. Webb, 155 N. C. 379, 71 S. E. 520; *Penny v. Salmon*, 217 N. C. 276, 7 S. E. (2d) 559.

Cited in Rhodes v. Hampton, 101 N. C. 629, 632, 8 S. E. 219; *Board v. Commissioners*, 111 N. C. 578, 586, 16 S. E. 621. Dissenting opinion of J. Clark in *Gattis v. Griffin*, 125 N. C. 332, 34 S. E. 429; *In re Spease Ferry*, 138 N. C. 219, 220, 50 S. E. 625; *Crocker v. Moore*, 140 N. C. 429, 433, 53 S. E. 229; *Bunch v. Commissioners*, 159 N. C. 335, 74 S. E. 1048; *Mann v. Allen*, 171 N. C. 219, 88 S. E. 235; *Township Road Comm. v. Board*, 178 N. C. 61, 100 S. E. 122.

ARTICLE VIII

Corporations Other Than Municipal

§ 1. Corporations under general laws.—No corporation shall be created nor shall its charter be extended, altered, or amended by special act, except corporations for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the State; but the General Assembly shall provide by general laws for the chartering and organization of all corporations and for amending, extending, and forfeiture of all charters, except those above permitted by special act. All such general laws and special acts may be altered from time to time or repealed; and the General Assembly may at any time by special act repeal the charter of any corporation. (Const. 1868; 1915, c. 99.)

Editor's Note.—Sec. 1 in the Constitution of 1868 was as follows: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the object of corporations cannot be attained under general laws. All general laws and special acts passed, pursuant to this section, may be altered from time to time or repealed." This section was stricken out and the present Sec. 1 substituted therefor pursuant to ch. 99, Public Laws of 1915, ratified by the people in November, 1916, and effective January 10, 1917.

In General.—Except for purposes of absolute repeal which is retained throughout as essential to the proper exercise and enforcement of the police powers of Government, and except, also, in the instances expressly designated in this

section, this section withdraws from the General Assembly any and all power by special enactments to create, extend, alter, or amend the charter of all private business corporations, and all quasi-public corporations, such as railroads, incorporated turnpike or toll roads, bridge companies, and the like, and also those corporations which while having at times and to some extent powers appertaining to government are in fact and in truth business corporations for the purpose principally of promoting private interests. *Watts v. Lenoir, etc., Turnpike Co.*, 181 N. C. 129, 135, 106 S. E. 497.

The title of this section, which must be read into the text to give the intended classification significance, refers to "corporations other than municipal," thus classifying all public corporations as municipal. *Wells v. Housing Authority*, 213 N. C. 744, 750, 197 S. E. 693.

Before the constitutional prohibition of this section, against creating corporations or amending their charters by special act, the General Assembly had granted numerous charters to utility companies giving them authority to set their own rates. However, such charter authority does not preclude rate regulation under the power of the state. Contracts between utilities and consumers setting the price of current are also subject to rate regulation. See 12 N. C. Law Rev., 296.

Purpose of Section.—"The purpose and effect of this section is to enable the state to control, modify or repeal corporate powers, thus avoiding the effect of the doctrine announced in *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518." *Connor & Cheshire Const. of N. C. (anno.)* pages 339, 340, cited and approved in *Elizabeth City Water, etc., Co. v. Elizabeth City*, 188 N. C. 278, 124 S. E. 611. See also, *Railroad Co. v. Dortch*, 124 N. C. 663, 673, 33 S. E. 1014.

Applicable to Private Corporation.—The prohibition contained in this section refers only to private or business corporation, and does not refer to public or quasi-public corporation acting as governmental agencies. *Dickson v. Brewer*, 180 N. C. 403, 104 S. E. 887; *Mills v. Com'rs*, 175 N. C. 215, 95 S. E. 481. See also *Webb v. Port Comm.*, 205 N. C. 663, 172 S. E. 377.

Under this interpretation, the section should be construed in connection with sec. 2, dealing with "dues from corporations;" sec. 3, defining corporations as including "associations and joint stock companies," and it should be noted that if sec. 4 (properly belonging in Art. VII) included corporations as governmental agencies, it would be meaningless. *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187.

The provisions of this section, prohibiting the Legislature from creating a corporation or extending, altering or amending its charter by special act has been held to apply only to private or business corporations; and where the Legislature by special act amending the charter of a city authorizes it to purchase electricity and resell it to its inhabitants and those within a three-mile zone of the city, the power to sell to such individuals and corporations does not detract from the public service or destroy the public character of the municipality, and where the same power is given the city by general statute also, the exercise of the power thus conferred will not be enjoined. *Holmes v. Fayetteville*, 197 N. C. 740, 741, 150 S. E. 624.

A commission created as an agency of the State to perform the governmental function of providing port facilities for the commerce of the State in the public interest, and not for private gain, is a public corporation, and the Legislature is not prohibited from creating such corporation by this section, nor is the act creating it a special act within the meaning of this section, and the Commission may lawfully exercise all powers conferred upon it in order to perform its duties as prescribed by the act. *Webb v. Port Comm.*, 205 N. C. 663, 172 S. E. 377.

Power to Extinguish Corporations.—The General Assembly may, at its discretion, abolish municipal as well as other corporations, because they are all alike creatures of its will, and exist only at its pleasure. *Ward v. Elizabeth City*, 121 N. C. 1, 3, 27 S. E. 993.

Right of Alteration a Part of Every Charter.—The provisions of this section, affecting the organization of corporations, and specifically providing that all "such laws or special acts may be altered from time to time or repealed," etc., enters into every charter taken out or corporation formed thereunder, and any such corporation may not complain when a statutory repeal or amendment has been made, on the ground that it works a hardship on it or impairs the value of its property, unless vested rights have been prior acquired by it which have been impaired or destroyed by the repealing or amendatory act complained of. *Elizabeth City Water, etc., Co. v. Elizabeth City*, 188 N. C. 278, 124 S. E. 611; *State v. Cantwell*, 142 N. C. 604, 55 S. E. 820; *Power Co. v. Whitney Co.*, 150 N. C. 31, 63 S. E. 188.

"Special Act" Only Prohibited.—This section only prohibits the enactment of a special act and an act which relates

to all municipal corporations of a county, including cities, town, townships, and school districts is not a special act within its meaning and intent. *Kornegay v. Goldsboro*, 180 N. C. 441, 446, 105 S. E. 187.

Effect of Dissolution upon Corporate Property.—Upon the dissolution or extinction of a corporation under this section for any cause, real property conveyed to it in fee does not revert to the original grantors or their heirs, and its personal property does not escheat to the state; and this is so whether or not the duration of the corporation was limited by its charter or general statute. *Wilson v. Leary*, 120 N. C. 90, 26 S. E. 630, overruling *Fox v. Horah*, 36 N. C. 358.

Applied in *Coleman v. Sou. R. Co.*, 138 N. C. 351, 50 S. E. 690.

Cited in the dissenting opinion of Brandeis, J., in *Liggett Co. v. Lee*, 288 U. S. 517, 550, 53 S. Ct. 481, 77 L. Ed. 929, 25 A. L. R. 699; *Carolina Coal, etc., Co. v. Southern R. Co.*, 144 N. C. 732, 57 S. E. 444.

§ 2. Debts of corporations, how secured.—Dues from corporations shall be secured by such individual liabilities of the corporations, and other means, as may be prescribed by law. (Const. 1868.)

§ 3. What corporations shall include.—The term "Corporation," as used in this article, shall be construed to include all associations and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons. (Const. 1868; 1915, c. 99.)

Where Corporate Powers Extinguished.—Where the Legislature deprived the board of township trustees of its existence as a municipal corporation, the right to sue and be sued are likewise extinguished, and hence it cannot thereafter be a party to a suit. *Wallace v. Trustees*, 84 N. C. 164. As to power to extinguish corporations, see note of *Ward v. Elizabeth City*, 121 N. C. 1, 3, 27 S. E. 993 under section 1.

Stated in *Barker v. Southern R. Co.*, 137 N. C. 214, 223, 49 S. E. 115.

§ 4. Legislature to provide for organizing cities, towns, etc.—It shall be the duty of the Legislature to provide by general laws for the organization of cities, towns, and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessment and in contracting debts by such municipal corporations. (Const. 1868; 1915, c. 99.)

Editor's Note.—Pursuant to Chapter 99, Public Laws of 1915, Section 4 of the original Constitution of 1868 was amended to read as the present Section 4 by adding "by general laws" after "to provide" and by changing the word "assessments" to "assessment." This section, in substance, constitutes a limitation on the provision of Art. VII, section 7 and must be construed therewith. One court has said that this section properly belongs in Art. VII. *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187. The searcher is therefore referred to the note placed under that article.

In General.—The court in *Pullen v. Raleigh*, 68 N. C. 451, 454, said: "This (section) seems to give a general control to the Legislature on the subject of municipal corporations, and the Legislature may, under it, restrict the power of taxation by corporations as it may think proper, due regard being had to other parts of the constitution."

Although a municipality may ordinarily levy a tax, as a necessary expense in the cases mentioned in Art. 7, section 7, without submitting the question to the qualified voter, it may not do so where the Legislature by statute requires the consent of such voter. *Ellison v. Williamston*, 152 N. C. 147, 67 S. E. 255; *Robinson v. Goldsboro*, 135 N. C. 382, 47 S. E. 462; *Wadsworth v. Concord*, 133 N. C. 587, 45 S. E. 948. It is for the Legislature to decide when it is necessary to pass a restrictive statute. *State v. Irvin*, 126 N. C. 989, 994, 35 S. E. 430. As to specific cases wherein it is necessary to secure the consent of the voters, see Art. 7, section 7 and note thereto.

The provisions of this section relate to municipal corporations as originally formed under legislative enactment, and is more restrictive in limiting the municipality in contracting

debts or pledging their credit than Article VII, section 7, which requires an election by its voters to do so, when not for necessary expenses. *Waters v. Comrs.*, 186 N. C. 719, 120 S. E. 450.

The legislature may restrict or limit the power of incorporated towns or cities to tax or contract debts for purposes which fall within the class of necessary expenses, for they are but the state's instrumentalities for the administration of local government; and when this restriction is thus placed upon them, or it is required of them to submit the question of a bond issue to popular vote, and an issue of bonds is made without compliance therewith, the issue is invalid. *Murphy v. Webb & Co.*, 156 N. C. 402, 72 S. E. 460, and cases cited therein.

The setting up of a municipal corporation by the legislature at any place, under this section, is left to legislative discretion. *Starmount Co. v. Ohio Sav. Bank, etc., Co.*, 55 F. (2d) 649, 652.

Counties, cities and towns are governmental agencies of the state, created by the legislature for administrative purposes, and the legislature retains control and supervision over both classes of municipal corporations, limited only by this section. *Saluda v. Polk County*, 207 N. C. 180, 176 S. E. 298.

Not Applicable to Special Assessments.—It seems that this section does not apply to special assessments for local municipal improvements, *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521. It is said by the court in this case: "Even if it did apply, an act of the Legislature authorizing an assessment is not void because it does not prescribe all of the particulars relating to such assessment. It is sufficient if it authorizes a fair and equitable method of ascertaining the peculiar benefits conferred upon the property, and apportioning the costs between the abutting owners."

School District Not Included.—A school district is not within the purview of the provisions of this section, it being not a city, town or incorporated village. *Felnet v. Commissioners*, 186 N. C. 251, 254, 119 S. E. 353; *Waters v. Comrs.*, 186 N. C. 719, 120 S. E. 450.

Alteration of Charter Not Forbidden.—This section does not forbid altering or amending charter of cities, towns and incorporated villages or conferring upon municipal corporations additional powers or restricting the powers theretofore vested in them. *Holton v. Mocksville*, 189 N. C. 144, 149, 126 S. E. 326. See *Deese v. Lumberton*, 211 N. C. 31, 188 S. E. 857.

Control of Finances.—The legislature has plenary power to control the finances of the municipal corporations which it creates, and to direct how their revenues shall be applied. Hence it can direct that revenues derived from municipal enterprises shall be applied on outstanding bonds as well as upon bonds to be issued thereafter. *George v. Asheville*, 80 F. (2d) 50, 55, 103 A. L. R. 568.

Applied in *Hutton v. Webb*, 124 N. C. 749, 33 S. E. 169; *Brockenbrough v. Commissioners*, 134 N. C. 1, 17, 46 S. E. 28.

Cited in *Holmes v. Fayetteville*, 197 N. C. 740, 746, 150 S. E. 624; *Starmount Co. v. Ohio Sav. Bank, etc., Co.*, 55 F. (2d) 649; *Saluda v. Polk County*, 207 N. C. 180, 186, 176 S. E. 298; *Webb v. Port Comm.*, 205 N. C. 663, 679, 172 S. E. 377; *Williamson v. High Point*, 213 N. C. 96, 195 S. E. 90; *Bradshaw v. High Point*, 151 N. C. 517, 66 S. E. 601; *Underwood v. Ashboro*, 152 N. C. 641, 68 S. E. 147; *Winston v. Wachovia Bank, etc., Co.*, 158 N. C. 512, 74 S. E. 611.

ARTICLE IX

Education

§ 1. Education shall be encouraged.—Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. (Const. 1868.)

Editor's Note.—This section constitutes the corner-stone in the foundation on which rest the provisions of the following sections, the courts in practically all the cases referring to the provision hereof and using them as a supplemental basis for the decisions primarily falling under one or more of the subsequent sections. Reference, therefore, is here made to the notes placed under the sections following in this article.

This and the following sections are mandatory in their provisions. *Fuller v. Lockhart*, 209 N. C. 61, 182 N. C. 733; *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 213, 189 S. E. 873. See also, *Elliott v. State Board of Equalization*, 203 N. C. 749, 166 S. E. 918.

Quoted in *Mecklenburg County v. Piedmont Fire Ins. Co.*, 210 N. C. 171, 185 S. E. 654; *Collie v. Franklin County Com'rs*, 145 N. C. 170, 59 S. E. 44.

Cited in *Julian v. Ward*, 198 N. C. 480, 482, 152 S. E. 401;

Reid v. City Coach Co., 215 N. C. 469, 2 S. E. (2d) 578, 123 A. L. R. 140; Fletcher v. Collins, 218 N. C. 1, 9 S. E. (2d) 606.

§ 2. General Assembly shall provide for schools; separation of the races.—The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race. (Const. 1868; Convention 1875.)

Cross Reference.—See Art. IX, sec. 5.

Editor's Note.—The last sentence was added by the Convention of 1875.

In General.—It was said by the court in *Lane v. Stanly*, 65 N. C. 153, 157: "It will be seen that the Constitution establishes the public school system, and the General Assembly provides for it, by its own taxing power, and by the taxing power of the counties, and the State Board of Education, by the aid of school committees, manage it. It will be observed that it is to be a 'system'; it is to be 'general', and it is to be 'uniform'. It is not to be subject to the caprices of localities, but every locality, yea, every child, is to have the same advantage and be subject to the same rules and regulations."

The requirement of this section of the Constitution, that our public-school system shall be uniform by legislative authority, relates to the uniformity of the "system," and not to the uniformity of the class or kind of the "schools;" and thus qualifying the word "system," it is sufficiently complied with where, by statute or authorized regulation of the public-school authorities, provision is made for establishment of schools of like kind throughout all sections of the State and available to all of the school population of the territories contributing to their support. *Board v. County Com'rs*, 174 N. C. 469, 93 S. E. 1001.

This and the following section of the Constitution require that at least one elementary school be maintained in each district, but the constitutional mandate does not extend to high schools. *Elliott v. Board of Equalization*, 203 N. C. 749, 166 S. E. 918.

Duty on Legislature.—It is the province of the General Assembly, and not of the State Board of Education, to establish a uniform system of public schools. *Board v. State Board*, 114 N. C. 313, 19 S. E. 277. See also *Bridges v. Charlotte*, 221 N. C. 472, 477, 20 S. E. (2d) 825.

The establishment and maintenance of a general and uniform system of public schools is upon and exclusively within the province of the general assembly. *Moore v. Board of Education*, 212 N. C. 499, 502, 193 S. E. 732, and cases cited therein.

This section contemplates that the general assembly shall provide a state system of public schools to the end that every child between the ages of six and twenty-one years, without regard to the county in which such child resides, shall have an opportunity to attend a school in which standards set up by the state are maintained and wherein tuition shall be free of charge, and it is the duty of the commissioners of each county, when such state system has been provided, to maintain in each district of the county one or more schools for the constitutional school term. *Marshburn v. Brown*, 210 N. C. 331, 186 S. E. 265.

Same—Mandatory.—The provisions of our Constitution, Art. IX, secs. 1, 2, 3, are mandatory that the Legislature provide by "taxation and otherwise for general and uniform system of public education, free of charge, to all of the children of the State from six to twenty-one years," etc., and for the continuance of the school term in the various districts for at least six months in each and every year, recognizing the counties of the State and designating them as the governmental agencies through which the Legislature may act in the performance of this duty and in making its measure effective. *Lacy v. Fidelity Bank*, 183 N. C. 373, 111 S. E. 612. See *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 213, 189 S. E. 873. See also, *Collie v. Franklin County Com'rs*, 145 N. C. 170, 59 S. E. 44.

Method of Distribution of Allowance.—County high schools are entitled to have a special allowance made to them in the yearly estimate of the county board of education for a four-months term (now six); but it is otherwise as to a school which is in strictness one of a town or city, governed by

local authority and accessible only to the school population of the specified district, for such is not a part of our public-school system; and this class of high schools may only receive their per capita or pro rata share of the estimate according to average an actual attendance and according to the provision of the statute or authoritative regulations applicable. *Board v. County Commissioners*, 174 N. C. 469, 93 S. E. 1001.

All of the funds raised in the state for common school purposes should be distributed per capita among the beneficiaries and not be retained in the counties where it is raised. *School Commissioners v. Board*, 169 N. C. 196, 85 S. E. 138; *Board v. State Board*, 114 N. C. 313, 19 S. E. 277. And in the distribution of the fund the General Assembly may not discriminate in favor, or to the prejudice of either the white or colored races. *Hooker v. Greenville*, 130 N. C. 472, 42 S. E. 141.

Racial Discrimination.—An act of the legislature which provides for the erection of a schoolhouse in a certain school district from the proceeds of a bond issue to be voted upon therein, "for the whites" in that district, violates the plain mandate of this section, and a purchaser of these bonds, though issued according to all other legal requirements, may refuse to accept them on the ground of their being invalid. *Williams v. Bradford*, 158 N. C. 36, 73 S. E. 154.

Separate Buildings, Teachers, etc.—This section commands that the children of each race are to be taught in separate buildings and by separate teachers. *Lowery v. School Trustees*, 140 N. C. 33, 52 S. E. 267.

Under this section the school building now provided for the colored children cannot be taken for use of white children. *Lowery v. School Trustees*, 140 N. C. 33, 52 S. E. 267.

Exemption of School Bonds from Taxation Is Valid.—See *Mecklenburg County v. Piedmont Fire Ins. Co.*, 210 N. C. 171, 185 S. E. 654.

County Need Not Assume Bonds of Unnecessary School Buildings.—Where a special charter school district and a city operating schools within a special charter school district coterminous with its corporate limits, issue bonds, respectively, for school sites, buildings, and maintenance of schools in order to provide better schools within the districts than those provided by the General Assembly for the county generally, in accordance with intent of the General Assembly in creating such special charter districts, but at the time such bonds are issued they are not reasonably essential and necessary for the operation of schools in the districts for the minimum constitutional term of six months, the city and special charter school district are not entitled to mandamus to force the county to assume such bonds upon the taking over by the county of the buildings as a part of the general system of public schools. *Greensboro v. Guilford County*, 209 N. C. 655, 184 S. E. 473.

Cited in Posey v. Board of Education, 199 N. C. 306, 154 S. E. 393; *Julian v. Ward*, 198 N. C. 480, 482, 152 S. E. 401; *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27; *Board of Education v. Wilson*, 215 N. C. 216, 1 S. E. (2d) 544; *Fletcher v. Collins*, 218 N. C. 1, 9 S. E. (2d) 606; *State v. Wolf*, 145 N. C. 440, 59 S. E. 40; *Benton v. Board of Education*, 201 N. C. 653, 161 S. E. 96; *Reid v. City Coach Co.*, 215 N. C. 469, 2 S. E. (2d) 578, 123 A. L. R. 140.

§ 3. Counties to be divided into districts.—Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in every year; and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment. (Const. 1868; 1917, c. 192.)

Editor's Note.—This section was amended by the substitution of "six" for "four" pursuant to ch. 192, Public Laws of 1917, ratified by the people in November, 1918.

Generally.—In discharging the duty, imposed by this section, to keep the public schools open for at least four months (now six) every year, the county Commissioners cannot disregard the limitations imposed by Article V, Section 1, as to the amount of tax to be levied. *Board v. Commrs*, 111 N. C. 578, 579, 16 S. E. 621. But see *Board v. County Commissioners*, 174 N. C. 469, 93 S. E. 1001.

Under this section, the State is required to be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in the year. For a long period of its history, the State performed this duty by proxy, maintaining the schools through the agency of the counties; and this section denounces as a criminal offense the failure of their tax levying bodies to comply with the requirement that the schools be maintained

at least six months in the year. *Bridges v. Charlotte*, 221 N. C. 472, 477, 20 S. E. (2d) 825.

This section is mandatory, but the mode of performance is prescribed by statute. *Hickory v. Catawba County*, 206 N. C. 165, 172, 173 S. E. 56. See *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 218, 189 S. E. 873.

Counties May Be Directed to Provide Funds.—By reason of this constitutional mandate it is within the power of the General Assembly to authorize and direct the counties of the State as administrative units or governmental agencies to provide the necessary funds by taxation or otherwise. *Harrell v. Board of Com'rs*, 206 N. C. 225, 229, 173 S. E. 614.

Legislative Function.—It is a legislative function to formulate the means of carrying out the provisions of this section. *Wilkinson v. Board of Education*, 199 N. C. 669, 155 S. E. 562.

Legislative Discretion.—This section having required a public school system of the State to have at least six months terms in each year, leaves it to the discretionary power of the Legislature to fix terms in excess of that period. *Frazier v. Board of Com'rs*, 194 N. C. 49, 138 S. E. 433.

A county is an administrative unit of the state in our state-wide public school system, and under mandate of this section, a statute requiring a county to maintain at least a six months' school term in each of its school districts and to provide the necessary funds therefor by taxation or otherwise, is valid. *Evans v. Mecklenburg County*, 205 N. C. 560, 172 S. E. 323.

The counties are made the governmental agencies of the state, under the provisions of this section in the maintenance of the constitutional six-month term of public school, and the county boards of education are given power to create, divide, abolish and consolidate school districts in accordance with a county-wide plan. *Elliott v. State Board of Equalization*, 203 N. C. 749, 166 S. E. 918.

It is the duty of the commissioners of the various counties in this state to maintain at least a six months term of public school in their respective counties, subject to indictment for their failure to do so. *Reeves v. Board of Education*, 204 N. C. 74, 167 S. E. 454.

It is the duty of the state under this section to provide a general and uniform state system of public schools of at least six months in every year wherein tuition shall be free of charge to all the children of the state between the ages of six and twenty-one. It is a necessary expense and a vote of the people is not required to make effective these and other constitutional provisions in relation to the public school system of the state. *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 213, 223, 189 S. E. 873. See also, *Fuller v. Lockhart*, 209 N. C. 61, 182 S. E. 733.

Discretion of General Assembly Rules as to Financing Public School System.—Under the mandatory provision of this section in relation to the public school system of the state, the financing of the public school system of the state is in the discretion of the General Assembly by appropriate legislation, either by state appropriation or through the county acting as an administrative agency of the state. *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 213, 223, 189 S. E. 873.

Building and Equipment Necessary for School Term.—Under this section sites, buildings, and equipment acquired, constructed, and used by a school district were deemed reasonably essential and necessary for the conduct and operation of the six months school term at the time the said sites, buildings, and equipment were acquired and constructed. *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 213, 225, 189 S. E. 873.

Assumption of Indebtedness.—When necessary to maintain the six-months term of public schools required by this section it is within the legislative authority in establishing its State-wide system to assume an indebtedness of a school district therefor, including the cost of necessary buildings, and direct that it be provided for by the respective counties as administrative units of the public-school system of the State. *Lovell v. Pratt*, 187 N. C. 686, 122 S. E. 661.

The fact that this section provides that county commissioners failing to perform their duties in regard to the maintenance of the required school term shall be guilty of a misdemeanor, does not preclude a writ of mandamus to compel the assumption by the county of indebtedness incurred by the districts for the erection and equipment of school buildings necessary to the constitutional school term. *Hickory v. Catawba County*, 206 N. C. 165, 173 S. E. 56.

Redistricting for School Purposes.—See *Moore v. Board of Education*, 212 N. C. 499, 193 S. E. 732.

Issuance of Mandamus.—The section of the Constitution have committed to the judgment and discretion of the county commissioners the manner and method of levying taxes to

maintain a four-months minimum period (now six) of the public schools, and in the exercise thereof the courts will not interfere by civil process, mandamus or otherwise, unless their action is so unreasonable as to amount to a manifest abuse of power. *County Board v. Board*, 150 N. C. 116, 63 S. E. 724.

Immediately after filing the opinion in this case, the Legislature (of 1909), then in session, passed an act giving the county boards of education the right to sue out a mandamus in such cases.—Ed. Note.

See *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 213, 189 S. E. 873, citing *Hickory v. Catawba County*, 206 N. C. 165, 173 S. E. 56, where it was held that resort may be had to the courts to compel performance of the duties of this section by mandamus when indictment of the defendants would not be an adequate remedy.

Applied in *Powell v. Bladen County*, 206 N. C. 46, 173 S. E. 50.

Quoted in *Mecklenburg County v. Piedmont Fire Ins. Co.*, 210 N. C. 171, 185 S. E. 654.

Cited in *Greensboro v. Guilford County*, 209 N. C. 655, 184 S. E. 473; *Julian v. Ward*, 198 N. C. 480, 152 S. E. 401; *Board of Education v. Wilson*, 215 N. C. 216, 1 S. E. (2d) 544; *East Spencer v. Rowan County*, 212 N. C. 425, 193 S. E. 837; *Collie v. Franklin County Com'rs*, 145 N. C. 170, 59 S. E. 44; *School Committee v. Taxpayers*, 202 N. C. 297, 162 S. E. 612; *School Committee v. Taxpayers*, 202 N. C. 382, 162 S. E. 907; *Fletcher v. Collins*, 218 N. C. 1, 9 S. E. (2d) 606 (dis. op.).

§ 4. What property devoted to educational purposes.—The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; also all moneys, stocks, bonds, and other property now belonging to any State fund for purposes of education; also the net proceeds of all sales of the swamp lands belonging to the State, and all other grants, gifts or devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State, or by the terms of the grant, gift or devise, shall be paid into the State treasury, and, together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining in this State a system of free public schools, and for no other uses or purposes whatsoever. (Const. 1868; Convention 1875.)

Editor's Note.—Sec. 4 of the Constitution of 1868, which was changed to read as the present Sec. 4 by the Convention of 1875, was as follows: "The proceeds of all land that have been, or hereafter may be granted by the United States to this State and not otherwise specially appropriated by the United States or heretofore by this State; also, all moneys, stocks, bonds, and other property now belonging to any fund for purposes of education; also, the net proceeds that may accrue the State from sales of estrays, or from fines, penalties, and forfeitures; also, the proceeds of all sales of the swamp land belonging to the State; also, all moneys that shall be paid as an equivalent for exemption from military duty; also, all grants, gifts or devises that may hereafter be made to this State, and not otherwise appropriated by the grant, gift or devise, shall be securely invested and sacredly preserved as an irreducible educational fund, the annual income of which, together with so much of the ordinary revenue of the State as may be necessary, shall be faithfully appropriated for establishing and perfecting in this State a system of free public school, and for no other purposes or uses whatsoever."

Stated in *McDonald v. Morrow*, 119 N. C. 666, 26 S. E. 132; *Bear v. Commissioners*, 124 N. C. 204, 32 S. E. 558; *Collie v. Franklin County Com'rs*, 145 N. C. 170, 59 S. E. 44.

§ 5. County school fund; proviso.—All moneys, stocks, bonds, and other property belonging to a county school fund; also the net proceeds from the sale of estrays; also the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal or military laws of the State;

and all moneys which shall be paid by persons as an equivalent for exemption from military duty, shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State: Provided, that the amount collected in each county shall be annually reported to the Superintendent of Public Instruction. (Const. 1868; Convention of 1875.)

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

In General.—This section appropriates all fines for violation of the criminal laws of the state for establishing and maintaining free public schools in the several counties, whether the fines are for violation of town ordinances made misdemeanors by statute or other criminal statutes. *Board v. Henderson*, 126 N. C. 689, 36 S. E. 158.

Fines, etc., Must Be Given by Law.—Under this section penalties and forfeitures belong to the state for free school purposes only when given by law to the state. *Carter v. Wilmington, etc., R. Co.*, 126 N. C. 437, 446, 36 S. E. 14, and cases there cited.

And Municipal Clerk Is Not Entitled to Fees from Fines.—By provision of this section, the clear proceeds of fines collected by the clerk of a municipal court belong to the county school fund, and the clerk is not entitled to retain a percentage thereof as his fees, regardless of the provisions of public-local laws relating to his compensation. *County Board of Education v. High Point*, 213 N. C. 636, 197 S. E. 191.

Parties.—A suit to compel a city to pay fines and penalties to the county board of education should be brought against the city or the board of aldermen, and not against the chief of police. *Bearden v. Fullam*, 129 N. C. 477, 40 S. E. 204.

Applied in *In re Wiggins*, 171 N. C. 372, 88 S. E. 508.

§ 6. Election of trustees, and provisions for maintenance, of the University.—The General Assembly shall have power to provide for the election of trustees of the University of North Carolina, in whom, when chosen, shall be vested all the privileges, rights, franchises and endowments thereof in anywise granted to or conferred upon the trustees of said University; and the General Assembly may make such provisions, laws, and regulations from time to time, as may be necessary and expedient for the maintenance and management of said University. (1872-3, c. 86.)

Editor's Note.—Pursuant to ch. 86, Public Laws of 1872-73, this Sec. 6 was substituted for Sec. 5 of the Constitution of 1868, which was as follows: "The University of North Carolina, with its lands, emoluments and franchises, is under the control of the State, and shall be held to an inseparable connection with the free public school system of the State."

§ 7. Benefits of the University.—The General Assembly shall provide that the benefits of the University, as far as practicable, be extended to the youth of the State free of expense for tuition; also, that all the property which has heretofore accrued to the State, or shall hereafter accrue, from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons, shall be appropriated to the use of the University. (Const. 1868.)

Applied in *In re Neal*, 182 N. C. 405, 109 S. E. 70; *University of North Carolina v. High Point*, 203 N. C. 558, 166 S. E. 511; *Carter v. Smith*, 209 N. C. 788, 185 S. E. 15.

§ 8. State Board of Education.—The general supervision and administration of the free public school system, and of the educational funds provided for the support thereof, shall, from and after the first day of April, one thousand nine hundred and forty-three, be vested in a State Board of Ed-

ucation to consist of the Lieutenant Governor, State Treasurer, the Superintendent of Public Instruction, and one member from each Congressional District to be appointed by the Governor. The State Superintendent of Public Instruction shall have general supervision of the public schools and shall be secretary of the board. There shall be a comptroller appointed by the Board, subject to the approval of the Governor as director of the Budget, who shall serve at the will of the board and who, under the direction of the board, shall have supervision and management of the fiscal affairs of the board. The appointive members of the State Board of Education shall be subject to confirmation by the General Assembly in joint session. A majority of the members of said board shall be persons of training and experience in business and finance, who shall not be connected with the teaching profession or any educational administration of the State. The first appointments under this section shall be members from odd numbered Congressional Districts for two years, and members from even numbered Congressional Districts for four years and, thereafter, all appointments shall be made for a term of four years. All appointments to fill vacancies shall be made by the Governor for the unexpired term, which appointments shall not be subject to confirmation. The board shall elect a chairman and a vice-chairman. A majority of the board shall constitute a quorum for the transaction of business. The per diem and expenses of the appointive members of the board shall be provided by the General Assembly. (Const. 1868; 1941, c. 151.)

Editor's Note.—Pursuant to Chapter 151 of the Public Laws of 1941, the former Sections 8 and 9 of the Constitution of 1868 were repealed and the present Section 8 substituted in lieu thereof. Those former sections read as follows: "§ 8. The Governor, Lieutenant-Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Instruction, and Attorney-General shall constitute a State Board of Education."

"§ 9. The Governor shall be president and the Superintendent of Public Instruction shall be secretary of the Board of Education."

Proposed Amendment.—Session Laws 1943, c. 468, proposed that this section be amended by substituting for the said section, the following:

"The general supervision and administration of the free public school system, and of the educational funds provided for the support thereof, except those mentioned in Section five of this Article, shall, from and after the first day of April, one thousand nine hundred and forty-five, be vested in the State Board of Education to consist of the Lieutenant Governor, State Treasurer, the Superintendent of Public Instruction, and ten members to be appointed by the Governor, subject to confirmation by the General Assembly in joint session. The General Assembly shall divide the State into eight educational districts, which may be altered from time to time by the General Assembly. Of the appointive members of the State Board of Education, one shall be appointed from each of the eight educational districts, and two shall be appointed as members at large. The first appointments under this section shall be: Two members appointed from educational districts for terms of two years; two members appointed from educational districts for terms of four years; two members appointed from educational districts for terms of six years; and two members appointed from educational districts for terms of eight years. One member at large shall be appointed for a period of four years and one member at large shall be appointed or a period of eight years. All subsequent appointments shall be for terms of eight years. Any appointments to fill vacancies shall be made by the Governor for the unexpired term, which appointment shall not be subject to confirmation. The State Superintendent of Public Instruction shall be the administrative head of the public school system and shall be secretary of the board. The board shall elect a chairman and vice-chairman. A majority of the board shall

constitute a quorum for the transaction of business. The per diem and expenses of the appointive members shall be provided by the General Assembly."

§ 9. Powers and Duties of the Board.—The State Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted. The State Board of Education shall have power to divide the State into a convenient number of school districts; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of the textbooks to be used in the public schools; to apportion and equalize the public school funds over the State; and generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto. All the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly. (Const. 1868; 1941, c. 151.)

Editor's Note.—Pursuant to Chapter 151 of the Public Laws of 1941, the former Sections 10, 11, 12, and 13 of the Constitution of 1868 were repealed and the present Section 9 substituted in lieu thereof. Those former sections read as follows:

"§ 10. The Board of Education shall succeed to all the powers and trusts of the president and directors of the Literary Fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to free public schools and the educational fund of the State; but all acts, rules and regulations of said board may be altered, amended, or repealed by the General Assembly, and when so altered, amended, or repealed they shall not be re-enacted by the board.

"§ 11. The first session of the board of Education shall be held at the capital of the State within fifteen days after the organization of the State government under this Constitution; the time of future meetings may be determined by the board.

"§ 12. A majority of the board shall constitute a quorum for the transaction of business.

"§ 13. The contingent expenses of the board shall be provided by the General Assembly."

§ 10. Agricultural department.—As soon as practicable after the adoption of this Constitution, the General Assembly shall establish and maintain, in connection with the University, a department of agriculture, of mechanics, of mining, and of normal instruction. (Const. 1868; 1941, c. 151.)

Editor's Note.—This section, formerly Section 14 of Article IX of the Constitution of 1868, was renumbered to become Section 10 pursuant to Chapter 151 of the Public Laws of 1941.

The Board a Department of State Government.—The Board of Agriculture is a department of the State Government, and an action against it to recover money alleged to have been wrongfully collected by it as a license tax cannot be maintained, the state not having given its consent to be sued in that respect. *Chemical Co. v. Board*, 111 N. C. 135, 136, 15 S. E. 1032.

Levy of Tax for Farm Agent's Salary.—The encouragement of agriculture is a fundamental objective of the State government, and a levy of a tax by a county to pay the county farm agent's salary is for a special purpose having the special approval of the Legislature, within the meaning of Art. V, § 6, for which a tax in excess of the 15-cent limitation may be imposed. *Nantahala Power, etc., Co. v. Clay County*, 213 N. C. 698, 197 S. E. 603.

§ 11. Children must attend school.—The General Assembly is hereby empowered to enact that every child, of sufficient mental and physical ability, shall attend the public schools during the period between the ages of six and eighteen

years, for a term of not less than sixteen months, unless educated by other means. (Const. 1868; 1941, c. 151.)

Editor's Note.—This section, formerly Section 15 of Article IX of the Constitution of 1868, was renumbered to become Section 11, pursuant to Chapter 151 of the Public Laws of 1941.

Stated and Applied in *State v. Wolf*, 145 N. C. 440, 441, 59 S. E. 40.

ARTICLE X

Homesteads and Exemptions

§ 1. Exemptions of personal property.—The personal property of any resident of this State, to the value of five hundred dollars, to be selected by such resident, shall be and is hereby exempted from sale under execution or other final process of any court, issued for the collection of any debt. (Const. 1868.)

Editor's Note.—It is thought more proper to place the main annotations regarding the homestead and personal property exemption under section 1-369 et seq. The notes placed thereunder together with the references compose a comprehensive treatment of the subject—reference to which is here made. The note found under this section is meant to embrace only direct construction of the provisions hereof, and may be of aid to the practitioner in dealing with the sections above mentioned.

Section Liberally Construed.—*Hyman v. Stern*, 43 F. (2d) 666.

The Marital Duty of Husband.—The husband's duty to protect and provide for his wife is more than a debt in its ordinary acceptance of the word, or within the contemplation of this and the following section of the constitution. *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863.

A husband's obligation to support his wife during the existence of the marital relation is not a "debt" within the meaning of this and the following section of the constitution. *Barber v. Barber*, 217 N. C. 422, 427, 8 S. E. (2d) 204, citing *White v. White*, 179 N. C. 592, 103 S. E. 216.

A Constitutional Right.—The right to the personal property exemption exists not by virtue of the allotment, but by virtue of the Constitution which confers it and attaches the protection to the debtor before the allotment or appraisal. *Lockhart v. Bear*, 117 N. C. 298, 23 S. E. 484. See *Crow v. Morgan*, 210 N. C. 153, 185 S. E. 668.

This and the following section are explicit in guaranteeing to every resident of the state his homestead and personal property exemption of the value fixed—"to be selected by the owner thereof." *McKeithen v. Blue*, 142 N. C. 360, 362, 55 S. E. 285.

Meaning of "Final Process."—A debtor may legally demand his personal property exemption at any time and to the last moment before the appropriation thereof by the court, and the order of court directing a payment of the money derived from the sale of such property is final process within the meaning of the Constitution, giving the creditor such right until execution or other final process. *Befarrah v. Spell*, 178 N. C. 231, 100 S. E. 321.

Diminution in Value of Property.—In the well considered opinion in *Campbell v. White*, 95 N. C. 344, it was said: "Though the debtor's personal property exemption has been duly allotted, whenever it has been diminished by use, loss, or other cause, he has a right to have any other personal property he may have exempted up to the prescribed limit," *Smith, C. J.*, saying that this section of the Constitution, is a continual mandate to the officer to leave so much of the debtor's personal estate untouched for his use, and, of course, the diminution from use, loss, or other cause must be replenished with other, if the debtor has such, up to the prescribed limits. It is plainly meant that when any final process against the debtor's estate is to be enforced, that much of his estate must be allowed to remain with him as not liable to sale. *Gardner v. McConnaughey*, 157 N. C. 481, 483, 73 S. E. 125.

Set-Off.—A party may not demand that his claim be allowed him as his personal property exemption so as to defeat the adverse party's right of counterclaim or set-off prior to the rendition of the final judgment on his claim, since to permit the party to assert the exemption before judgment would enable him to obtain judgment in instances in which, if a balance were struck, nothing would be due him. *Edgerton v. Johnson*, 218 N. C. 300, 10 S. E. (2d) 918. For note on this case, see 19 N. C. Law Rev. 227.

Plaintiff moved that the judgment rendered against him

in this cause on defendant's counterclaim should be offset by a judgment subsequently obtained by plaintiff against defendant in a separate action, contending that defendant is insolvent. Defendant demanded that the judgment rendered in his favor upon the counterclaim in this cause be allowed to him as his personal property exemption. Held: To allow offset would amount to "final process" within the meaning of this section, and defendant's demand that the judgment in his favor on the counterclaim be allowed him as his personal property exemption precludes plaintiff's right of offset. *Edgerton v. Johnson*, 218 N. C. 300, 10 S. E. (2d) 918.

Exemption Ceases at Death of Claimant.—The personal property exemption provided for by this section and the laws passed pursuant thereto, exists only during the life of the homesteader and after his death passes to his personal representative, to be disposed of in a due course of administration. *Johnson v. Cross*, 66 N. C. 167.

It is to be noted that by sections 3 and 5, after the death of the owner of a homestead, the exemption is continued on for the benefit of his children or widow; but there is no such provision in regard to the "personal property exemption."—Ed. Note.

Forfeiture of Exemption.—A bankrupt who conceals assets exceeding in value his statutory exemption forfeits his right to such exemption. *Hyman v. Stern*, 43 F. (2d) 666.

One who is a fugitive from justice, though leaving his family here, who cannot be found in the state and whose whereabouts are unknown, and the object of whose absence is to avoid serving a criminal sentence imposed by our courts, is not a resident of the state within the meaning of this section, of our constitution, and not entitled to his exemptions here in the absence of evidence or finding on the question of his animus revertendi. *Cromer v. Self*, 149 N. C. 164, 62 S. E. 885, 128 Am. St. Rep. 658.

Debtor Entitled to Exemption at All Times.—The five hundred dollar personal property exemption prescribed by this section of the constitution entitles a judgment debtor to the amount of the exemption at all times, and such sum may be set apart for the comfort and support of the judgment debtor as often as the judgment debtor may be pressed with execution. *Commissioner of Banks v. Yelverton*, 204 N. C. 441, 168 S. E. 505, commented on in 12 N. C. Law Rev. 65.

A debtor may legally demand his personal property exemption at any time and to the last moment before the appropriation thereof by the court, and the order of court directing a payment of the money derived from the sale of such property is final process within the meaning of the Constitution giving the creditor such right until execution or other final process. *Crow v. Morgan*, 210 N. C. 153, 156, 185 S. E. 668.

Cited in *Carpenter v. Duke*, 144 N. C. 291, 56 S. E. 938.

§ 2. Homestead.—Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises. (Const. 1868.)

Cross Reference.—See section 1-369 et seq. and notes placed thereunder.

Homestead and Personal Property Exemptions Distinguished.—The homestead exemption is permanent unless there is a reallocation by reason of an increase in value in the manner provided by section 1-373. But the personal property exemption is to be reassigned, whenever, at subsequent dates, executions are levied. The reason is that the realty is fixed and stable, whereas the articles of personal property may be increased or diminished in quantity, between the levy of executions. *Gardner v. McConnaughey*, 157 N. C. 481, 483, 73 S. E. 125.

In view of this section the doctrine of estoppel cannot deny the bankrupt his right to a homestead in lands which were subject to his debts. In selecting the land for his homestead exemption, he is not restricted to the tract on which he lives. In re *Hamrick*, 56 F. (2d) 240, 241.

The right to claim homestead may be lost by failure to as-

sert it in apt time, by waiver, or by estoppel. *Cameron v. McDonald*, 216 N. C. 712, 6 S. E. (2d) 497.

Right May Be Sold or Assigned.—The homestead right or estate is salable or assignable, and the purchaser can hold the land to which it pertains to the exclusion of judgment creditors during its existence. *Gardner v. Batts*; 114 N. C. 496, 19 S. E. 794. As to requisites of deed, see section 8 and note thereto.

Where there is a homestead right in land, the homesteader may alienate the same only with the joinder and private examination of the wife. *Farris v. Hendricks*, 196 N. C. 439, 146 S. E. 73, 77.

The owner of lands loses his right to a homestead therein allowed by this section upon his conveying the title to the same, by deed, though he may select a homestead thereafter in other of his lands under the provisions of section 1-370. *Duplin County v. Harrell*, 195 N. C. 445, 142 S. E. 481.

Allotment Unnecessary.—The title to the homestead is vested in the owner by the Constitution of this State, and no allotment by the sheriff is necessary to vest the title thereto. The allotment by the sheriff is only for the purpose of ascertaining whether there be an excess of property over the homestead which is subject to execution. *Lambert v. Kinnery*, 74 N. C. 348.

Land must be selected by the owner and allotted before it becomes exempt. It must also be both owned and occupied by the homesteader, and this at the time of issuance of the execution. *Chadbourn Sash, etc., Co. v. Parker*, 153 N. C. 130, 133, 69 S. E. 1.

Where a judgment debtor is present when his homestead in his lands is laid off to him by the appraisers and designates the land he desires for the purpose, he may not successfully contend thereafter that other lands should have been included, it not being contended that the value of the homestead as allotted was less than one thousand dollars. *Citizens' Bank v. Robinson*, 201 N. C. 796, 161 S. E. 487.

Where a mortgage on land is foreclosed and the land brings at the foreclosure sale a sum more than sufficient to pay the mortgage debt, the surplus remaining to the Constitutional limit of one thousand dollars is to be regarded as realty to which the homestead right attaches when the same has not been waived. *Farris v. Hendricks*, 196 N. C. 439, 146 S. E. 73, 77.

A mortgagor of lands is entitled to his homestead exemption in his equity of redemption as against the liens of judgment creditors, and an injunction will lie against the sale of the property under execution when his homestead has not been allotted. *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465.

There is no lien for purchase money in North Carolina, and while the judgment debtor cannot claim homestead as against a judgment for purchase money, the lien of a mortgage executed to a third person has priority over the judgment lien, when the mortgage is executed prior to the rendition of the judgment and prior to an amendment putting the title to the property in issue. *Jarrett v. Holland*, 213 N. C. 428, 196 S. E. 314.

A duly docketed judgment is a lien on the lands of the judgment debtor but is subject to the homestead interest in the lands as provided by this section. *Farris v. Hendricks*, 196 N. C. 439, 146 S. E. 73, 77.

The right to the homestead exemption is not forfeited by a fraudulent conveyance, and the judgment was properly modified by order directing that defendant be allotted his homestead in the land which should be exempt from sale by the commissioner. *New Amsterdam Cas. Co. v. Dunn*, 209 N. C. 736, 184 S. E. 488.

Exemption Allowed in Mortgaged Lands.—A debtor may have his homestead exemption allotted in lands owned by him but mortgaged to a third person, but in ascertaining the value thereof the mortgage debt should be disregarded, and the land appraised as though the debtor owned the unencumbered fee. *Crow v. Morgan*, 210 N. C. 153, 185 S. E. 668.

Or Vacant Lots.—Where the only real property owned by a judgment debtor consists of vacant lots, he may claim his homestead therein, since he may thereafter build a habitable structure thereon. *Equitable Life Assur. Soc. v. Russos*, 210 N. C. 121, 185 S. E. 632.

Quoted in *Simmons v. Respass*, 151 N. C. 5, 65 S. E. 516, 134 Am. St. Rep. 961.

Cited in *Vannoy v. Green*, 206 N. C. 77, 80, 173 S. E. 277.

§ 3. Homestead exemption from debt.—The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt

during the minority of his children, or any of them. (Const. 1868.)

See Editor's Note to section 5.

Only Infant Children Included.—An heir twenty-one years old is not entitled to homestead in the lands of his ancestor, his right thereto ceased as soon as he attained his majority. *Saylor v. Powell*, 90 N. C. 202.

The widow by a second marriage of one who died seized and possessed of land leaving no children by her, is not entitled to the benefit of a homestead therein, when he has left children by his first marriage, though they are adult. The meaning of the language of this and section 5 too plain for construction, that in speaking of children the instrument refers to children of the deceased owner. *Simmons v. Respass*, 151 N. C. 5, 65 S. E. 516.

Same—Where Only One Minor.—Where the owner of a homestead dies, leaving children, some of age and one a minor, the homestead estate vests alone in the minor child until his or her majority. *Simpson v. Wallace*, 83 N. C. 477.

Pecuniary Standing of Children Not Considered.—The right to a homestead is given to the minor children of an insolvent father, regardless of their pecuniary circumstances. *Allen v. Shields*, 72 N. C. 504; *Spence v. Goodwin*, 128 N. C. 273, 38 S. E. 859.

Right Not Waivable by Guardian Ad Litem.—A guardian ad litem cannot waive the homestead rights of infant heirs, especially when there is no consideration therefor, for such waiver would affect the substantial rights of the infants. *Spence v. Goodwin*, 128 N. C. 273, 38 S. E. 859.

Debts Contracted for Work and Labor.—By construing § 6 of this article in connection with this section the conclusion is sustained that for all debts contracted for work and labor done, a lien is given upon the property of a married woman. *Ball v. Paquin*, 140 N. C. 83, 52 S. E. 410, 3 L. R. A. (N. S.) 307.

The debt referred to in this section means the debt of the owner of the homestead, and not the debt of the infant children. *Bruton v. McRae*, 125 N. C. 206, 207, 210, 34 S. E. 397.

Right Not to Be Sold for Assets.—In a proceeding to sell land for assets, the executor can not sell the homestead interest of a minor child and devisee of the testator. *Bruton v. McRae*, 125 N. C. 206, 207, 34 S. E. 397.

§ 4. Laborer's lien.—The provisions of section one and two of this article shall not be so construed as to prevent a laborer's lien for work done and performed for the person claiming such exemption, or a mechanic's lien for work done on the premises. (Const. 1868.)

Cross References.—See section 44-1 et seq. and notes thereto. For other exceptions to the exemptions, see note of *Mebane v. Layton*, 89 N. C. 396, under section 1-369.

Definition of Terms.—A "laborer's lien" is solely for labor performed, while a "mechanic's lien" is broader and includes the "work done," i. e., the "building built" or superstructure put on the premises. *Broyhill v. Gaither*, 119 N. C. 443, 26 S. E. 31.

Lien for Materials Furnished.—See note of *Cumming v. Bloodworth*, 87 N. C. 83, under section 44-1. See also, *Broyhill v. Gaither*, 119 N. C. 443, 26 S. E. 31.

Applied in Sugg v. Pollard, 184 N. C. 494, 115 S. E. 153; *Isler v. Dixon*, 140 N. C. 529, 53 S. E. 348; *McMillan v. Williams*, 109 N. C. 252, 13 S. E. 764.

Quoted in Roper Lumber Co. v. Lawson, 195 N. C. 840, 844, 143 S. E. 847.

§ 5. Benefit of widow.—If the owner of a homestead die, leaving a widow but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she be the owner of a homestead in her own right. (Const. 1868.)

Cross Reference.—See section 1-369, analysis line "Who Entitled to Homestead and Exemptions," II, B. As to allotment after death of homesteader, see section 1-389 and notes thereto; as to right of widow whose deceased husband leaves adult children by a former marriage, see note of *Simmons v. Respass*, 151 N. C. 5, 65 S. E. 516, under section 3 of this article.

Editor's Note.—It is to be noted that the widow's right to the homestead provided for by this section is expressly conditioned upon her not being the owner of a homestead in her own right. Such a clause is not contained in section 3

which gives the right to the children during minority. On this point it was said in *Spence v. Goodwin*, 128 N. C. 273, 277, 38 S. E. 859: "This ——— emphasizes by direct implication the unconditional right of exemption given to the children by section 3."

Ownership at Death Essential.—It is only in the contingency that the husband is the owner of a homestead at the time of his death that the exemption from debts inures to her benefit. *Thomas v. Bunch*, 158 N. C. 175, 178, 73 S. E. 899.

A widow is not required to take action for the preservation of the right to a homestead in the lands of her deceased husband under the provisions of this section, and before the land can be validly sold by the personal representatives to make assets for the payment of the debts of the deceased the homestead must first be assigned. *Fulp v. Brown*, 153 N. C. 531, 69 S. E. 612.

Heirs Prior to Widow Where There Are No Creditors.—A widow is not entitled to homestead against the heirs at law where there are no creditors, but only to dower. *Caudle v. Morris*, 160 N. C. 168, 76 S. E. 17. See also, *Tucker v. Tucker*, 103 N. C. 170, 9 S. E. 299.

Cited in *Pence v. Price*, 211 N. C. 707, 715, 192 S. E. 99.

§ 6. Property of married women secured to them.—The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried. (Const. 1868.)

See notes to § 52-1.

Editor's Note.—To give effect to the provisions of the organic law as embodied in this section, the legislature from time to time has enacted statutes whose essence may be boiled down in substance to what is contained in this section. In fact some of those statutes are a verbatim confirmation of these provisions, while others are corollaries thereof deducible by necessary inference from those provisions through judicial construction.

For example section 39-7 et seq. deals with the execution and proof of instruments affecting a married woman's title to her property; section 52-1, secures to her all property acquired before and after marriage as her separate estate free from the claims of her husband; section 52-2 authorizes her to contract, with certain qualifications, as if she were unmarried, sections 52-8, 31-2, 52-1, empower her to dispose of her property by will, and there are many other sections in the code which are directly or indirectly offsprings of, or satellites to, this section.

By virtue of the community of source of these statutes, the instances are rare where this constitutional section has been construed apart from its satellites, or where the construction placed upon the latter is not applicable to the former, or vice versa. These constructions have been placed under the respective subordinate sections to which they refer, and all of them radiate a light upon the provisions of the organic law contained in this section. To the end that repetition may be avoided the counsel is urged to refer to those sections for no less direct constructions of this section than the sections under which they are placed, while he will find hereunder the more or less independent constructions of this section which do not appear under its subordinates.

In General.—There is no "beneficent provision of the Constitution" which throws additional shackles around women in the management of their separate property. The provision of the Constitution is in exactly the opposite direction, in accordance with the free spirit of the age and with the universal trend of legislation the world over. Its purpose is not to further assimilate married women to the condition of infants, but to make free women of them, to emancipate them from most of the restrictions formerly existing. *Strouse v. Cohen*, 113 N. C. 349, 353, 18 S. E. 323.

General Policy of Section.—This section is intended to emancipate married women and place them, so far as property rights are concerned, on a par with men and females sole. *McLeod v. Williams*, 122 N. C. 451, 454, 30 S. E. 129.

Common Law Rule Changed.—The common-law rule giving to the husband the actual or potential ownership of the separate choses in action belonging to his wife by reducing them into possession is now changed by this section giving

to the wife the sole ownership of her separate estate. *Turlington v. Lucas*, 186 N. C. 283, 119 S. E. 366.

In *Etheredge v. Cochran*, 196 N. C. 681, 146 S. E. 711, referring to this section, it is said by Adams, J.: "By virtue of these and other provisions the relation which married women formerly sustained to their husbands has been materially modified. Unity of person in the strict common-law sense no longer exists, and many of the common-law disabilities have been removed. Not only may they contract with each other; a married woman may now sue her husband in contract or in tort. *Dorsett v. Dorsett*, 183 N. C. 354, 111 S. E. 541, 23 A. L. R. 15; *Roberts v. Roberts*, 188 N. C. 560, 118 S. E. 9, 29 A. L. R. 1479." *Shirley v. Ayers*, 201 N. C. 51, 54, 158 S. E. 840.

Husband's Consent Necessary Only in Conveyances.—Under this section a married woman may dispose of her property by gift or otherwise without the assent of her husband, unless the law requires the disposition of it to be evidenced by a conveyance or a writing. *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784. See *Martin v. Bundy*, 212 N. C. 437, 193 S. E. 831.

The purpose of requiring the written assent is to afford the wife the counsel and protection of her husband, and not to convey any estate in the realty. When he signs it under her signature and then acknowledges the execution of the deed as one of the grantors, but one inference can arise, and that is that he was giving his required written assent to her conveyance. *Joiner v. Firemen's Ins. Co.*, 6 F. Supp. 103, 104.

Sufficiency of Husband's Written Assent.—Since the deed of the husband conveys no title to his wife's land, but evidences his written assent to her conveyance, upon reason and authority, subscribing his name under seal to her deed, and acknowledging his execution thereof as required by law, is a sufficient written assent to make her deed valid. *Joiner v. Firemen's Ins. Co.*, 6 F. Supp. 103, 104.

No Formal Conveyance to Transfer Note or Bond.—No formal conveyance is necessary under the requirement of this section of the Constitution in the transfer of a note or bond. The delivery of the note or bond to the endorsee after it has been endorsed in blank by the wife, the owner, and the husband, is a sufficient conveyance of the note or bond to satisfy the constitutional requirement. *Coffin v. Smith*, 128 N. C. 252, 255, 38 S. E. 864.

Legislative Power to Declare Wife Free Trader.—There is no constitutional inhibition on the power of the legislature to declare where and how the wife may become a free trader; this section being intended to protect instead of disabling her. *Hall v. Walker*, 118 N. C. 377, 24 S. E. 6.

A married woman who has been abandoned by her husband is a free trader, and she may execute a valid conveyance of her lands without his joinder. *Nichols v. York*, 219 N. C. 262, 13 S. E. (2d) 565.

Legislative Control over Capacity to Make Will.—This section conferring upon married women the right to make a will, etc., "as if she were unmarried," was designed chiefly to remove the common-law restriction on married women in this respect, and was not intended to free such right from every and all legislative regulation. *Flanner v. Flanner*, 160 N. C. 126, 75 S. E. 936.

May Devise or Bequeath Property as if Sole.—Under the provisions of this section, and as later declared by our statutes, a married woman may now devise and bequeath her separate real and personal property as if she were a feme sole, which does not apply to a conveyance of her realty by deed. *Freeman v. Lide*, 176 N. C. 434, 97 S. E. 402.

Liability of Husband for Rents Paid Wife after Foreclosure.—Where lands belonging to the separate estate of a wife have been foreclosed under a deed of trust thereon duly executed, and after such foreclosure the rents from the land are paid to the wife, the husband may not be held responsible for such rents by the person entitled to the rent by virtue of the foreclosure, since, under this section a wife is given sole ownership of her separate estate. In re *Longley*, 205 N. C. 488, 171 S. E. 788.

May Bar Husband's Curtesy by Devising the Property.—By marriage, before the adoption of the Constitution of 1868, the husband acquired no vested rights in the lands of his wife before a child was born capable of inheriting; and when the first child born of the marriage was after the adoption of the Constitution, which gives a married woman the power, among other things, of disposing, by will, of her property acquired before marriage, she may accordingly dispose of it by will and deprive him of his interest therein as tenant by the curtesy. *Richardson v. Richardson*, 150 N. C. 549, 64 S. E. 510.

Where a feme covert dies intestate her husband is entitled to his common law right of curtesy; where she devises her land, under this section, the estate of curtesy is destroyed. *Tiddy v. Graves*, 126 N. C. 620, 36 S. E. 127.

Vested curtesy rights of the husband at the time of the adoption of the constitution were not impaired by this section. *Richardson v. Richardson*, 150 N. C. 549, 64 S. E. 510.

Devise of Equitable Separate Estate.—She may devise her equitable separate estate, in the absence of contrary provisions in the instrument creating it, where the trustee is a passive trustee; and, whether the trust be passive or active, where the trust is to terminate with her life, and the estate to become absolute thereafter. *Freeman v. Lide*, 176 N. C. 434, 97 S. E. 402.

Same—Provisions of Instrument Creating the Estate Still Controls.—Married women have no greater estates, by operation of this section of the Constitution, than those conveyed by the terms of the deed under which they derive title; nor are the properties and incidents belonging to estates changed by that instrument. *Long v. Barnes*, 87 N. C. 329, 330.

The constitution imposes no limitation upon the right of a grantor or deviser to restrict or enlarge, by the terms of the instrument through which title passes, her jus disponendi. *Kirby v. Boyette*, 118 N. C. 244, 24 S. E. 18.

Not Applicable to Obligations of Wife as Surety to Her Husband.—This section, providing that the separate property of the wife shall not be liable for the debts of the husband, has no application to the obligation of the wife as surety of her husband, such obligation being regarded as a direct one between the creditor and herself. *Royal v. Southerland*, 168 N. C. 405, 84 S. E. 708.

Extent of Veto Power of Husband.—The veto power of the husband does not extend to devises and bequests, nor to any other disposition of her property, save in those cases which under the law must be made by a "conveyance," i. e., deeds and mortgages of realty and such mortgages of personality as are made by deed. To hold that the husband's veto power, by reason of the requirement of his written assent, extends to all gifts, sales, transfers and assignments of her personal property, oral or written, is to make the veto as broad as the enfranchisement. It is to say that her property shall remain hers, as before marriage, but that in no case whatever shall she own it as if she had remained single. It would be to require the husband's written assent in cases where no writing would be necessary on the part of the wife. *Jennings v. Hinton*, 126 N. C. 48, 53, 35 S. E. 187.

Estates by entireties as between husband and wife still exist in North Carolina, but where there is a judgment upon a joint contract against husband and wife, a lien thereunder is created against lands held by them in entireties, and execution may be issued against them. *Martin v. Lewis*, 187 N. C. 473, 122 S. E. 180.

Action for Tort.—The husband cannot sue to recover his wife's earnings, or damages for torts committed on her, and there is no reason why she can sue for torts or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband. If the husband could maintain an action to recover damages for torts on the wife she would be able to maintain an action on account of torts sustained by the husband. Such right of action if it existed in favor of the husband should exist in favor of the wife. It should be in favor of both, or neither, but in view of the constitution of 1868 and our statute on the subject, such action cannot be maintained by either on account of the injury to the other. *Hipp v. Dupont*, 182 N. C. 9, 108 S. E. 318.

The right of a married woman to maintain an action against her husband to recover for negligent injury is not limited to residents of this state, but a nonresident wife may maintain an action here against her nonresident husband on a transitory cause of action which arises in this state, and she is entitled to any recovery as her separate property. *Bogen v. Bogen*, 219 N. C. 51, 12 S. E. (2d) 649.

Power to Contract by Virtue of This Section.—Where it was contended that when the Constitution gave married women separate estates in their property, it gave them by a necessary implication an unrestricted dominion over the property, to bind it directly or indirectly, except when expressly forbidden, and an unrestricted right to contract, such as a feme sole or a man has, it was held that there was no such grant implied, that the terms "sole and separate estate" had a known and definite meaning in the law when the Constitution was framed, and that it must be taken that they were used in that instrument in the sense which had been affixed to them by prior decisions of the court. *Pippen v. Wesson*, 74 N. C. 437, 444. But this power is now expressly accorded to married women by the terms of statute known as Martin Act embodied in section 52-2.—Ed. Note.

Husband a Freeholder Where Wife Owns Land and There Are Children.—In *Hodgin v. Southern R. Co.*, 143 N. C. 93, 55 S. E. 413, it is said by Brown, J.: "One of the jurors was challenged by defendant upon the ground that he was not a freeholder. The challenge was allowed and plain-

tiff excepted. The juror owned no land, but his wife was seized of a fee and had children by her husband. While the Constitution, Art. X, sec. 6 [this section], has wrought very material and far-reaching changes as to the rights and dominion of the wife over her separate property, it seems, nevertheless, to have been held by this Court that the husband still has what is termed an 'interest' in her land which constitutes him technically a freeholder." *State v. Avant*, 202 N. C. 680, 684, 163 S. E. 806.

Prohibitions of Sections 52-5, Not Inhibited by This Section.—The provisions of section 52-5, dispensing with the necessity of the written consent of the husband to the conveyance by the wife of her lands when he has "been declared an idiot or a lunatic" is not inhibited by this section of the constitution. *Lancaster v. Lancaster*, 178 N. C. 22, 100 S. E. 120.

Conveyance by Submitting Title to Arbitrators.—If a married woman could dispose of her real estate, without the joinder of her husband, by submitting her title to arbitrators, that part of this section which ordains that a married woman, with the written assent of her husband, may convey her real estate, would be a dead letter. If such were the law, married woman, from design or by means or fraud and deceit, might by arbitrators, be deprived of their real estate and the husband deprived of his rights therein before he had knowledge of the matter, or the power to prevent it in either case. If a married woman could dispose of her real estate through arbitration, she would be enabled by an indirect method to do that which the Constitution and the laws prohibit, and that will never be allowed. *Smith v. Bruton*, 137 N. C. 79, 83, 49 S. E. 64.

Conveyances between Husband and Wife.—A deed executed by husband to wife in 1841, even if a fee simple deed, would have been void in law, and sustainable in equity only upon meritorious consideration; it is otherwise, as to such deed executed now, which is rendered valid under this section. *McLamb v. McPhail*, 126 N. C. 218, 35 S. E. 426.

Assignment of Insurance Policy.—The signature of the husband, as witness, to a written assignment by the wife, of her interest in an insurance policy on his life, taken out by him for her benefit, is equivalent to an assignment by the wife, "with the written assent of her husband," as provided by this section. *Jennings v. Hinton*, 126 N. C. 48, 35 S. E. 187.

Estates by entireties are not changed or affected by this section of the Constitution as to rights of married women. *Moore v. Shore*, 208 N. C. 446, 447, 181 S. E. 275, citing *Bank of Greenville v. Gornto*, 161 N. C. 341, 77 S. E. 222.

The husband has the right, during coverture, to deal with the possession of land held by him and his wife by entireties without the consent of the wife, but neither may make a contract affecting title so as to defeat the right of the survivor in the whole estate without the consent of the other. *Moore v. Shore*, 208 N. C. 446, 181 S. E. 275.

Where lots are conveyed with restrictive covenants limiting buildings to residences and one of such lots is owned by a husband and wife by the entireties, the husband may not convey or contract in respect to the negative easement of such lot over the other lots without the consent of his wife, since the wife has the right to such negative easement as a part of the estate if she should survive her husband. *Id.*

§ 7. Husband may insure his life for the benefit of wife and children.—The husband may insure his own life for the sole use and benefit of his wife and children, and in case of the death of the husband the amount thus insured shall be paid over to the wife and children, or to the guardian, if under age, for her or their own use, free from all the claims of the representatives of her husband, or any of his creditors. And the policy shall not be subject to claims of creditors of the insured during the life of the insured, if the insurance issued is for the sole use and benefit of the wife and/or children. (Const. 1868; 1931, c. 262.)

Editor's Note.—The amendment proposed by Public Laws of 1931, c. 262, and ratified at the next succeeding general election, added the second sentence to this section.

Generally.—This section clearly looks to the provision for the wife and children so that they may not be left destitute by the death of an insolvent husband and father, and is personal to them when they survive. *Hooker v. Sugg*, 102 N. C. 115, 8 S. E. 919.

The purpose is to enable the husband to make valuable

provision for his wife and children after his death, above, beyond and unaffected by his estate, personal and real, and the conditions of the same remaining at the time of his death. *Burwell v. Snow*, 107 N. C. 82, 87, 11 S. E. 1090.

Not a Part of Insured's Estate.—Where a life insurance policy is issued to one in the name and for the benefit of the wife and children it does not upon his death become a part of his estate. *Burton v. Farinholt*, 86 N. C. 260, 261. See also the discussion of this point contained in the dissenting opinion in *Herring v. Sutton*, 129 N. C. 107, 113, 39 S. E. 772.

Under this section the proceeds from the insurance policy payable to the wife and children is not a part of the insured's estate so that it may be claimed by an heir or next of kin. *Burwell v. Snow*, 107 N. C. 82, 87, 11 S. E. 1090.

This section "means, in the absence of fraud, that payment of premiums, even by an insolvent husband, shall not defeat payment at the death of the husband to the beneficiaries named in the policy." *Whiting v. Squires*, 6 F. (2d) 100, 101, reversing *In re Pittman*, 275 F. 686.

"The limit of the constitutional exemption of an insurance policy on the life of the husband against the claims of his creditors is that the wife or the wife and children take the benefits of a policy payable to her or them as beneficiaries at the death of the insured. The exemption may cover a policy payable to the wife and children with no power of the insured to change the beneficiaries, because in such a policy the wife or the wife and children have a vested interest, and the policy, if paid at all, must be paid to them at the death of the husband. But the exemption does not embrace the surrender value, the property of the husband, of a policy in which he can change the beneficiary at will." *Whiting v. Squires*, 6 F. (2d) 100, 101, reversing *In re Pittman*, 275 F. 686.

"The legislature could not by statute add to the constitutional exemption. *Wharton v. Taylor*, 88 N. C. 230. Therefore it could not make an exemption of the surrender value of the policy which might or might not, according to the will of the husband, fall to the wife or the wife and children as a policy of which they were beneficiaries at the death of the husband. It follows that, if the statute be construed as embracing the surrender value of a policy like these, it would be invalid as a legislative attempt to enlarge the insurance exemption to the wife and children provided by the Constitution." *Whiting v. Squires*, 6 F. (2d) 100, 102, reversing *In re Pittman*, 275 F. 686.

If § 58-205 stood alone, with its language unrestrained by the constitutional provision, the argument would be strong in favor of the view that every possible value of a policy including cash surrender value, though the husband retained the right to change the beneficiary, inures to the benefit and use of the wife or her children. This is the view taken of somewhat similar statutes where no constitutional limitation was involved. But, as this construction of the statute of North Carolina is doubtful, it should not be adopted when opposed to the provision of the Constitution, for every presumption must be indulged that the Legislature did not intend to attempt by statute to confer an exemption beyond that provided by the Constitution. Taking this view, we hold that the last sentence of the statute is but a repetition of the constitutional provision on the same subject, and is limited in its application to a policy of insurance standing in the name of the wife or her children as beneficiaries at the death of the husband. *Whiting v. Squires*, 6 F. (2d) 100, 102, reversing *In re Pittman*, 275 F. 686.

"The rule laid down by the Supreme Court is that under § 70a of the bankruptcy statute (Comp. St. § 9654) the cash surrender value of a policy of insurance is an asset of a bankrupt's estate, even when the policy is payable to a beneficiary other than the bankrupt, his estate, or his personal representative, if the bankrupt has reserved absolute power to change the beneficiary. *Cohen v. Samuels*, 245 U. S. 50, 38 S. Ct. 36, 62 L. Ed. 143; *Cohn v. Malone*, 248 U. S. 450, 39 S. Ct. 141, 63 L. Ed. 352. The court has further held that insurance policies embraced within the exemption laws of the state do not become assets in the hands of the trustee for the benefit of creditors. *Holden v. Stratton*, 198 U. S. 202, 25 S. Ct. 656, 49 L. Ed. 1018." *Whiting v. Squires*, 6 F. (2d) 100, reversing *In re Pittman*, 275 F. 686.

Cited in *Peoples Building & Loan Assn. v. Swaim*, 198 N. C. 14, 150 S. E. 668; *Russell v. Owen*, 203 N. C. 262, 165 S. E. 687; *In re Reiter*, 58 F. (2d) 631.

§ 8. How deed for homestead may be made.—Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed; but no deed made by the owner of a homestead

shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law. (Const. 1868.)

Cross Reference.—See section 39-7 et seq. and notes thereto. As to form of private examination, see sections 47-39, 47-40. See also note of *Dalrymple v. Cole*, 170 N. C. 102, 86 S. E. 988, under section 1-370.

Proposed Amendment.—Session Laws 1943, c. 662, proposed that this section be amended to read as follows:

"Nothing contained in the foregoing sections of this Article shall operate to prevent the owner of a homestead from disposing of the same by deed; but no deed made by the owner of a homestead shall be valid without the signature and acknowledgment of his wife."

Section Applies After Allotment of Homestead.—This section applies only to a conveyance of the homestead after it has been laid off. *Mayho v. Cotton*, 69 N. C. 289, 292, cited and approved in *Dalrymple v. Cole*, 170 N. C. 102, 104, 86 S. E. 988. See also, *Hager v. Nixon*, 69 N. C. 108.

General Rule.—A deed executed by the homesteader without the joinder of his wife is invalid and passes no interest. *Wittkowsky v. Gidney*, 124 N. C. 437, 438, 441, 32 S. E. 731.

The title to a homestead can be divested from the owner only in the mode prescribed by law, to-wit, by deed, with the consent of the wife evidenced by her privy examination. *Lambert v. Kinnery*, 74 N. C. 348.

Right of Grantee upon Non-Jointure of Wife.—Where a husband conveys his land without having his wife join in the deed, the grantee acquires the land free from the right of the wife to a homestead, unless the same has been laid off therein to the husband, but subject to the wife's right of dower, should she survive him. *Dalrymple v. Cole*, 170 N. C. 102, 104, 86 S. E. 988. For other enumerated instances where in the assent of the wife is not necessary, see note of *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437, under section 39-9. See also, *Simmons v. McCullin*, 163 N. C. 409, 79 S. E. 625; *Dalrymple v. Cole*, 156 N. C. 353, 72 S. E. 451.

It will be seen that the provisions of this section do not become effective, and do not begin to operate until an allotment of the homestead is made to the husband. On this point the cases appear to be entirely in accord. A full discussion containing a minute detail of the reasons therefor may be found in *Dalrymple v. Cole*, 170 N. C. 102, 104, 86 S. E. 988, cited supra.—Ed. Note.

Joinder of Wife Unnecessary in Conveyance of Estate in Reversion.—A married woman has no interest or estate in the reversion which takes effect after a homestead estate; therefore the assent of the wife is not necessary to give validity to a deed of the husband conveying such estate in reversion. *Jenkins v. Bobbitt*, 77 N. C. 385.

This holding is based on the construction placed on this section which is to the effect that the assent of the wife is necessary to a disposition of the homestead estate, and does not embrace the reversion.—Ed. Note.

Same—Unnecessary as to Residue.—The general power of alienation incident to ordinary ownership of real property exists as to all the residue or remaining interest in the lands over the homestead exemption, whether the exemption has or has not been allotted, this section of the Constitution applying alone to the homestead interest, and none other. *Davenport v. Fleming*, 154 N. C. 291, 70 S. E. 472.

Private Examination Hereunder Indispensable.—The private examination of a married woman is a mere statutory requirement and may be dispensed with or modified by the Legislature except in the cases embraced in the provisions of this section. *Barrett v. Barrett*, 120 N. C. 127, 131, 26 S. E. 691.

Land Acquired Prior to 1868.—The husband may convey land acquired before the Constitution of 1868 without the joinder of the wife and thereby bar the wife of dower or homestead. *Cawfield v. Owens*, 129 N. C. 286, 40 S. E. 62.

Cited in Corporation Commission v. Transportation Committee, 198 N. C. 317, 323, 151 S. E. 648; *Boyd v. Brooks*, 197 N. C. 644, 649, 150 S. E. 178; *Pence v. Price*, 211 N. C. 707, 716, 192 S. E. 99.

ARTICLE XI

Punishments, Penal Institutions, and Public Charities

§ 1. Punishments; convict labor; proviso.—The following punishments only shall be known to the laws of this State, viz: death, imprisonment with or without hard labor, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State. The

foregoing provision for imprisonment with hard labor shall be construed to authorize the employment of such convict labor on public works or highways, or other labor for public benefit, and the farming out thereof, where and in such manner as may be provided by law; but no convict shall be farmed out who has been sentenced on a charge of murder, manslaughter, rape, attempt to commit rape, or arson: Provided, that no convict whose labor may be farmed out shall be punished for any failure of duty as a laborer, except by a responsible officer of the State; but the convicts so farmed out shall be at all times under the supervision and control, as to their government and discipline, of the penitentiary board or some officer of this State. (Const. 1868; Convention 1875.)

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

Editor's Note.—All of this section after the first sentence was added by the Convention of 1875. This section of the constitution constitutes the basis for the legislative enactments regulating the punishment of violation of the criminal law found in the specific sections in the General Statutes. It sets definite boundaries beyond which the legislature, in the exercise of the power to prescribe the punishment for the various crimes, cannot transgress. The cases placed in the notes found under the specific sections in the chapter, "Crimes and Punishments," of the General Statutes, will necessarily throw some light on this section of the constitution. This fact renders it needless to repeat, at this point, a citation of those cases, and it is only necessary to refer the counsel to the sections of the above mentioned chapter.

Working Convicts—Section Not Basis of Disciplinary Rules.—This constitutional provision has no direct application to the discipline required in our jails and penitentiaries, for if so it would prevent solitary confinement, restriction of rations, and other reasonable punishments that are in customary use in prisons and penitentiaries. *State v. Nipper*, 166 N. C. 272, 274, 81 S. E. 164. But officers are civilly and criminally liable for an abuse or oppression of the adopted regulations under which the convicts are kept. *State v. Young*, 138 N. C. 571, 575, 50 S. E. 213.

Same—Regulations Must Be Reasonable.—Whether the prisoners are worked on the public road or kept in jail the regulations under which they must live must be reasonable. *State v. Young*, 138 N. C. 571, 575, 50 S. E. 213.

Stated in *State v. Burnett*, 179 N. C. 735, 102 S. E. 711.

§ 2. Death punishment.—The object of punishments being not only to satisfy justice, but also to reform the offender, and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact. (Const. 1868.)

Cross Reference.—See editor's note to section 1 of this article. As to punishment for murder, see section 14-17 and note thereto; as to punishment for arson, see section 14-58 and note thereto; as to burning of buildings other than dwelling houses, see sections 14-59 et seq., and notes thereto; as to punishment for burglary, see section 14-52 and note thereto; as to punishment for rape, see section 14-21 and note thereto.

Power of Legislature.—The punishment to be inflicted for any crime is left entirely to the general assembly, which can in its discretion affix lesser punishments, even for the four crimes, mentioned in this section, which are now visited with capital punishment. *State v. Lytle*, 138 N. C. 738, 744, 51 S. E. 66.

Under the discretionary power given by the constitution, the legislature has divided the crimes murder and burglary into two degrees and has affixed thereto the punishment for each enumerated offense. See specific cross references.—Ed. Note.

Applied to repeal portion of statute prescribing punishment of death for burning mill house, in *State v. King*, 69 N. C. 419.

§ 3. Penitentiary.—The General Assembly shall, at its first meeting, make provision for the erection and conduct of a State's prison or pen-

itentiary, at some central and accessible point within the State. (Const. 1868.)

Legislative Duties.—This provision imposes upon the Legislature the duty of attending to the details as to the erection of the necessary buildings, the purchase of such property, real and personal, as may be necessary for the uses of the prison; and also to form such regulations for the government and conduct of the prison as may seem proper. The officers or placement, their salaries and the distribution of their duties are all left with the General Assembly. *State Prison v. Day*, 124 N. C. 362, 367, 32 S. E. 748.

As to appointment of the directors of the penitentiary and filling vacancies, see N. C. Const., Art. III, section 10.

Referred to in *Railroad v. Holden*, 63 N. C. 410, 436; *Sedberry v. Carver*, 77 N. C. 319, 320.

§ 4. Houses of correction.—The General Assembly may provide for the erection of houses of correction, where vagrants and persons guilty of misdemeanors shall be restrained and usefully employed. (Const. 1868.)

Cross Reference.—See section 134-1 et seq. See also section 153-209 et seq.

Definition.—A house of correction, “as the name indicates, is designed for the reformation of youthful criminals, those who have not yet become hardened in crime.” *Ex parte Moore*, 72 Cal. 11, cited in *re Watson*, 157 N. C. 340, 351, 72 S. E. 1049.

§ 5. Houses of refuge.—A house or houses of refuge may be established whenever the public interest may require it, for the correction and instruction of other classes of offenders. (Const. 1868.)

§ 6. The sexes to be separated.—It shall be required, by competent legislation, that the structure and superintendence of penal institutions of the State, the county jails, and city police prisons secure the health and comfort of the prisoners, and that male and female prisoners be never confined in the same room or cell. (Const. 1868.)

The word “superintendence,” as used in this section, was intended to impose upon the governing officials of municipal corporations the duty of exercising ordinary care in procuring articles essential for the health and comfort of prisoners, and of overlooking their subordinates in immediate control of the prisoners, so far at least as to replenish the supply of necessary articles when notified that they are needed; and of employing such agents and appropriating such moneys as may be necessary to keep the prison in such condition as to secure the comfort and health of the inmates. *Moffitt v. Asheville*, 103 N. C. 237, 9 S. E. 695.

Liability of the City.—Under this section a city is liable in damages only for a failure to so construct its prison, or so provide it with fuel, bed-clothing, heating apparatus, attendance and other things necessary, as to secure to prisoners a reasonable degree of comfort, and protect them from such actual bodily suffering as would injure their health. If the Aldermen of a city comply with the above requirements, the city is not liable in damages for sickness and suffering endured by a prisoner, and caused by the neglect of the jailer, policeman or attendants, to properly minister to his wants and necessities. *Moffitt v. Asheville*, 103 N. C. 237, 9 S. E. 695.

This section imposes liability on a municipality only for such injuries to prisoners as result from its failure to properly construct and furnish the prison to afford prisoners reasonable comfort and protection from suffering an injury to health. *Parks v. Princeton*, 217 N. C. 361, 8 S. E. (2d) 217. For note on this case, see 19 N. C. Law Rev. 101.

§ 7. Provision for the poor and orphans.—Beneficent provisions for the poor, the unfortunate and orphan, being one of the first duties of a civilized and Christian state, the General Assembly shall, at its first session, appoint and define the duties of a board of public charities, to whom shall be entrusted the supervision of all charitable and penal State institutions, and who shall annually report to the Governor upon their condi-

tion, with suggestions for their improvement. (Const. 1868.)

Cross Reference.—As to corporate powers of a county generally, as exercised by the board of commissioners, see section 153-9; as to limitation on county indebtedness, see section 153-2; as to the corporate powers of a municipal corporation, see section 160-2; as to maintenance of the county poor, see section 153-152 and notes thereto; as to allowance of pensions, see section 153-157.

Editor's Note.—This section of the constitution has been the source of numerous legislative enactments, some of the most important of which are referred to above. The notes placed under these sections of the General Statutes contain many cases which will throw an illuminating light on the substantive law embodied in this section of the constitution. It is believed to be more helpful and beneficial to the practitioner to make reference to these specific sections of General Statutes, and the notes placed thereunder, where the constructions of the code sections are given in connection with basic constitutional provisions, than to segregate them and leave it to the searcher to find the connecting links.

Erection of County Home—Issuing Bonds.—The building of a county home is for a class of citizens without a place of residence, and beneficent provision for whom is recommended by this section, “as one of the first duties of a civilized and Christian State;” therefore, providing for such a home being included in the idea of their support, a county may pledge its faith and credit and issue valid bonds for that purpose, as a necessary expense, without the approval of its voters. *Commissioners v. Spitzer & Co.*, 173 N. C. 147, 91 S. E. 707.

Care of Indigent Sick Is Proper Function of State Government.—In accordance with express constitutional declaration of this section, the care of the indigent sick and afflicted poor is a proper function of the state government, and the General Assembly may by statute require the counties, as administrative agencies of the state, to perform this function, at least within their territorial limits. *Martin v. Board of Com'rs*, 208 N. C. 354, 180 S. E. 777.

There is no contractual duty on the part of the State to care for and maintain insane persons, the State Hospital being a charitable institution of the State, maintained voluntarily in recognition of Christian principles, as set out in this section. See § 143-120 et seq. *State v. Security Nat. Bank*, 207 N. C. 697, 178 S. E. 487.

Referred to in *Board v. Commissioners*, 113 N. C. 379, 383, 18 S. E. 661; *Board v. Commissioners*, 137 N. C. 310, 315, 49 S. E. 353.

§ 8. Orphan houses.—There shall also, as soon as practicable, be measures devised by the State for the establishment of one or more orphan houses, where destitute orphans may be cared for, educated, and taught some business or trade. (Const. 1868.)

§ 9. Inebriates and idiots.—It shall be the duty of the Legislature, as soon as practicable, to devise means for the education of idiots and inebriates. (Const. 1868.)

§ 10. Deaf-mutes, blind, and insane.—The General Assembly may provide that the indigent deaf-mute, blind, and insane of the State shall be cared for at the charge of the State. (Const. 1868; 1879, cc. 254, 268, 314.)

Cross Reference.—As to construction of the term “indigent,” see note in *In re Hybart*, 119 N. C. 359, 25 S. E. 963, under section 122-38. See also, *Hospital v. Fountain*, 128 N. C. 23, 38 S. E. 34. As to statutory provision for indigent patients in hospital for the insane, see section 122-38 et seq.

Editor's Note.—This section was inserted, pursuant to chs. 254 and 314, Public Laws of 1879, in lieu of Sec. 10 of the Constitution of 1868 which was as follows: “The General Assembly shall provide that all the deaf mutes, the blind, and the insane of the State, shall be cared for at the charge of the state.”

Referred to in *In re Boyett*, 135 N. C. 415, 419, 48 S. E. 789; *State v. Security Nat. Bank*, 207 N. C. 697, 704, 178 S. E. 487.

§ 11. Self-supporting.—It shall be steadily kept in view by the Legislature and the board of public charities that all penal and charitable institutions

should be made as nearly self-supporting as is consistent with the purposes of their creation. (Const. 1868.)

Cited in *Palmer v. Haywood County*, 212 N. C. 284, 193 S. E. 668, 113 A. L. R. 1195.

ARTICLE XII

Militia

§ 1. Who are liable to militia duty.—All able-bodied male citizens of the State of North Carolina, between the ages of twenty-one and forty years, who are citizens of the United States, shall be liable to duty in the militia: Provided, that all persons who may be averse to bearing arms, from religious scruples, shall be exempt therefrom. (Const. 1868.)

Stated in *Hinton v. Lacy*, 193 N. C. 496, 137 S. E. 669.

§ 2. Organizing, etc.—The General Assembly shall provide for the organizing, arming, equipping, and discipline of the militia, and for paying the same, when called into active service. (Const. 1868.)

Cross Reference.—For the numerous legislative enactments on the subject, see the chapter "Militia", section 127-1 et seq. As to support of families of indigent militiamen, see section 153-157.

By Whom Militia Paid.—The legislature may provide, if it think proper to do so, how and by whom the militia shall be paid. *Worth v. Commissioners*, 118 N. C. 112, 120, 24 S. E. 778. And in the absence of any special provision, they are to be paid by the state—the "power" that calls them out. *Id.* See section 127-80 and the note thereto.

Cited in *Baker v. State*, 200 N. C. 232, 156 S. E. 917.

§ 3. Governor Commander-in-chief.—The Governor shall be commander-in-chief and shall have power to call out the militia to execute the law, suppress riots or insurrections, and to repel invasion. (Const. 1868.)

Governor May Call Out Militia.—In the absence of legislation, the governor, as commander-in-chief, has the power to call out the militia, and the state guard being made a part of the militia, he has the power to call them out. This constitutional power may be regulated by legislation providing what shall amount to sufficient evidence of the existence of the causes mentioned in this section of the constitution. *Worth v. Commissioners*, 118 N. C. 112, 120, 24 S. E. 778.

Same—Not Subject to Legislative Restriction.—The legislature has no authority to restrict the power of the governor to call out the militia. *Worth v. Commissioners*, 118 N. C. 112, 124, 24 S. E. 778.

When Called into Service of United States.—See N. C. Const., Art. III, section 8.

§ 4. Exemptions.—The General Assembly shall have power to make such exemptions as may be deemed necessary, and to enact laws that may be expedient for the government of the militia. (Const. 1868.)

ARTICLE XIII

Amendments

§ 1. Convention, how called.—No convention of the people of this State shall ever be called by the General Assembly unless by the concurrence of two-thirds of all the members of each house of the General Assembly, and except the proposition, convention or no convention, be first submitted to the qualified voters of the whole State, at the next general election, in a manner to be prescribed by law. And should a majority of the votes cast be in favor of said convention, it shall assemble on such day as may be prescribed by the

General Assembly. (Const. 1868; Convention 1875.)

See 11 N. C. Law Rev., 242, for discussion as to whether the provisions of this section apply to the calling of a convention to consider a proposed federal amendment. This question was said to perplex the legislature and served to divide the Supreme Court.

Editor's Note.—The Convention of 1875 added the word "ever" after "shall" in line 2 and all of the section after the words "General Assembly" in line 4.

General Assembly may call convention to consider proposed amendment to the U. S. Constitution either under this section or in the exercise of its plenary powers. See "Opinions of the Justices," 204 N. C. 806, 172 S. E. 474.

§ 2. How the Constitution may be altered.—No part of the Constitution of this State shall be altered unless a bill to alter the same shall have been agreed to by three-fifths of each house of the General Assembly. And the amendment or amendments so agreed to shall be submitted at the next general election to the qualified voters of the whole State, in such manner as may be prescribed by law. And in the event of their adoption by a majority of the votes cast, such amendment or amendments shall become a part of the Constitution of this State. (Const. 1868; Convention 1875.)

Editor's Note.—Sec. 2 of the original Constitution of 1868, before it was amended by the Convention of 1875 to read as the present Sec. 2, was as follows: "No part of the Constitution of this State shall be altered, unless a bill to alter the same shall have been read three times in each House of the General Assembly and agreed to by three-fifths of the whole number of members of each House respectively; nor shall any alteration take place until the bill, so agreed to, shall have been published six months previous to a new election of members to the General Assembly. If, after such publication, the alteration proposed by the preceding General Assembly shall be agreed to, in the first session thereafter, by two-thirds of the whole representation in each House of the General Assembly shall be agreed to, in the first session thereafter, by two-thirds of the whole representation in each House of the General Assembly, after the same shall have been read three times on three several days in each House, then the said General Assembly shall prescribe a mode by which the amendment or amendments may be submitted to the qualified voters of the House of Representatives throughout the State; and if, upon comparing the votes given in the whole State, it shall appear that a majority of the voters voting thereon have approved thereof, then, and not otherwise, the same shall become a part of the Constitution." Public Laws 1931, c. 104, proposed an amendment to this section whereby the submission could be at a special election called for the purpose which was defeated.

Generally.—While to amend the Constitution of the State it is necessary for the voters to approve the proposed amendments to be submitted to them, it is likewise necessary to the validity of the election that the Legislature enact the proposition to amend into a statute by a three-fifths vote of each branch; and the constitutional provision that they be submitted "in such manner as may be prescribed by law" includes within its intent and meaning the time at which the amendments will be effective, if approved, the Constitution being silent on this point. *Reade v. Durham*, 173 N. C. 668, 91 S. E. 712. See also, *Freeman v. Cook*, 217 N. C. 63, 6 S. E. (2d) 894.

Applied in *University v. McIver*, 72 N. C. 76.

ARTICLE XIV

Miscellaneous

§ 1. Indictments.—All indictments which shall have been found, or may hereafter be found, for any crime or offense committed before this Constitution takes effect, may be proceeded upon in the proper courts, but no punishment shall be inflicted which is forbidden by this Constitution. (Const. 1868.)

Cross References.—See sections 15-140 to 15-155 and the

notes thereto. As to punishments, see N. C. Const. Art. XI, sections 1 et seq., and the references there made.

Cited in *Debbam v. Telephone Co.*, 126 N. C. 831, 835, 36 S. E. 269.

§ 2. Penalty for fighting duel.—No person who shall hereafter fight a duel, or assist in the same as a second, or send, accept, or knowingly carry a challenge therefor, or agree to go out of the State to fight a duel, shall hold any office in this State. (Const. 1868.)

Stated in *Cole v. Sanders*, 174 N. C. 112, 114, 93 S. E. 476.

§ 3. Drawing money.—No money shall be drawn from the treasury but in consequence of appropriations made by law; and an accurate account of the receipts and expenditures of the public money shall be annually published. (Const. 1868.)

Editor's Note.—This section is an exact repetition of the United States Constitution, Art. I, section 9, cl. 7.

Legislative Authority Required.—This section means that there must be legislative authority in order for money to be validly drawn from the treasury. In other words, the legislative power is supreme over the public purse. *White v. Hill*, 125 N. C. 194, 200, 34 S. E. 432, citing *Garner v. Worth*, 122 N. C. 250, 29, S. E. 364.

Section as Bar to Judicial Action.—This section effectually bars any judicial action to enforce collection of liabilities against the state, and the courts cannot direct the state treasurer to pay such claims, however just and unquestioned, when there is no legislative appropriation to pay the same. *Garner v. Worth*, 122 N. C. 250, 252, 29 S. E. 364.

When Mandamus Will Lie.—It is only when the legislative department has appropriated a certain fund to the payment of a liability incurred or to be incurred and the Auditor or Treasurer refuses to obey the legislative mandate that the Court can issue its mandamus to compel him to do so. *Garner v. Worth*, 122 N. C. 250, 253, 29 S. E. 364.

The state treasurer may refuse to pay a warrant of the auditor if it appear that the law under which it is issued is unconstitutional or the claim is not within the terms of the statute under which it is brought. *Martin v. Clark*, 135 N. C. 178, 180, 47 S. E. 397.

Mandamus to Enforce Payment against County.—See section 153-64 and the notes thereto.

§ 4. Mechanic's lien.—The General Assembly shall provide, by proper legislation, for giving to mechanics and laborers an adequate lien on the subject-matter of their labor. (Const. 1868.)

Editor's Note.—Under the power given by this section of the constitution the legislature has passed numerous enactments which secure to mechanics and laborers adequate liens, and means for their enforcement. These provisions may be found in section 44-1 et seq. Since the language of this constitutional section is clear and unobscure, merely giving to the general assembly a well-defined power, little judicial construction will be found, all the cases merely stating this provision of the constitution as the foundation of the G. S. sections above referred to. Whatever seemingly ambiguous terms that may be found in the code sections which have sprung out of this section of the constitution are explained in the note to the specific section in the code.

Quoted in *Roper Lumber Co. v. Lawson*, 195 N. C. 840, 844, 143 S. E. 847; *Boykin v. Logan*, 203 N. C. 196, 165 S. E. 680.

§ 5. Governor to make appointments.—In the absence of any contrary provision, all officers of this State, whether heretofore elected or appointed by the Governor, shall hold their positions only until other appointments are made by the Governor, or, if the officers are elective, until their successors shall have been chosen and duly qualified according to the provisions of this Constitution. (Const. 1868.)

Cited in *Markham v. Simpson*, 175 N. C. 135, 95 S. E. 106; *Freeman v. Board of Com'rs*, 217 N. C. 209, 7 S. E. (2d) 354.

§ 6. Seat of government.—The seat of gov-

ernment in this State shall remain at the city of Raleigh. (Const. 1868.)

§ 7. Holding office.—No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this State, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the General Assembly: Provided, that nothing herein contained shall extend to officers in the militia, justices of the peace, commissioners of public charities, or commissioners for special purposes. (Const. 1868; 1872-73, c. 88.)

Cross Reference.—As to what constitutes a public office and numerous illustrations thereof, see note to section 1-515. As to form and nature of the action to declare an office vacant, see sections 1-515 et seq. and the notes there placed.

Editor's Note.—Sec. 7 of the Constitution of 1868, amended pursuant to ch. 88, Public Laws of 1872-73, to read as the present Sec. 7, was as follows: "No person shall hold more than one lucrative office under the State, at the same time: Provided, That officers in the Militia, Justices of the Peace, Commissioners of Public Charities, and Commissioners appointed for special purposes, shall not be considered officers within the meaning of this section."

Proposed Amendment.—Session Laws 1943, c. 432, proposed that this section be amended by rewriting the proviso to read as follows:

"Provided, that nothing herein contained shall extend to officers in the militia, notaries public, justices of the peace, commissioners of public charities, or commissioners for special purposes."

Purpose.—The manifest intent is to prevent double office-holding—that offices and places of public trust should not accumulate in any single person—and the superadded words of "places of trust or profit" were put there to avoid evasion in giving too technical a meaning to the preceding words. *Doyle v. Raleigh*, 89 N. C. 133, cited and approved in *Groves v. Borden*, 169 N. C. 8, 84 S. E. 1042.

Effect of Acceptance of Similar Office.—Where one holding an "office or place of profit" accepts another such office or position in contravention of this section of the Constitution, the first is vacated eo instanti, and any further acts done by him in connection with the first office are without color, and cannot be de facto. *Whitehead v. Pittman*, 165 N. C. 89, 80 S. E. 976.

In *Barnhill v. Thompson*, 122 N. C. 493, 29 S. E. 720, it is said: "The acceptance of a second office by holding a public office operates ipso facto to vacate the first. While the officer has a right to elect which he will retain, his election is deemed to have been made when he accepts and qualifies for the second." The acceptance of the second office is of itself a resignation of the first. Cited with approval in *Whitehead v. Pittman*, 165 N. C. 89, 90, 80 S. E. 976.

The jurisdiction of a judge of a municipal recorder's court to impose sentence cannot be successfully attacked on the ground that at the time the recorder was appointed he was mayor of the municipality and therefore held two offices in contravention of this section, since even if it be granted that the statute permitting a mayor to be appointed recorder confers upon the mayor when chosen recorder other than ex officio duties, the acceptance of the office of recorder would vacate the office of mayor, but would not affect the office of recorder. In *re Barnes*, 212 N. C. 735, 194 S. E. 499.

Actions for Removal Where One Accepts Second Office.—When a person holding an office or place of trust accepts and qualifies for a second office, within the meaning of this section, the first office ipso facto becomes vacated, and an action to declare the first office vacant may be instituted in the name of the state on the relation of the attorney-general, by any individual who is a citizen and taxpayer of the jurisdiction where the officer is to exercise the powers of his office, but such an action cannot be maintained unless it appears that the leave of the attorney-general has been obtained either before the commencement of the action or afterwards supplied pending the proceedings. *Midgett v. Gray*, 158 N. C. 133, 73 S. E. 791.

A statute providing that the incumbent of one public office should also fill another public office is unconstitutional as violating this section, and cannot be upheld as merely affording the choice between the offices so that the acceptance of the second office would ipso facto vacate the

first, since incumbency in the first is essential to incumbency in the second. But a statute which creates no new office and appoints no additional, but merely attaches new duties to offices already existing, to be performed by the incumbents therein, does not violate this section. *Brigman v. Baley*, 213 N. C. 119, 195 S. E. 617.

Where one holding an office as county commissioner accepts a commission from the Governor as a notary public his position as county commissioner is eo instanti vacated, and where he continues to exercise the duties of county commissioner he may be removed therefrom in an action in the nature of a quo warranto. *Harris v. Watson*, 201 N. C. 661, 161 S. E. 215.

Recorder May Also Be Justice of Peace.—This section does not forbid one to hold the position of recorder of a town and the office of justice of the peace at the same time. *State v. Lord*, 145 N. C. 479, 59 S. E. 656.

Imposition of Additional Duties.—Chapter 341, Public-Local Laws of 1931, providing that the chairmen of certain county boards of Madison county should elect a tax manager for the county, merely imposes additional duties ex officio upon the said chairmen, and does not provide that any one of them should hold two public offices in violation of this section. *Freeman v. Board of Com'rs*, 217 N. C. 209, 7 S. E. (2d) 354.

Delegation of Duties.—A statute which places the affairs of a municipal corporation in the hands of a city council and a city manager and provides that in the event of a vacancy in the office of city manager, by sickness or otherwise, the council may delegate the duties of this office to one of its members, to be performed ex officio as mere auxiliary duties with such compensation as the council may determine, but shall receive no salary as a member of the council, is held not to contravene this section. *State v. Holmes*, 207 N. C. 293, 176 S. E. 746.

Applied in *McCullers v. Commissioners*, 158 N. C. 75, 73 S. E. 816; *Barnhill v. Thompson*, 122 N. C. 493, 29 S. E. 720.

§ 8. Intermarriage of whites and negroes prohibited.—All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation, inclusive, are hereby forever prohibited. (Convention 1875.)

Editor's Note.—This section was added by the Convention of 1875. It constitutes the first clause of section 14-131. Reference is therefore made to the note placed under that section.

Constitution of the United States

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

ARTICLE I

§ 1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

§ 2. [1.] The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

[2.] No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the state in which he shall be chosen.

[3.] Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

The first sentence of this clause (art. I, sec. 2, cl. 3) is amended by amendment XIV, § 2 and amendment XVI.

[4.] When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

[5.] The house of representatives shall chuse their speaker and other officers; and shall have the sole power of impeachment.

§ 3. [1.] The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Art. I, s. 3, cl. 1, is superseded by amendment XVII.

[2.] Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes.

The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

[3.] No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

[4.] The vice president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

[5.] The senate shall chuse their other officers, and also a president pro tempore, in the absence of the vice president, or when he shall exercise the office of president of the United States.

[6.] The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside: And no person shall be convicted without the concurrence of two-thirds of the members present.

[7.] Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

§ 4. [1.] The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of chusing senators.

[2.] The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

§ 5. [1.] Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

[2.] Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member.

[3.] Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the

members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

[4.] Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

§ 6. [1.] The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

[2.] No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

§ 7. [1.] All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

[2.] Every bill which shall have passed the house of representatives and the senate shall, before it become a law, be presented to the president of the United States. If he approve, he shall sign it; but if not, he shall return it with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.

[3.] Every order, resolution, or vote to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be re-passed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

§ 8. The congress shall have power [1.] To lay and collect taxes, duties, imposts and ex-

cises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

[2.] To borrow money on the credit of the United States;

[3.] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

[4.] To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

[5.] To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

[6.] To provide for the punishment of counterfeiting the securities and current coin of the United States;

[7.] To establish post offices and post roads;

[8.] To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

[9.] To constitute tribunals inferior to the supreme court;

[10.] To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

[11.] To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

[12.] To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

[13.] To provide and maintain a navy;

[14.] To make rules for the government and regulation of the land and naval forces;

[15.] To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

[16.] To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress;

[17.] To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;— and

[18.] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

§ 9. [1.] The migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by the congress prior to the year one thousand

eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

[2.] The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

[3.] No bill of attainder or ex post facto law shall be passed.

[4.] No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

[5.] No tax or duty shall be laid on articles exported from any state.

[6.] No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear or pay duties in another.

[7.] No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

[8.] No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them shall, without the consent of the congress, accept of any present, emolument, office or title, of any kind whatever, from any king, prince, or foreign state.

§ 10. [1.] No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts, or grant any title of nobility.

[2.] No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress.

[3.] No state shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

§ 1. [1.] The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice president, chosen for the same term, be elected, as follows:

[2.] Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress: but no senator or representative, or person holding an office of

trust or profit under the United States, shall be appointed an elector.

[3.] The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately chuse by ballot one of them for president; and if no person have a majority, then from the five highest on the list the said house shall in like manner chuse the president. But in chusing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice president. But if there should remain two or more who have equal votes, the senate shall chuse from them by ballot the vice president.

Art. II, s. 1, cl. 3, is superseded by amendment XII.

[4.] The congress may determine the time of chusing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

[5.] No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

[6.] In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

[7.] The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

[8.] Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I

will faithfully execute the office of president of the United States, and will to the best of my ability preserve, protect and defend the constitution of the United States."

§ 2. [1.] The president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

[2.] He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.

[3.] The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

§ 3. He shall from time to time give to the congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

§ 4. The president, vice president and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

§ 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

§ 2. [1.] The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to

all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

See amendment XI, as to suits against a state by citizens of another state or citizens or subjects of a foreign state.

[2.] In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

[3.] The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

§ 3. [1.] Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

[2.] The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV

§ 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

§ 2. [1.] The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

[2.] A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

[3.] No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

§ 3. [1.] New states may be admitted by the congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of

states, without the consent of the legislatures of the states concerned as well as of the congress.

[2.] The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

§ 4. The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress: Provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI

[1.] All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution as under the confederation.

[2.] This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

[3.] The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty-seven and of the Independence of the United States of Amer-

ica the Twelfth. In Witness whereof we have hereunto subscribed our names.

Go. WASHINGTON
Presidt. and deputy from Virginia.

New Hampshire.

John Langdon and Nicholas Gilman.

Massachusetts.

Nathaniel Gorham and Rufus King.

Connecticut.

Wm. Saml. Johnson and Roger Sherman.

New York.

Alexander Hamilton.

New Jersey.

Wil: Livingston, David Brearley, Wm. Patterson and Jona: Dayton.

Pennsylvania.

B. Franklin, Robt. Morris, Thos. Fitzsimmons, James Wilson, Thomas Mifflin, Geo. Clymer, Jared Ingersoll and Gouv Morris.

Delaware.

Geo. Read, John Dickinson, Jacob Broom, Gunning Bedford Jun, and Richard Bassett.

Maryland.

James McHenry, Danl. Carroll and Dan: of St. Thos. Jenifer.

Virginia.

John Blair—James Madison, Jr.

North Carolina.

Wm. Blount, Hu Williamson and Richd. Dobbs Spaight.

South Carolina.

Charles Pinckney, J. Rutledge, Charles Cotesworth Pinckney and Pierce Butler.

Georgia.

William Few and Abr. Baldwin.

Attest: William Jackson, Secretary.

The states ratified the Constitution in the following order:

Delaware	December 7, 1787
Pennsylvania	December 12, 1787
New Jersey	December 18, 1787
Georgia	January 2, 1788
Connecticut	January 9, 1788
Massachusetts	February 6, 1788
Maryland	April 26, 1788
South Carolina	May 23, 1788
New Hampshire	June 21, 1788
Virginia	June 26, 1788
New York	July 26, 1788
North Carolina	November 21, 1789
Rhode Island	May 29, 1790

AMENDMENTS

Articles in addition to, and amendment of, the constitution of the United States of America, proposed by congress, and ratified by the legislatures of the several states, pursuant to the fifth article of the original constitution.

The first ten amendments were proposed by congress on September 25, 1789, and became effective on December 15, 1791.

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT II.

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

AMENDMENT III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX.

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT X.

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.

AMENDMENT XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

AMENDMENT XII.

The electors shall meet in their respective states, and vote by ballot for president and vice president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate;—the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates and the votes shall then be counted;—the person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice president shall be the vice president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the senate shall choose the vice president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice president of the United States.

AMENDMENT XIII.

§ 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV.

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3. No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house remove such disability.

§ 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

§ 2. The congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI

The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

AMENDMENT XVII

The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the constitution.

AMENDMENT XVIII

§ 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

§ 2. The congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

§ 3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the congress.

AMENDMENT XIX

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

§ 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX

§ 1. The terms of the president and vice president shall end at noon on the 20th day of January, and the terms of senators and representatives at noon on the 3d day of January, of the

years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

§ 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

§ 3. If, at the time fixed for the beginning of the term of the president, the president elect shall have died, the vice president elect shall become president. If a president shall not have been chosen before the time fixed for the beginning of his term, or if the president elect shall have failed to qualify, then the vice president elect shall act as president until a president shall have qualified; and the congress may by law provide for the case wherein neither a president elect nor a vice president elect shall have qualified, declaring who shall then act as president, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a president or vice president shall have qualified.

§ 4. The congress may by law provide for the case of the death of any of the persons from whom the house of representatives may choose a president whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the senate may choose a vice president whenever the right of choice shall have devolved upon them.

§ 5. Sections 1 and 2 shall take effect on the

15th day of October following the ratification of this article.

§ 6. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

The twentieth amendment was declared in a proclamation of the Secretary of State, dated February 6, 1933, to have been ratified by thirty-nine of the forty-eight States.

AMENDMENT XXI

§ 1. The eighteenth article of amendment to the constitution of the United States is hereby repealed.

§ 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

§ 3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by conventions in the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the congress.

The twenty-first amendment was declared in a proclamation of the Acting Secretary of State, dated December 5, 1933, to have been ratified by thirty-six of the forty-eight States.

By his proclamation of December 5, 1933, the President proclaimed that the eighteenth amendment to the Constitution was repealed on December 5, 1933.

STATE OF NORTH CAROLINA

IN THE YEAR OF OUR LORD ONE THOUSAND
NINE HUNDRED AND FORTY-THREE

A BILL TO BE ENTITLED

AN ACT

REVISING AND CONSOLIDATING THE PUBLIC AND GENERAL
STATUTES OF THE STATE OF NORTH CAROLINA

The General Assembly of North Carolina do enact the following named chapters, subchapters and sections, to be known as the GENERAL STATUTES OF NORTH CAROLINA, that is to say:

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SUBCHAPTER I. DEFINITIONS AND GENERAL PROVISIONS.**Art. 1. Definitions.**

§ 1-1. Remedies.—Remedies in the courts of justice are divided into—

1. Actions.

2. Special proceedings.

(Rev., s. 346; Code, s. 125; C. C. P., s. 1; C. S. 391.)

Application of Sec. 1-64 to All Civil Remedies.—By virtue of this section and sec. 1-3 the terms of section 1-64, as to actions by guardians, embrace all civil remedies. *Hollomon v. Hollomon*, 125 N. C. 29, 33, 34 S. E. 99.

Admission of Patient to Hospital for Insane.—A proceeding in accordance with the provisions of § 122-36 et seq., in strictness, seems to be neither a civil action nor a special proceeding, notwithstanding this section. *In re Cook*, 218 N. C. 384, 11 S. E. (2d) 142.

§ 1-2. Actions.—An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense. (Rev., s. 347; Code, s. 126; C. C. P., s. 2; 1868-9, c. 277, s. 2; C. S. 392.)

§ 1-3. Special proceedings.—Every other remedy is a special proceeding. (Rev., s. 348; Code, s. 127; C. C. P., s. 3; C. S. 393.)

Cross References.—As to special proceedings generally, see § 1-393. As to special proceeding by creditor against personal representative, see § 28-122. As to special proceeding for collection of legacies and distributive shares, see § 28-159. As to special proceeding for partition of real estate, see § 46-1. As to special proceedings for allotment of dower, see § 30-11 et seq. As to special proceeding in allotment of year's allowance, see § 30-27 et seq.

Tests to Determine Special Proceedings.—Any proceedings which prior to the C. C. P. might have been commenced by petition, or motion on notice, such for instance as proceedings for dower, partition and year's allowance, are special proceedings under this section. *Tate v. Powe*, 64 N. C. 644; *Felton v. Elliott*, 66 N. C. 195.

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- 1-583. Orders by clerk on motion to remove; right of appeal; notice.
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Art. 48. Notices.

- 1-585. Form and service.
 1-586. Service upon attorney.
 1-587. Service upon a party.
 1-588. Service by publication.
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 1-590. Subpoena, service and signature.
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Art. 49. Time.

- 1-593. How computed.
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Art. 50. General Provisions as to Legal Advertising.

- 1-595. Advertisement of public sales.
 1-596. Charges for legal advertising.
 1-597. Regulations for newspaper publication of legal notices, advertisements, etc.
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 1-599. Application of two preceding sections.

Under this test, proceedings in bastardy (*State v. McIntosh*, 64 N. C. 607), or a petition by an administrator to sell lands for the payments of debts (*Hyman v. Jarnigan*, 65 N. C. 96; *Badger v. Jones*, 66 N. C. 305), classify as special proceedings.

In *Woodley v. Gilliam*, 64 N. C. 649, Mr. Justice Rodman expressed the opinion that a better test of a special proceeding is whether or not existing statutes direct a procedure different from the ordinary. He stated, however, that in practice the results of applying the two tests would almost always coincide, although he thought the one suggested by him the most convenient. And the court held in *Sumner v. Miller*, 64 N. C. 688, 689, Mr. Justice Dick delivering the opinion, that proceedings to obtain damages for injuries to land caused by the erection of a mill are special proceedings because made so by the statute creating a statutory remedy.

Under either rule an action to recover the possession of land, as, for example, ejectment, is not a special proceeding. *Woodley v. Gilliam*, 64 N. C. 649. Nor is mandamus to try title to an office, notwithstanding that it is not an ordinary civil action. *State v. Tate*, 66 N. C. 231.

Section quoted in *Jacobi Hdw. Co. v. Jones Cotton Co.*, 188 N. C. 442, 124 S. E. 756.

§ 1-4. Kinds of actions.—Actions are of two kinds—

1. Civil.

2. Criminal.

(Rev., s. 349; Code, s. 128; C. C. P., s. 4; C. S. 394.)

§ 1-5. Criminal action.—A criminal action is—

1. An action prosecuted by the state as a party, against a person charged with a public offense, for the punishment thereof.

2. An action prosecuted by the state, at the instance of an individual, to prevent an apprehended crime against his person or property. (Rev., s. 350; Code, s. 129; C. C. P., s. 5; Const., Art. IV, s. 1; C. S. 395.)

Editor's Note.—This section worked a significant change in the law of the state with its enactment in the Code of Civil Procedure. Prior to that time "all suits prosecuted in the name of the state were not necessarily criminal suits as distinguished from civil suits—the true test

being that when the proceeding was by indictment the suit was criminal, and when by action or other mode, though in the name of the state, it was a civil suit." State v. Pate, 44 N. C. 244. Hence a warrant to keep the peace was a civil action though brought in the name of the state. See State v. Locust, 63 N. C. 574, 575. But this section changed the rule in all such cases, the test now being whether the person is charged with a public offense or whether the action is prosecuted by the state at the instance of an individual to prevent or apprehend crime against the person or property of the individual; in either case the action being a criminal proceeding. See State v. Lyon, 93 N. C. 575, 576; State v. Oates, 88 N. C. 668.

Private Individuals as Prosecutors.—No person is regarded as a prosecutor for a public offense unless he is so marked on the bill of indictment. State v. Lupton, 63 N. C. 483.

Title of Case.—The terms "people of the state" as found in Art. IV, section 1 of the constitution, and "the state" as used in this section mean substantially the same. Thus a criminal case entitled "People v. A. B., criminal action" or "State v. A. B., indictment" as was used prior to the present constitution, are either correct forms. Larkins v. Murphy, 68 N. C. 381.

Subsection Two Affords Remedy against Alleged Unconstitutional Discriminations.—By prosecuting under this section persons doing acts allowed by a statute a remedy against alleged unconstitutional discriminations of a statute is afforded. Newman v. Watkins, 208 N. C. 675, 182 S. E. 453.

Which Affords an Adequate Remedy.—Where the alleged acts of the defendant are criminal the plaintiff is not entitled to equitable relief in the nature of an injunction but is furnished an adequate remedy by this section. Carolina Motor Service v. Atlantic Coast Line R. Co., 210 N. C. 36, 185 S. E. 479, 104 A. L. R. 1165.

§ 1-6. Civil action.—Every other is a civil action. (Rev., s. 351; Code, s. 130; C. C. P., s. 6; C. S. 396.)

§ 1-7. When court means clerk.—In the following sections which confer jurisdiction or power, or impose duties, where the words "superior court," or "court," in reference to a superior court are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular term of the court, in which cases the judge of the court alone is meant. (Rev., s. 352; Code, s. 132; C. C. P., s. 9; C. S. 397.)

Clerks Act for Court.—See section 1-12. Although the terms "court" and "superior court" as used in this section mean the clerk of the court as indicated, the clerk is given no separate jurisdiction apart from the court itself. In so far as the civil procedure is concerned, at least, the clerk acts as and for the court in the specified instances. His acts are performed by the court through him and stand as that of the court if not excepted to and reversed or modified on appeal, and thus there is no divided jurisdiction between the clerks and the judge. The whole procedure is in the court and has its sanction. Jones v. Desern, 94 N. C. 32, 34. See also, 1 N. C. Law R. 15.

Same—Civil Actions.—It was pointed out in Brittain v. Mull, 91 N. C. 498, 502, that the clerk does not exercise power in respect to pleadings and practice to any considerable extent in civil actions (as distinguished from special proceedings) because questions arising in such matters arise mainly in term time when the judge must act directly. This was due to the suspension act, but since the Crisp Act in 1919 the rule is otherwise. See note to section 1-12, and see the Editorial in 1 N. C. Law R. 199. So the clerk represents and is the court and has authority to exercise the discretionary powers conferred for the purpose of decreeing a sale of a decedent's estate for the payment of debts. Indeed the clerk implies the court in cases like this. Tillet v. Aydtlett, 90 N. C. 551, 553.

Same—Special Proceedings.—But in special proceedings he acts for the court in superintending the pleadings, practice and procedure, and in making all proper orders and judgments therein unless his action is revised or modified by the judge upon appeal. Jones v. Desern, 94 N. C. 32, 36; Adams v. Howards, 110 N. C. 15, 19, 14 S. E. 648.

It has never been doubted that it was competent for the legislature to confer such jurisdiction upon the clerk. Bank v. Wilkesboro Hotel Co., 147 N. C. 594, 601, 61 S. E. 570.

The word as used in Art. IV, section 28 of the constitu-

tion does not mean the court of the clerk. McAdoo v. Benbow, 63 N. C. 461.

Since the statute providing that a summary remedy against a railroad for damages caused by construction of the road over the land in favor of persons owning land may be begun either in or out of term by service of petition upon the defendant, it is proper for the judge to appoint commissioners as provided, if begun in term, but where the proceeding is begun in vacation the clerk may act for the court in the manner explained in these annotations. Click v. Western, etc., R. Co., 98 N. C. 390, 392, 4 S. E. 183.

The reference in section 8-90 to "the court" "or a judge thereof" refers to the clerk as well as the judge. Mills v. Biscoe Lumber Co., 139 N. C. 524, 52 S. E. 200.

The jurisdiction under section 26-3 is conferred upon the clerk by virtue of this section. Bank v. Wilkesboro Hotel Co., 147 N. C. 594, 61 S. E. 570.

This section gives the clerk power to enter a judgment for the recovery of money. Bank v. Wilkesboro Hotel Co., 147 N. C. 594, 601, 61 S. E. 570.

Application of Section.—This section was cited in Pelletier v. Saunders, 67 N. C. 261, as authority for the proposition that the term "superior court" as used in section 28-81 means clerk of the superior court.

Term Clerk Has Been Impliedly Read into § 1-461.—In view of this section it has been held that when the judgment in garnishment proceedings under § 1-461 is entered up, the execution is awarded as a matter of course and can be issued by the clerk without application to the judge. Newberry v. Meadows Fert. Co., 206 N. C. 182, 189, 173 S. E. 67.

Stated in Ex parte Wilson, 222 N. C. 99, 22 S. E. (2d) 262 (con. op.).

Art. 2. General Provisions.

§ 1-8. Remedies not merged.—Where the violation of a right admits both of a civil and a criminal remedy, the right to prosecute the one is not merged in the other. (Rev., s. 353; Code, s. 131; C. C. P., s. 7; C. S. 398.)

Summons Served upon Person in Jail.—In view of this section it was proper to serve a summons and order of arrest upon the defendant while confined in jail upon failure to give appearance bond to answer for a secret criminal assault. White v. Underwood, 125 N. C. 25, 26, 34 S. E. 104.

Cited in Scales v. Wachovia Bank & Trust Co., 195 N. C. 772, 776, 143 S. E. 868.

§ 1-9. One form of action.—The distinction between actions at law and suits in equity and the forms of such actions and suits are abolished, and there is but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which is denominated a civil action. (Rev., s. 354; Code, s. 133; C. C. P., s. 12; Const., Art. IV, s. 1; C. S. 399.)

Effect upon Substantive Law—Torts.—Although there is but one form of action there are torts and contracts just as there were prior to the C. C. P., but there are not several forms of action as there used to be, and pleadings are not suited for different forms of action as they used to be, but are all suited to one form, whether the subject of the action be a tort or a contract. Bitting v. Thaxton, 72 N. C. 541, 549.

Same—Legal and Equitable Principles.—Although one tribunal deals out both law and equity, the principles of law and equity remain separate and distinct, and it is just as important now as ever before to keep them separate. Jordan v. Lanier, 73 N. C. 90, 92.

But it is true that having but one tribunal causes the principles of law and equity to run into each other to some extent at least. For an illustration, see Jordan v. Lanier, 73 N. C. 90, 92.

The defendant's right of action by his counterclaim upon his unendorsed bond is still an equitable claim notwithstanding this section. Kiff v. Weaver, 94 N. C. 274, 279.

Nature of Defense Immaterial.—Any defense either legal or equitable may be set up by the defendant in an action by the endorsee upon a non-negotiable note. Thompson v. Osborne, 152 N. C. 408, 67 S. E. 1029.

Common Law Forms Immaterial.—Since the old technical distinctions in the forms of actions were abolished by this section, it is immaterial whether the plaintiff's

remedy under the old practice was trespass or case. *Sneed v. Harris*, 109 N. C. 349, 357, 13 S. E. 920.

An exception to a complaint that it is for money had and received and as such cannot be maintained unless the money has been actually received by the defendant is not maintainable under this section regardless of the common-law practice. *Staton v. Webb*, 137 N. C. 35, 38, 49 S. E. 55.

Where parties are brought into court by summons, the plaintiff can file his complaint, alleging a legal cause of action, or an equitable cause of action, or can combine them as he may elect. *Wilson v. Waldo*, 221 Fed. 505, 507.

Cited in *Riddick v. Davis*, 220 N. C. 120, 16 S. E. (2d) 562.

§ 1-10. Plaintiff and defendant.—In civil actions the party complaining is the plaintiff, and the adverse party the defendant. (Rev., s. 355; Code, s. 134; C. C. P., s. 13; C. S. 400.)

§ 1-11. How party may appear.—A party may appear either in person or by attorney in actions or proceedings in which he is interested. (Rev., s. 356; Code, s. 109; C. C. P., s. 423; C. S. 401.)

This right is alternative. A party has no right to appear both by himself and by counsel. Nor should he be permitted *ex gratia* to do so. *Abernethy v. Burns*, 206 N. C. 370, 173 S. E. 899. See *McClamroch v. Colonial Ice Co.*, 217 N. C. 106, 6 S. E. (2d) 850.

Cited in *Buncombe County v. Penland*, 206 N. C. 299, 305, 173 S. E. 609.

§ 1-12. Feigned issues abolished and substituted.—Feigned issues are abolished, and instead thereof, in the cases where the power formerly existed to order a feigned issue, or when a question of fact not put in issue by the pleadings is to be tried by a jury, an order for the trial may be made by the judge, stating distinctly and plainly the question of fact to be tried; and this order is the only authority necessary for a trial. (Rev., s. 357; Code, s. 135; C. C. P., s. 15; C. S. 402.)

Benefit of Feigned Issue Preserved.—See *Harkey v. Houston*, 65 N. C. 137.

Effect upon Proper Parties.—Since feigned issues in seduction cases have been abolished, the woman and not her father is the real party in interest if she be of age. *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397.

Effect of Carrying Feigned Issue to Supreme Court.—When an action upon a feigned issue is carried to the Supreme Court it will be dismissed. *Blake v. Askew*, 76 N. C. 325.

§ 1-13. Jurisdiction of clerk.—The clerk of the superior court has jurisdiction to hear and decide all questions of practice and procedure and all other matters over which jurisdiction is given to the superior court, unless the judge of the court or the court at a regular term is expressly referred to. (Rev., s. 358; Code, s. 251; C. C. P., s. 108; C. S. 403.)

Cross Reference.—See also § 1-7. As to summons in civil actions and duties of clerk therewith, see § 1-89.

Editor's Note.—This section was passed in 1868 as a part of the C. C. P. It was a part of the scheme to simplify procedure and speed up litigation so that justice could be had much sooner and at less expense than was formerly possible. But due to the depressed financial conditions brought about by the civil war, the people were not desirous of a more speedy system of procedure for the reason that in actions for debts the unfortunate litigants might have more time in which to improve their financial conditions so that they might be able to discharge the judgments. Under pressure of such demand the legislature passed in the same year what is known as the "Bachelor Act" which suspended the operation of certain portions of the C. C. P. temporarily. The legislature of 1870 made the suspension more permanent by providing that the act should remain in force until otherwise provided. The suspension act became chapter 18 of *Battle's* revival, was incorporated in the Code as chapter 10 of the C. C. P., was carried forward in subsequent revivals (see *Bynum v. Powe*, 97 N. C. 374, 381, 2 S. E. 170), and remained in force until

1919 when the legislature passed what is known as the "Crisp Act" restoring the suspended provisions of the C. C. P. (See post, section 1-89). See *Campbell v. Campbell*, 179 N. C. 413, 415, 102 S. E. 737. See Editorial in 1 N. C. Law R. 199.

The effect of the suspension act was far-reaching, many sections having been totally suspended while others were suspended only in part. The editor's notes under the particular sections will point out the effect upon such sections.

The suspension act was chiefly directed at the portions of the C. C. P. which gave the clerk of the superior court power to decide questions of practice, procedure and other such matter out of term time. Hence this section was modified by the act. To prevent this section from operating in the class of cases named above, the act provided that the summons in all civil actions should be made returnable to the court in term time and that questions of pleading, practice and procedure should be determined during term time only. Therefore in such cases the operation of this section was totally suspended. But the suspension act did not affect special proceedings and in such cases the clerk continued to exercise the power hereby conferred upon him, except as such authority may have been modified or affected by subsequent statutes. *Jones v. Desern*, 94 N. C. 32, 35; *Warden v. McKinnon*, 94 N. C. 378, 387; *Brittain v. Mull*, 91 N. C. 498.

With the passage of the Crisp Act this section is in full force and effect and should be construed in connection with section 1-89 where the terms of the recent act will be found. See *Campbell v. Campbell*, 179 N. C. 413, 415, 102 S. E. 737.

Constitutionality of Suspension Act.—The constitutionality of the suspension act was attacked in *McAdoo v. Benbow*, 63 N. C. 461, upon the ground that the constitution required the clerk to hear and decide all questions of practice and procedure, but it was held that the constitution made no such provision and that the legislature had power thereunder to make such regulations. Although there was one dissent to the holding, it became to be universally recognized as the law until the Crisp Act of 1919. *Bynum v. Powe*, 97 N. C. 374, 381, 2 S. E. 170.

Nature of Clerk's Power.—In exercising the jurisdiction herein conferred, the clerk is no more than a servant of the court, subject to its supervision in the manner provided elsewhere by statute. *Turner v. Holden*, 109 N. C. 182, 186, 13 S. E. 731; *Maxwell v. Blair*, 95 N. C. 317, 321; *Brittain v. Mull*, 91 N. C. 498, 502.

As was indicated in *McAdoo v. Benbow*, 63 N. C. 461, 464, the jurisdiction is conferred upon the court, and not upon the clerk. He is merely an instrument in performing his functions. Thus there is no divided jurisdiction between the clerk and judge, but they both function as officials of the same court exercising but one jurisdiction. *Jones v. Desern*, 94 N. C. 32, 35.

Upon appeal from the rulings of the clerk, in vacation, upon procedural motions in pending civil actions, the jurisdiction of the superior court is not derivative but the judge hears the matter *de novo*. *Cody v. Hovey*, 219 N. C. 369, 14 S. E. (2d) 30.

Regularly, in special proceedings (since the act of 1919 in all proceedings, see the editor's note to this section) the pleadings should be made up and perfected by the Clerk, acting as and for the Court. Indeed, he so makes all the orders and judgments in the course of the proceeding, except in some exceptional respects, otherwise expressly provided for. *Brittain v. Mull*, 91 N. C. 498; *Wharton v. Wilkerson*, 92 N. C. 407; *Loflin v. Rouse*, 94 N. C. 508, 509.

The Court in term, should not do more than to direct the Clerk to perfect the pleadings and to allow or disallow amendment according to law. If the Clerk should proceed and make decisions of questions of law, with which a party should be dissatisfied, such party might appeal, and in that way the decision of the Judge would become that of the Court. It was the duty of the Clerk to make all proper orders of reference, as well as other orders and judgments in the course of the proceeding. If he should err in such respect, an appeal might be taken as indicated above. *Loflin v. Rouse*, 94 N. C. 508, 510.

It was not the duty of the Judge in term, after the issues were tried—there being no question of law to be decided,—to direct the Clerk what to do, or to make an order remanding the case to the Clerk. The latter ought to have proceeded without an order, and heard and determined the case upon its merits, subject to the right of appeal to the Judge. *Brittain v. Mull*, 94 N. C. 595, 599.

Same—To Grant Equitable Relief.—The C. C. P. does not give the clerk power to make an order granting affirmative equitable relief. Equitable relief must be set up in the an-

swer as a defense and then the clerk has power to hear all questions herein permitted. See *Vance v. Vance*, 118 N. C. 864, 24 S. E. 768; *Bragg v. Lyon*, 93 N. C. 151.

Same—Effect of Failure of Clerk to Decide Questions. — We are not authorized to decide the questions of law presented by the pleadings and the issues of fact found by the jury, because they have not been decided by the Clerk, acting for the Court, and, upon appeal, by the Judge. It is the duty of the Clerk, acting for the Court, to decide whatever question may be presented, and to make all proper orders. *Brittain v. Mull*, 94 N. C. 595, 599.

Amendments after Joinder of Issues.—Where, in special proceedings, the pleadings are made up before the Clerk, and upon joinder of issues are transferred to the Court in term, the Judge has power to allow amendments, or he may stay the trial and remand the papers to the Clerk, in order that he may consider a motion to amend. *Loftin v. Rouse*, 94 N. C. 508.

Same—Remanding Order Interlocutory. — An order remanding the papers to the Clerk, in order that he may hear a motion to amend the pleadings, to the end that an account should be taken, is interlocutory and does not impair a substantial right, and cannot be appealed from. *Loftin v. Rouse*, 94 N. C. 508.

Application to Special Proceedings.—See the editor's note to this section. Proceedings to obtain partition, dower and the like are special proceedings, *Jones v. Desern*, 94 N. C. 32, 35. So is a proceeding by creditors to compel an administrator to an account and payment of the debts of the estate. *Brittain v. Mull*, 91 N. C. 498; *Warden v. McKinnon*, 94 N. C. 378, 387.

And the granting of a warrant of attachment was a special proceeding. *Cushing v. Styron*, 104 N. C. 338, 339, 10 S. E. 258.

Stated in Ex parte Wilson, 222 N. C. 99, 22 S. E. (2d) 262 (con. op.).

SUBCHAPTER II. LIMITATIONS.

Art. 3. Limitations, General Provisions.

§ 1-14. When action commenced.—An action is commenced as to each defendant when the summons is issued against him. (Rev., s. 359; Code, s. 161; C. C. P., s. 40; C. S. 404.)

When Statute Adopted.—The statutes of limitation appearing in the following sections did not become effective until the adoption of the C. C. P.; prior to that time the statute of presumptions was in force. *Crawford v. McLellan*, 87 N. C. 169.

The statutes prescribing limitations in the code displace those contained in the Revised Code. *Lynn v. Lowe*, 88 N. C. 478, 483.

Subchapter Exclusive. — All civil actions must be commenced within the periods prescribed in this subchapter, "except where in special cases a different limitation is prescribed by statute." *Woody v. Brooks*, 102 N. C. 334, 340, 9 S. E. 294.

Modes of Commencing Action.—There are only two ways by which a civil action may be commenced: 1. By issuing a summons; 2. By submitting a controversy without action. When the former method is resorted to the action is commenced when the summons is issued, and not until that is done. But if the defendant sees proper to do so he may appear without a summons and thereby waive its issuance. *McClure v. Fellows*, 131 N. C. 509, 42 S. E. 951.

Any form of action or special proceeding in this State must always be commenced by summons or attachment. *Morris v. House*, 125 N. C. 550, 560, 34 S. E. 712.

What Constitutes Issuing of Summons. — The word "issue," means going out of the hands of the clerk, expressed or implied, to be delivered to the Sheriff for service. If the clerk delivers it to the Sheriff to be served, it is then issued; or if the clerk delivers it to the plaintiff, or some one else, to be delivered by him to the Sheriff, this is an issue of the summons; or, as is often the case, if the summons is filled out by the attorney of plaintiff, and put in the hands of the Sheriff. This is done by the implied consent of the clerk, and constitutes an issuance from the time it is placed in the hands of the Sheriff for service. But a summons simply filled up and lying in the office of an attorney, would not constitute an issuing of the summons. Nor would the fact that a summons was filled up and held by the clerk for a prosecution bond constitute the issuing of a summons, until the bond is given, or at least until it goes out by the consent of the clerk for the purpose of being served on the defendant. *Webster v. Sharpe*, 116 N. C.

466, 471, 21 S. E. 912; *Pettigrew v. McCain*, 165 N. C. 472, 81 S. E. 701.

Notwithstanding the omission of the signature of the clerk, or the omission of the seal, it has been held sufficient where the clerk actually issued it, but where the clerk gave a blank summons to counsel who filled it out without either the seal or the signature of the clerk and had it served without giving the clerk an opportunity to pass upon the sufficiency of the undertaking, the summons was too defective to constitute a commencement. *Redmond v. Mullenax*, 113 N. C. 505, 511, 18 S. E. 708.

Effect of Defective Summons.—If a paper bear internal evidence of its official origin, and of the purpose for which it was issued, it comes within the definition of original process. It may be amended to conform to the requirements of a perfect summons, and be considered as issued in the first instance. But, unless there is something upon the face of the paper which stamps upon it unmistakably an official character, it is not a defective summons, but no summons at all, and cannot be considered the commencement of an action. *Redmond v. Mullenax*, 113 N. C. 505, 510, 18 S. E. 708.

Issuance Does Not Confer Jurisdiction.—While an action is commenced as to each defendant when the summons is issued against him, jurisdiction of the cause and of parties litigant can be acquired only by a legal service of process, unless there is an acceptance of service or a general appearance, actual or constructive. *Hatch v. Alamance Co.*, 183 N. C. 617, 112 S. E. 529. *Bernhardt v. Brown*, 118 N. C. 700, 701, 24 S. E. 527; *Vick v. Flournoy*, 147 N. C. 209, 60 S. E. 978; *Warlick v. Reynolds & Co.*, 151 N. C. 606, 66 S. E. 657, 21 R. C. L. 1315.

Cited in Massachusetts Bonding, etc., Co. v. Knox, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438 (dis. op.).

§ 1-15. Statute runs from accrual of action; pleading.—Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute. The objection that the action was not commenced within the time limited can only be taken by answer. (Rev., s. 360; Code, s. 138; C. C. P., s. 17; C. S. 405.)

Section not Statute of Presumptions.—Now we have no statute of presumptions. This section prescribes a statute of limitations only. *Helm Co. v. Griffin*, 112 N. C. 356, 358, 16 S. E. 1023.

This section applies to actions wherein formal pleadings are required to be filed and not to proceedings in the nature of a controversy without action upon an agreed statement of facts for the distribution of funds arising from a foreclosure sale. In re *Gibbs*, 205 N. C. 312, 171 S. E. 55.

Necessity of Cause of Action or Claim. — If there is no claim or cause of action the statute will not run. This principle is recognized by this section and there is nothing in sec. 1-49 which conflicts with it. *Miller v. Shoaf*, 110 N. C. 319, 324, 14 S. E. 800.

Necessity of Pleading Statute. — It is familiar learning that the statute of limitations is not available unless pleaded. *Guthrie v. Bacon*, 107 N. C. 337, 12 S. E. 204; *Randolph v. Randolph*, 107 N. C. 506, 12 S. E. 374; and this is required by the statute. *Albertson v. Terry*, 109 N. C. 8, 10, 13 S. E. 713; *King v. Powell*, 127 N. C. 10, 11, 37 S. E. 62. But facts will suffice. *Pipes v. Lum Co.*, 132 N. C. 612, 44 S. E. 114.

It is error for the judge to instruct the jury where the statute of limitations is not pleaded that the plaintiff can not recover. *Pegram v. Stoltz*, 67 N. C. 144, 146.

Manner of Pleading.—It was unquestionably true under the former system, where an equitable claim appeared upon the face of the bill to be barred by lapse of time, or the statute of limitations, that it might have been taken advantage of by demurrer, and that it need not be specially pleaded, but the statute now requires it to be pleaded, and no distinction is made in this respect between equitable and legal causes of action. *Guthrie v. Bacon*, 107 N. C. 337, 339, 12 S. E. 204.

The statute of limitations cannot be pleaded in a demurrer, but must be taken advantage of only by answer, by express provision of the statute. In *Bacon v. Berry*, 85 N. C. 124, 125, the defendant demurred because more than seven years elapsed since the rendition of the judgment when the suit was commenced. The court held that it was, in fact, a plea of the statute of limitations, which must be set up in the answer, it being an objection that can never be taken by demurrer, citing *Green v. North Carolina R. Co.*, 73 N. C. 524. See also *Kahnweiler v. An-*

derson, 78 N. C. 133; King v. Powell, 127 N. C. 10, 11, 37 S. E. 62. If the facts are admitted, the court may pass on the question of the bar, as in *Ewbank v. Lyman*, 170 N. C. 505, 87 S. E. 348. It was held in *Long v. Bank*, 81 N. C. 41, at p. 46, that even if the statutory bar is apparent on the face of the complaint, it could not be pleaded except by answer, and not by demurrer or motion to dismiss. The same was held in *Oldham v. Rieger*, 145 N. C. 254, at p. 259, 58 S. E. 1091, and the reason why such a thing cannot be done is fully stated, in addition to the positive requirement of the statute as the best of reasons, and a demurrer alleging that time had elapsed was in that case characterized as a "speaking demurrer." Nor could the bar of the statute be raised by a motion to dismiss. *Oldham v. Rieger*, supra; *Moody v. Wike*, 170 N. C. 541, 543, 87 S. E. 350.

Under this section limitation on foreclosure of tax sale certificate cannot be taken advantage of by demurrer. *Logan v. Griffith*, 205 N. C. 580, 172 S. E. 348.

Application to Possessory Titles. — The rule does not apply to possessory titles, which are more in the nature of presumptions than strict limitations. *Commonwealth Mut. Fire Ins. Co. v. Edwards*, 124 N. C. 116, 32 S. E. 404.

Accrual of Cause Illustrated. — The statute of limitations where a party dies pending action begins to run from the date of the appointment of the administrator, and the plea of the statute must be set up in the answer. *Lynn v. Lowe*, 88 N. C. 478.

Where one pays another upon a debt which is uncertain in amount and takes an acknowledgment to a refund if overpaid, the statute does not begin to run against the agreement to refund until after the amount of overpayment is ascertained. *Falls v. McKnight*, 14 N. C. 421.

The defendant administrator, according to his own admission assuming to act as plaintiff's agent in the collection and application of the rents, cannot plead the Statute of Limitations unless there was a demand and a refusal, and then only from the time thereof. *Shuffer v. Turner*, 111 N. C. 297, 16 S. E. 417.

A cause of action against the guarantor on a note accrues upon the maturity of the note and the failure of the maker to pay same according to its tenor. *Hall v. Hood*, 208 N. C. 59, 179 S. E. 27.

Where a municipal corporation constructs a sewer system which empties quantities of raw sewage and other obnoxious matter in a stream, which matter is periodically washed upon contiguous lands by freshets, in an action against the city by the owner of the land, all damages to the land based on trespass occurring prior to three years before the institution of the action are barred by the three-year statute of limitations under this section and section 1-52. *Lightner v. Raleigh*, 206 N. C. 496, 174 S. E. 272.

Cited in *McNeill v. Suggs*, 199 N. C. 477, 480, 154 S. E. 729.

§ 1-16. Defenses deemed pleaded by insane party.—On the trial of any action or special proceeding to which an insane person is a party, such insane person is deemed to have pleaded specially any defense, and shall on trial have the benefit of any defense, whether pleaded or not, that might have been made for him by his guardian or attorney under the provisions of this chapter. The court, at any time before the action or proceeding is finally disposed of, may order the bringing in, by proper notice, of one or more of the near relatives or friends of the insane person, and may make such other order as it deems necessary for his proper defense. (Rev., s. 361; 1889, c. 89, s. 2; C. S. 406.)

Applicable against State Institutions.—The superintendent of the State Hospital cannot recover compensation against guardian of insane person for the maintenance of his ward for more than three years preceding the bringing of the action. *State Hospital v. Fountain*, 129 N. C. 90, 39 S. E. 734.

Hearing of Family.—If there was ever a time when the family of an insane person ought to be heard, it would seem that a petition for the appointment of a receiver for an insane person confined in the state asylum is one. In re *Hybart*, 119 N. C. 359, 360, 25 S. E. 963. See *Farmers, etc., Bank v. Duke*, 187 N. C. 386, 392, 122 S. E. 1.

§ 1-17. Disabilities.—A person entitled to commence an action, except for a penalty or forfei-

ture, or against a sheriff or other officer for an escape, who is at the time the cause of action accrued either—

1. Within the age of twenty-one years; or
2. Insane; or

3. Imprisoned on a criminal charge, or in execution under sentence for a criminal offense;

may bring his action within the times herein limited, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the same, when he must commence his action, or make his entry, within three years next after the removal of the disability, and at no time thereafter. (Rev., s. 362; Code, ss. 148, 163; C. C. P., ss. 27, 142; 1899, c. 78; C. S. 407.)

Editor's Note. — In 1899 the legislature struck the provisions which made coverture a disability on par with the others enumerated in this section. See *Weathers v. Borders*, 124 N. C. 610, 617, 32 S. E. 881; *Berry v. Ritter Lumber Co.*, 141 N. C. 386, 54 S. E. 278.

But the statute provided that the time elapsing before its passage can not be counted against a married woman in actions of ejectment, and in other actions it should not apply to actions pending at its passage. *Lafferty v. Young*, 125 N. C. 296, 297, 300, 34 S. E. 444; *Swift v. Dixon*, 131 N. C. 42, 42 S. E. 458.

Applicable to Idiot. — The statute of limitations does not run against an idiot by reason of the excepting clause in this section. *Outland v. Outland*, 118 N. C. 138, 23 S. E. 972.

Detention in Asylum by Defendant's Wrongful Act.—Where plaintiff's cause of action was based upon the alleged wrongful act of defendant in causing plaintiff's detention in an insane asylum, defendant will not be allowed to take advantage of his own wrong, and as to defendant, plaintiff was non sui juris for the period during which plaintiff was detained, and the statute of limitations did not run against plaintiff's cause of action during that period. *Jackson v. Parks*, 216 N. C. 329, 4 S. E. (2d) 873.

Former Law Unchanged. — There is nothing in this section which changes the law as it formerly existed. *Fredrick v. Williams*, 103 N. C. 189, 9 S. E. 298.

Section Relates to True Title. — Adverse possession relates only to the true title, and the exemptions in the statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action. *Berry v. Ritter Lumber Co.*, 141 N. C. 386, 54 S. E. 278.

Effect of Defects of Other Sections. — The criticism to which section 1-38 may be subjected in misreciting other intended sections cannot affect the application of this section to the previously limited actions for real property, to which these are expressly made subject. *Clayton v. Rose*, 87 N. C. 106, 111.

Three Year Period Enforced. — In case of infancy, even after the expiration of the time of the limitation, an action may be brought within three years after full age. *Campbell v. Crater*, 95 N. C. 156, 157; and if not brought within that time the action is barred. *Clendenin v. Clendenin*, 181 N. C. 465, 472, 107 S. E. 458. Dissenting Opinion.

Seven years' adverse possession under color, is no bar to an action of ejectment, where the person entitled to commence the same is an infant at the time the title to the land descended to him, and sues within three years next after full age. *Clayton v. Rose*, 87 N. C. 106.

If land is held adversely to an insane person for such length of time as would bar his recovery if sane, such insane person, or those claiming under him, must commence an action within three years after the disability of insanity is removed, else their rights to recover will be barred. *Warlick v. Plonk*, 103 N. C. 81, 9 S. E. 190.

Effect of Disability Continuing Through Life. — If the disability continued during life, and for a period thereafter sufficient to complete the prescribed time of seven years, the title would be perfected in the occupant, subordinate only to a right in the heir to sue for the recovery of the land for the space of three years next after his death. The running of the statute against the action and to consummate the title would be concurrent after the decease of the grantor. *Ellington v. Ellington*, 103 N. C. 54, 57, 9 S. E. 208.

Effect of Guardian Having Right to Sue. — *Culp v. Lee*, 109 N. C. 675, 678, 14 S. E. 74, has no application to actions

for the recovery of realty when the legal title is in the person under disability. The court held that the distributees having had a general guardian, the executor, having been exposed to an action by him for the full period prescribed by the statute, was protected by the lapse of time. *Cross v. Craven*, 120 N. C. 331, 332, 333, 26 S. E. 940.

The failure of the guardian to institute actions which he has the authority and duty to bring on behalf of his ward is the failure of the ward, entailing the same legal consequences with respect to the bar of the statutes of limitation. *Johnson v. Pilot Life Ins. Co.*, 217 N. C. 139, 7 S. E. (2d) 475, 128 A. L. R. 1375.

Running of Statute Where No Final Account Filed. — When no final account has been filed, the statute begins to run from the arrival of the ward at age. *Self v. Shugart*, 135 N. C. 185, 187, 47 S. E. 484.

§ 1-18. Disability of marriage.—In any action in which the defense of adverse possession is relied upon, the time computed as constituting such adverse possession shall not include any possession had against a feme covert during coverture prior to February thirteenth, one thousand eight hundred and ninety nine. (Rev., s. 363; 1899, c. 78, ss. 2, 3; C. S. 408.)

Cross References.—As to constitutional provision concerning property of married women, see the North Carolina Constitution, Article X, § 6. As to status of married women in civil actions and with reference to property in general, see § 52-1.

Purpose of Section. — This section is a part of the major stroke of the law to free the married woman from the merged identity fiction which deprived her of a legal existence. Other sections are §§ 52-1 et seq. See 2 N. C. Law Rev. 181.

Coverture Not Defense Since 1899.—Under the provisions of this section, and sections 52-1 et seq., passed in pursuance of Article X, section 6, of our State Constitution, husband and wife are authorized to contract and deal with their separate property, subject to specific exceptions as if they were unmarried. *Roberts v. Roberts*, 185 N. C. 566, 118 S. E. 9.

Since the passage of this section if the feme covert's right of entry and title were defeated by defendants' adverse possession for seven years under color before the action was commenced, the plea of coverture will not avail her. *Bond v. Beverly*, 152 N. C. 56, 57, 67 S. E. 55.

Since the passage of this section coverture is not a defense in bar of the running of the statute of limitations. *Carter v. Reeves*, 167 N. C. 131, 83 S. E. 248.

In a suit to cancel deeds because of the mental incapacity of the grantor to make them, and under which the defendant in possession claims title by adverse possession under color, the coverture of the plaintiff will not avail her to repel the bar of the statute of limitations, which has run in favor of the defendant's title. *Butler v. Beil*, 181 N. C. 85, 106 S. E. 217.

Section Contemplates True Owner. — A possession cannot well be adverse, within the meaning of this section, to any one who has no title or right of entry or action. It cannot be adverse to one who is a mere stranger to the true title and who has no claim whatever to the land, for he has no right to be barred by such a possession. It has sole reference to the owner of the title. *Berry v. Ritter Lumber Co.*, 141 N. C. 386, 395, 54 S. E. 278.

Effect of Statute upon Proof. — Until twenty years had elapsed since the passage of this section, one claiming title by adverse possession had the burden of proving that the statute began to run prior to the disability of coverture. *Holmes v. Carr*, 172 N. C. 213, 90 S. E. 152.

§ 1-19. Cumulative disabilities.—When two or more disabilities coexist at the time the right of action accrues, or when one disability supervenes an existing one, the limitation does not attach until they all are removed. (Rev., s. 364; Code, ss. 149, 170; C. C. P., ss. 28, 49; C. S. 409.)

Editor's Note. — By the phraseology of this section, it is evident that cumulative disabilities will only prevent the running of a statute before it has started. Any number, after the statute has once begun to run, will not suspend or arrest the operation. See *Holmes v. Carr*, 172 N. C. 213, 90 S. E. 152. See also, sec. 1-20.

Operation of Section Illustrated. — The disability of coverture supervened upon that of infancy, and the statute of limitations is suspended in language too explicit to be

capable of any other construction. *Clayton v. Rose*, 87 N. C. 106; *Cross v. Craven*, 120 N. C. 331, 332, 26 S. E. 940. *Epps v. Flowers*, 101 N. C. 158, 160, 7 S. E. 680; *Lafferty v. Young*, 125 N. C. 296, 297, 300, 34 S. E. 444.

This section can have no application when there is a clear running of the Statute for the period fixed after the disability is removed, as when an infant attains his majority. *Campbell v. Crater*, 95 N. C. 156, 162.

Significance of Length of Time of Disabilities. — The length of time elapsing during cumulative disabilities so long as the disabilities are continuous is immaterial. *Epps v. Flowers*, 101 N. C. 158, 161, 7 S. E. 680.

§ 1-20. Disability must exist when right of action accrues.—No person may avail himself of a disability except as authorized in § 1-19, unless it existed when his right of action accrued. (Rev., s. 365; Code, s. 169; C. C. P., s. 48; C. S. 410.)

Running of Statute Cannot Be Stopped. — If the statute of limitations commences to run nothing stops it. When it begins to run against the ancestor, it continues to run against the heir, although the heir is under disability when the descent is cast. *Frederick v. Williams*, 103 N. C. 189, 9 S. E. 298. See *Clendenin v. Clendenin*, 181 N. C. 465, 472, 107 S. E. 458; *Asbury v. Fair*, 111 N. C. 251, 16 S. E. 467.

Principle Applied. — The principle of this section applies where the defendant is out of the state but left after the cause of action accrued. *Blue v. Gilchrist*, 84 N. C. 239, 241. It applies also in the case of insanity, see note under section 1-16; and applies formerly in the case of coverture, see note under sec. 1-18.

§ 1-21. Defendant out of state; when action begun or judgment enforced.—If, when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the state, action may be commenced, or judgment enforced, within the times herein limited, after the return of the person into this state, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this state, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action, or the enforcement of the judgment. (Rev., s. 366; Code, s. 162; C. C. P., s. 41; 1881, c. 258, ss. 1, 2; C. S. 411.)

Retroactive Effect.—As a general rule statutes of this character apply to actions pending at the time they take effect provided the actions have not been barred by a previous limitation. See *Cox v. Brown*, 51 N. C. 100.

The general purpose of this section, taken in connection with the statute of limitation, is to give the person having an accrued cause of action, or judgment, as prescribed, opportunity substantially during the whole of the lapse of the time against him to bring his action or enforce his judgment. *Armfield v. Moore*, 97 N. C. 34, 37, 38, 2 S. E. 347.

Nonsuit in Absence of Supporting Evidence.—Where plaintiff resists under this section defendant's plea of the statute of limitations solely on the ground that defendant left the state prior to three years from the accrual of the cause of action, and defendant denies the allegation of nonresidence, in the absence of evidence by plaintiff in support of the allegation of nonresidence, defendant's motion as of nonsuit is properly allowed. *Savage v. Currin*, 207 N. C. 222, 176 S. E. 569. See § 1-25 and note thereto.

The words "any person," are employed to designate the person to be affected and embraced by the section, are very comprehensive, and there is nothing in its scope or purpose that excludes nonresidents. *Armfield v. Moore*, 97 N. C. 34, 37, 38, 2 S. E. 347.

"The times herein limited" means, and must mean, the time prescribed elsewhere in the Code, or in statutes amending or passed as substitutes therefor. The plain intent of the statute is to put nonresidents on the same footing as residents, and not to protect them from an action unless they have been for two years exposed to service of summons. *Armfield v. Moore*, 97 N. C. 34, 2 S. E. 347; *Williams v. Iron Belt Bldg., etc., Ass'n.*, 131 N. C. 267, 269, 42 S. E. 607; *Hill v. Lindsay*, 210 N. C. 694, 188 S. E. 406.

Sufficiency of Return to Start Statute. — Where the debtor was a nonresident of this State, but was here on visit of a day or two each year, such visits would not have effect of putting the statute in motion. *Armfield v. Moore*, 97 N. C. 34, 2 S. E. 347.

The "return to the State," specified by this section, as necessary to put the statute in motion, is a return with a view to residence—not a casual appearance in the state, passing through it, or even making a visit here. *Lee v. McKoy*, 118 N. C. 518, 522, 24 S. E. 210.

Same—Applicable Where Absence Started Before Accrual. —Where a debtor is out of the State at the time the cause of action accrues, the statute of limitation does not begin to run until he returns to this State for the purpose of making it his residence. *Armfield v. Moore*, 97 N. C. 34, 2 S. E. 347.

When Running Suspended by Action. — It will be observed that this statutory provision prescribes and embraces three distinct cases in which the statute of limitation will not operate as a bar because of the continuous lapse of the time prescribed next after the cause of action accrued, or judgment was rendered or docketed; (1) Where the debtor was out of the state at the time the cause of action accrued or the judgment was rendered or docketed. This case may apply alike to a resident or nonresident debtor. In it time does not begin to lapse in his favor until he shall return to the State—not simply on a hasty visit of a day or two, at long intervals, but for the purpose of residence. And if, after such returns, he shall depart from the state for the purpose of residence out of it, or to sojourn out of it for a year or more, the time of his absence will not be allowed in his favor; it will be subtracted from the time that would have been so allowed if he had remained in the State. (2) When, after the cause of action accrued or the judgment was rendered or docketed, the debtor-resident or nonresident of the State—departed from and resided out of it, "the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action or the enforcement of such judgment." (3) When, after the cause of action has accrued or judgment has been rendered or docketed, the debtor shall depart from the State, "and remain continually absent for the space of one year or more," the time of his absence shall not be allowed in his favor. *Armfield v. Moore*, 97 N. C. 34, 36, 2 S. E. 347; *Arthur v. Henry*, 157 N. C. 393, 395, 73 S. E. 206.

The statute of limitations is suspended in the following cases: (1) When the person against whom a cause of action exists becomes a nonresident, whether he remain continuously absent for a year or occasionally visits the state; (2) when such person retains his residence, but is absent from the state continuously for one year or more. *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210.

When a person becomes a nonresident of the state it is not necessary that he should remain continuously out of the state one year to stop the running of the statute, nor would occasional visits to the state put the statute in motion. *Lee v. McKoy*, 118 N. C. 518, 521, 24 S. E. 210.

And this without exception of instances where a proceeding in rem will lie against property situated here. No presumption of payment of the debt will be raised within the period allowed for the commencement of the action. *Love v. West*, 169 N. C. 13, 84 S. E. 1048. See concurring opinion.

When Limitation Begins to Operate against Foreign Corporation. — An action against a foreign corporation to recover usury may be begun within two years from the time there is someone in the State upon whom service can be made. *Williams v. Iron Belt Bldg., etc., Ass'n*, 131 N. C. 267, 42 S. E. 607.

When Judgment in Personam Not Rendered. — Where a nonresident defendant of this state has had no personal service of summons made upon him and has not accepted service, and has no property herein subject to attachment or levy, a judgment upon publication of service under the provisions of this section, may not be rendered against him in personam, in an action for debt; and where so rendered it will be set aside. *Bridger v. Mitchell*, 187 N. C. 374, 121 S. E. 661.

Section Not Applicable after Statute Has Run. — This section is not applicable after the statute of limitation has run. *Southern R. Co. v. Mayes*, 113 Fed. 84.

Applicability to Actions in Rem. — This section is applicable to actions in rem as well as actions in personam, no exception being made. *Love v. West*, 169 N. C. 13, 84 S. E. 1048.

Applicability to Suits against Bail. — Proceedings against bail, in civil actions, are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the state in the mean-

while. *Albemarle Steam Nav. Co. v. Williams*, 111 N. C. 35, 15 S. E. 877.

Applicable to Enforce Resulting Trust. —Where a cause of action to enforce a resulting trust has existed for more than ten years, but subtracting the length of time the trustee thereof had been out of the state, the elapsed time is less than ten years, then, under this section, the cause of action is not barred by the ten-year statute. *Miller v. Miller*, 200 N. C. 458, 157 S. E. 604.

Effect of Non-resident's Ownership of Property in State. —The fact that a non-resident debtor has property within the State will not affect this Section, which suspends the operation of the Statute of Limitations for the period during which the person, against whom the demand is made, is out of the State. *Grist v. Williams*, 111 N. C. 53, 15 S. E. 889.

Non-Resident Foreign Corporations. —The statute of limitations does not apply to foreign non-resident corporations. *Grist v. Williams*, 111 N. C. 53, 15 S. E. 889; *Alpha Mills v. Watertown Steam Engine Co.*, 116 N. C. 797, 804, 21 S. E. 917.

But it does apply to non-resident corporations as well as individuals. *Alpha Mills v. Watertown Steam Engine Co.*, 116 N. C. 797, 21 S. E. 917; *Grist v. Williams*, 111 N. C. 53, 15 S. E. 889; *Green v. Hartford Life Ins. Co.*, 139 N. C. 309, 310, 51 S. E. 887; *Volivar v. Richmond Cedar Works*, 152 N. C. 34, 35, 67 S. E. 42; 152 N. C. 656, 63 S. E. 200.

Effect of Corporation Service Statutes. —Sections 58-153, 58-154, which authorize service of summons against non-resident insurance companies upon the Commissioner of Insurance, in no way abrogate or affect the suspension of the running of the statutes of limitation in such cases. That service can thus be had upon a non-resident corporation may be a reason why the General Assembly should amend this section, so as to set the statute running in such cases, but it has not done so and the courts can not. *Green v. Hartford Life Ins. Co.*, 139 N. C. 309, 310, 51 S. E. 887.

Applicable to Operation of Sec. 1-53. —The existence of the conditions enumerated in this section will suspend the operation of sec. 1-53. *Williams v. Iron Belt Bldg., etc., Ass'n*, 131 N. C. 267, 269, 42 S. E. 607.

Cited in. *Osborne v. Board of Education*, 207 N. C. 503, 504, 177 S. E. 642.

§ 1-22. Death before limitation expires; action by or against executor. —If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration, provided the letters are issued within ten years of the death of such person. If the claim upon which the cause of action is based is filed with the personal representative within the time above specified, and admitted by him, it is not necessary to bring an action upon such claim to prevent the bar, but no action shall be brought against the personal representative upon such claim after his final settlement. (Rev., s. 367; Code, s. 164; C. C. P., s. 43; 1881, c. 80; C. S. 412.)

I. General Consideration.

II. Death of Creditor.

III. Death of the Debtor.

IV. Filing Claim.

I. GENERAL CONSIDERATION.

Cross References. —As to actions which survive to and against a personal representative, see § 28-172 et seq. As to actions which do not survive, see § 28-175. See also § 1-74. As to final settlement of personal representative, see § 28-121 and § 28-162 et seq.

Editor's Note. —This section was new with the C. C. P. It has remained unchanged since its insertion except that the last sentence was added by the act of 1881, and the proviso at the end of the second sentence by the act of 1919.

The section has been held to be an enabling and not a

disabling statute, and to apply only in those cases where, but for its interposition, a claim would be barred, *Benson v. Bennett*, 112 N. C. 505, 17 S. E. 432; *Redmond v. Pippen*, 113 N. C. 90, 93, 18 S. E. 50; *Humphrey v. Stephens*, 191 N. C. 101, 131 S. E. 383; *Geitner v. Jones*, 176 N. C. 542, 97 S. E. 494, intending to enlarge and extend the time within which the action may be brought, and not to suspend the operation of the statute, which continues to run. *Irvin v. Harris*, 184 N. C. 547, 114 S. E. 818. It means that if at the time of the death of the debtor the claim is not barred, action may be brought within one year after the grant of letters to the personal representative in those cases where, in regular course, but for the interposition of this section, the claim would become barred in less time than one year from such grant. It was not intended to be a restriction on the statute of limitation so that a claim should become barred by the lapse of a year from the grant of letters, where, in regular course but for this section, it would not be barred till a later date. The object in view is that when the cause of action survives and is not barred at the time of the death, there shall be at least one year after the death of the creditor, or one year after the grant of letters of administration to the personal representative of the debtor, before action is barred. This is conclusively shown by the words of the section, that if the party die before the claim is barred action may be brought "After the expiration of the time limited, and within one year." *Benson v. Bennett*, 112 N. C. 505, 507, 17 S. E. 432; *Coppersmith v. Wilson*, 107 N. C. 31, 12 S. E. 77.

Formerly there was no such extension of time to prevent the bar of the statutes from becoming complete as is provided in this section. *Hawkins v. Savage*, 75 N. C. 133; *Bruner v. Threadgill*, 88 N. C. 361. *Patterson v. Wadsworth*, 89 N. C. 407, 409.

Exception to General Rule.—This section is an exception to the general rule that when the statutes of limitation once begin to run nothing can stop them. *Matthews v. Petersen*, 150 N. C. 134, 135, 63 S. E. 721. *Winslow v. Benton*, 130 N. C. 58, 59, 40 S. E. 840.

However, it should be observed that it has no application where the bar attached before death. *Grady v. Wilson*, 115 N. C. 344, 347, 20 S. E. 518; *Parker v. Hardin*, 121 N. C. 57, 58, 28 S. E. 20; *Copeland v. Collins*, 122 N. C. 619, 30 S. E. 315; *Winslow v. Benton*, 130 N. C. 58, 59, 40 S. E. 840; *V. ughan v. Hines*, 87 N. C. 445, 450; *Daniel v. Laughlin*, 37 N. C. 433, 437; *Humphrey v. Stephens*, 191 N. C. 101, 131 S. E. 383.

And for that reason will not constitute an exception to the rule where such bar had attached at death. Nor will the section apply where the action is not barred within the year fixed by the section.

To What Limitations Applicable.—The section only applies to the limitations prescribed in the Code of Civil Procedure. *Hall v. Gibbs*, 87 N. C. 4, 5, 6.

Nothing will defeat the operation of this section except the disabilities mentioned in the statutes, fraud or certain other defenses of an equitable nature. *Syme v. Badger*, 96 N. C. 197, 2 S. E. 61.

When it is pertinent to the subject it must be taken in connection with section 1-47. *Redmond v. Pippin*, 133 N. C. 90, 92, 18 S. E. 50.

Applicability in Action to Subject Lands.—The heirs at law can successfully plead the statute of limitations against the administrator seeking to subject their lands to the payment of deceased's debt as fully as he can against a creditor. *Matthews v. Peterson*, 150 N. C. 134, 63 S. E. 721.

A personal representative who seeks to subject descended or devised lands to make assets for the payment of debts represents the creditors of the estate and in that capacity is entitled to any benefit or exception which the creditors might have in prosecuting the action against him including the benefits of this section. *Smith v. Brown*, 101 N. C. 347, 7 S. E. 890.

When Section Begins to Run Against Insane.—This section, commences to run against an insane claimant only from the time of the qualification of his guardian. *Irvin v. Harris*, 182 N. C. 647, 109 S. E. 867.

Whether Notes under Seal.—Where notes matured less than three years prior to the date of death of the maker, an action on the notes was not then barred by the three-year statute of limitation, and the filing of claim and the admission of it, in accordance with this section, would prevent the claim being barred, and any question as to whether the notes were or were not under seal becomes immaterial in this phase of the case. *Lister v. Lister*, 222 N. C. 555, 562, 24 S. E. (2d) 342.

Effect of Order to Add Parties in Supreme Court.—See *Gertner v. Jones*, 176 N. C. 542, 97 S. E. 494. Cited in 13 N. C. Law Rev. 60.

II. DEATH OF CREDITOR.

Brought within Year of Creditor's Death.—Actions upon claims in favor of an estate of a decedent must be brought within one year of his death, without regard to when administrator was appointed. *Coppersmith v. Wilson*, 107 N. C. 31, 12 S. E. 77.

Construction upon Section.—Although it was held that a statute does not run against a party not in existence or under a disability or against such a person, it may be noted that *Brawley v. Brawley*, 109 N. C. 524, 14 S. E. 73, does not change the construction placed upon this section that an action must be brought by a representative of a creditor within one year after his death, and against the representative of a debtor in one year after taking out letters of administration, when it would otherwise have become barred. *Burgwyn v. Daniel*, 115 N. C. 115, 119, 20 S. E. 462.

Time is counted from the death of the decedent, in respect to claims in favor of the estate, because the law does not encourage remission in those entitled to administrations, and this notwithstanding what is said in *Dunlap v. Hendley*, 92 N. C. 115. *Coppersmith v. Wilson*, 107 N. C. 31, 12 S. E. 77.

Same—Dunlap v. Hendley.—It is said in *Dunlap v. Hendley*, 92 N. C. 115, 117 that where the creditor died before the statute ran and the administrator brought action within the year after the death of the creditor but after the statute had run, it is questionable whether this section could help the case because the administrator should bring the action within the period of the statute of limitation and while it is running. This position is clearly contradictory to the terms of the section and it was held in *Coppersmith v. Wilson*, 107 N. C. 31, 12 S. E. 77, that notwithstanding the language used the action could be brought any time within the year.

When Time Extended.—This section does not extend the life of a judgment beyond the ten years where the judgment creditor dies more than a year before the expiration of the ten-year limitation. *Hughes v. Boone*, 114 N. C. 54, 19 S. E. 63.

The death of the judgment creditor did not suspend the statute. The effect was only to give one year's time from the death of the creditor to the personal representative to bring action, if otherwise it would have been barred by the lapse of ten years before such year had expired. *Benson v. Bennett*, 112 N. C. 505, 17 S. E. 432. But there was more than one year after the death of the creditor before the ten years expired, and therefore this section has no place. *Hughes v. Boone*, 114 N. C. 54, 56, 19 S. E. 63.

Contract as to Limit Permissible.—A reasonable stipulation in a contract of carriage with a railroad company for an interstate shipment of goods, as to the time wherein suit may be brought for loss or damage, is a part of the contract between the parties, and being made without exception, is not suspended by this section. *Thigpen v. East Carolina Railway*, 184 N. C. 33, 113 S. E. 562.

Principle Illustrated.—Where the statute had not run at the infestate's death, and the action was brought within one year after the issuing of the letters of administration, the action was not barred under this section notwithstanding that the ordinary statutory period had elapsed between the accrual and the bringing of the action. *Robertson v. Dunn*, 87 N. C. 191; *Mauney v. Holmes*, 87 N. C. 428.

III. DEATH OF THE DEBTOR.

Section Mandatory.—Actions upon claims against the estate of a decedent must be brought in one year after administration. *Coppersmith v. Wilson*, 107 N. C. 31, 12 S. E. 77; *Winslow v. Benton*, 130 N. C. 58, 40 S. E. 840.

Running Arrested against Unrepresented Estate.—Where Proceeding on Representative's Bond.—*Brawley v. Brawley*, 109 N. C. 524, 14 S. E. 73, held that the statute of limitation did not run to bar an action by an administrator de bonis non against the representative and bondsmen of a deceased administrator while there was no administrator de bonis non—no one in esse who could bring such action. This would not apply to an action brought by the creditor, or a distributee, or legatee, directly against the representative of the deceased executor, administrator or guardian and their sureties for breach of the bond. *Benson v. Bennett*, 112 N. C. 505, 17 S. E. 432; *Coppersmith v. Wilson*, 107 N. C. 31, 12 S. E. 77; *Burgwyn v. Daniel*, 115 N. C. 115, 119, 20 S. E. 462.

Flemming v. Flemming Qualified.—It is said in *Flemming v. Flemming*, 85 N. C. 127, 128, to be well settled that the death of the debtor after the cause of action has accrued will not suspend the running of the statute to the completion of the prescribed time. This was intended to be the statement of a general principle, resting upon numerous adjudications, and without reference to the modifications made by the words of the act recited, and to which atten-

tion was not at the moment of penning the sentence directed, and certainly with no intent to disregard or ignore the express statutory mandate. *Mauney v. Holmes*, 87 N. C. 428, 433.

Applicable to Partners.—Notwithstanding that a deceased partner's debt to his firm would have otherwise been barred by statute since his death, yet where no administrator has been appointed, the debt will not be barred until after one year from the appointment of an administrator unless more than ten years has elapsed since his death. *Irvin v. Harris*, 182 N. C. 656, 109 S. E. 871.

Principle Illustrated.—It was held that a claim reduced to judgment is barred by the ten years statute of limitation unless the claim was admitted by administrator, or action was brought upon it, in one year after the expiration of the ten years on the appointment of administrator as prescribed by statute. *Brittain v. Dickson*, 104 N. C. 547, 10 S. E. 701.

Where judgment is obtained against an administrator who dies five years later and there was no further administration until thirteen years later when steps were taken to collect the judgment, it was held that the ten year proviso applied to bar an enforcement. *Fisher v. Ballard*, 164 N. C. 326, 80 S. E. 239.

Where the period of limitation for a judgment was ten years, and some two months before it ran the judgment creditor died and no representative qualified until two and a half years later but in the meantime the debtor had died and his representative was not qualified until two years and eleven months after the death of the creditor, and the action was brought four months after the latter representative's qualification, by virtue of this section it was not barred. *Dunlap v. Hendley*, 92 N. C. 115.

Proviso—Issuing within Ten Years.—The proviso is a wise restriction to prevent the inconvenience and often the injustice of collecting stale claims. *Matthews v. Peterson*, 150 N. C. 134, 136, 63 S. E. 721.

When the letters of administration have been issued before the operative effect of the proviso the provision that such should have been issued within ten years from the death of the intestate is inapplicable. *Matthews v. Peterson*, 150 N. C. 134, 63 S. E. 721.

There is no statutory provision which prevents the expiration of a judgment lien in case of death and administration similar to that of the proviso. *Matthews v. Peterson*, 150 N. C. 134, 135, 63 S. E. 721.

IV. FILING CLAIM.

Not Retroactive.—The last sentence of this section applied only to those claims that were filed at the time of the passage of the act and were not then barred. It could not apply to those barred when the act became effective. *Whitehurst v. Day*, 90 N. C. 542.

Purpose of Filing Claim.—The purpose of the creditor then is, b, filing his claim with the administrator, to avoid the running of the Statute against his debt, and to fix the debt by the admission of the personal representative—the very reverse of presenting the claim for instant payment. *Stonestreet v. Frost*, 123 N. C. 640, 650, 31 S. E. 836. From dissenting opinion.

The word "filed" has reference, certainly, to the old custom of stringing on a line or wire papers of value for past or future usefulness, or maybe both. The same end is subserved by tying together or bundling papers and labeling them or cataloguing them on rolls or lists for future use. *Stonestreet v. Frost*, 123 N. C. 640, 649, 31 S. E. 836. From dissenting opinion.

The filing of claim is intended to be of advantage to creditors who do not receive or who do not expect to receive payment of their debts on presentation, in enabling them to leave with the personal representative a memorandum of their claims to save the trouble and expense of bringing suit, and to prevent the bar of the Statute of Limitations. And the act of the creditor in filing the claim is an admission on his part that he does not expect the immediate payment of the debt, but that he wishes the claim entered, "filed," somewhere, in some way, by the personal representatives. *Stonestreet v. Frost*, 123 N. C. 640, 650, 31 S. E. 336. From dissenting opinion.

Notice to the executor for information is the prime purpose of the statute in requiring the claim to be filed and seems to be all that is necessary for his purpose, until he is ready to make a final settlement. *Hinton v. Pritchard*, 126 N. C. 8, 10, 35 S. E. 127.

The term "filed" signifies that the claim is to be exhibited, for inspection, to the personal representative, for his admission or rejection. It is not required of the creditor to part with the possession of the evidence of his claim. *Hinton v. Pritchard*, 126 N. C. 8, 35 S. E. 127.

Sufficiency of Filing.—Where an administrator, knowing

that his appointment is at the instance and solicitation of judgment creditors so that they might make collection immediately upon appointment, with memorandum of the judgment in hand, investigates and ascertains that the judgment has not been paid, and thereafter institutes proceedings to sell the lands of intestate to make assets to pay the judgment, claim on the judgment has been filed and admitted by the administrator within this section. *Rodman v. Stillman*, 220 N. C. 361, 17 S. E. (2d) 336.

Merely notice to an executor of a claim against the decedent's estate, received without comment or approval by the executor, is not a filing of the claim within the meaning of this section, but where, after such notice, the executor carries the item as a debt on the books of the estate and reports it to the clerk as a debt owed by the estate, the executor's approval will be inferred, and the statute will not operate as a bar. *Horne Corp. v. Creech*, 205 N. C. 55, 169 S. E. 794.

Section Illustrated.—The exhibition by the Sheriff within one year of the date of administration to the administrator, of an execution issued in favor of the county against the intestate, which the administrator admits is correct and does not pay for want of assets—is a sufficient "filing" required by this section, so as to render unnecessary an action to prevent the bar of Statute of Limitations. *Stonestreet v. Frost*, 123 N. C. 640, 642, 31 S. E. 836. See dissenting opinion.

In *Stonestreet v. Frost*, 123 N. C. 640, at pages 646 and 647, 31 S. E. 836, it is said that it is a sufficient "filing," when the claim is presented within the proper time to the personal representative and he acknowledges the validity of the debt. "The creditor can never compel the administrator to 'string' the claim. He has done his part when he has presented it to the administrator with sufficient certainty as to the nature and amount of the debt." *Justice v. Gallert*, 131 N. C. 393, 394, 42 S. E. 850.

Sufficiency of Presentation.—Where the plaintiff never presents his claim, or any proof of it, but simply announces its amount, without response from the representative, the running of the statute is not arrested under this section. *Flemming v. Flemming*, 85 N. C. 127, 131.

Sufficiency of Admission.—A partial payment by the personal representative, without objection, is an unequivocal act from which an admission of the justice of the claim may be inferred. *Hinton v. Pritchard*, 126 N. C. 8, 35 S. E. 127.

When the personal representative does not deny the correctness of the claim filed with him in proper time, but filed his petition to make assets to pay it, this is strong proof that he admitted it. *Woodlief v. Bragg*, 108 N. C. 571, 13 S. E. 211.

Same—Silence.—If a claim is presented in the form of a bill of particulars, and the representative refuses an explicit admission of denial, the plaintiff has the right to deem its acceptance without remark as arresting the running of the statute. *Flemming v. Flemming*, 85 N. C. 127, 131.

Effect of Admission.—The admission of the validity of a claim by an administrator, where presented within proper time, dispenses with any formal proof thereof. *Justice v. Gallert*, 131 N. C. 393, 42 S. E. 850.

Claims not barred presented to the administrator in one year after letters granted and admitted by him need not be put in suit to prevent the bar of the statute pending the administration, nor can the heirs plead the statute as to them. *Turner v. Shuffler*, 108 N. C. 642, 13 S. E. 243.

A distinct acknowledgment and promise made by an executor or administrator and based upon a sufficient consideration imposes a personal liability upon the representative, but does not take away the protection afforded by lapse of time to the estate represented. *Fall v. Sherrill*, 19 N. C. 371; *Oates v. Lilly*, 84 N. C. 643; *Flemming v. Flemming*, 85 N. C. 127, 128.

Application to Heirs.—There is nothing in this section which would seem to indicate a suspension of the statute as to the personal representative only, leaving the heir at law to be protected by the lapse of time. *Woodlief v. Bragg*, 108 N. C. 571, 572, 13 S. E. 211.

The personal representative represents the deceased, and his admission of the correctness of a claim, unless impeachment for fraud, will estop the heirs. *Woodlief v. Bragg*, 108 N. C. 571, 13 S. E. 211.

Since the amendment of 1881 the heir is as much barred by the filing of the claim within the prescribed time and its admission by the personal representative, as he would be by the latter submitting to a judgment. It will be noted that the claim in controversy in *Beyers v. Park*, 88 N. C. 456, was a cause of action accrued prior to the Code of Civil Procedure and this section did not apply to it at

all. *Hall v. Gibbs*, 87 N. C. 4; *Woodlief v. Bragg*, 108 N. C. 571, 573, 13 S. E. 211.

Suit by Administrator Sufficient Notice of His Claim.—*Harris v. Davenport*, 132 N. C. 697, 44 S. E. 406.

Not Applicable to Judgments.—Where a judgment had been obtained on a claim, the amendatory act of 1881 can have no application. *Woodlief v. Bragg*, 108 N. C. 571, 573, 13 S. E. 211.

§ 1-23. Time of stay by injunction or prohibition.—When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action. (Rev., s. 368; Code, s. 167; C. C. P., s. 46; C. S. 413.)

Nature of Operation upon Statute.—This section as its terms clearly impart, affects, and is intended to affect only a litigant's right to prosecute an action in court as fixed by the statute, and does not as a rule operate to extend or prolong a time limit or a property right as determined by the contract of the parties. *Gatewood v. Fry*, 183 N. C. 415, 418, 111 S. E. 712.

Effect of Irregularity in Granting.—Mere irregularity in the granting of an injunction will not render it a nullity, so as to prevent the suspension of the statute of limitations, under this section, during the pendency of the injunction. *Walton v. Pearson*, 85 N. C. 34, 35.

§ 1-24. Time during controversy on probate of will or granting letters.—In reckoning time when pleaded as a bar to actions, that period shall not be counted which elapses during any controversy on the probate of a will or granting letters of administration, unless there is an administrator appointed during the pendency of the action, and it is provided that an action may be brought against him. (Rev., s. 369; Code, s. 168; C. C. P., s. 47; C. S. 414.)

Persons Protected.—This section applies only to protect creditors, there being no one for them to sue. *Stelges v. Simmons*, 170 N. C. 42, 86 S. E. 801.

It does not apply to the heirs at law or devisees to nullify the protection given every one in adverse possession of realty for seven years under color of title, nor to invalidate a judgment rendered against the heir or devisee that the title to the property is in another. *Stelges v. Simmons*, 170 N. C. 42, 46, 86 S. E. 801.

Effect Where No Representative during Contest.—This section applies only where there is no administrator or collector during the contest. *Hughes v. Boone*, 114 N. C. 54, 19 S. E. 63.

Cited in *Frederick v. Williams*, 103 N. C. 189, 191, 9 S. E. 298; *Ex parte Smith*, 134 N. C. 495, 47 S. E. 16.

§ 1-25. New action within one year after nonsuit, etc.—If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested, the plaintiff or, if he dies and the cause of action survives, his heir or representative may commence a new action within one year after such nonsuit, reversal, or arrest of judgment, if the cost in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought in forma pauperis. (Rev., s. 370; Code, ss. 142, 166; C. C. P., ss. 21, 45; 1915, c. 211, s. 1; C. S. 415.)

Cross References.—As to actions which do and which do not survive, see § 28-172 et seq. As to actions in forma pauperis, see § 1-109 et seq. and § 6-24.

Editor's Notes.—This section was amended in 1915 by adding the condition relating to costs.

This section is mandatory as to the payment of costs prior to the commencement of the record action. *Rankin v. Oates*, 183 N. C. 517, 112 S. E. 32.

The words "new action," "new suit," and "original suit" indicate a difference in the two actions though the causes may be identical. *Cooper v. Crisco*, 201 N. C. 739, 161 S. E. 310.

When Section Applies.—This section applies only when

the party would otherwise be barred from his right of action from the lapse of time prescribed by the statute of limitations relating to the cause of action. *Grimes v. Andrews*, 170 N. C. 515, 87 S. E. 341.

It has been held in *Bradshaw v. Citizens' Nat. Bank*, 172 N. C. 632, 90 S. E. 789, that when both suits, as in this case, are brought within the time allowed by the general law, neither the section in question nor the amendment thereto requiring the prepayment of costs, applied for in such case it was not necessary to resort to it, nor could plaintiff be properly considered as proceeding under it, but, under the provisions of the general statute, establishing the time within which these actions should be brought. *Summers v. Southern R. Co.*, 173 N. C. 398, 399, 92 S. E. 160.

Since the claim was not presented within the time limited before the first action was commenced, it is not protected from the operation of the statute after the nonsuit by this section. *Royster v. Commissioners*, 98 N. C. 148, 152, 3 S. E. 739.

While this section relating to the time of institution of an action in regard to the statute of limitations, provides that an action may be instituted within one year from judgment as of nonsuit, provided the original action was not brought in forma pauperis, a voluntary nonsuit will not bar a subsequent action even though the original action nonsuited was brought in forma pauperis. *Briley v. Roberson*, 214 N. C. 295, 199 S. E. 73.

Pendency of Action Suspends Statute.—An action for the recovery of real property, instituted against a tenant in common in adverse possession, suspends the running of the statute of limitations as to the cotenant then out of possession. *Locklear v. Bullard*, 133 N. C. 260, 45 S. E. 580.

The reason of the law is that the running of the statute should, in the very nature of things, be arrested as soon as the party has asserted his right by action. *Locklear v. Bullard*, 133 N. C. 260, 264, 45 S. E. 580.

This section applies to limitations generally, including a contractual limitation in a policy of liability insurance, and not solely to limitations which are strictly statutes of limitation. *Carolina Transp., etc., Co. v. American Alliance Ins. Co.*, 214 N. C. 596, 200 S. E. 411.

Actions to Which Applicable.—This section has reference only to actions regularly instituted in the regular course of civil procedure, and does not embrace mere motions in an action or a motion for an execution upon a dormant judgment. This appears from the legal meaning of the terms employed and the obvious implication arising upon them, taken together, to express the legislative intent. The leading important words are "an action," "an action commenced within the time prescribed therefor," "a judgment therein," "reversed on appeal," or "arrested," "the cause of action survived," "a new action." These words and such phraseology do not apply for the most part to motions and merely incidental proceedings. *McIlhenny v. Wilmington Sav., etc., Co.*, 108 N. C. 311, 313, 12 S. E. 1001.

The cause of action in the first suit may be identical with the cause in the second, but it does not follow that the prosecution bond, the bond of indemnity, or the leave given by the Attorney-General in the first action can avail the defendant in the action last instituted. *Cooper v. Crisco*, 201 N. C. 739, 161 S. E. 310.

Where a foreign receiver, under the mistake that special permission was necessary for him to sue in the courts of our state, has taken a voluntary nonsuit, and obtains permission to sue in our courts, and brings the identical action again within one year from the nonsuit, if the former action has not been barred by a statute of limitations applicable, the second action is in time if brought within one year from the time of the voluntary nonsuit. *Van Kempen v. Latham*, 201 N. C. 505, 506, 160 S. E. 759.

Where a proceeding for compensation is instituted before the Industrial Commission, and the proceeding is dismissed, an action thereafter begun in the Superior Court by the widow as administratrix against the employer to recover for the employee's wrongful death will not be considered a continuation of the proceedings before the Industrial Commission so as to relate back to the time of the institution of such proceedings, and the action instituted in the Superior Court is barred if not brought within one year from the employee's death, there being a distinction between dismissal of proceedings under the compensation act and a nonsuit entered in an action instituted in the Superior Court entitling plaintiff to institute a new action within one year. *Mathis v. Camp Mfg. Co.*, 204 N. C. 434, 168 S. E. 515.

Where the original action was instituted in the state court within less than three years after the cause of action accrued, and the present action was instituted in the federal court within less than a year after the nonsuit was taken

in the original action, there can be no question as to the protection of this statute being available. *Federal Reserve Bank v. Kalin*, 81 F. (2d) 1003, 1007.

Where plaintiff took a voluntary nonsuit in the federal court on his cause of action to recover the penalty for usury, based on numerous separate transactions between the parties, and within a year thereafter he instituted four separate actions in the state court embracing the identical items declared on in the original action, and if the original action was instituted within the time prescribed, the four separate causes of action would not be barred by the statute of limitations. *Marshall Motor Co. v. Universal Credit Co.*, 219 N. C. 199, 13 S. E. (2d) 230.

Section as Extension of Time. — This section is an extension of time beyond that allowed by the general statutes in the instances as stated, including nonsuit. *Summers v. Southern R. Co.*, 173, N. C. 398, 92 S. E. 160; *Caldwell Land, etc., Co. v. Hayes*, 157 N. C. 333, 72 S. E. 1078.

The time is extended because the new action is considered as a continuation of the former action, and they must be substantially the same, involving the same parties, the same cause of action, and the same right. *Van Kempen v. Latham*, 201 N. C. 505, 513, 160 S. E. 759.

Effect of No Cause Stated in First Action. — This section authorizes the commencement of a new action of the same cause of action within one year after reversal of judgment on appeal, though the first complaint was insufficient to state a cause of action. *Woodcock v. Bostic*, 128 N. C. 243, 38 S. E. 881.

Where the cause of action of the first and second suit are identical this section applies notwithstanding that the first action was dismissed because of a failure to state a cause. *Webb v. Hicks*, 125 N. C. 201, 202, 34 S. E. 395.

Effect of New Cause of Action. — Where a new cause of action is alleged the original action is no protection as against the statute of limitations. *Woodcock v. Bostic*, 128 N. C. 243, 248, 38 S. E. 881.

The statutory remedy against defunct corporations must be brought within the prescribed limitation and though an action is brought, but not in the proper manner, against the proper parties, this section will not apply to save the right of action from the statutory bar. *VonGlahn v. DeRosset*, 81 N. C. 467, 468.

Effect of Agreement Not to Plead Statute.—An agreement in the original action not to plead the statute of limitations does not apply to the new action. *Citizens' Sav., etc., Co. v. Warren*, 204 N. C. 50, 167 S. E. 494.

Nonsuit Operates as Res Adjudicata Only Where Second Action Is Substantially Identical with First.—In order for a judgment of nonsuit to operate as res adjudicata in a subsequent action brought under the provisions of this section, it is required that the trial court find as a fact that the second suit is based upon substantially identical allegations and evidence as the first, and where the trial court hears no evidence and finds no facts its judgment dismissing the action upon the plea of estoppel by the former judgment is premature and inadvertently made. *Batson v. City Laundry Co.*, 206 N. C. 371, 174 S. E. 90; *Ingle v. Cassady*, 211 N. C. 287, 189 S. E. 776.

Burden of Proving Identity of Causes. — In action to recover lands wherein the plaintiff depends upon a nonsuit in a former action to repel the bar of the statute of limitation, it is necessary for him to bring himself within the meaning of the statute and show identity of parties, cause of action, and title, or that he is the "heir at law or representative" of the former plaintiff, the second action being regarded as a continuance of the writ in the first one; and it is insufficient if the plaintiff in the second action was a grantee of the plaintiff in the first one before the latter commenced his action. *Quelch v. Futch*, 174 N. C. 395, 93 S. E. 899.

Parol Evidence to Prove Nature of Action. — In an action to recover land parol testimony that a prior action brought without filing a complaint is identical with the present action is inadmissible. *Young v. Atlantic Coast Line R. Co.*, 189 N. C. 238, 126 S. E. 600. See also *Drinkwater v. Western Union Tel. Co.*, 204 N. C. 224, 168 S. E. 410; *Little v. Bost*, 208 N. C. 762, 182 S. E. 448.

The question as to whether an action is a continuation of a former one so as to bring it within the provisions of this section is one of law to be decided from the original complaint, and when no complaint is filed in the prior action, the identity of the causes of action may not be shown by parol evidence. *Motsinger v. Hauser*, 195 N. C. 483, 142 S. E. 589.

Dismissal or nonsuit as to one defendant for misjoinder of parties and causes is a nonsuit within the provisions of this section, permitting plaintiff to institute another action within one year of nonsuit when the original action is in-

stituted within the time prescribed. *Carolina Transp., etc., Co. v. American Alliance Ins. Co.*, 214 N. C. 596, 200 S. E. 411.

Limitation Where Second Action Brought in Equity. — The fact that more than one year had elapsed before the beginning of the present action, from the termination by nonsuit of the defendant's action to recover for services rendered to her mother from the administrator does not bar her recovery upon her counterclaim, the same being of an equitable nature to which this section has no application, under the facts of the case. *Shell v. Lineberger*, 183 N. C. 440, 441, 111 S. E. 769.

Dismissals — Want of Jurisdiction. — This section applies where the first action was dismissed because the court in which it was brought had no jurisdiction. *Webb v. Hicks*, 125 N. C. 201, 202, 34 S. E. 395.

Application where Statute Not One of Limitation. — This statute contains no exception of cases under section 28-173, or of any other cases where the time prescribed for bringing the original action might not be strictly a statute of limitation. There is no cause why the privilege to commence a new action within a year after nonsuit should not apply equally to all cases of nonsuit. The statute makes no distinction, and there is certainly none in the reason of the thing, which is the same as to that class of cases as in any others. *Meekins v. Norfolk, etc., R. Co.*, 131 N. C. 1, 2, 42 S. E. 333; *See Williams v. Iron Belt Bldg., etc., Ass'n*, 131 N. C. 267, 269, 42 S. E. 607.

Same — Actions for Death by Wrongful Act. — While the requirements of section 28-173, giving a right of action for death caused by the wrongful act, etc., is not in strictness a statute of limitation, but a condition affecting the cause of action itself, yet when such suit has been brought within the time specified it comes within the provision of this section. *Trull v. Seaboard Air Line R. Co.*, 151 N. C. 545, 66 S. E. 586. The maximum time allowed under the two sections when construed together is two years. *Brooks v. Suncrest Lumber Co.*, 194 N. C. 141, 138 S. E. 532.

A new action for wrongful death commenced within one year from the date of nonsuit falls within the provisions of this section notwithstanding the provisions of § 28-173, and the fact that the plaintiff has been assessed with additional costs upon motion for reassessment made in the second action and has not paid the cost so reassessed is immaterial. *Swainey v. Great Atlantic, etc., Tea Co.*, 204 N. C. 713, 169 S. E. 618. See notes to § 28-173.

While the requirement that an action for wrongful death must be instituted within one year, is a condition annexed to the cause of action rather than a statute of limitations, this section applies to actions for wrongful death. *Blades v. Southern Ry. Co.*, 218 N. C. 702, 12 S. E. (2d) 553.

Federal Employers' Liability Act.—This section has been held not applicable to an action brought in a State court under the Federal Employers' Liability Act. *Brooks v. Suncrest Lumber Co.*, 194 N. C. 141, 143, 138 S. E. 532, citing *King v. R. R.*, 176 N. C. 301, 97 S. E. 29; *Belch v. R. R.*, 176 N. C. 22, 96 S. E. 640.

Section Illustrated.—Where an action is begun within the prescribed period, but terminated in a non-suit after the period has run, this section applies to permit another action within one year from the date of non-suit. *Hines v. Rowland Lumber Co.*, 174 N. C. 294, 93 S. E. 833.

Where it does not appear otherwise than that the first suit was commenced in time, and the second was instituted within a year of the nonsuit, this section operates to prevent a bar of the statute. *Bank v. Loughran*, 122 N. C. 668, 671, 30 S. E. 17.

Effect of Costs Provision. — This section does not forbid the commencement of a second action without paying the costs of the first, but annexes this as a condition to bringing the new action free from the bar of the statute, if pleaded; and a motion to dismiss it before answer filed, upon the ground that the costs of the former one had not been paid, will be denied. *Bradshaw v. Citizens' Nat. Bank*, 172 N. C. 632, 90 S. E. 789.

But where the appropriate statute has been pleaded and its time expired both before the bringing of the new action and the payment of the cost in the original one, the second action is barred though commenced within the one-year period, when the original case has not been brought in forma pauperis. *Rankin v. Oates*, 183 N. C. 517, 112 S. E. 32.

Same — When Applicable. — The amendment of 1915 requiring the payment of costs has no application when the second action has been brought within the time permitted by the general law. *Summers v. Southern R. Co.*, 173 N. C. 398, 92 S. E. 160.

Same — Excuse. — It may be shown by plaintiff that

his failure to pay costs before commencing his second action upon the same contract was caused by the failure or the delay of the clerk of the Superior Court to let him know the amount thereof though the plaintiff had urgently and continuously requested it, and that he would have promptly paid them according to the provisions of the statute had he been able to ascertain them. *Hunsucker v. Corbitt*, 187 N. C. 496, 122 S. E. 378.

A nonsuit designates the action of the court in ending the case or sending the case out of court where plaintiff is not entitled to proceed to trial because of defect in parties, pleadings or jurisdiction, or where the plaintiff is unable to prove his case and the cause is dismissed as upon a demurrer to the evidence, and in such instances, when the original action is instituted within the time prescribed, complainant is entitled to bring a new action within one year. *Blades v. Southern Ry. Co.*, 218 N. C. 702, 12 S. E. (2d) 553.

Judgment of Nonsuit on Merits of Case as Bar to Subsequent Action on Same Cause on Substantially Same Evidence.—A plaintiff may bring an action and have it heard upon its merits, and, if a judgment of nonsuit is then entered, he may bring a new suit within one year, or he may have the cause reviewed by the Supreme Court. If the Supreme Court affirms the judgment of the trial court, he may, under this section, bring a new action within the period therein specified. But, if upon the trial of the new action, upon its merits, in either event, it appears to the trial court, and is found by such court as a fact, that the second suit is based upon substantially identical allegation and substantially identical evidence, and that the merits of the second cause are identically the same, thereupon the trial court should hold that the judgment in the first action was a bar or res adjudicata, and thus end that particular litigation. *Hampton v. Rex Spinning Co.*, 198 N. C. 235, 240, 151 S. E. 266.

Cross Action.—Plaintiff administratrix was a party defendant in an action for negligence. The administratrix set up a cross action therein against her codefendants for wrongful death prior to the expiration of one year from date of intestate's death. On appeal, the cross action was dismissed because it did not arise out of plaintiff's cause of action. The administratrix within one year of the dismissal instituted this action for wrongful death against the same defendants upon the same cause. Held: Defendants' demurrer to the complaint stating these facts, on the ground that it appeared upon the face of the complaint that the action was not instituted within one year from intestate's death, was properly overruled, since her cross complaint in the first action should be regarded as the origination of the present action. *Blades v. Southern Ry. Co.*, 218 N. C. 702, 12 S. E. (2d) 553.

Effect of Costs Provisions.—In order to be entitled to institute an action within one year after nonsuit in an action instituted prior to the bar of the statute of limitations, plaintiffs must show that the costs in the prior action have been paid or that it was brought in forma pauperis. *Osborne v. Southern Ry. Co.*, 217 N. C. 263, 7 S. E. (2d) 500.

Propriety of Directed Verdict for Plaintiff Where Record Contains No Evidence of Payment of Costs of Prior Action.—Where, after judgment as of nonsuit, another action has been brought on the same cause of action within one year under the provisions of this section, and defendant moves for judgment of nonsuit and excepts to the trial court's refusal of the motion, and on appeal the only question presented is whether the plaintiff had paid the costs of the prior action as required by the statute, held, the burden is upon the plaintiff to show compliance with the statute and where the record on appeal contains no evidence that the costs of the prior action had been paid, a directed verdict in the plaintiff's favor will be held erroneous, and it cannot be presumed that such evidence was properly before the jury from the fact that the trial court stated at the close of testimony that as he understood the evidence he would have to give a directed verdict that the costs had been paid, to which counsel did not object until after a verdict in the plaintiff's favor. *Southerland v. Crump*, 199 N. C. 111, 153 S. E. 845.

Applied in *Jones v. Bagwell*, 207 N. C. 378, 388, 177 S. E. 170.

Cited in *Midkiff v. Palmetto Fire Ins. Co.*, 198 N. C. 568, 570, 152 S. E. 792; *Collins v. Smith*, 109 N. C. 468, 470, 14 S. E. 88.

§ 1-26. New promise must be in writing.—No acknowledgment or promise is evidence of a new or continuing contract, from which the statutes of limitations run, unless it is contained in some

writing signed by the party to be charged thereby; but this section does not alter the effect of any payment of principal or interest. (Rev., s. 371; Code, s. 172; C. C. P., s. 51; C. S. 416.)

- I. General Consideration.
- II. Acknowledgment or New Promise.
- III. Part Payment.
- IV. Request Not to Sue.

I. GENERAL CONSIDERATION.

Cross Reference.—As to contracts requiring writing, see § 22-1 et seq.

See 13 N. C. Law Rev. 57 for comment on this section.

Effect upon Prior Law.—This section does not change the character or quality of the acknowledgment or new promise therefore required to repel the bar of the statute of limitations in an action on contract, except that the new promise should be "in some writing signed by the party to be charged." *Phillips v. Giles*, 175 N. C. 409, 95 S. E. 772; *Peoples Bank, etc., Co. v. Tar River Lbr. Co.*, 221 N. C. 89, 19 S. E. (2d) 138.

The substituted statute after a fixed time bars the cause of action itself, and does not, as before, obstruct the remedy merely. *McDonald v. Dickson*, 87 N. C. 404, 406.

The Section Is Mandatory.—*Fleming v. Staton*, 74 N. C. 203.

Retroactive Effect.—This section has no application where the cause of action had accrued upon the new as well as the old cause. *Farson v. Bowden*, 74 N. C. 43, 45.

Section as Rule of Evidence.—This section is merely a rule of evidence enacted to prevent fraud and perjury. *Royster v. Farrell*, 115 N. C. 306, 310, 20 S. E. 475.

Applicability to Judgments.—A judgment is not a contract within the meaning of this section. This is true because a cause of action on contract or tort loses its identity when merged in a judgment; and thereafter a new cause of action arises out of the judgment. *McDonald v. Dickson*, 87 N. C. 404. See the dissenting opinion.

Action of One of Class Affecting All of Class.—Where from the condition stated upon a negotiable note, the endorsers sign as sureties, a payment thereon of the maker before the same is barred, suspends the running of the statute of limitations as to all within this class, and a payment of the interest on the note by one of the sureties will repel the bar of the statute as to all of the sureties thereon. *Dillard v. Farmers Mercantile Co.*, 190 N. C. 225, 129 S. E. 598.

II. ACKNOWLEDGMENT OR NEW PROMISE.

The English Statute.—The original statute of limitation (21 Jas. I, ch. 16) had no provision as to new promises and acknowledgments. The court made the law on this subject and made it apply to all causes of action that rested on a promise. *Royster v. Farrell*, 115 N. C. 306, 310, 20 S. E. 475, and citations.

Confined to Contracts.—The terms of this section as to written acknowledgments, etc., are confined to actions on contracts and is not applicable to judgments. *McDonald v. Dickson*, 87 N. C. 404. See dissenting opinion.

Elements Necessary to Valid Promise.—In *Greenleaf v. Norfolk, etc., R. Co.*, 91 N. C. 33, the Supreme Court declared that the promise must be (1) in writing, (2) extend to the whole debt, (but see *Pope v. Andrews*, 90 N. C. 401) and must (3) be to pay money and not in something else of value. The promise to pay the debt, too, must be (4) unconditional. *Greenleaf v. Norfolk, etc., R. Co.*, 91 N. C. 33; *Bates & Co. v. Herren & Co.*, 95 N. C. 388; *Taylor v. Miller*, 113 N. C. 340, 18 S. E. 504; *Wells v. Hill*, 118 N. C. 900, 904, 24 S. E. 771; *Bryant v. Kellum*, 209 N. C. 112, 182 S. E. 708.

The promise must be (5) identical and (6) between the original parties—by the same man; and, further, when the original contract is made with another one, and the promise relied on to repel the statute is made with another, who is the plaintiff in the action, the cause of action is the new promise, and it must be declared on; this new promise must be in writing. *Fleming v. Staton*, 74 N. C. 203; *Pool v. Bledsoe*, 85 N. C. 1, 2.

It has been held, that the promise must be made to the creditor himself (*Parker v. Shuford*, 76 N. C. 219, and *Farson v. Bowden*, 76 N. C. 425) or to an attorney or agent for the creditor (*Kirby v. Mills*, 78 N. C. 124; *Hussey v. Kirkman*, 95 N. C. 63, 67), and must be express (*Cooper v. Jones*, 128 N. C. 40, 38 S. E. 28), clear and positive (*Hussey v. Kirkman*, 95 N. C. 63) to repel the statute.

The new promise must be distinct and specific, and a mere acknowledgement of the debt, though implying a promise to pay, is not sufficient. *Riggs v. Roberts*, 85 N.

C. 152; *Faison v. Bowden*, 76 N. C. 425. This section provides that the statute is only waived by acknowledgment or new promise, which amounts to "a new or continuing contract." *Helm Co., v. Griffin*, 112 N. C. 356, 358, 16 S. E. 1023.

In *Riggs v. Roberts*, 85 N. C. 152, the words "distinct and specific," "unequivocal," are really applied to a promise to pay which would revive a debt from which the debtor had been discharged in bankruptcy. While either one of these qualifying words alone would be applicable to the promise or acknowledgment to take the case out of the statute of limitations, there is no special weight superadded by the use of them all at once. *Taylor v. Miller*, 113 N. C. 340, 343, 18 S. E. 504.

In other words there must be such facts and circumstances as to show that the debtor recognized a present subsisting liability and manifested an intention to assume or renew the obligation. This means that the acknowledgment of a debt, which would be sufficient to repel the statute, must manifest an intention to renew the debt as strong and convincing as if there had been a direct promise to pay it. This principle runs through all the decisions of the Supreme Court on this subject. *Wells v. Hill*, 118 N. C. 900, 903, 24 S. E. 771; *Simonton v. Clark*, 65 N. C. 525. See dissenting opinion.

A written acknowledgment, or new promise, certain in its terms, or which can be made certain, is sufficient to repel the operations of the statute of limitations, under this section. It follows that a mere vague declaration of an intention to pay an undefined amount, and without reference to anything that can make it certain, would not be sufficient, but an admission that "the parties are yet to account, and are willing to account and pay the balance then ascertained," would be. *Long v. Oxford*, 104 N. C. 408, 409, 10 S. E. 525.

In order for a letter signed by the debtor to remove the bar of the statute of limitations it must contain an express, unconditional promise to pay or a definite, unqualified acknowledgment of the debt as a subsisting obligation, and a letter acknowledging the debt at the time defendant left plaintiff's city but claiming that it had been canceled by the creditor's action in selling the debtor's goods of a value greatly in excess of the debt, is not such an acknowledgment of a subsisting obligation as will repel the statutory bar. *Smith v. Gordon*, 204 N. C. 695, 169 S. E. 634.

Must Be within Statutory Limit Itself.—The three-year statute of limitations bars a simple action for debt, and where a letter relied on as arresting the running of the statute is written more than three years before the commencement of the action it is ineffective. *Smith v. Gordon*, 204 N. C. 695, 169 S. E. 634.

When Promise Implied.—Where the debtor has, by a signed written instrument, unqualifiedly and definitely acknowledged the debt as his subsisting obligation, the law will imply a promise to pay it, and it is sufficient to repel the bar of the statute of limitations unless there is something in the writing to repel such implication. *Phillips v. Giles*, 175 N. C. 409, 410, 95 S. E. 772. *McRae v. Leary*, 46 N. C. 91; *Smith v. Leeper*, 32 N. C. 86. *Cecil v. Henderson*, 121 N. C. 244, 246, 28 S. E. 481.

The Writing.—As to expression of opinion in charge on sufficiency of writing, see note to sec. 1-180.

A new promise to pay, if not in writing, can not defeat the operation of the statute of limitation. *Raby v. Stuman*, 127 N. C. 463, 37 S. E. 476.

In order to revive a debt which is barred by the statute of limitation, there must be an express unconditional promise to pay the same in writing or a written, definite and unqualified acknowledgment of the debt as a subsisting obligation, signed by the debtor, etc., and from which the law will imply a promise to pay. *Phillips v. Giles*, 175 N. C. 409, 410, 95 S. E. 772. And it is proper to exclude parol evidence that a new promise was made (*Christmas v. Haywood*, 119 N. C. 130, 134, 25 S. E. 861.), although prior to the section the law was otherwise. *Faison v. Bowden*, 74 N. C. 43.

It was said in *Flemming v. Flemming*, 85 N. C. 127, that the oral assertion of a claim to an administrator who remains silent, even if the silence should be construed on admission, is ineffectual because not in writing, see sec. 1-22.

And so is security given for debts barred by the statute, at least to the extent of the property conveyed. *Taylor v. Hunt*, 118 N. C. 168, 172, 24 S. E. 359. But an unaccepted offer to discharge a bond by a conveyance of land (*Riggs v. Roberts*, 85 N. C. 152), or an unaccepted offer to pay a debt by a conveyance of land are not such recognition of subsisting liabilities as in law will imply a promise to pay. *Wells v. Hill*, 118 N. C. 900, 904, 24 S. E. 771; nor is a promissory note barred by the statute of limitations revived

by an offer to pay in Confederate currency or bank-bills. *Simonton v. Clark*, 65 N. C. 525. See dissenting opinion.

The accumulation of adjectives used in their application to the words "acknowledgment and promise" in the statute, has produced the impression that it requires more than an ordinary promise in writing to repel the bar of the statute. The old law, before the promise need be in writing, was, "the new promise must be definite and show the nature and amount of the debt, or must distinctly refer to some writing, or to some other means by which the nature and amount of it can be ascertained; or there must be an acknowledgment of a present subsisting debt, equally definite and certain, from which a promise to pay such debt may be implied," *McBride v. Gray*, 44 N. C. 420; *Faison v. Bowden*, 72 N. C. 405; *Riggs v. Roberts*, 85 N. C. 152. Since the statute, the words used are as applicable to this case: "The promise must be unconditional." *Greenleaf v. Norfolk, etc., R. Co.*, 91 N. C. 33. It must be "certain in its terms." *Long v. Oxford*, 104 N. C. 408, 10 S. E. 525; *Taylor v. Miller*, 113 N. C. 340, 342, 18 S. E. 504.

Same—Illustrations.—A new note embracing an old indebtedness of the maker is a sufficient writing signed by the parties to be charged to bring the old indebtedness within the operation of this section. *Irvin v. Harris*, 182 N. C. 647, 109 S. E. 867. The words "I propose to settle," written in answer to a letter demanding payment of a note barred by the lapse of time, amount to an acknowledgment or new promise sufficient to take the case out of the operation of the statute of limitations. *Taylor v. Miller*, 113 N. C. 340, 18 S. E. 504, but a writing "I am going to pay it as soon as I can" is conditioned upon ability to pay and is therefore insufficient. *Cooper v. Jones*, 128 N. C. 40, 38 S. E. 28.

A paper-writing signed by a parent certifying that she owes her daughter a sum of money, in a stated amount, for moneys she has borrowed from her at various times, and stating the daughter was to have a certain sum of money from her estate, giving her reasons, is sufficiently definite to imply a promise to pay the amount of the debt, and a new promise, to repel the bar of the statute of limitations. *Phillips v. Giles*, 175 N. C. 409, 410, 95 S. E. 772.

Where a suit had already been commenced to recover an amount alleged to be due upon account, and the defendant set up the statutory bar as a defence, but wrote a letter to the plaintiff's attorney stating that, if he would take five hundred dollars in satisfaction, judgment might go against him at court, the letter is an admission and assumption of the debt to the specified amount (\$500), and operates to remove the bar to the recovery of the time. *Pope v. Andrews*, 90 N. C. 401. But see *Wells v. Hill*, 118 N. C. 900, 904, 24 S. E. 771 and citations.

Where a debtor wrote to his creditors declining proffered credit because he was unable to pay what he already owed them (which was barred by the statute), but expressing his confidence in his ability to pay whatever he might contract for in the future it was held, that, as the letter contained no promise to pay the barred debt, the bar of the statute was not removed. *Helm Co. v. Griffin*, 112 N. C. 356, 16 S. E. 1023.

Acknowledgment as Rebutting Presumption of Satisfaction.—Before the adoption of The Code, proof of a promise or acknowledgment would rebut the presumption of the satisfaction of a mortgage, as is shown by numerous decisions. *Brown v. Becknall*, 58 N. C. 423; *Ray v. Pearce*, 84 N. C. 485; *Hughes v. Edwards*, 8 Wheat., 489; *Simmons v. Ballard*, 102 N. C. 105, 9 S. E. 495. And now the bar of our present statute of limitations may be overcome by proof of a promise or acknowledgment, but the proof must be in writing, unless the new promise be one that the law implies from a part payment. *Hill v. Hillard & Co.*, 103 N. C. 34, 9 S. E. 639; *Royster v. Farrell*, 115 N. C. 306, 310, 20 S. E. 475.

III. PART PAYMENT.

Editor's Note.—It should be observed that the effect of partial payment stopping the statute is not of statutory origin. It was not in the English statute of James I. and 9 Geo. IV. did nothing more than recognize the common law right. Thus it originated with the courts and its application depends upon the reasoning in such decisions. This is equally true in North Carolina for this section merely recognizes the right, leaving the application of the principles to the courts as has always been the case. See *Battle v. Battle*, 116 N. C. 161, 163, 21 S. E. 177.

Thus the effect of this section is to leave the law as it was prior to the adoption of the Code of Civil Procedure as regards the effect of a partial payment in removing the bar of the statute of limitations, See *State Nat. Bank v. Harris*, 96 N. C. 118, 1 S. E. 459.

The effect of any payment of principal or interest, being expressly excepted from this section, thereby leaving as to

such payments the principals obtaining at common law before the enactment of the statute. *Kilpatrick v. Kilpatrick*, 187 N. C. 520, 122 S. E. 377.

Payment Tantamount to Writing.—This section dispenses with a writing where partial payment is made, because the payment is in effect a written promise. *McDonald v. Dickson*, 87 N. C. 404. See the dissenting opinion.

Provisions Not Applicable to Judgments.—A partial payment voluntarily made on a judgment does not remove the statutory bar. *McDonald v. Dickson*, 87 N. C. 404. See the dissenting opinion.

Elements Essential to Take Case Out of Statute.—The general principle on which part payment takes a case out of the statute is that the party paying intended by it to acknowledge and admit the greater debt to be due. If it was not in the mind of the debtor to do this, then the statute, having begun to run, will not be stopped by reason of such payment. (*Cashmar-King Supply Co. v. Dowd*, 146 N. C. 191, 197, 59 S. E. 685) for partial payment starts the statute running anew only when it is made under such circumstances as will warrant the clear inference that the debtor recognizes the debt as existing and his willingness or at least his obligation, to pay the balance. *Battle v. Battle*, 116 N. C. 161, 163, 21 S. E. 177. See also *Lester Piano Co. v. Loven*, 207 N. C. 96, 176 S. E. 290.

Thus when a payment is made by defendant only in contemplation of an agreed compromise of a debt, such payment will not repel the bar of the statute of limitations as to the balance thereof. *Cashmar-King Supply Co., v. Dowd*, 146 N. C. 191, 59 S. E. 685.

Same—Time from Which Statute Starts Anew.—There is no express provision that a partial payment shall prevent the operation of the statute except from the time it was made. The statute merely leaves its effect to be determined by the law as it was before the enactment of the section as to a new promise. *Battle v. Battle*, 116 N. C. 161, 21 S. E. 177; *State Nat. Bank v. Harris*, 96 N. C. 118, 121, 1 S. E. 459; *Riggs v. Roberts*, 85 N. C. 152; *Cashmar-King Supply Co. v. Dowd*, 146 N. C. 191, 196, 59 S. E. 685; *Kilpatrick v. Kilpatrick*, 187 N. C. 520, 122 S. E. 377.

Same—Credits on Accounts.—When the running of the statute of limitations would otherwise bar an action upon an account, and there is evidence tending to show a credit thereon was agreed to by the creditor and debtor within the three-year period, and accordingly given, the effect of this credit to repel the bar relates to the time of the agreement made and effected; and an instruction that made it depend upon the time of the debt incurred for which the credit was given, is reversible error to the plaintiff's prejudice. *Kilpatrick v. Kilpatrick*, 187 N. C. 520, 122 S. E. 377.

The fact that the maker of a note has a claim against the holder which the holder endorses as a credit on the note without the assent of the maker, will not be such a partial payment as will rebut the statute of limitations, but an agreement to apply one existing liability to another is such a partial payment as will stop the operation of the statute, although the endorsement is never actually made on the note. *State Nat. Bank v. Harris*, 96 N. C. 118, 1 S. E. 459.

An account of transaction between two persons, to be mutual, when kept by only one of them, must be with the knowledge and concurrence of the other, so as to make a credit given to such other repel the bar of the statute of limitations. *Cashmar-King Supply Co. v. Dowd*, 146 N. C. 191, 59 S. E. 685.

Persons Who May Make—Trustee for Creditors.—Where an assignment for benefit of creditors confers no power on the trustee, as agent of the debtor, to do any act to waive the Statute, or to express a willingness or intention to pay the debt after it becomes otherwise barred, a partial payment made by the trustee on a note of the debtor will not arrest the running or remove the bar of the Statute of limitations. *Battle v. Battle*, 116 N. C. 161, 21 S. E. 177.

Same—Principal upon Bond.—Payment made by a principal upon a bond, before the cause of action thereon is barred against the sureties, arrests the operation of the statute of limitations. *Moore v. Goodwin*, 109 N. C. 218, 13 S. E. 772.

Payment of interest on a note by the principal, before it is barred by lapse of time, arrests the operation of the statute of limitations as to all the makers, sureties as well as principal, and the statute commences again to run only from the day when the last payment was made. *Green v. Greensboro Female College*, 83 N. C. 449.

Same—Obligor of Same Class.—Where a payment is made upon a claim, before it is barred by the lapse of time, by one of several obligors of the same class, it becomes the legal act of all, and arrests the operation of the statute as to them but does not revive the liability of others of a different class. *Wood v. Barber*, 90 N. C. 76. But it was

held in *Moore v. Goodwin*, 109 N. C. 218, 13 S. E. 772 that a payment by the principal upon a bond under such circumstances arrests the operator as to the sureties. "General Consideration," ante this note.

Same—Partner.—In an action against a firm upon a draft accepted by the cashier of a bank who was also a member of the firm, and who made a partial payment upon the same, it was held that, to remove the statutory bar set up by the defendant firm, the burden is on the plaintiff to show in what capacity the acceptor acted in making such payment—whether as cashier or as a member of the firm. *Wood v. Barber*, 90 N. C. 76.

Burden of Proving Payment.—The burden is upon the plaintiff to show that a partial payment was made at such a time as to save the debt from the operation of the statute. *Riggs v. Roberts*, 85 N. C. 152.

IV. REQUEST NOT TO SUE.

Statement of Rule.—Where delay in bringing suit is caused by a request of the defendant, or his attorney and his promise to pay the debt and not to avail himself of the plea of the statute, he will not be allowed to plead the statute, as it would be against equity and good conscience. *Joyner v. Massey*, 97 N. C. 148, 1 S. E. 702. This principle is derived from equity as is a new promise or partial payment, and does not depend upon statute. However it is recognized as an exception in the application and instruction of this section. See *Barcraft & Co. v. Roberts & Co.*, 91 N. C. 363, 369.

So it has been held that notwithstanding this section, when a creditor has delayed action at the request of the debtor, and under his promise, express or implied, to pay the debt and not to plead the statute of limitations, the courts, in the exercise of their equitable jurisdiction, will not permit the debtor to plead the lapse of time and the creditor may bring his action within the statutory time after such promise and request for delay although not in writing. *Cecil v. Henderson*, 121 N. C. 244, 245, 28 S. E. 481.

Principles Controlling Application.—In giving effect to request not to sue and promises, not to plead the statute, the courts proceed upon the idea of an equitable estoppel, holding that it would be against good conscience and to encourage fraud to permit the debtor to repudiate them when by his contract he has lulled the creditor into a feeling of security and has induced him to delay bringing action (*Daniel v. Board*, 74 N. C. 494; *Haymore v. Commissioners*, 85 N. C. 268), and it is now "settled that if plaintiff was prevented from bringing his action during the statutory period by such conduct on the part of the defendant as makes it inequitable to him to plead the statute, or by reason of any agreement not to do so, he will not be permitted to defeat plaintiff's action by interposing the plea." *Tomlinson v. Bennett*, 145 N. C. 279, 281, 59 S. E. 37; *State v. United States Fidelity etc., Co.*, 176 N. C. 598, 97 S. E. 490.

Same—Request without Agreement Insufficient.—A request not to sue will not stay the statute of limitation, but it must be an agreement not to plead it. *Raby v. Stuman*, 127 N. C. 463, 37 S. E. 476.

It is essential, however, not only that there shall be a new promise and a request for delay, but there must be a promise not to plead the statute if delay is given. *Hill v. Hilliard, & Co.*, 103 N. C. 34, 9 S. E. 639; *Cecil v. Henderson*, 121 N. C. 244, 248, 28 S. E. 481.

A simple admission by an executor of the correctness of a claim against the testator's estate, and a verbal promise to pay the same out of the assets prior to the 1881 amendment of section 1-22, will not arrest the runnings of the statute of limitations, where there is no proof that the creditor refrained from suing at the request of the executor, or that there was any agreement for indulgence. This case falls within the terms of this section. *Whitehurst v. Dey*, 90 N. C. 542.

Necessity for Writing.—"It is true that Smith, C. J. for whose learning we have the highest respect, said in a concurring opinion in *Joyner v. Massey*, 97 N. C. 148, 153, 1 S. E. 702, that this statute applied to promises not to plead the statute of limitations, and this is referred to without approval or disapproval by Clark, C. J. in *Brown v. Atlantic Coast Line R. Co.*, 147 N. C. 217, 60 S. E. 985, 16 L. R. A. (N. S.) 645, but the opinion of the majority of the Court in *Joyner v. Massey* was the other way, and it is expressly decided in *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481, that the statute has no application, and that request not to sue and promises not to plead the statute of limitations need not be in writing." *State v. United States Fidelity, etc., Co.*, 176 N. C. 598, 601, 97 S. E. 490.

§ 1-27. Admission by partner or comaker.—No

act, admission or acknowledgment by any partner after the dissolution of the copartnership, or by any of the makers of a promissory note or bond after the statute of limitations has barred the same, is evidence to repel the statute, except against the partner or maker of the promissory note or bond doing the act or making the admission or acknowledgment. (Rev., s. 372; Code, s. 171; C. C. P., s. 50; C. S. 417.)

Section Changed Law. — In *McIntire & Co. v. Oliver*, 9 N. C., 209, it was held that the acknowledgment of a subsisting partnership debt by one partner, even after the dissolution of the firm, was binding on all the constituent members and prevented the operation of the statute of limitation. The same doctrine is announced in *Willis v. Hill*, 19 N. C., 231, and *Walton v. Robinson*, 27 N. C., 341. In the latter case, the same reviving effect is ascribed to a payment as involving a resumption of the residue of the debt. In consequence of these rulings was passed the act of 1852, now embodied in this section. *Wood v. Barber*, 90 N. C. 76, 79.

Part payment of a note by the payee who had endorsed it will not repel the bar of the statute of limitations as against the maker, this section, confining the act, admission or acknowledgment as evidence to repel the bar to the associated partners, obligors and makers of a note. *LeDuc v. Butler*, 112 N. C. 458, 17 S. E. 428. This principle is recognized and distinguished in *Larper v. Edwards*, 115 N. C. 246, 248, 20 S. E. 392; *Garrett v. Reeves*, 125 N. C. 529, 540, 34 S. E. 636. From the dissenting opinion see the excellent discussion in *Green v. Greensboro College*, 83 N. C. 451.

A payment made by the maker, after the bar of the statute, operates as a renewal as to himself only. *Garrett v. Reeves*, 125 N. C. 529, 34 S. E. 636. Bonds are in the same class as notes. *Rogers v. Clements*, 98 N. C. 180, 183, 3 S. E. 512. It was held in this latter case that co-obligors do not stipulate by implication in the joint obligation that each may bind the other by his admissions made after the obligation is due.

Section Defeated by Payment of Small Sum etc. — This section may be practically nullified by triennial payments of insignificant amounts or alleged promises not to plead the statute. See *Garrett v. Reeves*, 125 N. C. 529, 34 S. E. 636; *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143. Dissenting opinion.

Partial Payment Prior to Dissolution or Bar. — In an action against a firm upon a draft accepted by the cashier of a bank who was also a member of the firm, and who made a partial payment upon the same, it was held that, to remove the statutory bar set up by the defendant firm, the burden is on the plaintiff to show in what capacity the acceptor acted in making such payment—whether as cashier or as a member of the firm. The section is not applicable to these facts until a dissolution. *Wood v. Barber*, 90 N. C. 76, 77.

A payment by the principal on a note, before the bar of the statute, operates as a renewal as to himself, the sureties and endorser, this section not being applicable. *Garrett v. Reeves*, 125 N. C. 529, 34 S. E. 636; *Moore v. Goodwin*, 109 N. C. 218, 219, 13 S. E. 772; *Greene v. Greensboro Female College*, 83 N. C. 449; *Wood v. Barber*, 90 N. C. 76, 80.

As to co-obligors on a note, it was held that a payment by one before the debt was barred would extend the time as to the other, but a promise to pay would not have that effect. The rule as to payment has been applied to all co-obligors who come within the same class as original makers of the instrument, having a community of interest and a common obligation. A payment by a principal or surety, before the debt is barred, will continue the obligation as to both. But the rule would not apply to obligors in different classes, as endorser and makers. *Davis v. Alexander*, 207 N. C. 417, 421, 177 S. E. 417.

New Promise or Payment by Partner. — Under this section, no new promise or a payment by a partner, after the dissolution of the partnership, will have any effect to bind the other partners. *Davis v. Alexander*, 207 N. C. 417, 421, 177 S. E. 417.

Death of Partner. — Since the death of one of the partners dissolves the partnership, payment on a debt by the survivor will not repel the statute which would otherwise run against the estate of the deceased. *Irvin v. Harris*, 182 N. C. 656, 109 S. E. 871.

A Default Judgment on Debt Barred. — A judgment by default suffered by one joint obligor does not renew the

note as to the others. *Lane v. Richardson*, 79 N. C. 159. See also *Rogers v. Clements*, 98 N. C. 180, 3 S. E. 512.

§ 1-28. Undisclosed partner.—The statutes of limitations apply to a civil action brought against an undisclosed partner only from the time the partnership became known to the plaintiff. (Rev., s. 373; 1893, c. 151; C. S. 418.)

§ 1-29. Cotenants.—If in actions by tenants in common or joint tenants of personal property, to recover the same, or damages for its detention or injury, any of them are barred of their recovery by limitation of time, the rights of the others are not affected thereby, but they may recover according to their right and interest, notwithstanding such bar. (Rev., s. 374; Code, s. 173; C. C. P., s. 52; 1921, c. 106; C. S. 419.)

Section Changes Rule—Realty Not Affected. — This section changes the rule in regard to personality. It does not affect the law as to real property. *Expressio unius exclusio alterius*. *Cameron v. Hicks*, 141 N. C. 21, 36, 53 S. E. 728.

Elements of Tenancy in Common.—Under the law of North Carolina, as in New York, tenancy in common arises whenever an estate in real or personal property is owned concurrently by two or more persons under a conveyance or under circumstances which do not either expressly or by necessary implication call for some other form of cotenancy. *Powell v. Malone*, 22 F. Supp. 300, 302.

§ 1-30. Applicable to actions by state.—The limitations prescribed by law apply to civil actions brought in the name of the state, or for its benefit, in the same manner as to actions by or for the benefit of private parties. (Rev., s. 375; Code, s. 159; C. C. P., s. 38; C. S. 420.)

This section abrogated the common law maxim "nullum tempus occurrit regi" protecting public property from the negligence of public officers. *Furman v. Timberlake*, 93 N. C. 66, 67.

The maxim no longer obtains even in the case of collecting taxes, unless the statute applicable to or controlling the subject provides otherwise. *Wilmington v. Cronly*, 122 N. C. 388, 30 S. E. 9; *Furman v. Timberlake*, 93 N. C. 66; *Threadgill v. Wadesboro*, 170 N. C. 641, 87 S. E. 521.

When Statute Does Not Apply. — No statute of limitations runs against the sovereign unless it is expressly so provided therein; hence, where an act authorizing the collection of arrearages of taxes for past years does not prescribe any limitation, the ten years' statute of limitations does not apply, and the unpaid taxes for any year can be recovered. *Wilmington v. Cronly*, 122 N. C. 388, 30 S. E. 9.

The three-year statute of limitations does not apply to an action by a municipality to enforce assessment liens for public improvements, since the three-year statute does not apply to actions brought by the state or its political subdivisions in the capacity of its sovereignty. *Charlotte v. Kavanaugh*, 221 N. C. 259, 20 S. E. (2d) 97.

Insane Presumed to Have Plead Statute. — In view of the provisions of this section and section 1-16, an insane person is presumed to have plead the statute of limitations against the state. *State Hospital v. Fountain*, 129 N. C. 90, 39 S. E. 734.

§ 1-31. Action on open account.—In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action accrues from the time of the latest item proved in the account on either side. (Rev., s. 376; Code, s. 160; C. C. P., s. 39; C. S. 421.)

Cross Reference.—As to book accounts as evidence of last settlement between parties in action for less than sixty dollars, see § 8-42.

Accounts to Which Applicable. — In order that one item being in date shall have the effect of bringing the whole account within date, it must appear that there were mutual accounts between the parties, or an account of mutual dealings, kept by one with the knowledge and concurrence of the other. *Hussey v. Burgwyn*, 51 N. C. 385. The mere existence of disconnected and opposing de-

mands, between two parties, one of which demands is of recent date, will not take a case out of the statute of limitations. There must be mutual running accounts, having reference to each other, between the parties, for an item within time to have that effect. *Green v. Caldcleugh*, 18 N. C. 320.

There must be an assent of both parties that the items of the one account are to be applied to the liquidation of the other. The understanding of the plaintiff alone would not be sufficient. *Ibid*.

The purchase of merchandise on credit, the purchaser paying a certain sum in cash on the account each fall, and the balance due on the account being carried forward into the next year and the next year's purchases being added thereto, is not a mutual, open and current account within the purview of this section, but is an account current, and as to all items purchased within three years from the last cash payment the three year statute of limitations will begin to run from the date of the last cash payment, and in an action to recover the balance due, instituted more than three years after the last item charged, but within three years from the last cash payment, an instruction that the whole account was barred by the statute of limitations is error. *Richlands Supply Co. v. Banks*, 205 N. C. 343, 171 S. E. 358.

Same—Mutuality by Implication.—Mutuality of accounts may be the result of direct agreement, or it may be inferred from the dealings of the parties—if established, it renders unavailable the defense of the statute of limitations to both parties. *Stancell v. Burgwyn*, 124 N. C. 69, 32 S. E. 378.

A mutual account may be inferred where each party keeps a running account of the debits and credits, or where one, with the knowledge of the other keeps it. *Mauney & Son v. Colt*, 86 N. C. 464; *Green v. Caldcleugh*, 18 N. C. 320, 321; *Hussey v. Burgwyn*, 51 N. C. 385; *Robertson v. Pickerell*, 77 N. C. 302; *Stokes v. Taylor*, 104 N. C. 394, 399, 10 S. E. 566.

Same—Extension of Credit.—To constitute a mutual account it must be reciprocal as to the credit extended, so as to imply a promise to pay the balance due, upon which ever side it may fall; and an extension of credit upon the one side alone falls neither within the intent and meaning of our decisions nor the statute applicable. *Hollingsworth v. Allen*, 176 N. C. 629, 97 S. E. 625.

Same—Running Account All on One Side.—Where there is a running account, all on one side, the statute of limitations begins to run on each item from its date; but where there are mutual accounts, the statute begins to run only from the last dealing between the parties. *Robertson v. Pickerell*, 77 N. C. 302, 303.

Same—Draft Not Referring to Account.—The bar of the statute of limitations is not repelled by the transmission of a draft by the debtor and its receipt by the creditor within the three years, the former not making any allusion to or recognition of the account, or any debt whatever. *Hussey v. Burgwyn*, 51 N. C. 385.

When Statute Not Applicable.—This section does not apply to an ordinary store account, though open and continued where the credit is all on one side and the only items of discharge consist in payments on account. In such case limitations will begin to run from the date of each purchase as to the item itself, unless the bar has been repelled in some recognized legal manner. *Brock v. Franck*, 194 N. C. 346, 139 S. E. 696.

An indefinite promise to pay intermittently from time to time for such services as may be rendered by one party to another is not a mutual, open, and current account with reciprocal demands between the parties within the purview of this section. *Phillips v. Penland*, 196 N. C. 45, 147 S. E. 731.

Under an agreement with decedent to pay for services to be irregularly rendered from time to time as needed without a definite time fixed for payment, but under a general promise to pay for them, in an action against the administrator of the deceased promisor for the value of such services: Held, a payment made by the deceased in 1925, intended by him to be made upon the debt, will have the effect of reviving the claim against the statute of limitations only for the three years next preceding his death in 1926, subject to the credit of the payment so made. *Phillips v. Penland*, 196 N. C. 425, 147 S. E. 731.

Where plaintiff instituted action against administratrix of deceased to recover for services rendered deceased, and it appeared that plaintiff alone kept the account of charges for such services and that he entered thereon from time to time credits for rent for decedent's land, the facts are insufficient to establish mutual, open, and current accounts, and the statute of limitations began to run against plain-

tiff's claims from the date of each item. *Tew v. Hinson*, 215 N. C. 436, 2 S. E. (2d) 379.

Effects of Conflicting Evidence as to Item.—When there is conflicting evidence as to whether the item sued on was to be related to other items upon which the defendant relied it is reversible error for the judge to direct a verdict thereon if the jury believe the evidence. *McKinnie Bros. v. Webster*, 188 N. C. 514, 125 S. E. 1.

Conflicting evidence as to whether last item entered was proper in mutual, open and current account was for the jury. *Hammond v. Williams*, 215 N. C. 657, 3 S. E. (2d) 437.

§ 1-32. Not applicable to bank bills.—The limitations prescribed by law do not affect actions to enforce the payment of bills, notes or other evidences of debt, issued or put in circulation as money by banking corporations incorporated under the laws of this state. (Rev., s. 377; Code, s. 174; C. C. P., s. 53; 1874-5, c. 170; C. S. 422.)

Cited in *Ownbey v. Parkway Properties*, 222 N. C. 54, 21 S. E. (2d) 900.

§ 1-33. Actions against bank directors or stockholders.—The limitations prescribed by law do not affect actions against directors or stockholders of any banking association incorporated under the laws of this state, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created. (Rev., s. 378; Code, s. 175; C. C. P., s. 54; C. S. 423.)

When Statute Begins to Run.—It is a question of grave doubt, if the point had been raised, whether the statute as to the plaintiff's cause of action began to run upon the mere declaration of insolvency of the bank, and did not in truth begin to run upon the actual discovery, later on. *Houston v. Thornton*, 122 N. C. 365, 375, 29 S. E. 827.

§ 1-34. Aliens in time of war.—When a person is an alien subject, or a citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period limited for the commencement of the action. (Rev., s. 379; Code, s. 165; C. C. P., s. 44; C. S. 424.)

Editor's Note.—As to right of alien enemy to sue in the courts of this state, see *Krachanake v. Acme Mfg. Co.*, 175 N. C. 435, 95 S. E. 851.

Art. 4. Limitations, Real Property

§ 1-35. Title against state.—The state will not sue any person for, or in respect of, any real property, or the issue or profits thereof, by reason of the right or title of the state to the same—

1. When the person in possession thereof, or those under whom he claims, has been in the adverse possession thereof for thirty years, this possession having been ascertained and identified under known and visible lines or boundaries; which shall give a title in fee to the possessor.

2. When the person in possession thereof, or those under whom he claims, has been in possession under color of title for twenty-one years, this possession having been ascertained and identified under known and visible lines or boundaries. (Rev., s. 380; Code, s. 139; C. C. P., s. 18; R. C., c. 65, s. 2; C. S. 425.)

Cross References.—As to validity of such possession against claimants under the state, see § 1-37. As to statutes of limitation with reference to titles of the state board of education, see § 146-91.

Law Prior to Section.—Before the Code of Civil Procedure, to prevent the uncertainty of titles, the courts of this state had adopted the arbitrary rule, that from the adverse possession of land for thirty years a grant from the state should be presumed—a rule so arbitrary that a jury

was not permitted to find the fact against the presumption; nor was it necessary that the party in adverse possession should connect himself with those who had preceded him in the possession; nor was it necessary that the adverse possession should have been held up to known and visible boundaries, but only to the extent of the title claimed by the persons in possession, which might be shown by any of those ways which the law permits in the absence of metes and bounds set forth in deeds, or known and visible boundaries, as for instance, by the declarations of old men now dead, the deeds of neighboring tracts of land calling for the land in question by the name by which it was known, upon the principle, *id certum est quod certum reddi potest*. *FitzRandolph v. Norman*, 4 N. C. 564; *Candler v. Lunsford*, 20 N. C. 542; *Price v. Jackson*, 91 N. C. 11, 14.

Same—Nature of Presumption. — The question of the presumption of a grant from adverse possession has never been regarded as one to be decided upon natural presumptions as to facts, but upon a statutory or arbitrary rule established by the Legislature, or by the Courts, to prevent the uncertainty of titles which would arise if the questions in each case were to be determined by a jury, on their belief of the fact, derived from a consideration of all the circumstances in evidence. *Melvin v. Waddell*, 75 N. C. 361.

Effect of Section upon Prior Law. — But the law is now changed, and the thirty years' adverse possession which was formerly held to be a presumption of a grant, is now by statute made, under certain circumstances, an absolute bar against the state. *Price v. Jackson*, 91 N. C. 11, 14.

The State is deemed to have surrendered its right where it permits an adverse occupation of land under colorable title without interruption for twenty-one years, and a title vests in the occupant which can only be divested by a subsequent adverse possession by another till his right in turn ripens in the same way. *Walker v. Moses*, 113 N. C. 527, 18 S. E. 339.

Section Not Retroactive. — The right of action which accrued prior to the adoption of C. P., is not governed by its provisions. *Johnson v. Parker*, 79 N. C. 475, 477.

Extent and Limitation of Application. — This section may be confined to cases where, by reason of adverse possession of land for the time mentioned in the section, the State is willing to forego her title thereto, and agrees not to sue for the same, nor for any of the issues or profits thereof. It was not intended by this section that the State should not be barred from recovering except by the lapse of thirty years or twenty-one years, on personal actions after the state has parted with the title to the lands, for those periods relate only to the adverse possession, without or with color, which will be sufficient to bar the title, and the State agrees that when the adverse possession has continued for so long a time—thirty years without color and twenty-one years with color—she will not sue the person who has thus held the possession, but surrender her title to him; nor will she sue for the issues or profits. But this does not mean that the time limited for bringing any suit for the rents, issues or profits of land should be lengthened so that instead of being three years, as already specially prescribed by the statute, it should be thirty or twenty-one years. *Tillery v. Whiteville Lumber Co.*, 172 N. C. 296, 298, 90 S. E. 196.

Adverse Possession against Municipality. — Under the law of this State, as it formerly prevailed, title by adverse occupation could be acquired against a municipality. This was established and recognized as a rule of property not only under our decisions applicable to the question, *Moore v. Meroney*, 154 N. C. 158, 163, 69 S. E. 838; *State v. Long*, 94 N. C. 896; *Crump v. Mims*, 64 N. C. 767; but the principle was embodied in our statute law in 1868, now sections 1-30 and 1-37. *Threadgill v. Wadesboro*, 170 N. C. 641, 87 S. E. 521.

Application to Rents, Profits etc. — It was not intended by this section that the state should not be barred from recovering except by the lapse of thirty years or twenty-one years, for those periods relate only to the adverse possession, without or with color, which will be sufficient to bar the title; nor will she sue for issues or profits. The loss of rents and profits is incidental to the loss of land. But this does not mean that the time limited for bringing any suit for the rents, issues, or profits of land should be lengthened so that instead of being three years, as already specially prescribed by the statute, § 1-52, it should be thirty or twenty-one years. Those periods are not applicable to personal actions, but only to actions for the recovery of land or some interest therein. *Tillery v. Whiteville Lumber Co.*, 172 N. C. 296, 298, 90 S. E. 196.

Application to Personal Actions.—The limitations as to color for twenty-one years, and without for thirty years, do not apply to personal actions after the State has parted with her title to the lands. *Tillery v. Whiteville Lumber Co.*, 172 N. C. 296, 90 S. E. 196.

Essential Characteristics of Possession.—In order to put the statute of limitations in motion against the true owner of land, it is necessary that there should be an actual, open, visible occupation of the land by another, begun and continued under a claim of right. The assertion of a mere claim of title, as for instance the payment of taxes thereon, is not sufficient. *Malloy v. Bruden*, 86 N. C. 251.

A party may show, as against the State, possession under known and visible boundaries for thirty years. *Mobley v. Griffin*, 104 N. C. 113, 115, 10 S. E. 142.

Sufficiency of Possession.—The possession spoken of must be constituted by such acts as would expose the party to a suit by the State, or by some person claiming under the State; for it is the forbearance to sue that raises such a presumption of right as induced the Legislature to ratify the apparent title. *Hedrick v. Gobble*, 61 N. C. 348, 349.

Possession is insufficient to constitute the basis of adverse possession against the state or a private individual where the plaintiff merely shows that the agent of plaintiff's grantor raked and hauled straw one or two years and plaintiff's father cultivated an acre or two of the land one year. *Prevatt v. Harrelson*, 132 N. C. 251, 43 S. E. 800.

The evidence was held sufficient to be submitted to the jury on the issue of plaintiffs' actual, open, continuous, notorious, and adverse possession of the lands sufficient to ripen title in plaintiffs under the provisions of this section, and defendants' motion to nonsuit was erroneously granted. *Owens v. Blackwood Lbr. Co.*, 210 N. C. 504, 187 S. E. 804.

Evidence held sufficient to support directed verdict for the holder of paper title on theory that defendants did not establish title by adverse possession as contemplated by this and § 1-42. *Peterson v. Sucro*, 101 F. (2d) 282.

Same—Lappage.—The rule, that in controversies between titles of different dates which lap, actual possession of the lappage is required to perfect the color of title of the junior claimant, applies to controversies between the State and citizens who claim under mesne conveyances which extend the boundaries of the original grant. *Hedrick v. Gobble*, 61 N. C. 348.

Necessity of Continuity. — Thirty years adverse possession is necessary only to bar the State, and this need not be a continuous occupancy, nor need there be any connection between the tenants. *FitzRandolph v. Norman*, 4 N. C. 584; *Candler v. Lunsford*, 20 N. C. 542; *Reed v. Earnhart*, 32 N. C. 516; *Davis v. McArthur*, 78 N. C. 357; *Cowles v. Hall*, 90 N. C. 330; *Mallett v. Simpson*, 94 N. C. 37; *Bryan v. Spivey*, 109 N. C. 57, 13 S. E. 766; *Hamilton v. Icard*, 114 N. C. 532, 19 S. E. 607; *Walden v. Ray*, 121 N. C. 237, 238, 28 S. E. 293; *May v. Mfg. Co.*, 164 N. C. 262, 80 S. E. 380.

Necessity of Privity of Possession.—A plaintiff, in proving the title out of the State by an adverse possession of thirty years, may avail himself of any possession by others adverse to the State, although he may not be able to connect himself with them. *Melvin v. Waddell*, 75 N. C. 361. This case was decided under the law prior to this section. See page 366 of the opinion and the authorities cited.—Ed. Note.

In case of a reliance upon thirty years adverse possession the plaintiff must show a privity between himself and those who preceded him in the possession, and also, that the possession was held up to known and visible boundaries. *Price v. Jackson*, 91 N. C. 11. This decision is in keeping with the express terms of the section.—Ed. Note.

Connection of Occupation with Boundaries.—Where there is a physical occupation with claim extending to certain marked boundaries, there must be some evidence tending to connect such occupation with the boundaries claimed or some exclusive control or dominion over the unoccupied portions of the land. *May v. Manufacturing & Trading Co.*, 164 N. C. 262, 80 S. E. 380.

Possession Short of Period as Evidence of Grant.—If there has been an adverse possession for any time short of thirty years, it is not a circumstance to be submitted to a jury, either alone or with others of like tendency, as evidence upon which they may find the fact of a grant. But on an adverse possession of thirty years a jury is not at liberty to find that in fact no grant ever issued. *Melvin v. Waddell*, 75 N. C. 361.

Nature of Possession Is Question for Jury.—Conceding the evidence establishes 30 years' possession, there was still left for the jury's determination the questions as to whether such possession was adverse, and as to whether such possession was held up to known and visible lines and boundaries, as required by this section. *McKay v. Bullard*, 207 N. C. 628, 630, 178 S. E. 95.

Effect of Running of Statute against State.—When a title is shown out of the State by adverse possession, sec. 1-38 applies where one thereafter acquires title under a sheriff's deed and holds possession thereunder for seven years. *Walker v. Moses*, 113 N. C. 527, 18 S. E. 339.

Burden of Showing Good Title—Against State.—Upon the principle that the plaintiff in an action for possession must show title good against the world, including the State under whom all lands are held, it has become a settled rule that where no grant is introduced the burden of proof cannot be shifted to the defendant in such actions without prima facie proof of possession under colorable title for twenty-one years under subsection (2). *Hamilton v. Icard*, 114 N. C. 532, 538, 19 S. E. 607.

Effect upon Running Where Grant Made.—Where an occupant is seated on the interference when the overlapping grant is issued, and is claiming colorable title adversely to the state under this section, the statute still continues to run in his favor as to the whole lappage unless the grantee, or those claiming under him, enter upon and occupy some portion of the lappage or bring an action. *Hamilton v. Icard*, 114 N. C. 532, 542, 19 S. E. 607.

If, on the contrary, the occupant of the lappage, wishes to use his adversary's grant to show that the title is out of the state in order to establish it in himself, by virtue of sec. 1-38, he must prove an adverse occupation for seven years after the grantee's right of action accrued on receiving his grant. *Hamilton v. Icard*, 114 N. C. 532, 542, 19 S. E. 607.

Effect of Patent to Part Possession.—The constructive possession of one claiming under color of title for twenty-one years—the period necessary to give title against the State—is not interrupted by the mere issuance to another of a patent including part of the land claimed by him where his actual possession is within the lappage. *Hamilton v. Icard*, 114 N. C. 532, 19 S. E. 607.

Cited in *Ware v. Knight*, 199 N. C. 251, 154 S. E. 35; *Virginia-Carolina Tie, etc., Co. v. Dunbar*, 106 F. (2d) 383.

§ 1-36. Title presumed out of state.—In all actions involving the title to real property title is conclusively deemed to be out of the state unless it is a party to the action, but this section does not apply to the trials of protested entries laid for the purpose of obtaining grants, nor to actions instituted prior to May 1, 1917. (1917, c. 195; C. S. 426.)

Section Not Retroactive.—This section, having no retrospective effect, is applicable only to actions commenced since May 1, 1917. *Riddle v. Riddle*, 176 N. C. 485, 97 S. E. 382; *Johnson v. Fry*, 195 N. C. 832, 837, 143 S. E. 857.

Purpose of Section.—To remove the burdensome and untoward condition growing out of the difficulty of proving title out of the State the Legislature enacted this section. It provides that, in actions between individual litigants, title shall be conclusively presumed to be out of the State. But that is the extent and limit of it. There is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself. *Moore v. Miller*, 179 N. C. 396, 399, 102 S. E. 627.

"Where either party exhibits a patent to the land in dispute, since the State can no longer assert any claim, it is familiar learning that either the grantee or the party claiming adversely to it after its introduction may, as a general rule, use it to show that the State is no longer a claimant and make good his own claim by proof of possession under colorable title for seven years only. *Gilchrist v. Middleton*, 107 N. C. 663, 12 S. E. 85; *Hamilton v. Icard*, 114 N. C. 532, 539, 19 S. E. 607.

This rule also applies where the question of title to land depends upon the true divisional lines between the parties to the action, adjoining owners, and each has introduced a grant from the State to their lands respectively, which taken together, cover the locus in quo, and either one may then establish title to any part thereof by adverse possession for twenty years. *Stewart v. Stephenson*, 172 N. C. 81, 89 S. E. 1060.

Within Legislative Power.—This section affects the remedy—mode of procedure—and is within the power of the General Assembly to pass. *Johnson v. Fry*, 195 N. C. 832, 837, 143 S. E. 857.

May Show Title out of State.—Under this section neither party is required to show title out of the State though either may do so. *Dill-Cramer-Truitt Corp. v. Downs*, 195 N. C. 189, 190, 141 S. E. 570, citing *Pennell v. Brookshire*, 193 N. C. 73, 136 S. E. 257.

Sources of Title Available.—And where the plaintiff has

sufficiently alleged general ownership of the locus in quo, he is not confined to the location of the adjoining boundary line under his grant, for he may avail himself of any source of title that he may be able to establish by his testimony. *Stewart v. Stephenson*, 172 N. C. 81, 89 S. E. 1060.

In an action to recover lands by twenty years adverse possession under § 1-40, it is not required that the plaintiff should show title out of the State, except in cases of protested entries, etc., when the State is not a party to the action. *Johnson v. Fry*, 195 N. C. 832, 143 S. E. 857.

And it is error to instruct the jury that the burden of proof is on the plaintiff to show title out of state in addition to sufficient adverse possession to ripen the title in himself. *Dill Corporation v. Downs*, 195 N. C. 189, 141 S. E. 570.

Applied in *Berry v. Coppersmith*, 212 N. C. 50, 193 S. E. 3.

Quoted in *Owens v. Blackwood Lbr. Co.*, 210 N. C. 504, 187 S. E. 804.

Cited in *Ware v. Knight*, 199 N. C. 251, 254, 154 S. E. 35.

§ 1-37. Such possession valid against claimants under state.—All such possession as is described in § 1-35, under such title as is therein described, is hereby ratified and confirmed, and declared to be a good and legal bar against the entry or suit of any person, under the right or claim of the state. (Rev., s. 381; Code, s. 140; C. C. P., s. 19; C. S. 427.)

Sufficiency of Possession as Affecting Application.—This section does not apply where the proof of possession is insufficient under section 1-35. *Prevatt v. Harrelson*, 132 N. C. 250, 251, 43 S. E. 800.

Application against Municipality.—Prior to the enactment of § 1-45, title to lands by adverse possession could be acquired against a State or a municipal corporation, which is a political agent of the State; and where before the enactment of this statute sufficient possession of the character required had ripened the title to a part of a street of a city under our statutes, this section and section 1-30, as construed by the decisions, the municipality may not reassert the lost ownership except under the power of eminent domain vested in it by the law and for the public benefit. *Threadgill v. Wadesboro*, 170 N. C. 641, 87 S. E. 521.

§ 1-38. Seven years possession under color of title.—When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under color of title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same, except during the seven years next after his right or title has descended or accrued, who in default of suing within that time shall be excluded from any claim thereafter made; and such possession, so held, is a perpetual bar against all persons not under disability. (Rev., s. 382; Code, s. 141; C. C. P., s. 20; C. S. 428.)

I. General Note on Adverse Possession.

A. General Consideration.

B. Character of Possession.

II. Note to Section 1-38.

I. GENERAL NOTE ON ADVERSE POSSESSION.

A. General Consideration.

Cross References.—As to title presumed out of state, see § 1-36. As to adverse possession of twenty years, see § 1-40.

For article on Adverse Possession—Color of Title, see 16 N. C. Law Rev. 149.

Editor's Notes.—The scope of this note is limited to a treatment of the general principles of titles by adverse possession of property which are alike applicable and essential to all the sections of the code upon the subject. It would have been impracticable to cite all of the great mass of cases upon this subject in this note and no attempt has been made to do so but references have been made to the digest where cumulative citations may be found.

While statutes of limitations are generally held to bar the remedy and not affect the right, adverse possession affects the right by vesting the actual title in the disseizor. In this respect it is an exception to the general rule of limitations.

Definition.—Adverse possession consists of the actual possession of property held to the exclusion of others including the true owner, and is exercised by making the ordinary use of which the property is susceptible in its present state and taking the usual profits. *Locklear v. Savage*, 159 N. C. 236, 74 S. E. 347. Such acts must be so repeated as to show that they are done in the character of owner, in opposition to the right or claim of any other person and not merely as an occasional trespasser. It must be as decided and notorious as the nature of the property will permit, affording unequivocal indication to all persons that the claimant is exercising the dominion of owner. *Loftin v. Cobb*, 46 N. C. 406. This is the definition given by Judge Gaston in *Williams v. Buchanan*, 23 N. C. 535, 537, and has generally been followed since the case was decided in 1841.

Adverse possession is actual possession in the character of owner, evidenced by making the ordinary uses and taking the usual profits of which the property is susceptible in its present state, to the exclusion of all others, including the true owner. *Carswell v. Creswell*, 218 N. C. 40, 7 S. E. (2d) 58.

Such adverse possession as will ripen into title must be for the prescribed period of time and be clear, definite, positive and notorious. It must be continuous, adverse, hostile, and exclusive during the whole statutory period, and under a claim of title to the land occupied. *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993.

In other words, the claim must be adverse and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action. It is the occupation with the intent to claim against the true owner which renders the entry and possession adverse. *Snowden v. Bill*, 159 N. C. 497, 75 S. E. 721.

There must be known and visible boundaries such as to apprise the true owner and the world of the extent of the possession claimed. *Barfield v. Hill*, 163 N. C. 262, 79 S. E. 677 and cases cited.

A better and more concise definition than was given in *Locklear v. Savage*, 159 N. C. 236, 237, 74 S. E. 347, would be difficult to find. It is therefore quoted as a resume: "Adverse possession within the meaning of the law * * * consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be as decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner."

The particular elements will now be presented in somewhat more detail.

Color of title is defined in *Smith v. Proctor*, 139 N. C. 314, 324, 51 S. E. 889, as "a paper-writing (usually a deed) which professes and appears to pass the title, but fails to do so." A deed to which the privy examination of the married woman is not taken is color of title. *Norwood v. Totten*, 166 N. C. 648, 82 S. E. 951; see *Barbee v. Bumpass*, 191 N. C. 521, 132 S. E. 275; *Booth v. Hariston*, 193 N. C. 278, 136 S. E. 879. In *Garner v. Horner*, 191 N. C. 540, 132 S. E. 290, it is held: Failure to comply with § 52-12, renders a deed void, although it is good as color of title. *Best v. Utley*, 189 N. C. 356, 361, 127 S. E. 337; *Whitten v. Peace*, 188 N. C. 298, 124 S. E. 571; *Ennis v. Ennis*, 195 N. C. 320, 323, 142 S. E. 8.

Whether a deed is champertous which conveys to the grantor's son certain described lands, reserving to the grantor and his wife a life estate, given in consideration of the grantee's successfully maintaining a suit to clear the title to the lands conveyed, it is sufficient color of title after registration and after the falling in of the reserved life estate, to ripen the title in the grantee under this section. *Ennis v. Ennis*, 195 N. C. 320, 142 S. E. 8.

An unregistered deed ordinarily is not color of title, except as between the original parties. *Johnson v. Fry*, 195 N. C. 832, 838, 143 S. E. 857.

And where the probate of a deed to lands is fatally defective it is not color of title against the grantor in a later registered deed, under sufficient probate, from a common grantee. *McClure v. Crow*, 196 N. C. 657, 146 S. E. 713.

Property Subject to Prescription. — The title to property of the state (see sec. 1-35), and this included the property of the political subdivision prior to the enactment in 1891 of what is now sec. 1-45 which changed the rule, may be acquired by adverse possession. But section 1-44 provides that property belonging to public service companies is not generally subject to title by prescription. It is the gen-

eral rule that the property of private persons is always subject to title by adverse possession. See secs. 1-38, 1-42.

Persons against Whom Prescription May Be Claimed.— This subject was dealt with incidentally under the preceding catchline. Continuing that discussion, adverse possession and prescription may be had against a trustee and this though the cestui que trust is under a disability and out of the state. *Blake v. Allman*, 58 N. C. 407. And where the title is lost by the trustee, the cestui que trust is also concluded. *Cameron v. Hicks*, 141 N. C. 21, 53 S. E. 728; *King v. Rhew*, 108 N. C. 696, 13 S. E. 174.

Joint tenants and tenants in common may lose their property by adverse possession and what is sufficient against one is sufficient against all. *Cameron v. Hicks*, supra. But in order for one tenant to gain title by adverse possession against his joint tenants he must commit some act of sufficient notoriety as to clearly indicate to the cotenants that he is holding adversely to them and to their exclusion. This is true because the possession of one tenant is presumed to be the possession of all.

There may be an entry or possession of one tenant in common which may amount to an actual ouster, so as to enable his cotenant to bring ejectment against him, but it must be by some clear, positive, and unequivocal act equivalent to an open denial of his right and to putting him out of the seizin. Such an actual ouster, followed by possession for the requisite time, will bar the cotenant's entry. *Dobbins v. Dobbins*, 141 N. C. 210, 53 S. E. 870.

So where a mortgage is made to a tenant in common by the other tenants therein, it is an ouster that puts them to their action and commences the running of the statute of limitations, either under seven years color or under twenty years otherwise. Section 1-40. *Crews v. Crews*, 192 N. C. 679, 135 S. E. 784.

And where the plaintiffs seek to be let into the possession of lands as tenants in common, and it appears without conflicting evidence that the defendants have been in peaceful possession under a mortgage from ancestor for more than thirty years after ouster, no issue of fact is raised for the determination of the jury the title being complete in the adverse possessors. *Crews v. Crews*, 192 N. C. 679, 135 S. E. 784.

The statute will not ordinarily begin running against a remainderman until the falling in of the life estate. *Roe v. Journigan*, 181 N. C. 180, 106 S. E. 690. See post this note, catchline "Title to Remainder During Life Estate."

Applied in *United States v. Rose*, 20 F. Supp. 350.

B. Character of Possession.

Must Be Actual. — There can be no adverse possession without an actual possession of the locus in quo. *Cutler v. Blockman*, 4 N. C. 368, and no constructive possession will ripen into a good title. *Williams v. Wallace*, 78 N. C. 354.

Thus the payment of taxes and the employment of agents in respect to land are insufficient acts to constitute possession. *Ruffin v. Overly*, 88 N. C. 369. As was said by the court in considering sec. 1-38, and this applies with equal force to all the statutes, "the adverse claimant should either possess it in person, or by his slaves, servants or tenants; for feeding of cattle or hogs, or building hog pens, or cutting wood from off the land, may be done so secretly as that the neighborhood may not take notice of it; and if they should, such facts do not prove an adverse claim, as all of these are but acts of trespass: Whereas, when a settlement is made upon land, houses erected, lands cleared and cultivated, and the party openly continues in possession, such acts admit of no other construction than this, that the possessor means to claim the land as his own." *Grant v. Winborne*, 3 N. C. 56; *Andrews v. Mulford*, 2 N. C. 311. It has been held that cutting timber and making shingles in a swamp unfit for cultivation continuously for seven years (see sec. 1-38) is a good possession.

Same—Test for Determining Sufficiency. — As stated above in this note, using the land continuously and openly a sufficient length of time for the only purpose for which it is fit, is all that is required. Thus maintaining fish traps, erecting and repairing dams and using the property every year during the fishing season for a sufficient number of years is sufficient possession of a non-navigable stream. *Locklear v. Savage*, 159 N. C. 236, 74 S. E. 347, and citations. However cutting trees and feeding hogs upon land susceptible of other uses, is insufficient. *Loftin v. Cobb*, 46 N. C. 406; *Vanderbilt v. Johnson*, 141 N. C. 370, 54 S. E. 298, sets forth sufficient evidence of adverse possession.

Applying the "use of which the land is capable" test the court has decided that the following acts were sufficient: Overflowing land under certain circumstances, see *LaRoque v. Kennedy*, 156 N. C. 360, 72 S. E. 454; erecting dams and fish traps, *Gudger v. Kensley*, 82 N. C. 482, 483;

operating lime kiln, *Moore v. Thompson*, 69 N. C. 120; making turpentine, *Gudger v. Kensley*, 82 N. C. 482, 483; cultivation, *Burton v. Carruth*, 18 N. C. 2, 3 and citations. *Wallace v. Maxwell*, 32 N. C. 110, *Smith v. Bryan*, 44 N. C. 180, 183; pasture, *Andrews v. Mulford*, 2 N. C. 311; and cutting timber, *Wall v. Wall*, 142 N. C. 387, 55 S. E. 283; *Staton v. Mullis*, 92 N. C. 624.

The following acts were held insufficient because of lack of continuity or insufficient duration. Cultivation, *Hamilton v. Icard*, 114 N. C. 532, 19 S. E. 607; *Hamilton v. Icard*, 117 N. C. 477, 23 S. E. 354; *Prevatt v. Harrelson*, 132 N. C. 250, 43 S. E. 800; *State v. Suttle*, 115 N. C. 784, 20 S. E. 725; gold hunting, *Ward v. Herrin*, 49 N. C. 23, 25, and citations; cutting timber, *Barlett v. Simmons*, 49 N. C. 295, 296; *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154; *Campbell v. Miller*, 165 N. C. 51, 80 S. E. 974; *Blue Ridge Land Co. v. Floyd*, 167 N. C. 686, 83 S. E. 687.

Same—Payment of Taxes. — Paying taxes is not enough to constitute an adverse possession. The payment of taxes is an assertion of a mere claim of title and therefore is insufficient because it is not an actual, open, visible occupation begun and continued under a claim of right. *Malloy v. Bruden*, 86 N. C. 251. However it does constitute a relevant fact in establishing a claim of title and may be considered along with evidence of possession in proving adverse possession. *Austin v. King*, 97 N. C. 339, 2 S. E. 678; *Christman v. Hillard*, 167 N. C. 4, 7, 82 S. E. 949.

Same—Title to Remaindermen During Life Estate. — Title by adverse possession cannot be had against the remaindermen before the life estate has ended, because no actual possession of the remainder may be had, but title to the life estate may be gained at such time. *Brown v. Brown*, 168 N. C. 4, 84 S. E. 25. The statutes cannot begin to run against remaindermen until the expiration of the particular estate. *Honeycutt v. Brooks*, 116 N. C. 788, 21 S. E. 558; *Roe v. Journigan*, 181 N. C. 180, 106 S. E. 690.

Same — Adjoining Boundaries. — If two persons own adjoining lands, and one runs a fence so near the line as to induce the jury to believe that any slight encroachments were inadvertently made, and that it was the design to run on the line, the possession constituted by the inclosure might be regarded as permissive, and could not be treated as adverse, even for the land within the fence, except as it furnished evidence of the line in a case of disputed boundary. The line being admitted, it would not make a title, where a naked adverse possession will have that effect, because there was no intention to go beyond his deed, but an intention to keep within it, which by a mere mistake he had happened not to do. *Currie v. Gilchrist*, 147 N. C. 548, 61 S. E. 581; *Blue Ridge Land Co. v. Floyd*, 171 N. C. 543, 546, 547, 88 S. E. 862.

Necessity of Being Visible and Notorious. — It was suggested under the definition that the possession must be as notorious as the nature of the property will permit. The illustrations given under the preceding catch line and the rule therein developed are but illustrations of this rule. The possession must always be as actual, as well as notorious, as the nature of the property will permit, but, although the possession must always be so notorious as to be visible, it is not necessary that the true owner have actual knowledge. It is sufficient if the possession would be notice of the adverse character to the ordinary person, if he should make the observation that the ordinary owner would make of his own property. The owner is bound to ascertain the nature of the claim after notice has been given him. *Kennedy v. Maness*, 138 N. C. 35, 50 S. E. 450.

The possession spoken of must be constituted by such acts as would expose the party to a suit by the State, or by some person claiming under the State; for it is the forbearance to sue that raises such a presumption of right as induced the Legislature to ratify the apparent title. *Hedrick v. Gobble*, 61 N. C. 348, 349.

Posting land and keeping away trespassers is insufficient because it is not a visible and notorious possession. *Berry v. Richmond Cedar Works*, 184 N. C. 187, 113 S. E. 772.

Continuity and Duration. — The duration of the possession to ripen into title is always fixed by the statutes. The ordinary periods are fixed; as against the state by sec. 1-35, private individual, under color, sec. 1-38, and without color, sec. 1-40. Certain limitations and exceptions are imposed upon these sections by secs. 1-44 and 1-45.

Proof that land was cultivated under one claiming title and that timber was cut thereon as needed, unaccompanied by any evidence of the length of time of the occupancy by cultivation, did not establish title by adverse possession without color of title under section 1-40. *Betts v. Gahagan*, 212 Fed. 120.

The continuity is largely a matter of interpretation and construction of these sections for none of them ex-

pressly indicate the extent to which the possession must be continuous.

In proving continuous adverse possession nothing must be left to mere conjecture. The testimony must tend to prove the continuity of possession for the statutory period, either in plain terms or by "necessary implication." *Ruffin v. Overby*, 105 N. C. 78, 83, 11 S. E. 251. The possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period, and that during it the claimant has, from time to time, continuously subjected the disputed land to the only use of which it was susceptible. *Locklear v. Savage*, 159 N. C. 236, 239, 74 S. E. 347; *Cross v. S. A. L. Co.* 172 N. C. 119, 90 S. E. 14. Occasional trespasses are not sufficient, for the possession must be of such character as to continually expose the party to suit by the true owner. *Alexander v. Richmond Cedar Works*, 177 N. C. 137, 98 S. E. 312. The illustrations and the rule stated under the catchline "Actual Possession," in this note expound the true rule of continuity. It must be just as continuous as the nature of the property will permit provided it is sufficient to meet the requirement as to notoriousness.

So, where the plaintiff showed a sufficient and connected title to the land in controversy in himself, as contemplated by section 1-42, it is necessary for the defendant, claiming by adverse possession under a deed to his ancestor, as color, to show a continuity of such possession for seven years. *Blue Ridge Land Co. v. Floyd*, 167 N. C. 686, 83 S. E. 687.

It has been held that the possession by a tenant of defendant's ancestor for one year, under his deed, and the occasional entry upon the land by his heirs at law after his death, for the purpose of cutting a few logs, is insufficient evidence of adverse possession in character and continuity to be submitted to the jury. *Blue Ridge Land Co. v. Floyd*, 167 N. C. 686, 83 S. E. 687.

An intervening period of five months, *Holdfast v. Shepard*, 28 N. C. 361, and one year, *Ward v. Herrin*, 49 N. C. 23, 24; *Malloy v. Bruden*, 86 N. C. 251, 259, have been held to be sufficient intervals to defeat title by adverse possession.

A gap occurring during the period of a suspension of the statute is sufficient to destroy the continuity. *Malloy v. Bruden*, 85 N. C. 251.

Same — Reasons for Rule as to Continuity. — The reason for the rule of continuity is that at all times there is a presumption in favor of the true owner, and he is deemed by law to have possession coextensive with his title except during the periods he is actually ousted by the personal occupation of another, so that whenever the occupation of another actually ceases, the title again draws to it the possession, and the seizin of the owner is restored. A subsequent entry even by the same wrongdoer and under the same claim of title constitutes a new disseizin from the date of which the statute takes a fresh start. *Malloy v. Bruden*, 86 N. C. 251, 259. But it is not to be understood that the possession is interfered with by the casual entry of a trespasser sufficiently to defeat title. *Hayes v. Lumber Co.*, 180 N. C. 252, 104 S. E. 527.

From the above authorities it would seem that the true rule is that whenever an occupation ceases for a period ever so brief the statute stops running but if the nature of the only use to which the land can be subjected is such or the actual and continuous occupation is such that from the very nature of things there are periods of time when the adverse possessor is not actually upon the land but is in fact occupying it under his claim the possession is not sufficiently interrupted to defeat title when so held for a sufficient period of time. Ed. Note.

The discussion under this catchline is limited to actions against private individuals. The rule regarding the continuity of the possession as against the state is converse to that respecting continuity as against private individuals. See note to sec. 1-35.

Tacking Possessions — Privity. — It is not necessary that the adverse claimant hold the possession for the statutory period provided he can establish a privity in claim, possession, etc., with the prior possessors, which when taken together will constitute the period of time necessary to give title. *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201. This privity is necessary where the claimant has not had possession for the statutory period for he cannot derive any benefit from the possession of a third party, or of others claiming under the third party, where he fails to connect himself with such third party's title. *Johnston v. Case*, 131 N. C. 491, 42 S. E. 957.

This rule of privity applies alike to cases of adverse possession against the state and private individuals, whether

with or without color of title, *May v. Mfg., etc., Co.*, 164 N. C. 262, 80 S. E. 380; *Johnston v. Case*, 131 N. C. 491, 42 S. E. 957; although prior to sec. 1-35 the rule was otherwise as against the state. *Phipps v. Pierce*, 94 N. C. 514, 518; *Price v. Jackson*, 91 N. C. 11, 13.

It has been held that to constitute privity, the later occupant must enter under a prior one and obtain his possession either by purchase or descent from him. Privity means privity of possession and not privity in blood for a "privity in blood" is one who derives his title by descent and applies to a real title which can descend and not to a mere colorable title. By this is meant, of course, that the possession descends and the heirs must take immediate possession to prevent a gap. Upon such entry the possession of the ancestor may be tacked to that of the heirs as if he possessed the land under color of title, the heirs, by descent so possess it. *Barrett v. Brewer*, 153 N. C. 547, 69 S. E. 614; *Alexander v. Gibbon*, 118 N. C. 796, 24 S. E. 748; *Truston v. Blount*, 4 N. C. 455. In a like manner the widow may tack her possession to that of her husband where she immediately possesses the property as a part of her homestead, (*Atwell v. Shook*, 133 N. C. 387, 45 S. E. 777) or dower. *Jacobs v. Williams*, 173 N. C. 276, 91 S. E. 951.

The possession of a widow under a homestead inures to the benefit of the heirs, and for the purpose of perfecting title in them by adverse possession may be tacked to that of the husband. *Atwell v. Shook*, 133 N. C. 387, 45 S. E. 777.

For the reason explained above possession by the legal representative is a continuation of the possession of the deceased. *Trustees v. Blount*, 4 N. C. 455.

The possession of a tenant is the possession of the landlord and is to be added to that of the landlord in person. *Alexander v. Gibbons*, 118 N. C. 796, 24 S. E. 748.

The same rule applies where a vendee holds possession under articles of purchase and his possession enures to ripen the defective title of the vendor. *Rhodes v. Brown*, 13 N. C. 195. This rule was applied as against co-tenants of a husband, notwithstanding that the husband, who held entire possession and while so holding deeded the property to his wife, was later decreed a tenant in common, the wife not being a party to the proceedings. *Gill v. Porter*, 176 N. C. 451, 97 S. E. 381.

It should be observed in this connection that the possession of a grantor who had no color of title cannot be tacked to that of his grantee in order to make up the seven years possession under color of title as required by sec. 1-38. *Morrison v. Craven*, 120 N. C. 327, 26 S. E. 940.

In cases where the claimant is holding possession under color of title he cannot tack his possession of the land not covered by his color to the possession of his grantor. This is an application of the rule that possession cannot be tacked to make out title by prescription when the deed under which the last occupant claims title does not include the land in dispute. See *Jennings v. White*, 139 N. C. 22, 51 S. E. 799; *Blackstock v. Cole*, 51 N. C. 560.

Same—Hostile Character. — It may be stated as a general proposition that the possession must be hostile to the true owner. This question becomes especially important where a person standing in a fiduciary relation has possession of the property in such capacity or where a tenant, a licensee, vendor or some other such person gains title in subordination to the true owner. See *Rogers v. Mabe*, 15 N. C. 180; *Foscue v. Foscue*, 37 N. C. 321; *Johnson v. Farlow*, 35 N. C. 84. Such person cannot hold possession adversely until he commits some act sufficient to apprise the true owner of the fact that he is holding adversely to his interest under a claim of ownership.

Whenever the possessor holds in subordination to the true owner whether in such capacity as named above or by having recognized a superior title in another, his possession will not ripen into title. *Gwyn v. Stokes*, 9 N. C. 235.

Thus there is no presumption that the possession of one under and in subordination to the legal title is adverse, and when the title is thus claimed by adverse possession, or for seven years under color, the burden is upon him who relies thereon to show such possession to have been continuous, uninterrupted, and manifested by distinct and unequivocal acts of ownership. *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993.

An adverse possession by one tenant in common is indicated by a hostile attitude apparent to the Court or jury, from which it may be seen by some act done that the intent to hold alone is manifested to the cotenants, as if they attempt to assert their claim, as to enter, or to demand an account of rents, etc., which is resisted by the occupant, his possession becomes adverse, and the statu-

te begins to run. *Tharpe v. Holcomb*, 126 N. C. 365, 35 S. E. 608.

Burden of Proof — Presumptions. — When the title is claimed by adverse possession, the burden is on him who relies upon such claim to show continuous possession. There is no presumption that the possession of real estate is adverse. *Monk v. Wilmington*, 137 N. C. 322, 49 S. E. 345; *Bland v. Beasley*, 145 N. C. 168, 170, 58 S. E. 993. See sec. 1-42.

II. NOTE TO SECTION! 1-38.

Generally.—When title to land is out of the state, seven years' adverse possession under color of title is sufficient to ripen title in ordinary cases. *Virginia-Carolina Tie, etc., Co. v. Dunbar*, 106 F. (2d) 383.

Title is deemed to be out of the state where the state is not a party to the action. *Duke Power Co. v. Toms*, 118 F. (2d) 443, 445.

Relation to Section 1-56.—This section and sec. 1-40 apply to actions for the recovery of real estate to the exclusion of sec. 1-56. *Williams v. Scott*, 122 N. C. 545, 29 S. E. 877.

Effect of Disability.—Seven years' adverse possession under color, is no bar to an action of ejectment, where the person entitled to commence the same is an infant at the time the title to the land descended to him, and sues within three years next after full age. *Clayton v. Rose*, 87 N. C. 106, 107.

But a married woman who acquired no title by another junior grant issued to her cannot use her disability to defeat the right of the plaintiffs. *Berry v. Lumber Co.*, 141 N. C. 386, 54 S. E. 278.

Connection with Grant as Requisite to Pleading Section.—The plaintiff may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title in himself and those under whom he claims, for seven years before the action was brought. *Blair v. Miller*, 13 N. C. 407; *Christenbury v. King*, 85 N. C. 229; *Isler v. Dewey*, 84 N. C. 345; *Mobley v. Griffin*, 104 N. C. 112, 115, 10 S. E. 142.

Boundaries.—In an action to quiet title the fact that, as a result of the impounding of water some of the boundaries have been submerged and could not be located did not destroy the value of the testimony as to their location at the time of the adverse possession relied on, and it was clearly competent for a witness to testify that he knew the land described in the deed and to the acts of possession occurring on that land. *Duke Power Co. v. Toms*, 118 F. (2d) 443, 445.

Sufficiency of Paper to Constitute Color.—There can be no color of title without some paper writing attempting to convey title, but which does not do it either because of want of title in the person making it or because of the defective mode of conveyance used; and, semble, that under the act of 1891 it must not be so plainly and obviously defective that a man of ordinary capacity could be misled by it. This is true notwithstanding the holding in *Neal v. Nelson*, 177 N. C. 394, 23 S. E. 428; *Williams v. Scott*, 122 N. C. 545, 29 S. E. 877.

An instrument is none the less color of title because of defects discoverable from the record, the purport of this section being to afford protection to apparent titles, void in law, and supply a defense where none existed without its aid. *Perry v. Bassenger*, 219 N. C. 838, 15 S. E. (2d) 365.

Same—Bond for Title as Color.—Where a bond for title is unconditional and calls for no future payment, the presumption, in the absence of any evidence to the contrary, is that the price was paid before or at the time of the signing, so that it is "color of title" to support adverse possession within this section. *Betts v. Gahagan*, 212 Fed. 120.

"After payment of the purchase money, a bond for title is 'color of title' to support adverse possession even against the vendor. *Avent v. Arrington*, 105 N. C. 377, 10 S. E. 991." *Betts v. Gahagan*, 212 Fed. 120, 123.

Same—Deed for Partition as Color.—A deed by the heirs of a deceased owner of land for partition thereof is not color of title within this section. *Betts v. Gahagan*, 212 Fed. 120.

A deed by a grantee in a deed of partition by heirs of the deceased owner to a third person of the land conveyed to the grantee in the partition is color of title within this section, where the third person had no interest in the land outside of the deed. *Betts v. Gahagan*, 212 Fed. 120.

Where the possession of a widow, when tacked to the possession of her husband, is sufficient to confer title to the land on the heirs of the husband by adverse possession, under section 1-40, whether a certain deed of a commissioner in a partition proceeding constituted color of title so as to complete the title of the heirs by adverse possession under

this section is immaterial. *Atwell v. Shook*, 133 N. C. 387, 45 S. E. 777.

Where land devised to testator's children with remainder to testator's grandchildren was sold under order of court by a commissioner to one of the life tenants, and defendants were the purchasers by mesne conveyances from the life tenant, the deed executed by the commissioner, being similar to a deed from a stranger, constituted color of title. *Perry v. Bassenger*, 219 N. C. 838, 15 S. E. (2d) 365.

Same—Unregistered Deed.—An unregistered deed is not color of title as against judgment creditors of the grantor. *Eaton v. Doub*, 190 N. C. 14, 123 S. E. 494.

While an unregistered deed is not color of title as against subsequent grantees under registered deeds and creditors of the grantor, where the grantee in the unregistered deed conveys by registered deed, and mesne conveyances from him are duly registered, such registered deeds are color of title, under this section, and where the land is held by actual possession successively by the grantees in such chain of title continuously for over seven years prior to the filing of a judgment against the grantor in the unregistered deed, the grantor in the unregistered deed is divested of title by adverse possession prior to the filing of the judgment, and the judgment does not constitute a lien against the land. *Glass v. Lynchburg Shoe Co.*, 212 N. C. 70, 192 S. E. 899.

Same—Voidable Deed.—A voidable deed is sufficient color although it is a distinct and separate source of title from the one under which entry was first made. *Butler v. Beil*, 181 N. C. 85, 106 S. E. 217.

Same—Void Deed.—A void deed constitutes color of title. *Bond v. Beverly*, 152 N. C. 56, 67 S. E. 55.

A wife's deed to her husband is color of title even if it be void, and his sufficient adverse possession for seven years, under this section, will ripen the fee-simple title in him. *Potts v. Payne*, 200 N. C. 246, 156 S. E. 499.

Same—Deed by Mortgagor in Possession.—A deed by the mortgagor in possession to a third party, with notice of the mortgage, conveys only the equity of redemption, and does not pass such a colorable title as may ripen by possession into an absolute legal estate. *Parker v. Banks*, 79 N. C. 480.

Same—Sheriff's Deed after Judgment against Nonresident.—A sheriff's deed at an execution sale under a judgment obtained against the nonresident owner by his wife to recover for maintenance and necessities furnished by her to their minor children, in which action attachment was levied on the land, is at least color of title under this section, the judgment not being void. *Campbell v. Campbell*, 221 N. C. 257, 20 S. E. (2d) 53.

Same—Deed after Husband Abandons Wife.—After abandonment, the wife's possession as purchaser at execution sale of a judgment obtained against him, is adverse to the husband, and her possession for the period required by this section, will bar him. *Campbell v. Campbell*, 221 N. C. 257, 20 S. E. (2d) 53.

The evidence tended to show that plaintiff, the owner of the locus in quo, left the state and abandoned his wife and children, that thereafter a tax lien on the locus in quo was foreclosed and deed was made by the commissioner to plaintiff's attorney, who, by direction of plaintiff, executed a quitclaim deed to plaintiff's youngest child. That some 13 years prior to the institution of the action, relying upon the belief that the husband was dead, the wife executed quitclaim deed and the other children executed deed to the youngest child, and that the following day the youngest child and her husband executed deed of trust upon the property in which she represented that her father was dead and that she had title. Defendants claim title as grantee from the purchaser at the foreclosure sale of the deed of trust. It was held that the tax deed and the deeds of the wife and the other children to the youngest child constituted color of title, and defendants' evidence that the youngest child went into possession under such color of title and remained in possession for a period in excess of 7 years is sufficient to take the case to the jury upon defendants' contention that they had acquired title to the locus in quo by adverse possession under this section, and the verdict of the jury under correct instructions from the court is determinative of the question. *Nichols v. York*, 219 N. C. 262, 13 S. E. (2d) 565.

Same—Deed of Non Compos Mentis.—The deed of a person non compos is color of title, and possession under it for seven years ripens into title against those not under disability. *Ellington v. Ellington*, 103 N. C. 54, 9 S. E. 208.

Character of Possession under Section.—Chief Justice Ruffin in *Green v. Harman*, 15 N. C. 158 at p. 162, said, "The operation of the statute of limitations depends upon two things: The one is possession continued for seven years; and the other the character of that possession—that it should be adverse. It has never been held that the owner should actu-

ally know of the fact of possession, nor have actual knowledge of the nature or extent of the possessor's claim. It is presumed, indeed, that he will acquire the knowledge, and it is intended that he should." *Blue Ridge Land Co. v. Floyd*, 171 N. C. 543, 546, 88 S. E. 862.

Adverse possession must be possession under known and visible lines and boundaries, and under colorable title. *Berry v. Coppersmith*, 212 N. C. 50, 54, 193 S. E. 3.

The possession of one under color is sufficient notice of his claim of title to the lands. *Butler v. Bell*, 181 N. C. 85, 106 S. E. 217.

The adverse possession for seven years under color, which bars the entry of the true owner, must be open, continuous, uninterrupted, and manifested by distinct and unequivocal acts of ownership, the burden being upon him who asserts that he has thus acquired the title, to show such actual adverse possession. *Monk v. Wilmington*, 137 N. C. 322, 49 S. E. 345; *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993; *Stewart v. McCormick*, 161 N. C. 625, 626, 77 S. E. 761. For full treatment see part one of this note, supra.

If the character of the possession is insufficient to ripen a perfect title, the question of color of title does not arise. *Clendenin v. Clendenin*, 181 N. C. 465, 107 S. E. 458.

Charging This and Section 1-40.—Where, in an action for the recovery of land, defendant relied on this section and section 1-40, and the evidence justified a finding in his favor under this section, but there was no evidence to support a verdict under section 1-40, the error in refusing to charge that defendant could not hold under section 1-40 was not reversible, since it could not be inferred that the verdict was based on a finding of adverse possession for twenty years merely because the court refused to charge that there was no evidence of adverse possession for twenty years. *Betts v. Gahagan*, 212 Fed. 120, 121.

Conflict Making Jury Question.—Where the defendant in ejectment claims the locus in quo by sufficient evidence of adverse possession with and without "color," as against plaintiff's chain of paper title, and the defendant denies the genuineness of a lease to his predecessor which the plaintiff has introduced, an issue of fact is raised for the determination of the jury. *Virginia-Carolina Power Co. v. Taylor*, 191 N. C. 329, 131 S. E. 646.

Effect on Lien of Judgment Creditor.—Adverse possession against a judgment debtor for a period of seven years under color of title does not affect the lien of a judgment creditor, the judgment creditor having no right of entry or cause of action for possession, but only a lien enforceable according to the prescribed procedure, and as to him the possession is not adverse. *Moses v. Major*, 201 N. C. 613, 160 S. E. 890.

Effect of Miscitation.—The criticism to which this section may be obnoxious in misreciting other intended sections cannot affect the application of section 1-17 to the previously limited actions for real property, to which these are expressly made subject. *Clayton v. Rose*, 87 N. C. 106, 111. Formerly this section cited the statutes naming and defining the disabilities and it is to these citations that this annotation refers. Ed. Note.

Cited in *Dill-Cramer-Truitt Corp. v. Downs*, 195 N. C. 189, 141 S. E. 570; *Owens v. Blackwood Lbr. Co.*, 210 N. C. 504, 187 S. E. 804; *McKay v. Bullard*, 219 N. C. 589, 14 S. E. (2d) 657.

§ 1-39. Seizin within twenty years necessary.—

No action for the recovery or possession of real property shall be maintained, unless it appears that the plaintiff, or those under whom he claims, was seized or possessed of the premises in question within twenty years before the commencement of the action, unless he was under the disabilities prescribed by law. (Rev., s. 383; Code, s. 143; C. C. P., s. 22; C. S. 429.)

Section Not Retroactive.—This salutary provision does not extend to actions already commenced or rights of actions already accrued at the ratification of the Code. *Covington v. Stewart*, 77 N. C. 148, 151.

Legal Title Prima Facie Evidence of Possession.—If a plaintiff establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action. *Johnston v. Pate*, 83 N. C. 110; *Conkey v. Roper Lumber Co.*, 126 N. C. 499, 503, 36 S. E. 42.

Same—Section Construed with Section 1-42.—In cases where there is no tenancy in common this section must be construed with section 1-42, for this section is explained in sec. 1-42 by the further declaration that the person who

establishes a legal title to the premises shall be presumed to have been possessed thereof within the time required by law, etc. *Conkey v. Roper Lumber Co.*, 126 N. C. 499, 502, 36 S. E. 42.

Same—Effect of Plea of Section by Adversary.—The pleading by a defendant of this section does not shift upon the plaintiff the burden of showing that he has been in the possession within twenty years before the commencement of the action, but the presumption created by sec. 1-42 can only be rebutted by proof on the part of the defendant that the defendant had been in adverse possession of the premises for twenty years. *Conkey v. Roper Lumber Co.*, 126 N. C. 499, 502, 36 S. E. 42.

Same—Character of Defendant's Possession as Affecting Application.—This section does not apply when the plaintiffs have shown legal title and it appears that the defendants' possession has not been for twenty continuous years. *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993. See also *Clendenin v. Clendenin*, 181 N. C. 465, 107 S. E. 458 where it was held that the other entry must be openly and notoriously adverse or some act must be done to clearly indicate that it has become adverse, and that the occupation of the mother-in-law's land after her death, where original entry was in subordination to her title, is insufficient. See also *Rutledge & Co. v. Griffin Mfg. Co.*, 183 N. C. 430, 111 S. E. 774.

Same—Where Previously Gained by Adverse Possession.—Where plaintiffs acquired the title by adverse possession of the land under color for more than thirty years, it follows that they had at least constructive seizin or possession within twenty years before this suit was brought, which would satisfy the requirement, as seizin follows the title, if there is no actual possession and it is not incumbent on them to show an actual seizin or possession of the premises in question for twenty years before the commencement of the action. *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993; *Stewart v. McCormick*, 161 N. C. 625, 626, 77 S. E. 761.

Notwithstanding that a judgment was rendered against a party in an action to recover lands, if he subsequently enter, inclose and use the lands for the statutory period, he will acquire a new estate by disseizin and acquiescence and will be presumed to have been in possession within the past twenty years. *Moore v. Curtis*, 169 N. C. 74, 85 S. E. 132.

Evidence Sufficient under Section.—The evidence in *Dean v. Gupton*, 136 N. C. 141, 48 S. E. 576, was sufficient to sustain a finding under this section that the defendant held adversely to the plaintiff.

State statutes of limitation neither bind nor have any application to the United States, when suing to enforce a public right or to protect interests of its Indian wards. *United States v. 7,405.3 Acres of Land*, 97 F. (2d) 417, 423.

Cited in *Johnson v. Fry*, 195 N. C. 832, 836, 143 S. E. 857; *Reid v. Reid*, 206 N. C. 1, 4, 173 S. E. 10.

§ 1-40. Twenty years adverse possession.—No action for the recovery or possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other persons for twenty years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability. (Rev., s. 384; Code, s. 144; C. C. P., s. 23; C. S. 430.)

Cross Reference.—As to adverse possession for seven years under color of title, see § 1-38.

Editor's Note.—The first part of the annotations under section 1-38 are devoted to a treatment of the general principles of adverse possession and that treatment is just as pertinent to this section as to sec. 1-38. Thus no repetition of the principle therein discussed will be made in this note.

Proof Out of State as Prerequisite to Pleading Section.—Prior to the passage of sec. 1-36, in 1917, before one could establish title to property under this section, title must have been proved to be out of the state.—Ed. Note.

Thus, where adjoining owners were litigating with respect to their boundaries and each introduced a grant from the state to their lands respectively, which taken together, covered the locus in quo, title was shown out of the state and either party could establish title to any part thereof by adverse possession for twenty years under this section. *Stewart v. Stephenson*, 172 N. C. 81, 89 S. E. 1060.

But since the passage of section 1-36 the title is conclusively presumed to be out of the state and such proof is not now necessary except in the cause specified.—Ed. Note.

Effect of Section Upon Prior Law.—The possession for twenty years which raised a presumption of title, as the law has been heretofore administered, has now the force and effect of giving an actual title in fee by the provisions of this section. *Covington v. Stewart*, 77 N. C. 143, 151.

Section Prescribes Maximum Required.—It is error to charge that the adverse claimant must maintain open and continuous possession without break for thirty years before the bringing of his action as only twenty years adverse possession is required to give a title in fee to the possessor, as against all persons not under disability, except the state, see sec. 1-35. *Walden v. Ray*, 121 N. C. 237, 238, 28 S. E. 293.

Section 1-38 Immaterial When This Section Applicable.—Where title by adverse possession can be established under this section, the question of whether a color of title is sufficient under section 1-38 is immaterial. *Atwell v. Shook*, 133 N. C. 387, 45 S. E. 777.

Even if there is a deed, with metes and bounds, the adverse possession of twenty years would bar the defendant under the statute of limitations. *Railroad v. Olive*, 142 N. C. 257, 271, 55 S. E. 263, cited and distinguished. *May v. Atlantic Coast Line R. Co.*, 151 N. C. 388, 66 S. E. 310.

Section Applicable to Exclusion of Section 1-56.—This section and section 1-38 apply to actions for the recovery of real estate to the exclusion of section 1-56. *Williams v. Scott*, 122 N. C. 545, 29 S. E. 877.

Applicability of General Rule Where United States Is Nominal Party.—The principle that the United States is not bound by any statute of limitations, nor barred by any laches of its officers, however gross, does not apply where United States is a mere nominal party so as to preclude adverse possessor from asserting an adverse claim against Indians, who are the real parties in interest. *United States v. Rose*, 20 F. Supp. 350, 353.

Presumption of Deed to Possession.—There is no error in a judge charging that where title is out of the state and the evidence shows possession for 20 years the jury might presume a deed to the possessor from any person having title. This is settled law. *Melvin v. Waddell*, 75 N. C. 361, 368.

Deed as Evidence of Possession.—Deed of sheriff to grantor of plaintiff in ejectment is no evidence of possession. *Prevatt v. Harrelson*, 132 N. C. 250, 43 S. E. 800.

Elements of Possession Necessary.—See general note under section 1-38.

Tenants in Common—Possession of One Possession of All.—The possession of one tenant in common is presumed to be the possession of all. *Tharpe v. Holcomb*, 126 N. C. 365, 35 S. E. 608.

Where plaintiff and defendants were tenants in common, the possession of the defendants, not having been adverse for twenty years, was the possession of the plaintiff. *Conkey v. Roper Lumber Co.*, 126 N. C. 499, 36 S. E. 42.

To ripen title under a deed from a tenant in common twenty years adverse possession is necessary and this applies to one to whom the alienee of a tenant has attempted to convey the entire estate. *Bradford v. Bank*, 182 N. C. 235, 108 S. E. 750.

Evidence of Possession Sufficient to Sustain Charge.—Where the plaintiff introduced evidence to show that he had open and continuous adverse possession of the lands under known and visible metes and bounds for more than twenty years, it is sufficient under this section to sustain a charge of the court to the jury as to his title by adverse possession. *Stewart v. Stephenson*, 172 N. C. 81, 89 S. E. 1060.

Adverse possession sufficient to ripen title is the exclusive use of the claimant for twenty years, continuously taxing the exclusive benefits such as the land in question is capable of yielding, under known and visible metes and bounds. *Johnson v. Fry*, 195 N. C. 832, 143 S. E. 857.

Priority over Judgment Lien.—Where a judgment debtor has lost title to lands by adverse possession, prior to the acquisition and registration of the judgment, the judgment creditor under § 1-234, is not entitled to execution on the locus in quo, the judgment debtor having no title at the time of the judgment, and this result is not affected by the giving of a deed by the debtor to the claimant, which was not registered until after the judgment. *Johnson v. Fry*, 195 N. C. 832, 143 S. E. 857.

Effect of Exclusive Dominion after Dedication to Public.—Where the owner of land has platted and sold it by deeds referring to streets, parks, etc., according to a registered map, the grantees have an easement therein, but where he has later fenced off a part of the land so offered for dedication to the public and under known metes and bounds has exercised exclusive and adverse dominion over the enclosed lands, asserting absolute title, the statute of limitations will begin to run against the easements of the grantees thus acquired, which will ripen title to the enclosed lands in favor

of the owner or his grantee under the provisions of this section, by twenty years adverse possession. *Gault v. Lake Waccamaw*, 200 N. C. 593, 158 S. E. 104.

Burden of Proof.—See note under § 1-42.

Question for Jury.—Where there is evidence that title to the lands had been acquired under twenty years adverse possession this question should be submitted to the jury. *McClure v. Crow*, 196 N. C. 657, 146 S. E. 713.

Evidence of plaintiffs' testator's actual, open and notorious adverse possession of the land in question under known and visible metes and bounds, in the character of owner and adverse to the claims of all other persons held sufficient to be submitted to the jury under this section. *Reid v. Reid*, 206 N. C. 1, 173 S. E. 10; *Owens v. Blackwood Lbr. Co.*, 210 N. C. 504, 187 S. E. 804; *Caskey v. West*, 210 N. C. 240, 186 S. E. 324.

Where it is alleged that defendant's predecessor in title went into possession of the locus in quo pursuant to a parol partition between him and his cotenants in common, and that each tenant thereafter held his share so allotted in severalty and hostilely to his cotenants for more than twenty years, the allegations are sufficient to raise the issue of title by adverse possession in the tenant in common, and it is error for the trial court to disregard the plea of title by adverse possession and refuse to submit the case to the jury. *Martin v. Bundy*, 212 N. C. 437, 193 S. E. 831.

Mines and Mineral Rights.—Plaintiff claiming mineral rights by adverse possession without color of title must show such possession under known and visible lines and boundaries for twenty years. *Davis v. Federal Land Bank*, 219 N. C. 248, 13 S. E. (2d) 417.

Merely prospecting does not constitute possession of mine and mineral rights. *Id.*

Where plaintiffs' evidence tended to show that they worked the fertilizer minerals at various places on the locus in quo for over twenty years but did not otherwise locate such work, and since plaintiffs do not claim under color of title, there can be no presumption that their possession was to the outer boundaries of their claim, and the evidence is insufficient to show adverse possession of the mining rights under known and visible lines and boundaries. *Id.*

In an action to remove cloud on title to the mineral rights in the locus in quo, which had been severed from the title to the surface, and for possession thereof by adverse possession, plaintiffs did not claim under paper title or under color of title. It was held that plaintiffs may not rely upon the weakness of defendant's title but must establish their own title good against the world or good against defendants by estoppel, and there being no question of estoppel involved, plaintiffs must prove title to the mineral rights by adverse possession for a period of twenty years under known and visible lines and boundaries. *Davis v. Federal Land Bank*, 219 N. C. 248, 13 S. E. (2d) 417.

Claim to Timber.—Evidence.—As to competency of evidence where question depended upon high and low water marks, see *Rutledge & Co. v. Griffin Mfg. Co.*, 183 N. C. 430, 111 S. E. 774.

Where the possession of one cotenant is pursuant to an agreement of all cotenants, his possession for more than twenty years is insufficient to bar his cotenants or their privies. *Stallings v. Keeter*, 211 N. C. 298, 190 S. E. 473.

Cited in *Dean v. Gupton*, 136 N. C. 141, 48 S. E. 576; *Mobley v. Griffin*, 104 N. C. 112, 115, 10 S. E. 142; *Dill-Cromer-Truitt Corp. v. Downs*, 195 N. C. 189, 190, 141 S. E. 570; *Glass v. Lynchburg Shoe Co.*, 212 N. C. 70, 192 S. E. 899; *Nichols v. York*, 219 N. C. 262, 13 S. E. (2d) 565.

§ 1-41. Action after entry.—No entry upon real estate shall be deemed sufficient or valid, as a claim, unless an action is commenced thereupon within one year after the making of the entry, and within the time prescribed in this chapter. (Rev., s. 385; Code, s. 145; C. C. P., s. 24; C. S. 431.)

Editor's Note.—At common law any person who had a right of possession could assert it by a peaceful entry, without the formality of a legal action, and being so in possession, could retain it, and plead that it was his soil and freehold. This was allowed in all cases where the original entry of the wrongdoer was unlawful. See 1 Bouv. Law Dict., title "Entry." This section seems to be a limitation upon the rule in that while an entry may be made, it must be followed by a suit within one year and within the period of limitation (either 20, 7, 30 or 21 years after the statute began running, as this case might be) prescribed by the various sections of the code. The effect seems to be that the common law entry without maintain-

ing a suit within one year thereof is insufficient so that one cannot repossess himself by an entry without also maintaining an action. The latter part of this section, "and within the time prescribed by law before the commencement of the action" is but a recognition of the statutes prescribing the various periods necessary for an adverse possession ripening into title.

Cited in *Clayton v. Cagle*, 97 N. C. 300, 303, 1 S. E. 523.

§ 1-42. Possession follows legal title.—In every action for the recovery or possession of real property, or damages for a trespass on such possession, the person establishing a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person is deemed to have been under, and in subordination to, the legal title, unless it appears that the premises have been held and possessed adversely to the legal title for the time prescribed by law before the commencement of the action. (Rev., s. 386; Code, s. 146; C. C. P., s. 25; C. S. 432.)

Cross References.—As to title against the state, see § 1-35. As to adverse possession of seven years under color of title, see § 1-38. As to adverse possession of twenty years, see § 1-40.

Necessity of Showing Legal Title.—The statutory presumption as to possession and occupation of land in favor of the true owner, from the express language of the provision, will arise and exist only in favor of a claimant who has shown "a legal title", and until this is made to appear the presumption is primarily in favor of the occupant, that he is in possession asserting ownership. *Moore v. Miller*, 179 N. C. 396, 102 S. E. 627.

Presumption of Subordination.—When the defendant relies on a deed made to his ancestor as color, and adverse possession of others thereunder to ripen his title, it is necessary to show that their occupancy was under or connected with the deed under which he claims, or the presumption will obtain that they were under the true title shown by the plaintiff. *Blue Ridge Land Co. v. Floyd*, 167 N. C. 686, 83 S. E. 687.

When the plaintiff in ejectment shows title to the locus in quo, and the defendant claims title by adverse possession, the latter must establish such affirmative defense by the greater weight of the evidence; otherwise, under this section, the defendants' occupation is deemed to be under and in subordination to the legal title. *Hayes v. Cotton*, 201 N. C. 369, 371, 160 S. E. 453.

Presumption of Possession and Rebuttal.—The presumption that one who proves legal title in himself has been in possession within twenty years is not rebutted by proof that an adverse claimant has been in possession where the claimant holds under a deed from a tenant in common with the devisor of the holder of the legal title. *Roscoe v. Roper Lumber Co.*, 124 N. C. 42, 46, 32 S. E. 389.

It is not necessary to consider the effect of this section where, conceding the presumption raised thereby, it is rebutted by the admission in the case agreed. *Kirkman v. Holland*, 139 N. C. 185, 189, 51 S. E. 856.

Same—Where Neither in Possession.—Where the defendants have not shown twenty years' possession, and the plaintiffs having shown the legal title, the law carries the seizin to the party having the legal title, when neither is in possession. *Bland v. Beasley*, 145 N. C. 168, 169, 58 S. E. 993.

Title acquired by adverse possession is legal title, and occupancy of the land thereafter will be presumed to be in subordination to such title, unless held adversely to such title for the statutory period. *Purcell v. Williams*, 220 N. C. 522, 17 S. E. (2d) 652.

Construed with Section 1-39.—Where the plaintiff by proving legal title has raised the presumption under this section that he has been in possession within twenty years the presumption operates to satisfy the requirements of sec. 1-39 so that the plaintiff does not have to prove such possession. The two sections are to be construed together—the defendant must show that he himself has been in possession adversely for twenty years. *Johnston v. Pate*, 83 N. C. 110; *Conkey v. Roper Lumber Co.*, 126 N. C. 499, 36 S. E. 42.

Presumption as to Possession of One Not True Owner.—It was held, in *Ruffin v. Overby*, 88 N. C. 369: "... every possession of land by one other than the claimant is deemed to be adverse until proof to the contrary is made." And it seems that the holding is in conflict with

this section. This may be explained by reference to the fact that the ouster in that case occurred prior to 1863, as it did in *Bryan v. Spivey*, 109 N. C. 57, 13 S. E. 765. Thus there is no presumption under the section that the possession of the plaintiffs and those under whom they claim is adverse. *Monk v. Wilmington*, 137 N. C. 322, 325, 49 S. E. 345.

There is no presumption that the possession of one under and in subordination to the legal title is adverse, and when the title is thus claimed by adverse possession, or for seven years under color, the burden is upon him who relies thereon to prove possession. *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993.

But even if *Ruffin v. Overby*, 88 N. C. 369, is in conflict with this section, the section does not profess to be conclusive. The presumption does not arise until the claimant "establishes a legal right to the premises," and not then even, if "it appears that such premises have been held and possessed adversely to such legal title." *Monk v. Wilmington*, 137 N. C. 322, 328, 49 S. E. 345. From dissenting opinion.

Disability Exception Limited to Persons Having Right of Entry, etc.—Adverse possession relates only to the true title, and the exceptions in this statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action. *Berry v. Lumber Co.*, 141 N. C. 386, 396, 54 S. E. 278.

Application to Claims from Common Source.—Where the parties claimed title from a common source, the plaintiff's deed being the older, but the defendant's having been recorded first, and possession for many years was in defendant, there being no evidence of the plaintiff ever having possession, this section does not apply. *Mintz v. Russ*, 161 N. C. 538, 77 S. E. 851.

Burden and Sufficiency of Proof.—The defendant in an action to recover lands, depending upon adverse possession thereof under color of title, where the plaintiff has proved a perfect chain of paper title, has the burden of proving this defense by the greater weight of the evidence, under this section; and while an instruction thereon that the defendant must satisfy the jury thereof has been held sufficient, a further charge in connection therewith, that the defendant need not satisfy the jury by the greater weight of the evidence, is in effect a charge that the jury may be satisfied by less than the greater weight of the evidence, and constitutes reversible error. *Bryan v. Spivey*, 109 N. C. 57, 13 S. E. 766; *Monk v. Wilmington*, 137 N. C. 322, 49 S. E. 345; *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993; *Steward v. McCormick*, 161 N. C. 625, 77 S. E. 761; *Ruffin v. Overby*, 105 N. C. 78, 11 S. E. 251; *Blue Ridge Land Co. v. Floyd*, 171 N. C. 543, 88 S. E. 862.

Evidence held sufficient to support directed verdict for the holder of paper title on theory that defendants did not establish title by adverse possession as contemplated by this and § 1-35, sub-division 2. *Peterson v. Sucro*, 101 F. (2d) 282.

The use of the word "satisfied" in a charge upon the sufficiency of evidence under this section did not intensify the proof required to entitle the plaintiffs to their verdict. The weight of the evidence must be with the party who has the burden of proof, or else he cannot succeed. But surely the jury must be satisfied, or, in other words, be able to reach a decision or conclusion from the evidence and in favor of the plaintiff which will be satisfactory to themselves. The plaintiffs' proof need not be more than a bare preponderance; but it must not be less. *Fraleigh v. Fraleigh*, 150 N. C. 501, 504, 64 S. E. 381; *State v. McDonald*, 152 N. C. 802, 807, 67 S. E. 762; *Blue Ridge Land Co. v. Floyd*, 171 N. C. 543, 545, 88 S. E. 862.

The burden of proving title by sufficient adverse possession is on the defendant in ejectment relying thereon, and where the evidence of the plaintiff has tended to show a perfect chain of paper title, the defendant's title is deemed to be in subordination thereto under this section, and it is reversible error for the trial judge in effect to instruct the jury that the burden of disproving the defendant's evidence is on the plaintiff. *Virginia-Carolina Power Co. v. Taylor*, 194 N. C. 231, 139 S. E. 381.

Applied in *Johnston v. Pate*, 83 N. C. 110, 112.

§ 1-43. Tenant's possession is landlord's.—When the relation of landlord and tenant has existed, the possession of the tenant is deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that the

tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited. (Rev., s. 387; Code, s. 117; C. C. P., s. 26; C. S. 133.)

Cross Reference.—As to provisions concerning landlord and tenant generally, see § 42-1 et seq.

Section Operates as Estoppel.—The plaintiff can prove title by estoppel, as by showing that the defendant was his tenant (or derived his title through his tenant) when the action was brought. *Conwell v. Mann*, 100 N. C. 234, 6 S. E. 782; *Melvin v. Waddell*, 75 N. C. 361; *Mobley v. Griffin*, 104 N. C. 112, 115, 10 S. E. 142; *Moore v. Miller*, 179 N. C. 396, 398, 102 S. E. 627.

Section Fixes Maximum Period.—The presumption which attaches to the possession of a tenant following the termination of tenancy, is only a presumption for the periods limited in the statute, and after the expiration of such periods, the presumption no longer exists. *Melvin v. Waddell*, 75 N. C. 361. *Virginia-Carolina Power Co. v. Taylor*, 191 N. C. 329, 331, 131 S. E. 646.

Establishment of Tenancy—Question of Fact.—Where the plaintiff in ejectment has shown paper title by mesne conveyances from a state grant of the lands in controversy, and the defendant, claiming under sufficient evidence of adverse possession with and without color, and denies a lease introduced by the plaintiff to the defendant's predecessor in title: Held, reversible error for the court to instruct the jury that defendant's possession is conclusively presumed to be that of a tenant for twenty years under the provisions of this section and exclude evidence of ownership of his predecessor in title during the continuance of the lease and for twenty years thereafter. *Virginia-Carolina Co. v. Taylor*, 191 N. C. 329, 131 S. E. 646.

Parol Gift as Rebuttal of Tenancy.—A parol gift of land will not convey title but it will rebut the idea of tenancy and possession under it will ripen into title if continued for twenty years. *Wilson v. Wilson*, 121 N. C. 525, 34 S. E. 685; *Dean v. Gupton*, 136 N. C. 141, 48 S. E. 576.

How Tenant May Maintain Action Involving Title.—A tenant under lease may not maintain an action against his lessor involving title during the period of the lease without first surrendering the possession he has under the lease. *Lawrence v. Eller*, 169 N. C. 211, 85 S. E. 291; *Abbott v. Cromartie*, 72 N. C. 292, 295.

Eviction under Legal Process and Re-entry.—Although where a tenant has been evicted by legal process and has entered under another claim, etc., the fact may be set up against the landlord and the principle of this section does not apply, if the eviction is the result of a collusion and the tenant then enter under the evictor, his property not having been moved from the premises, the court will not permit a defect of the landlord's title but will apply the principle of this section notwithstanding the eviction. *Pate v. Turner*, 94 N. C. 47.

Effect of Failure of Landlord to Prove Title.—Where the plaintiff fails to show any title in himself, and relies entirely on estoppel by this section, the judgment should be limited to a recovery of the possession, leaving the tenant free to assert any title he may have in another action. *Benton v. Benton*, 95 N. C. 559.

Competency of Evidence Respecting Tenancy.—Where a defendant in partition proceedings claims title by adverse possession, evidence that defendant entered as tenant is competent. *Alexander v. Gibbon*, 118 N. C. 796, 24 S. E. 748; *Shannon v. Lamb*, 126 N. C. 38, 35 S. E. 232; *Hatcher v. Hatcher*, 127 N. C. 200, 37 S. E. 207; *Bullock v. Bullock*, 131 N. C. 29, 42 S. E. 458.

Application to Tenants in Common.—Where a tenancy in common is shown, the possession of one is the possession of all—and the rule is the same, when one enters to whom a tenant in common has by deed attempted to convey the whole land. *Roscoe v. Roper Lumber Co.*, 124 N. C. 42, 32 S. E. 389.

The ouster of one tenant in common by another will not be presumed from an exclusive use of the common property and appropriation of the profits, for less period than twenty years; and the result is not changed when one enters to whom a tenant in common has by deed attempted to convey the entire tract. *Roscoe v. Roper Lumber Co.*, 124 N. C. 42, 32 S. E. 389.

Evidence that a tenant in common with defendant in ejectment claiming the locus in quo by adverse possession, paid rent to another, prior to the existence of the cotenancy, is not evidence that the defendant entered into possession under the title of such other person. *Virginia-Carolina Power Co. v. Taylor*, 191 N. C. 329, 131 S. E. 646.

A delay by feme covert, tenant in common, for three

years and a few months after the death of her husband, and for seven years and a few months after the falling in of the life estate of her father does not raise a presumption of an actual ouster by her cotenants in common, so as to defeat her title, and under the statute of limitations bar her action. *Day v. Howard*, 73 N. C. 1.

Principle stated in *McNeill v. Fuller*, 121 N. C. 209, 28 S. E. 299; *Prevatt v. Harrelson*, 132 N. C. 250, 251, 43 S. E. 800.

Cited in *Pitman v. Hunt*, 197 N. C. 574, 576, 150 S. E. 13; *Nichols v. York*, 219 N. C. 262, 13 S. E. (2d) 565.

§ 1-44. No title by possession of right of way.

—No railroad, plank road, turnpike or canal company may be barred of, or presumed to have conveyed, any real estate, right of way, easement, leasehold, or other interest in the soil which has been condemned, or otherwise obtained for its use, as a right of way, depot, stationhouse or place of landing, by any statute of limitation or by occupation of the same by any person whatever. (Rev., s. 388; Code, s. 150; C. C. P., s. 29; R. C., c. 65, s. 23; C. S. 434.)

Reason for Section.—The provisions of this section are justified upon the ground that the right of way is dedicated to a public use and for this reason is protected against loss by adverse possession. One using the right of way is at most a permissive licensee. *Muse v. R. R. Co.*, 149 N. C. 443, 63 S. E. 102; *Carolina, etc., R. Co. v. McCaskill*, 94 N. C. 746; *R. R. v. Olive*, 142 N. C. 257, 55 S. E. 263.

When Section Applies.—This section applies, it would seem, only after the company has acquired and taken possession of a right of way and has no application where there is merely an executory contract. The decisions seem to go the length of holding that the section does not apply unless the company has operated the road. See *May v. Atlantic, etc., R. Co.*, 151 N. C. 388, 66 S. E. 310.

So the grant to a railroad company of an undefined or "floating" right-of-way over the owner's lands is of an executory nature, and where no consideration has been paid by the company, the right may be lost by lapse of ten years upon failure of entry and of location by the company. *Hemphill v. Annis*, 119 N. C. 518, 26 S. E. 152; *Willey v. Norfolk, etc., R. Co.*, 96 N. C. 408, 1 S. E. 446; *May v. Atlantic, etc., Co.*, 151 N. C. 388, 66 S. E. 310.

Before this section can apply the company must have secured or acquired the right of way either by condemnation or otherwise and an executory contract to convey is not sufficient to meet the requirement. Even if an instrument is drawn for the purpose of making the conveyance it must meet the formalities required of such an instrument or it will be deemed insufficient for the purpose of bringing it within the purview of this section. *Beattie v. Carolina R. Co.*, 108 N. C. 425, 12 S. E. 913.

Same—Where Grant Presumed by Charter.—Where a company acquired an easement by a provision of its charter and not by condemnation or purchase, it would seem that the principle of this section applies so that although a part of its right of way might be used by the owner it has a right of entry whenever it needs the property for its use. *Railroad v. Sturgeon*, 120 N. C. 225, 26 S. E. 779; *Railroad v. Olive*, 142 N. C. 257, 55 S. E. 263; *Carolina Central R. Co. v. McCaskill*, 94 N. C. 746, 753; *Earnhardt v. Sou. R. Co.*, 157 N. C. 358, 72 S. E. 1062.

Effect of Section.—Under this section the possession by the defendants of the land covered by the right of way cannot operate as a bar to or be the basis for any presumption of abandonment by the railroad of its right of way. *Railroad v. Olive*, 142 N. C. 257, 55 S. E. 263.

The title of the railroad to the right of way once acquired, can not be lost by occupancy as to any part of it by the lapse of time. *Carolina, etc., R. Co. v. McCaskill*, 94 N. C. 746; *Purifoy v. Richmond, etc., R. Co.*, 108 N. C. 100, 12 S. E. 741.

Same—Effect of Permitting Improvements.—Mere silence while a trespasser is improving real estate as if it was his own, while it may sustain a claim for the value of such improvements when made in good faith, cannot be allowed to transfer the property itself to such trespasser. *Carolina Central R. Co. v. McCaskill*, 94 N. C. 746.

Effect upon Power of State, etc., to Change Grade.—This section does not affect the State or a municipality in the assertion of its right to require a railroad company to change the grade of its roadbed where it is crossed by streets, so that public travel and drainage may not be impeded. *Atlantic, etc., R. v. Goldsboro*, 155 N. C. 356, 357, 71 S. E. 514, aff'd 232 U. S. 548, 34 S. Ct. 364, 58 L. Ed. 721.

Section Not Applicable.—An incorporated city or town may obtain title to streets located upon the right of way of a railroad company by long and continuous, open, and adverse use thereof for such purpose, and where the city has so used the land for a long period of time there is a presumption of an original condemnation by the city, and this section has no application as to the rights of municipalities to acquire the land. In the *Matter of Assessment against Property of Southern Ry. Co.*, 196 N. C. 756, 147 S. E. 301.

Cited in *Durham v. R. R.*, 104 N. C. 261, 264, 10 S. E. 208; *Railroad v. Olive*, 142 N. C. 257, 55 S. E. 263; *Bass v. Roanoke, etc., Power Co.*, 111 N. C. 439, 455, 16 S. E. 402; *Purifoy v. Richmond, etc., R. Co.*, 108 N. C. 100, 12 S. E. 741; *Loven v. Parson*, 127 N. C. 301, 37 S. E. 271.

§ 1-45. No title by possession of public ways.

No person or corporation shall ever acquire any exclusive right to any part of a public road, street, lane, alley, square or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of an encroachment upon or obstruction or occupancy of any public way it shall not be competent for a court to hold that such action is barred by any statute of limitations. (Rev., s. 389; 1891, c. 224; C. S. 435.)

Prior Law.—Prior to the enactment of this section title to lands by adverse possession could be acquired against a State or a municipal corporation, which is a political agent of the State; and where before the enactment of this statute sufficient possession of the character required had ripened the title to a part of a street of a city under what are now sections 1-30, 1-35, as construed by the decisions of our Supreme Court, the municipality may not reassert the lost ownership except under the power of eminent domain vested in it by the law and for the public benefit. *Threadgill v. Wadesboro*, 170 N. C. 641, 87 S. E. 521.

For cases decided prior to section, see *Turner v. Com.*, 127 N. C. 153, 37 S. E. 191; *Moose v. Carson*, 104 N. C. 432, 10 S. E. 689; *State v. Long*, 94 N. C. 896; *Crump v. Mims*, 64 N. C. 767.

Same—Effect of Section upon Title Acquired.—Where an owner has acquired title by adverse possession to a part of a street under the Code of 1868 and the construction placed thereon by the decisions of the Supreme Court, the reversal of the principle thereafter by this Court cannot disturb the title theretofore acquired. *Threadgill v. Wadesboro*, 170 N. C. 641, 87 S. E. 521.

Application of Section.—Possession of the street by any one claiming it adversely cannot divest or destroy the right of the public therein. The Court, in *Moose v. Carson*, 104 N. C. 432, at p. 434, 10 S. E. 689, seems to have overlooked what was decided in *State v. Long*, 94 N. C. 896, with respect to the effect of adverse possession of a highway upon the right of the public or the citizen therein prior to this section. *State v. Godwin*, 145 N. C. 461, 465, 59 S. E. 132.

Where a county entered into the possession of a square for the public use before this section, the provisions of this section will not permit the plaintiff to acquire title thereto by adverse possession under a deed purporting to convey a part thereof. *Gates County v. Hill*, 158 N. C. 584, 73 S. E. 804.

A right to maintain a building on a navigable stream which obstructs the operation of a draw in a county bridge cannot be acquired by adverse user by virtue of this section. *Lenoir County v. Crabtree*, 158 N. C. 357, 74 S. E. 105.

Same—Curing Erroneous Charge.—An erroneous charge that the title to an open square, dedicated to and accepted by a town, would be acquired by seven years adverse possession, contrary to the provisions of this section, is not cured alone by a full and complete charge on the principles of an offer to dedicate and an acceptance of the square by the town. *Atlantic, etc., R. Co. v. Dunn*, 183 N. C. 427, 111 S. E. 724.

Applies Only to Streets Acquired by Municipality.—The principle of law of this section applies only to such streets as the municipality has acquired and not to land offered to be dedicated by a private citizen for use as streets when such offer of dedication has not been accepted by the municipality before the offer has been unequivocally withdrawn. *Gault v. Lake Waccamaw*, 200 N. C. 593, 158 S. E. 104.

Sections Construed with This Section.—Construing sec-

tion 146-91 providing that no statute of limitation shall effect the title or bar the action of one claiming it under an assignment from the State Board of Education, etc., with sections 1-30, 1-35, and this section, it is held, that the limitations as to color for twenty-one years, and without for thirty years, do not apply to personal actions after the State has parted with her title to the lands; and the three years statute to recover damages for trespass in cutting and removing trees from the land applies under the facts in this case. *Tillery v. Whiteville Lumber Co.*, 172 N. C. 296, 90 S. E. 196.

Possession Prior to Enactment.—When sufficient adverse possession of a street of an unincorporated town by the present owners and those claiming under them has been shown, for thirty-five years prior to the enactment of this section the right of the town to the use of the street is barred by the statute of limitations. *Tadlock v. Mizell*, 195 N. C. 473, 132 S. E. 713.

Property Conveyed to Trustees for Municipal Purposes.—Where property was conveyed to trustees for the benefit of members of the community for use as a community house or playground, this section does not apply. *Carswell v. Creswell*, 217 N. C. 40, 7 S. E. (2d) 58.

Art. 5. Limitations, Other than Real Property.

§ 1-46. Periods prescribed.—The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this article. (Rev., s. 390; Code, s. 151; C. C. P., s. 30; C. S. 436.)

Statute Affects Remedy Only.—The statute of limitations relates only to remedy, and the defendant is never afforded an opportunity of relying upon it until the plaintiff resorts to his remedy, either by action on the judgment, or motion in the nature of *scire facias* to revive it. *Berry v. Corpening*, 90 N. C. 395.

Same — Defenses against Former Statute.—Since the prior law was not an absolute bar to actions, but merely raised a presumption of payment which might be rebutted, the question of changed residence, destitution or insolvency of debtor and other such questions were material in rebutting the presumption raised, but under the present law are immaterial for such purposes since the present statutes totally bar the action. See *Campbell v. Brown*, 86 N. C. 376, 382.

Actions for Which No Statutes.—There is no statute of limitations applicable to an action brought by citizens to test the validity of an election held relative to subscribing stock to a railroad company, but such action must be brought within a reasonable time. *Jones v. Commissioners*, 107 N. C. 248, 12 S. E. 69. Nor is there any statute applicable to the probate of wills. In *re Dupree's Will*, 163 N. C. 256, 79 S. E. 611.

Application of Statutes to Trust Relations.—Where a partner receives firm money in winding up the affairs of the partnership in pursuance of an agreement that he so receives such funds, he holds them in trust for the other partners and the statutes do not run. *McNair v. Ragland*, 7 N. C. 139, 145.

Suspension of Statutes.—The statute of limitation does not run when there is no one in esse capable of suing. *Grant v. Hughes*, 94 N. C. 231.

Effect of Change of Period by Amendment.—A reasonable time for the commencement of an action before the statute changing the period works a bar, *Nichols v. R. R.*, 120 N. C. 495, 26 S. E. 643, shall be the balance of the time unexpired according to the law as it stood when the amending act was passed, provided it shall never exceed the time allowed by the new statute. For example, if the action would have been barred in six years, and four years had elapsed before the amending act, then two years more would be a reasonable time. If three years time would bar the action and three years had elapsed, as in the present case, before the amending Act is passed, then three years thereafter would be the limit and no more, and this rule will apply to all other periods of limitation on actions. *Culbreth v. Downing*, 121 N. C. 205, 206, 28 S. E. 294.

Cited in *Copley v. Scarlett*, 214 N. C. 31, 197 S. E. 623.

§ 1-47. Ten years.—Within ten years an action—

1. Upon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its rendition. No such action may be brought more than once, or have the effect to continue the lien of the original judgment.

2. Upon a sealed instrument against the principal thereto.

3. For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

4. For the redemption of a mortgage, where the mortgagee has been in possession, or for a residuary interest under a deed in trust for creditors, where the trustee or those holding under him has been in possession, within ten years after the right of action accrued.

5. For the allotment of dower upon lands not in the actual possession of the widow following the death of her husband. (Rev., s. 391; Code, s. 152; C. C. P., ss. 14, 31; 1937, c. 368; C. S. 437.)

- I. In General.
- II. Subs. (1). Judgments and Decrees.
- III. Subs. (2). Sealed Instruments.
- IV. Subs. (3). Mortgage Foreclosure.
- V. Subs. (4). Redemption of Mortgage.

I. IN GENERAL.

Editor's Note.—The 1937 amendment added subsection 5 to this section.

For a discussion of the effect of the amendment, see 15 N. C. Law Rev. 354.

See 11 N. C. Law Rev. 220.

Law Prior to Section.—It was said of the statute of presumption immediately preceding this section that, "its obvious policy, as said in *Ingram v. Smith*, 41 N. C. 97, is to insist peremptorily on diligence in all cases to which it has any application, and it is one which the courts must fairly carry out. So emphatically is it a statute of repose, that no saving is made in it of the rights of infants, femes covert, or persons non compos." *Hamlin v. Mebane*, 54 N. C. 18; *Hodges v. Council*, 86 N. C. 181; *Headen v. Womack*, 88 N. C. 468, 470.

The presumption was not conclusive; it might have been rebutted by any pertinent proof, and such proof was presumed by the appellate court where there was no complaint of the finding of fact by the Court. In *re Walker*, 107 N. C. 340, 343, 12 S. E. 136.

Though not strictly a statute of limitations, the section was so denominated in a general sense, and hence it was made a part of the chapter denominated in the Revised Code "Limitations." And although it did not create an absolute bar, it did, in a sense, create a conditional bar. *Rogers v. Clements*, 98 N. C. 180, 184, 3 S. E. 512.

Same—Effect of Present Section.—This section has taken the place of the former statute of presumptions, R. C., ch. 65, sec. 18 in respect to judgments. *Brown v. Harding*, 171 N. C. 686, 689, 89 S. E. 222.

Retrospective Effect.—This statute did not apply to actions commenced before August, 1868, or where the right of action accrued before that date. *Gaither v. Sain*, 91 N. C. 304.

A limitation is inflexible and unyielding; it ceases to operate only in the way and for the cause prescribed by the statute. *Brown v. Harding*, 171 N. C. 686, 689, 89 S. E. 222.

Application Limited to Actions or Suits—Power of Sale.—The statute was intended to apply only to actions or suits, and this is apparent from the very language of the law. In a case where it became necessary to decide whether a sale under a power was a suit or an action within the meaning of a statute it was held that a proceeding to foreclose a mortgage by advertisement is not a suit. Such a proceeding is merely an action of the mortgagee exercising the power of sale given him by the mortgagor. In no sense is it a suit in any court, and all the definitions of that word require it to be a proceeding in some court. *Cone v. Hyatt*, 132 N. C. 810, 44 S. E. 678; *Miller v. Cox*, 133 N. C. 578, 582, 45 S. E. 940.

The legislature has prescribed ten years as the limitation to an action upon a judgment, but it has made no provision for a party to avail himself of its protection when there is no action or proceeding in the nature of an action taken against him. *Berry v. Corpening*, 90 N. C. 395, 398.

Same—Leave to Issue Execution.—A proceeding for leave to issue execution on a judgment charging lands with owelty in partition is an "action" within the meaning of the statute of limitations. *Ex parte Smith*, 134 N. C. 495, 47 S. E. 15.

Sufficiency of Plea of Section.—An answer alleging "that the plaintiff has not brought his action within the time prescribed by law, and the same is barred by the statute of limitations," is a sufficient plea of the statute of limitations. *Pemberton v. Simmons*, 100 N. C. 316, 6 S. E. 122.

Duty to Consider Unsatisfactory Plea.—Although the plea of this section was indefinite and unsatisfactory, it was the duty of the court below to have considered and determined it, and a failure to do so was held to be error. *Proctor v. Proctor*, 105 N. C. 222, 10 S. E. 1036.

Effect of Part Payment.—A partial payment voluntarily made does not remove the statutory bar. *McDonald v. Dickson*, 87 N. C. 404. See dissenting opinion.

Effect of Making or Adding Parties.—Where this section applies, its provisions are not affected by the fact that additional parties to the action, ordered by the Supreme Court, had not been made before a succeeding term of the superior court, and the judge had thereupon ordered a discontinuance of the action, from which there was no appeal. *Geitner v. Jones*, 176 N. C. 542, 97 S. E. 494.

Evidence as to Running.—Evidence as to the running of this statute can have no pertinency where but little more than three years has elapsed. *Wilcoxon v. Logan*, 91 N. C. 449.

Applied in Serls v. Gibbs, 205 N. C. 246, 171 S. E. 56; *Farmville v. Paylor*, 208 N. C. 108, 179 S. E. 459; *Allsbrook v. Walston*, 212 N. C. 225, 193 S. E. 151; *Davis v. Cockman*, 211 N. C. 630, 191 S. E. 322.

Cited in Sikes v. Parker, 95 N. C. 232; *Usry v. Suit*, 91 N. C. 406, 416; *Wilcoxon v. Logan*, 91 N. C. 449; *Williams v. McNair*, 98 N. C. 332, 4 S. E. 131, 133; *In re Gibbs*, 205 N. C. 312, 171 S. E. 55; *Furr v. Trull*, 205 N. C. 417, 420, 171 S. E. 641; *Davis v. Alexander*, 207 N. C. 417, 420, 177 S. E. 417; *Ritter v. Chandler*, 214 N. C. 703, 200 S. E. 398; *Owney v. Parkway Properties*, 221 N. C. 27, 18 S. E. (2d) 710.

II. SUBS. (1). JUDGMENTS AND DECREES.

Prior Law.—This statute of presumptions Rev. Code ch. 65, section 18, the former law corresponding to this section, which declared that judgments, decrees, etc., should be presumed to be satisfied within ten years was not conclusive. *In re Walker*, 107 N. C. 340, 12 S. E. 136.

A decree in proceedings for partition had in 1861, adjudging owelty of partition against certain shares of the land divided, was subject to the statute of presumptions, which corresponded to this section, because this section is not retroactive. *Herman v. Watts*, 107 N. C. 646, 12 S. E. 437.

If there are valid subsisting judgments for the unpaid mortgage debt and the vendee does not deny the liability, the assignee of a joint vendor cannot insist upon the statute of presumption of payment from lapse of time as to the original debt, nor upon a bar by the act of limitations, as to the reduced debt assumed by the assignee of the vendee. *Ely v. Bush, etc., Co.*, 89 N. C. 358.

There is therefore no analogy which makes the decisions under the former precedents applicable to the present law (since the C. C. P. in 1868) inasmuch as they relate entirely to rules of evidence and not to the removal of a statutory bar where the action is upon a bond or judgment. *McDonald v. Dickson*, 87 N. C. 404, 406.

Prior to this statute there was no limitation absolutely barring the cause of action upon a judgment, but the statutes merely raised a presumption of payment which might be rebutted by competent evidence.

The period of time necessary to lapse before the presumption arose varied with the various statutes. At common law the period required was a great lapse of time, next the period was fixed by statute at 20 years, and then by the act of 1826 was changed to ten years. This remained the law until the C. C. P. of 1868 which changed the presumption to an absolute bar and the period fixed at ten years. See *McDonald v. Dickson*, 87 N. C. 404, 412.

Statute Strictly Construed.—A statute so entirely in derogation of common right as is the statute of limitations, should be strictly construed, and under it a judgment should not be treated as a contract, because it does not come within the necessity of that term. *McDonald v. Dickson*, 87 N. C. 404, 411.

Retroactive Effect.—A judgment rendered before, though docketed after, the adoption of the Code of Civil Procedure, is subject only to a presumption of satisfaction, and not to the statute of limitations as prescribed in the Code. *Johnston v. Jones*, 87 N. C. 393.

Section Operates as Bar.—This section fixes the current period of ten years as that which terminates the lien of a judgment, and operates as a bar to a new action upon it. *McDonald v. Dickson*, 85 N. C. 248, 251.

An action to enforce the lien of a judgment by condemning the land of the judgment debtor to be sold is not an action upon a judgment within the purview of subsection

(1), but even if the statute were applicable it would not have the effect of continuing the lien of the judgment beyond the ten-year period prescribed by § 1-234. *Lupton v. Edmundson*, 220 N. C. 188, 16 S. E. (2d) 840.

Significance of Transcribing Justice's Judgment to Superior Court.—A creditor having a judgment in a justice's court may keep his judgment altogether in that court, and rely alone on such process for its enforcement as a justice of the peace may issue; and if he so do, the bar of section 1-49 will apply to it at the end of seven years, unless before that time he sues and obtains a new judgment as he lawfully may do; but if he elect to have a transcript docketed in the superior court, and it is done, then all right of execution in the justice's court is renounced and in lieu thereof, the creditor has the more efficient and far reaching executions and process of the superior court. *Broyles v. Young*, 81 N. C. 315, 318.

The transcript of a justice's judgment docketed in the superior court becomes, for the purpose of lien and execution, a superior court judgment and is subsequent to the ten-year limitation notwithstanding section 1-49. *Broyles v. Young*, 81 N. C. 315.

Land is not relieved under this section of a judgment lien by the mere transfer of the debtor's title. But it has been held that "the lien upon lands of a docketed judgment is lost by the lapse of ten years from the date of the docketing, and this notwithstanding execution was begun but not completed before the expiration of ten years." *Osborne v. Board of Education*, 207 N. C. 503, 504, 177 S. E. 642, citing *Hyman v. Jones*, 205 N. C. 266, 171 S. E. 103.

Application to Foreign Judgments.—This section applies to foreign judgments. *Arrington v. Arrington*, 127 N. C. 190, 37 S. E. 212.

A cause of action on a judgment accrues from the date of its rendition. *Rodman v. Stillman*, 220 N. C. 361, 365, 17 S. E. (2d) 336.

When Statute Begins to Run — Judgment for Costs.—A judgment for costs is considered part of the first judgment where the costs were first levied against the plaintiff but were later adjudged against the defendant, and there is no bar except from the lapse of ten years under par. (1) of this section. *Owen v. Paxton*, 122 N. C. 770, 772, 30 S. E. 343.

Same—At Time of Judgment or Confirmation of Sale.—Where an action is instituted to recover the amount due on a note and to foreclose the mortgage securing the same and judgment is rendered on the debt, an order being made for the sale of the land, which sale was later reported and confirmed, the statute of limitations began to run at the date of the money judgment and not from the date of the confirmation of the sale. *McCaskill v. McKinnon*, 121 N. C. 192, 28 S. E. 265.

Same—Judgment for a Devastavit against Executor.—When an action is brought against an executor or administrator for a devastavit, and a judgment is obtained against him, the cause of action accrues at the time of the qualification, and the law in force at the time governs, but when the action is brought after the death of the executor, the cause of action accrues as against his real and personal representative, when such representative qualifies and gives notice to creditors. *Syme v. Badger*, 96 N. C. 197, 2 S. E. 61.

Same—Alimony Payable Annually.—In an action on a judgment for alimony, payable annually, the annual sums are barred within ten years from the time they become due under this section. *Arrington v. Arrington*, 127 N. C. 190, 37 S. E. 212. See dissenting opinion.

Stopping the Statute.—Where judgment was taken in 1926, and in 1931 defendant moved before the clerk to set the judgment aside, motion denied and appeal taken to the judge, and the clerk ordered that execution should not issue until the adjournment of the August, 1931, term of court, and the appeal to the judge was never heard, the order of the clerk and the appeal to the judge did not have the effect of stopping the statute and the judgment was barred in 1939 by the ten years statute of limitations. *Exum v. Carolina R. Co.*, 222 N. C. 222, 22 S. E. (2d) 424.

Effect of Judgment upon Contract or Tort.—A cause of action on contract or tort loses its identity when merged in a judgment; and thereafter a new cause of action arises out of the judgment. *McDonald v. Dickson*, 87 N. C. 404.

Period of Statute—Effect of Admission of Claim by Administrator.—A claim reduced to judgment is barred by the ten years statute of limitation unless the claim was admitted by the administrator, or action was brought upon it, in one year after the expiration of the ten years on the appointment of administrator as prescribed by statute. *Brittain v. Dickson*, 104 N. C. 547, 10 S. E. 701.

Same—Specialties Reduced to Judgments.—Specialties, when reduced to judgments, are merged, and the statute bar-

ring judgments will then apply. *Brittain v. Dickson*, 104 N. C. 547, 10 S. E. 701.

Effect of Issuing Executions During Period.—The statute of limitations may be set up as a defense by an administrator to a motion for leave to issue execution after ten years from the date of docketing a judgment against his intestate and this although executions have regularly been issued within each successive period of three years after the judgment was docketed. *Berry v. Corpening*, 90 N. C. 395.

The words "any state" must be taken to mean the judgment of a court of any state including our own. But it could make no material difference, even if not construed to include this state, since, by section 1-56, every action for relief not specially provided for must be commenced within the same period of ten years after the cause of action shall have accrued. *McDonald v. Dickson*, 85 N. C. 248, 251.

Effect of Payment on Judgment.—A payment on a judgment does not arrest the running of the statute of limitations. *McCaskill v. McKinnon*, 121 N. C. 192, 28 S. E. 265.

A partial payment on a judgment does not arrest the running of the statute of limitations. *Hughes v. Boone*, 114 N. C. 54, 55, 19 S. E. 63.

Comparison of Effect of Application of Section 1-56 with This Section.—It can make no difference whether subsection 1 of this section or section 1-56 applies. The result will be the same in either case. *Ex parte Smith*, 134 N. C. 495, 502, 47 S. E. 16.

Application to Issuance of Execution.—The issuing of an execution on a decree charging owelty in partition is barred within ten years. *Ex parte Smith*, 134 N. C. 495, 47 S. E. 16.

The statute of limitations is a proper plea and a complete bar to a motion for leave to issue execution on a judgment, when such motion is made more than ten years after the rendition of such judgment. *McDonald v. Dickson*, 85 N. C. 248.

III. SUBS. (2) SEALED INSTRUMENTS.

Section Operates upon Remedy.—This section limits the time within which actions may be brought and thus operates upon the remedy and not the right. The bar of the statute on a sealed promissory note is of that character, and while it takes away the forum for the enforcement of the note, it does not destroy the debt. *Demai v. Tart*, 221 N. C. 106, 109, 19 S. E. (2d) 130.

When Statute Begins to Run—Breach of Warranty.—In an action for breach of a covenant of warranty the statute of limitation begins to run when there is an ouster of the grantee. *Shankle v. Ingram*, 133 N. C. 254, 45 S. E. 578.

Same—Breach of Covenant of Seizin.—In an action for damages for breach of covenant of seizin the statute of limitation begins to run upon delivery of the deed. *Shankle v. Ingram*, 133 N. C. 254, 45 S. E. 578.

Same—Coupons of Bonds.—The Statute of Limitations begins to run against coupons of bonds at the maturity, not of the bonds, but of the coupons. *Threadgill v. Commissioners*, 116 N. C. 616, 617, 21 S. E. 425.

Same—Guaranty under Seal.—An action upon a guaranty under seal is not barred until ten years after the cause of action accrues. *Coleman v. Fuller*, 105 N. C. 328, 11 S. E. 175.

Application to Sureties.—This subsection is not applicable to actions against sureties. The use of the word "principal" and the omission of the word "sureties" clearly indicates this to be the intention of the legislature. Section 1-52, subs. (1) is applicable to sureties and the action against them is limited to three years. *Welfare v. Thompson*, 83 N. C. 279; *Redmond v. Pippen*, 113 N. C. 92, 18 S. E. 50; *Barnes v. Crawford*, 201 N. C. 434, 437, 160 S. E. 464; *North Carolina Bank, etc., Co. v. Williams*, 208 N. C. 243, 244, 180 S. E. 81; *North Carolina Bank, etc., Co. v. Williams*, 209 N. C. 806, 185 S. E. 18.

Guarantor as Principal under Section.—Neither the spirit nor the letter of this section makes a guarantor principal to the original obligation. *Coleman v. Fuller*, 105 N. C. 328, 332, 11 S. E. 175. From dissenting opinion.

Application to Bills, Notes, etc.—The prior law, as does this section, embraced "single bills," as well as promissory notes and other demands therein designated. *Rogers v. Clements*, 98 N. C. 180, 3 S. E. 512.

An action on a note under seal against the endorser on the note is ordinarily barred after three years from maturity of the note, by § 1-52, subs. 1, even though the endorsement is itself also under seal, an endorser not being a principal to the note so as to come within the provisions of this section, prescribing a ten-year period "upon a sealed instrument against the principal thereto." *Howard v. White*, 215 N. C. 130, 1 S. E. (2d) 356.

Where the note contained the word "seal" opposite the

signature it was held to be conclusive as to the nature of the instrument. Therefore this section controls as to the time within which an action might be brought. *Federal Reserve Bank v. Kalin*, 81 F. (2d) 1003.

Application to Bonds—Former Law.—The corresponding section of the former law was construed to embrace single bonds, though they were not named in terms. *Rogers v. Clements*, 98 N. C. 180, 184, 3 S. E. 512.

The presumption of payment of a bond arises after ten years from the time the right of action accrues, and the provisions of section 1-26 do not apply. *Hall v. Gibbs*, 87 N. C. 4.

Same—Section Not Retroactive.—A bond for the payment of money executed prior to this section, by the principal and his sureties is exempted from the operation of the statute of limitations as contained in this section. *Knight v. Braswell*, 70 N. C. 709.

Conditions Repelling Statute — Set-off.—A set-off in favor of the obligor is not a part payment as to an endorser and does not repel the statute. *Woodhouse v. Simmons*, 73 N. C. 30.

Power of Sale in Deed of Trust.—See generally, *Merrimon v. Postal Tel.-Cable Co.*, 207 N. C. 101, 176 S. E. 246.

Whether Note under Seal as a Question of Law or Fact.—While ordinarily the bar of the statute of limitations is a mixed question of law and fact, where, in an action on a note, the plea of the statute is based upon defendant's contention that the note was not under seal, but defendant offers no evidence in support of his contention that he did not adopt the printed word "seal" appearing on the note after his name as maker, the question of the statute becomes a matter of law, and the court properly refuses to submit an issue as to whether the action was barred. *Currin v. Currin*, 219 N. C. 815, 15 S. E. (2d) 279.

IV. SUBS. (3) MORTGAGE FORECLOSURE.

The prior law corresponding to this section created a presumption that after ten years the mortgage was presumed to have been satisfied which might have been rebutted and did not operate to absolutely bar the right. *Pemberton v. Simmons*, 100 N. C. 316, 6 S. E. 122.

Only Limitation upon Right to Foreclose.—This section is the only limitation upon the mortgagee's right of action for foreclosure or sale. *Parker v. Banks*, 79 N. C. 480, 484.

Prerequisites to Bar.—In order to bar an action for relief under this section two things must concur, namely, the lapse of ten years after the forfeiture or after the power of sale became absolute or after the last payment, and the possession of the mortgagor during that period. *Woodlief v. Wester*, 136 N. C. 162, 168, 48 S. E. 578; *Owney v. Parkway Properties*, 222 N. C. 54, 56, 21 S. E. (2d) 900.

Necessity for Possession.—The mere lapse of time, unaccompanied by any possession, does not obstruct the right to foreclose a mortgage. *Simmons v. Ballard*, 102 N. C. 105, 9 S. E. 495. Decided under prior statute.

The statutory presumption of abandonment of an equitable claim to land, arising within ten years after the right of action accrues, is fatal to the plaintiffs upon the facts of this case. *Headen v. Womack*, 88 N. C. 468.

Same — Remainderman before Lapse of Life Estate.—The actual possession of the life tenant does not inure to the remainderman. Thus, during the continuance of the life estate the latter cannot avail himself of that actual possession as against one who holds a mortgage on his interest for the purpose of barring his right under the mortgage. *Malloy v. Bruden*, 86 N. C. 251, 257; *Woodlief v. Wester*, 136 N. C. 162, 164, 48 S. E. 578.

Where a remainderman, not being in possession, executes a mortgage, the foreclosure of the mortgage is not barred after ten years from the forfeiture thereof or from the last payment, such action being brought within ten years from the time of the acquisition of the possession by the remainderman. *Woodlief v. Wester*, 136 N. C. 162, 48 S. E. 578.

Character of Possession Necessary.—It is impossible to suppose that the legislature intended a constructive possession, for the "mortgagor or grantor" could never have such possession as against a mortgagee. The latter has the right or possession by construction of law, as he has the legal title, and, if a constructive possession was intended, there was no use in requiring possession at all, as, if neither party was in actual possession, the constructive possession would always be in the mortgagee. *Dobbs v. Gullidge*, 20 N. C. 197; *London v. Bear*, 84 N. C. 266; *Deming v. Gainey*, 95 N. C. 528; the Code, section 146; *Williams v. Wallace*, 78 N. C. 354; *Simmons v. Ballard*, 102 N. C. 105, 9 S. E. 495; *Woodlief v. Wester*, 136 N. C. 162, 166, 48 S. E. 578; *Owney v. Parkway Properties*, 222 N. C. 54, 21 S. E. (2d) 900.

Same—Section Applicable to Exclusion of 1-56.—Where

there is no possession by either party, there can be no running of the statute. If it was intended that section 1-56 should apply where there is no possession by either party, it was utterly useless to insert in subsection (3) and (4) the provision in regard to possession, as the statute under such a construction of section 1-56, would run whether there was any possession or not, and the period of limitation is the same in both sections. *Woodlief v. Wester*, 136 N. C. 162, 169, 48 S. E. 578.

Since this subsection is an express provision of law directly applicable to an action to foreclose, it must be disregarded altogether before section 1-56 has any application. Such a construction would be a complete reversal of the will of the legislature as plainly expressed. *Woodlief v. Wester*, 136 N. C. 162, 168, 48 S. E. 578.

There are several cases decided under section 1-56 in which the principle of section 1-47, sub. 3 has been adopted by analogy, and in which it was held that a party who remains in possession of land is not barred of any equity therein by lapse of time, and that the statute runs only where the other party has had possession. *Thornburg v. Mastin*, 93 N. C. 258; *Mask v. Tiller*, 89 N. C. 423; *Smith v. McKee*, 87 N. C. 389; *Norton v. McDevitt*, 122 N. C. 755, 756, 30 S. E. 24. *Menzel v. Hinton*, 132 N. C. 660, 44 S. E. 385, 95 Am. St. 660 was explained in *Woodlief v. Wester*, 136 N. C. 162, 168, 48 S. E. 578.

When Holding Becomes Adverse. — When the mortgagor of property is left in possession, he or his vendee holds it for the mortgagee, and his possession does not become adverse so as to set the statute in motion until condition broken. *Woody v. Jones*, 113 N. C. 253, 18 S. E. 205.

Absence from State as Suspending Section. — An action to foreclose a mortgage comes within the purview of section 1-21, and the absence of the mortgagor from the state suspends the running of the statute. *Love v. West*, 169 N. C. 13, 14, 84 S. E. 1048.

Where this subsection 3 is pleaded, the absence of the mortgagor from the state for a year or longer as prescribed in section 1-21 will not be counted, nor will any presumption of payment of the debt be raised within the period allowed for the commencement of the action. *Love v. West*, 169 N. C. 13, 84 S. E. 1048. See concurring opinion.

Effect upon Debt Secured. — The provisions of this paragraph only bar an action to foreclose the mortgage, and do not bar an action to recover the debt secured by the mortgage. *Fraser v. Bean*, 96 N. C. 327, 2 S. E. 159.

Effect of Bar of Debt upon Foreclosure. — The fact that a note is barred by the three-year statute, section 1-52, does not prevent the mortgagee from foreclosing his mortgage securing it, this section being applicable. *Jenkins v. Griffin*, 175 N. C. 184, 95 S. E. 166.

Although an action upon the debt secured by a mortgage may be barred by the lapse of time, the remedy appertaining to the security may be enforced. *Overman v. Jackson*, 104 N. C. 4, 10 S. E. 87.

Where a note has not been barred, the foreclosure of a deed in trust, securing it, may be ordered. *Geitner v. Jones*, 176 N. C. 542, 97 S. E. 494.

A mortgage is an incident of the note it secures, and the statute of limitations will not run against its foreclosure when it has not run against the note. *Humphrey v. Stephens*, 191 N. C. 101, 131 S. E. 383.

Effect of Payment of Interest. — This section will not bar foreclosure on a deed of trust when, although the debt was due more than 10 years ago, interest has been paid on the debt within 10 years. *Dixie Gro. Co. v. Hoyle*, 204 N. C. 109, 167 S. E. 469.

Section Not Applicable to Power of Sale. — The execution of a power of sale in a mortgage is not barred by the statute of limitations referring to actions to foreclose mortgages. *Miller v. Cox*, 133 N. C. 587, 45 S. E. 940. For limitation upon execution of power of sale, see sec. 45-26.

This section applies to actions for foreclosure of a mortgage or deed of trust and not to foreclosure under a power of sale and to take benefit under such a statute, it must be pleaded. *Spain v. Hines*, 214 N. C. 432, 434, 200 S. E. 25. See also, 17 N. C. Law Rev. 448.

It is conceded that if it were necessary for the mortgagee to bring an action to invoke the equitable aid of the court to foreclose his mortgage, he would be barred, because in that event he would abandon his power of sale and ask for the intervention of the court, which would be compelled to enforce the statutory bar. *Woodlief v. Wester*, 136 N. C. 162, 168, 48 S. E. 578.

The theory of the statute is that there has been an abandonment of the right, which will not be presumed unless the party resisting the enforcement of the right has had possession. *Woodlief v. Wester*, 136 N. C. 162, 169, 48 S. E. 578.

Effect of Barring Foreclosure upon Power of Sale. —

"The court said in *Menzel v. Hinton*, 132 N. C. 660, 662, 44 S. E. 385, 'It is well settled that an action upon the debt may be barred without affecting the right to maintain an action to foreclose the mortgage given to secure it. *Capehart v. Detrick*, 91 N. C. 344. This because the bar of the statute affects only the remedy and not the right,' and upon this point the court was unanimous." *Jenkins v. Griffin*, 175 N. C. 184, 186, 95 S. E. 166.

It was further said that the execution of a power of sale is not within the language of this subsection saying, "It is not necessary for the mortgagee to institute an action for the foreclosure of the mortgage or the execution of the power of sale; hence no time is fixed by the statute within which he must execute the power. The word 'action' in the paragraph evidently has reference to the action for foreclosure, and not to the execution of the power of sale, which requires no action." See *Miller v. Cox*, 133 N. C. 578, 582, 45 S. E. 940.

But the general assembly has changed the law in this particular by providing that the power of sale "shall become inoperative, and no person shall execute any such power when an action to foreclose such mortgage or deed of trust for the benefit of creditors would be barred by the statute of limitations," section 45-26, and this subsection, bars actions to foreclose a mortgage or deed of trust unless commenced within ten years, etc. *Jenkins v. Griffin*, 175 N. C. 184, 187, 95 S. E. 166.

Menzel v. Hinton was followed in *Cone v. Hyatt*, 132 N. C. 810, 812, 44 S. E. 678, and section 45-26, which bars a power of sale when foreclosure is barred, was passed to overcome the decisions. *Humphrey v. Stephens*, 191 N. C. 101, 104, 131 S. E. 383.

The Exercise of a Power of Sale under Mortgage is not a Suit. — See *Miller v. Cox*, 133 N. C. 578, 582, 45 S. E. 940.

Applicability to Consent Judgment Allowing the Equity.

— A consent judgment providing that the defendant has an equity to redeem the land upon the payment of a certain sum, on or before a certain day, and if this payment is made on or before that day the plaintiff will convey said land to the defendant, but in case of failure to pay within the time limited, the defendant shall stand absolutely debarred and foreclosed of and from any and all equity or other estate, established the relation of mortgagor and mortgagee, and notwithstanding the provision of strict foreclosure that relation continued to exist after the day of forfeiture and under this subsection ten years possession of the defendant, after default, bars the plaintiff. *Bunn v. Braswell*, 139 N. C. 135, 51 S. E. 92.

Necessity of Pleading Section — Waiving Objection. — When a party to an action involving the title to lands in dispute contends that a certain mortgage necessary in the paper title of the adverse party, is barred by this subdivision an objection that the same was not specially pleaded is waived when, after the conclusion of the evidence and argument, he obtains permission from the court to open the case and offer evidence tending to show that the mortgage had been kept in date of payment, thus rendering the issue appropriate and necessary. *Ferrell v. Hinton*, 161 N. C. 348, 77 S. E. 224.

Section Must Be Specifically Pleaded. — In an action to foreclose a mortgage the ten-year statute of limitations must be specially pleaded. *Stancill v. Spain*, 133 N. C. 76, 45 S. E. 466.

Power of Grantee to Plead. — The grantees of a mortgage are entitled to plead, in a foreclosure action, the statute of limitations. *Stancill v. Spain*, 133 N. C. 76, 45 S. E. 466.

Section Applicable to Mortgage of Surety. — Where a surety executes a mortgage on his own land, an action to foreclose the same is not barred until the expiration of ten years. *Miller v. Cox*, 133 N. C. 578, 45 S. E. 940.

Applicability to Vendor and Vendee. — While the relation of vendor and vendee is in many respects similar to that existing between mortgagor and mortgagee, this subsection does not embrace actions arising out of executory contracts for sales of land. *Overman v. Jackson*, 104 N. C. 4, 10 S. E. 87.

Cancellation of Barred First Mortgage by Second Mortgagee. — A second mortgagee cannot have the first mortgage canceled because it is barred by the statute of limitations. *Miller v. Cox*, 133 N. C. 578, 45 S. E. 940.

Effect of Part Payment. — Payment on a bond secured by mortgage before it goes out of date, and within ten years before suit brought, will prevent the bar of the statute of limitations, and a purchaser of the land at a mortgage sale will not be barred. *Williams v. Kerr*, 113 N. C. 306, 18 S. E. 501.

Part payment operating to start the running of the stat-

ute of limitations anew against the right of action to foreclose a mortgage or deed of trust, is any payment on the debt secured by the instrument, and the action to foreclose is not barred within ten years from such payment notwithstanding that the part payment is applied to only one of the notes secured, resulting in the bar of the statute as to an action on the other note. *Demai v. Tart*, 221 N. C. 106, 19 S. E. (2d) 130.

Sale under Barred Mortgage — Remedy of Mortgagor. — A sale under a mortgage barred by the statute would carry to the purchaser no title. The plaintiff mortgagor being in possession has a full defense to an action for ejectment when brought by the purchaser. *Capehart v. Biggs & Co.*, 77 N. C. 261; *Fox v. Kline*, 85 N. C. 173; *Hutaff v. Adrian*, 112 N. C. 259, 17 S. E. 78.

Where a mortgagor in possession has a full defense to an action for ejectment when brought by a purchaser at a sale under a mortgage barred by the statute of limitations, the court will not interfere by injunction to prevent a sale threatened by the mortgagee. It would be otherwise if there were a contest as to the amount due under the mortgage. *Hutaff v. Adrian*, 112 N. C. 259, 17 S. E. 78.

Sale While Suit to Foreclose Pending.—Suit to foreclose a duly registered deed of trust was instituted prior to the bar of this section against the trustee, the cestuis and the assigns of the cestuis. While the suit was pending, the assigns of the cestuis sold the property, and upon discovering the transfer, plaintiff had the purchasers made parties. At the time they were made parties the ten-year period prescribed by statute had expired. It was held that the purchasers during the pendency of the foreclosure suit were chargeable with notice thereof and acquired only that interest which their grantors then had, and could not assert the bar of the statute. *Massachusetts Bonding, etc., Co. v. Knox*, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438.

Foreclosure Held Only Remedy in Absence of Signed Note.—Where the plaintiff did not sign the note and was not bound thereby, having executed only a deed of trust on her land as additional security for the debt, in the event of default in payment, foreclosure of the deed of trust is the only action maintainable against her. This section therefore, prescribes the time within which an action may be brought. *Carter v. Bost*, 209 N. C. 830, 184 S. E. 817.

Principle illustrated in *Woody v. Jones*, 113 N. C. 253 255, 18 S. E. 205.

V. SUBS. (4). REDEMPTION OF MORTGAGE.

Applicability to Trust Relation.—The personal representative of a trustee, constituted by a deed in trust, has no right to plead this statute of limitation against his cestui que trust calling for a settlement of the trust. *Johnston v. Overman*, 55 N. C. 182.

When Statute Begins Running. — Where, in accordance with the agreement expressed in the instrument, the mortgagee enters at once into possession of the lands, the mortgagor's right for an accounting arises when the bond the instrument secures has matured and remains unpaid; and his right of action and that of those claiming under him accrues then, and the mortgagor's right of action is barred by a continued peaceful possession by the mortgagee for ten years therefrom. Section 1-42 does not apply. *Crews v. Crews*, 192 N. C. 679, 135 S. E. 784.

Necessity for Possession in Mortgagee.—The mere lapse of time, unaccompanied by possession, does not obstruct the right to redeem. *Simmons v. Ballard*, 102 N. C. 105, 9 S. E. 495. Decided under prior statute.

The statute of limitation does not run against a mortgagor in possession of lands by reason of the legal title being in the mortgagee, not in possession. *Cauley v. Sutton*, 150 N. C. 327, 64 S. E. 3.

This section applies only where the mortgagee or trustee is in possession. The opinion of the Court in this case rests upon the ground that it does not apply where the mortgagee or trustee has not been in possession, hence such case necessarily is one not therein "provided for" and falls under section 1-56. *Woodlief v. Wester*, 136 N. C. 162, 170, 48 S. E. 578. From dissenting opinion. It was held in the main opinion that § 1-56 was not applicable.

Same—Holding under Tenant.—Where a mortgagee takes adverse possession of, and rents out the mortgaged land, the payments of rent to him by his tenants on the land does not affect the running of the statute of limitations against the mortgagor's right to sue for redemption. *Frederick v. Williams*, 103 N. C. 189, 9 S. E. 298.

Nature of Possession.—It is not required that the possession of the mortgagee be adverse in order to bar the mortgagor's action in ten years, under the provisions of this section. *Crews v. Crews*, 192 N. C. 679, 135 S. E. 784.

The prior statute said nothing about an actual possession

being essential to the prescribed effect of the lapse of time. Where there was no actual possession the constructive possession followed the legal title, and where such possession was had for more than ten years after the right to redeem accrued, the statute barred the right of redemption. *Simmons v. Ballard*, 102 N. C. 105, 9 S. E. 495.

But the possession required by this statute must be actual and not merely constructive. *Weathersbee v. Goodwin*, 175 N. C. 234, 95 S. E. 491. *Stevens v. Turlington*, 186 N. C. 191, 119 S. E. 210, for the action to enforce the equity of redemption is barred after the lapse of ten years, from the date on which his cause of action accrued, where the mortgagee has been in the actual possession of the land. *Crews v. Crews*, 192 N. C. 679, 684, 135 S. E. 784. See *Simmons v. Ballard*, 102 N. C. 105, 9 S. E. 495, and the dissenting opinion.

Possession presumed by virtue of section 1-42 is not sufficient to meet the requirements of this section, par. 4, for although more than ten years have passed since the cause of action accrued, an action for redemption, under this subsection is not barred, unless the mortgagee has during said time been in the actual possession of the land conveyed by the mortgage. *McNair v. Boyd*, 163 N. C. 478, 79 S. E. 966; *Cauley v. Sutton*, 150 N. C. 327, 330, 64 S. E. 3; *Simmons v. Ballard*, 102 N. C. 105, 9 S. E. 495; *Crews v. Crews*, 192 N. C. 679, 683, 135 S. E. 784.

Effect of Intervening Disability. — Where the mortgagee sells the mortgaged land, buys it himself, and enters into adverse possession in the lifetime of the mortgagor, the action is barred as against the infant heirs under this section. *Frederick v. Williams*, 103 N. C. 189, 9 S. E. 298.

Nor did the prior statute contain a saving clause in favor of persons under disabilities. *Houck v. Adams*, 98 N. C. 519, 4 S. E. 502.

Applicability Where Action Not for Redemption. — The question as to whether the bar of this statute applies to recover lands held under a mortgage, the action not being one to redeem, was raised but not decided. *Weathersbee v. Goodwin*, 175 N. C. 234, 95 S. E. 491.

Principle Illustrated. — When a mortgagee has been in possession more than thirty years since the execution of the mortgage, the right of redemption is barred. *Gray v. Williams*, 130 N. C. 53, 40 S. E. 843.

Where the mortgagee has actual possession, either when the cause of action for redemption accrues or where he thereafter goes into and remains continuously in such possession for more than ten years, before an action to redeem is commenced, the statute of limitations, where pleaded and relied upon in the answer, is a complete defense. *Bernhardt v. Hagamon*, 144 N. C. 526, 57 S. E. 222; *Crews v. Crews*, 192 N. C. 679, 683, 135 S. E. 784.

Edwards v. Tipton, 85 N. C. 479, 480, is a case illustrating the application of the prior statute.

§ 1-48. Actions to recover deficiency judgments limited to within one year of foreclosure.—No action shall be maintained on any promissory note, bond, evidence of indebtedness or debt secured by a mortgage or deed of trust on real estate after the foreclosure of the mortgage or deed of trust securing the same, except within one year from the date of sale under such foreclosure; but this section shall not extend the time of limitation on any such action. (1933, c. 529, s. 1.)

This section protects all substantial rights of the parties and its application held not to impair plaintiff's contractual rights. *Orange County Building, etc., Ass'n v. Jones*, 214 N. C. 30, 197 S. E. 618.

An action for a deficiency judgment after foreclosure is not barred by this section when it is instituted less than one year after the expiration of the ten-day period for an increase in bid, even though it is instituted more than one year after the date the property is exposed for sale. *Shelby Bldg., etc., Ass'n v. Black*, 215 N. C. 400, 2 S. E. (2d) 6.

§ 1-49. Seven years.—Within seven years an action—

1. On a judgment rendered by a justice of the peace, from its date.

2. By a creditor of a deceased person against his personal or real representative, within seven years next after the qualification of the executor or administrator and his making the advertisement required by law for creditors of the deceased to present their claims, where no personal service of such notice in writing is made upon

the creditor. A creditor thus barred of a recovery against the representative of any principal debtor is also barred of a recovery against any surety to the debt. (Rev., s. 392; Code, s. 153; C. C. P., s. 32; C. S. 438.)

I. Subsection One.

II. Subsection Two.

Cross References.

As to judgment in a court of a justice of the peace, see § 7-166 et seq. As to requirement of advertisement for claims against estate by executor, administrator, etc., see § 28-47. As to personal notice to creditor by executor, administrator, etc., see § 28-49.

I. SUBSECTION ONE.

This section is not retroactive. *Morris v. Syme*, 88 N. C. 453, 455.

When Statute Begins to Run.—Where a judgment was rendered by a justice of the peace and upon a rehearing granted by him a similar judgment was rendered, the statute of limitations began to run from the date of the later, the first judgment having been vacated. *Salmon v. McLean*, 116 N. C. 209, 21 S. E. 178.

Judgment Docketed in Superior Court.—A judgment of a justice of the peace, duly docketed in the superior court, becomes a judgment of the superior court in every respect, and may be enforced by execution at any time within ten years from the date of such docketing under section 1-47. *McIlhenny v. Wilmington, etc., Co.*, 108 N. C. 311, 12 S. E. 1001; *Adams v. Guy*, 106 N. C. 275, 11 S. E. 535.

Where the judgment debtor made a motion, within ten years from docketing judgment, for leave to issue execution thereon, which was denied, and thereupon within one year after such denial, but more than ten years from the date of docketing, he brought an action on the judgment, it was held, that the action was barred by the statute of limitations, sec. 1-25 not being applicable to the facts. *McIlhenny v. Wilmington Sav., etc., Co.*, 108 N. C. 311, 12 S. E. 1001.

Same—Where Action on Judgment.—In an action upon justice's judgments which have been docketed in the superior court and not merely a motion for executions, the seven years statute applied and barred a recovery of the claim. *Oldham v. Rieger*, 148 N. C. 548, 551, 62 S. E. 612; *Daniel v. Laughlin*, 87 N. C. 433.

An action in the nature of a creditor's bill, brought in the superior court against an executor, for the purpose of an accounting and the payment of a judgment rendered against the testator obtained in a justice's court, is an action upon a judgment of a justice of the peace. *Oldham v. Rieger*, 148 N. C. 548, 62 S. E. 612.

Application to Surety upon Stay of Execution.—Where one by signing a stay of execution upon a justice's judgment as surety becomes thereby a party to the judgment, the statutory bar of seven years applies to an action brought against the surety upon the judgment. *Barringer v. Allison*, 78 N. C. 79.

II. SUBSECTION TWO.

Prior Law.—Under the provisions of the Act of 1715, if the debt was due at the death of the debtor, an action must have been brought within seven years from the death, otherwise both the heir and the executor would have been discharged, and if the action arose after the death, the action must have been brought within seven years after the cause of action arose, or the act would have been a bar, provided the personal representative has paid over the assets. *Syme v. Badger*, 96 N. C. 197, 2 S. E. 61.

R. C. ch. 65, sec. 11, provided that creditors should make their claim within seven years after the death of their debtor, or be forever barred; and according to every interpretation which has been put upon its terms, it worked a complete bar to every demand, due at the death of the debtor, upon which suit was thereafter delayed for seven years, provided it appeared that in the meantime the estate had been fully administered, so that nothing remained in the hands of the administrator, with which to satisfy the claim. *Godley v. Taylor*, 14 N. C. 178; *Cooper v. Cherry*, 53 N. C. 323; *McKeithan v. McGill*, 83 N. C. 517; *Morris v. Syme*, 88 N. C. 453, 455.

Purpose and Effect of Statute.—Our present limitations in favor of estates of deceased persons are unconnected with assets and are intended to stimulate the vigilance of creditors and give repose to the estates of deceased debtors. *Lawrence v. Norfleet*, 90 N. C. 533, 535.

The statute was intended to be restricted to cases where the creditor's action lies against the personal representative as such, e. g., the right to enforce specific performance or some lien or trust not covered by other provisions of the

Code. *Smith v. Brown*, 101 N. C. 347, 7 S. E. 890. This is the only way to avoid the absurdity of barring a cause of action before it arises. When the creditor, seeking merely to collect his debt, is not barred as against the personal representative, he cannot be barred as against the land which that representative is to subject. The liability is that of the land, and not of the heir as such. *Lee v. McKoy*, 118 N. C. 518, 525, 24 S. E. 210.

This section applies to an action against a personal, and where necessary, the real representatives to compel the performance of some right of which the debt itself is the foundation. *Lister v. Lister*, 222 N. C. 555, 562, 24 S. E. (2d) 342.

Statute as Absolute Bar.—After the time prescribed in this section, the statute is an absolute bar to creditors. *Lawrence v. Norfleet*, 90 N. C. 533; *Worthy v. McIntosh*, 90 N. C. 536; *Woody v. Brooks*, 102 N. C. 334, 343, 9 S. E. 294. From dissenting opinion.

Evidence of Laches.—In *Strayhorn v. Aycock*, 215 N. C. 43, 200 S. E. 912, plaintiff claimed proceeds of an insurance policy payable to estate of testator and contended that the policy was taken out by him to secure him for funds advanced testator. This action was not instituted until some fourteen years after testator's death. It was held that the rights of creditors having intervened, the record disclosed conduct on the part of the plaintiff barring the action for laches.

When Construed with Section 1-52.—While this section standing alone would extend the time "by any creditor of a deceased person against his personal or real representative within seven years," etc., we must take it in connection with section 1-52, which restricts "within three years an action upon a contract, obligation or liability arising out of a contract express or implied, except those mentioned in the preceding sections" (which especially referred to contracts under seal, section 1-47, par. 2, *Joyner v. Massey*, 97 N. C. 148, 1 S. E. 702), and with section 1-22. *Redmand v. Pippin*, 113 N. C. 91, 92, 18 S. E. 50.

Section Confined to Creditors — Construed with Section 1-56.—The language of the statute is confined to actions by a creditor, whereas the duty to subject the land rests primarily on the personal representative. It would be anomalous to bar the creditor in seven years under this section and the personal representative in ten years under section 1-56. *Lee v. McKoy*, 118 N. C. 518, 525, 24 S. E. 210.

Same—Application to Action for Possession.—This section does not apply to an action, brought to obtain possession of land bought for plaintiff's mother with plaintiff's money but conveyed to the former, the action being brought against the husband of the grantee after her death. *Norton v. McDevit*, 122 N. C. 755, 30 S. E. 24.

Same—Application to Suit between Administrators.—Where a suit is brought by one administrator against another, it must be commenced within seven years next after the right of action vests in the plaintiff under his appointment. *Lawrence v. Norfleet*, 90 N. C. 533.

Prerequisite to Running.—The mere lapse of time—seven years—does not create the bar; it must be coupled with the advertisement, or personal notice, and when these have been made, the statute will begin to run from the date of the qualification of the executor or administrator. *Love v. Ingram*, 104 N. C. 600, 10 S. E. 77.

When Statute Begins to Run.—It was not intended by this statute that the seven years should begin to run from the time of "making the advertisement." If that was the intention of the legislature, they would not in the same connection have employed the words "next after the qualification of the executor or administrator," as that is an event which must precede the advertisement, and which under the provisions of the law may do so by the space of twenty days. To give the act that construction there would be two events and leave it doubtful from which the time is to be computed. *Cox v. Cox*, 84 N. C. 138, 141.

Suits against an administrator must be brought by creditors of the decedent within seven years next after the qualification of the administrator. The Code, sec. 153. *Lawrence v. Norfleet*, 90 N. C. 533.

This statute is construed in *Cox v. Cox*, 84 N. C. 138, and it is held that while the advertisement is an indispensable prerequisite to the operation, it is incidental, and the time must be computed from the qualification of the representative. *Lawrence v. Norfleet*, 90 N. C. 533, 535.

Effect of Failure to Present Claim.—Though the failure to present the claims is declared to be an absolute bar (except against those laboring under disabilities), without any qualification as to the advertisement, this statute does not protect an administrator unless he has paid over the assets, and is absolute and positive in denying the remedy as advertised in conformity to the act. *Cooper v. Cherry*, 53 N. C. 323; *Cox v. Cox*, 84 N. C. 138, 142.

Significance of Making Advertisement. — The words "and making the advertisement required by law," etc., were used simply to qualify the provisions of the act, and the act should be construed as if it read "within seven years next after the qualification of the executor or administrator, provided he shall have made the advertisement required by law for creditors of the deceased to present their claims," etc. *Cox v. Cox*, 84 N. C. 138, 142.

See the dissenting opinion in *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294.

While the advertisement for creditors to present their claims is an indispensable prerequisite to the operation of this section, yet, as to the time from which the statute begins to run, it is incidental. *Lawrence v. Norfleet*, 90 N. C. 533.

Same—Prerequisites to Pleading by Representatives.—The executor or administrator must show that seven years have transpired after his qualification before the commencement of the action, and that he had advertised as required by law. Without proof of the advertisement, the plea of the statute of limitations cannot avail him. *Cox v. Cox*, 84 N. C. 138, 142.

An executor or administrator who pleads the statute of limitations under this subsection must show that the seven years have expired next after his qualification before suit brought, and that he has advertised according to law. Without proof of the advertisement, the plea of the statute will not avail him. *Cox v. Cox*, 84 N. C. 138.

Same — Necessity for Affirmative Plea. — To enable the personal representative of a deceased person to avail himself of the limitations provided in this subsection, he must allege in his plea, and prove upon the trial, that he made the advertisement, or gave the personal notice to the creditors, as prescribed in the statute. *Love v. Ingram*, 104 N. C. 600, 10 S. E. 77.

Conditions Preventing the Running. — Nothing will defeat the operation of this subsection, except the disabilities mentioned in the Code, or such fraud or other matter of equitable nature, as would make it against conscience to rely on the statute. *Syme v. Badger*, 96 N. C. 197, 2 S. E. 61.

The death of the surety and the lapse of a time longer than that prescribed in the statute before the qualification of a personal representative did not suspend the operation of the statute, if the wards could, during that time, have proceeded against the guardian. *Williams v. McNair*, 98 N. C. 332, 4 S. E. 131, 133.

Pendency of Suit as Suspension. — If an action is brought by a creditor against the personal representative of his deceased debtor within seven years, etc., but by delays in the courts judgment is not obtained until after seven years, the real representative is not protected by the statute of limitations when it is sought to subject the decedent's lands to the payment of such debt. *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210.

So much of the ruling in *Syme v. Badger*, 96 N. C. 197, 2 S. E. 61, as holds that the realty is protected from liability for the debts of the deceased if the statutory period of seven years has expired, even though the creditor had begun proceedings within the seven years against the personal representative to enforce his claim, but by delays in the court had failed to obtain judgment till after that period is overruled. This decision has been much questioned and has been repeatedly shaken, among other cases, see *Woodlief v. Bragg*, 108 N. C. 571, 13 S. E. 211, and *Smith v. Brown*, 101 N. C. 347, bottom of p. 352, 7 S. E. 890. It may be noted that its supporting case, *Andres v. Powell*, 97 N. C. 155, 2 S. E. 235, which protected the heir at law by the lapse of seven years from the qualification of the personal representatives, even as to causes of action accruing subsequently to the death of the decedent, was overruled in *Miller v. Shoaf*, 110 N. C. 319, 14 S. E. 800, thereby establishing the dissenting opinion of *Merrimon, J.*, in *Andres v. Powell* as the correct statement of the law. *Lee v. McKoy*, supra, therefore, overruled the decision in *Syme v. Badger*, which, after the long and repeated consideration given it, seems to have been founded upon a mistaken line of reasoning. See *Smith v. Brown*, pp. 352, 353. Since the obtaining of a judgment against the personal representatives prevents the bar of the statute as to the real representatives, there can be no reason why the latter are not equally prohibited from pleading the statute when the action was begun against the personal representatives within seven years, but by delays in the courts judgment was not had against them until after the lapse of seven years.

The ruling in *Syme v. Badger* would bar a cause of action before the right to sue on it had accrued. *Lee v. McKoy*, 118 N. C. 518, 523, 24 S. E. 210.

Same — As against Heirs Where Not Parties. — Where

proceedings against the administratrix were instituted within the seven years after her qualification and making advertisement though the heirs at law were not made parties to the proceedings till after the lapse of seven years, the proceedings, not being barred as to the personal representative, cannot be barred as to the heirs at law by this section. *Lee v. McKoy*, 118 N. C. 518, 525, 24 S. E. 210.

Time of Accrual as Affecting Application. — This subsection contemplates those claims upon which the right of action had accrued at the time of qualification; as to those upon which the right of action subsequently accrues, the statute begins to run from the date of such accrual. *Syme v. Badger*, 96 N. C. 197, 2 S. E. 61, and *Andres v. Powell*, 97 N. C. 155, 2 S. E. 235; distinguished. *Miller v. Shoaf*, 110 N. C. 319, 14 S. E. 800.

Necessity for Full Administration. — Creditors of a deceased person, whose claims were due at the death of the debtor, are barred after seven years next after letters granted; provided the estate has been fully administered. *Morris v. Syme*, 88 N. C. 453. Governed by R. C. ch. 65, section 11.

Effect of No Assets in Hands of Representatives. — This statute is an absolute bar unless suit is brought within the time specified, whether there be assets or not in the hands of the representative. *Lawrence v. Norfleet*, 90 N. C. 533.

What Must Be Pleaded and Proved by Administrator. — Where an administrator had assets and sets up the statute of limitations against a debt of his intestate he must aver and prove that he has properly administered the same, in order that his plea may avail him. If it is ascertained he has no assets, the statute is a complete bar. *Little v. Duncan*, 89 N. C. 416.

The statute was not a bar, at all events; if there were assets in the hands of the administrator, the plea of this section would not be good and avail him, unless he should, in that case, aver and prove that he had paid such assets to the persons entitled to the same. *Little v. Duncan*, 89 N. C. 416, 419.

Heirs as Parties. — In order to save circumlocution the heirs at law may be made parties to the proceedings against the personal representative. *Lilly v. Wooley*, 94 N. C. 412, which was cited with approval in *Syme v. Badger*, 96 N. C. 197, 2 S. E. 61, and which has been approved since in *Brittain v. Dickson*, 104 N. C. 547, 10 S. E. 701; *Lee v. McKoy*, 118 N. C. 518, 526, 24 S. E. 210.

§ 1-50. Six years.—Within six years an action—

1. Upon the official bond of a public officer.
2. Against an executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final account by the proper officer, and the filing of the audited account as required by law.
3. For injury to any incorporeal hereditament.
4. Against a corporation, or the holder of a certificate or duplicate certificate of stock in the corporation, on account of any dividend, either a cash or stock dividend, paid or allotted by the corporation to the holder of the certificate or duplicate certificate of stock in the corporation. (Rev., s. 393; Code, s. 154; C. C. P., s. 33; 1931, c. 169; C. S. 439.)

I. In General.

II. Subsection One—Public Officers.

III. Subsection Two—Executor, Guardian, etc.

Cross References.

As to official bonds generally, see § 128-8 et seq. As to right of action on bond of executor, administrator, or collector, see § 28-42. As to action on bond of guardian, see § 33-14. See also § 55-116.

I. IN GENERAL.

Editor's Note.—The Act of 1931 which added subsection 4 to this section became effective on March 23, 1931.

Prior Law. — Formerly there was no statute limiting the time in which actions must be brought on bonds, except a provision in favor of the surety. *Humble v. Mebane*, 89 N. C. 410, 415.

"The present statute takes the place of section 5, chapter 65 of the Revised Code. It is manifestly intended to serve the same purpose, and must receive the same construction as to the time when the statute begins to operate." *Baker v. Monroe*, 15 N. C. 412; *Coomer v. Little*, 1

N. C. 311. Commissioners of Moore County v. MacRae, 89 N. C. 95, 97.

Manner of Pleading Section. — This section must be affirmatively pleaded. *Humble v. Mebane*, 89 N. C. 410, 415.

II. SUBSECTION ONE—PUBLIC OFFICERS.

Application to Bond of Defaulted Clerk. — This section is applicable to an action against the surety on the bond of a defaulted clerk of the Superior Court. *State v. Martin*, 186 N. C. 127, 118 S. E. 914.

Application to Action for Tort against Clerk. — In an action of tort against a Clerk of the Superior Court for failing to index a docketed judgment as required, this section does not apply. *Shackelford v. Staton*, 117 N. C. 73, 23 S. E. 101.

Application to Registers of Deeds. — The statutory limit for bringing actions on the official bond of the register of deeds seems to be six years, under this section. Thus the statute commences to run from the time of the failure to register. *State v. Grizzard*, 117 N. C. 105, 110, 23 S. E. 93. See also, *Bank of Spruce Pine v. McKinney*, 209 N. C. 668, 184 S. E. 506.

When Statute Begins to Run.—An action upon an official bond may be brought within six years after a breach thereof; the statute does not begin to run from the date, but only from the breach of the bond. *Commissioners v. MacRae*, 89 N. C. 95.

Ordinarily the statute begins to run from the time of the breach of the bond. Upon the termination of a sinking fund commissioner's term the law required him to account for funds in his hands and his failure to do so constituted a breach of his official bond giving rise to a cause of action thereon immediately. *Washington v. Bonner*, 203 N. C. 250, 165 S. E. 683.

Ordinarily, the statute of limitations on the bond of a clerk of the superior court begins to run upon default and not upon discovery, and when funds are paid into the clerk's office to the use of a person who is sui juris and knows that the funds are subject to his demand, and the clerk invests such funds in good faith, the provisions of § 1-52, par. 9, have no application in an action against successive sureties on the clerk's bonds to recover the loss sustained through such investment. *Thacker v. Fidelity, etc., Co.*, 216 N. C. 135, 4 S. E. (2d) 324.

Where the official bond of a public officer by valid contractual limitation covers only the first year of the official's six-year term of office, the statute of limitations begins to run in favor of the surety on the bond from the expiration of the first year of the official's term of office and not the expiration of the official's statutory six-year term of office in view of this section. *Washington v. Trust Co.*, 205 N. C. 382, 171 S. E. 438.

Protection Extends to Surety. — This statute protects both principal and surety upon the bond. *Vaughan v. Hines*, 87 N. C. 445.

III. SUBSECTION TWO—EXECUTORS, GUARDIANS, ETC.

Purpose of Section. — This section is intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and after reasonable time, to give quiet and repose to the estate of dead men. *Andres v. Powell*, 97 N. C. 155, 160, 2 S. E. 235.

Application and Relation of Various Sections.—This section, par. (2), expressly applies to actions on the "official bond," § 1-52, par. (6) to sureties only, and section 1-56 so far as executors, administrators and guardians are concerned, is applicable only when there has been a settlement, either by acts of the parties or a decree of court. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294. See dissenting opinion.

Where the distributees, who until they became of age, had a guardian, did not bring suit for an alleged balance due under the testator's will for fifteen years after the executor filed his final account, the action was barred by either this section or section 1-56. *Culp v. Lee*, 109 N. C. 675, 14 S. E. 74.

The statutes of limitation applicable to actions against administrators make a distinction between their fiduciary liabilities and their liabilities upon the administration bond. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294. Dissenting opinion.

Application to Action for Account. — Where the action is not brought upon the official bond as administrator of the testator of the defendant, but it is brought to compel an account and settlement of the estate of the intestate of the plaintiff in his hands in his lifetime, the defendant is a trustee of an express trust, and the Statute of Limitations does not apply. *Woody v. Brooks*, 102 N. C. 334, 338, 9 S. E. 294.

Application to Action for Share. — The Statute does not

run in favor of administrators against the suit of the next of kin for their distributive shares, *Woody v. Brooks*, 102 N. C. 334, 338, 9 S. E. 294; unless the action is on the bond to recover the amount of such share. *Vaughan v. Hines*, 87 N. C. 445.

When Applicable to Action for Balance Due. — No statute of limitations is a bar to an action to recover a balance admitted by a personal representative to be due legatees or distributees on his final account, unless he can show that he has disposed of such balance in some way authorized by law, or unless three years have elapsed since a demand and refusal to pay such admitted balance. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294. See dissenting opinion.

Persons against Whom Section Absolute Bar. — An action must be brought against an executor or administrator by a creditor, legatee or next of kin of the decedent, within six years after the filing of the final account, or it will be barred by the statute. *Andres v. Powell*, 97 N. C. 155, 2 S. E. 235. See dissenting opinion.

The creditors must bring their action within the six year period of limitation. *Andres v. Powell*, 97 N. C. 155, 161, 2 S. E. 235. See dissenting opinion.

It would be a curious legal anomaly if, within six years, the next of kin should bring their action against the executor or administrator (and they must bring it within six years or be barred) and recover, and then more than six years after the auditing of the account a creditor of the deceased should bring action and be allowed to recover, either out of the executor or administrator, or out of the next of kin or heir. *Andres v. Powell*, 97 N. C. 155, 161, 2 S. E. 235.

An action on the bond must be prosecuted within the six years after the filing of the specified account as well by the next of kin as by creditors, in order to escape the statutory obstruction. *Woody v. Brooks*, 102 N. C. 334, 338, 9 S. E. 294.

After the time prescribed in this section and section 1-52, subsection 6, the statute is an absolute bar to the next of kin. *Vaughan v. Hines*, 87 N. C. 445; *Spruill v. Sanderson*, 79 N. C. 466; *Woody v. Brooks*, 102 N. C. 334, 343, 9 S. E. 294. From dissenting opinion.

This applies to an action upon a bond to recover distributive shares. *Vaughan v. Hines*, 87 N. C. 445.

Extent of Surety's Protection. — This statute protects the surety as well as the principal. *Andres v. Powell*, 97 N. C. 155, 156, 160, 2 S. E. 235; *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135. See dissenting opinion.

In addition to the protection of this section, the sureties on the bond are exonerated unless action is brought within three years after breach of the bond under section 1-52, par. 6. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294. See dissenting opinion.

Where the cause of action against an executor, administrator or guardian is for a breach of the bond, it is barred as to the sureties after three years from the breach complained of under section 1-52, par. 6; *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135. See dissenting opinion.

Failure of Guardian to Pay Balance Due Ward.—An action against a guardian for failure to pay the ward the balance of the estate due the ward after the ward has attained his majority is not barred by the six-year statute of limitations where the guardian has not filed a final account as required under this section, the statute not applying to such action. *State v. Fountain*, 205 N. C. 217, 171 S. E. 85.

Significance of Final Account and Audit. — The final account is the initial point at which the Statute begins to run, to actions upon the bond for a breach of its obligations, but leaves the representative, in his fiduciary capacity, exposed to the demand of the fiduciary or creditor, the latter losing his remedy under the condition set out in the preceding section. *Woody v. Brooks*, 102 N. C. 334, 339, 9 S. E. 294.

Until a final account is filed and audited there can be no bar; nor is there any as to a balance admitted to be due by such final account, unless the executor or administrator can show that he has disposed of it in some way authorized by law, or unless there has been a demand and a refusal to pay such admitted balance, in which case the action is barred in three years after such demand and refusal. *Woody v. Brooks*, 102 N. C. 334, 339, 9 S. E. 294.

After the final account the statute runs against the next of kin, and an action against the administrator upon his official bond is barred after six years from the auditing of his final account. *Andres v. Powell*, 97 N. C. 155, 156, 160, 2 S. E. 235. See dissenting opinion.

The bar is unavailable under this section, unless there has been an account audited for the guardian, or unless there has been a lapse of three years from the breach of the bond

in favor of the surety. *Humble v. Mebane*, 89 N. C. 410, 415.

Same—Effect of Failure to Make Final Settlement. — See note from *Self v. Shugart*, cited below.

A guardian qualified in July, 1872; his ward came of age in September following; the guardian died without having settled his trust or making any of the returns required; in 1887 the ward made a demand upon, and brought suit against the sureties on the bond; held, that his action was barred. *Norman v. Walker*, 101 N. C. 24, 7 S. E. 468.

Significance of Demand Irrespective of Final Account. — Whether the final account is or is not filed, if there is a demand and refusal, the action is barred as to both the principal and sureties on said bond in three years under sec. 1-52, par. 6. *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135. See dissenting opinion.

When such final account is filed, and there is no demand and refusal; Quere, whether the action as to the executor, administrator or guardian himself is barred in six years or ten years. *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135. See dissenting opinion.

Same — As Applied to Suit by Minor. — An action by the ward against the sureties on the bond of the guardian is barred after three years from the time the ward becomes twenty-one years old if the guardian makes no final settlement; and within six years if the guardian makes a final settlement. *Self v. Shugart*, 135 N. C. 185, 47 S. E. 484. See dissenting opinion.

Where there is no final account filed, semble, that the statute begins to run from the arrival of the ward of age, but whether in such cases three years or ten years bars, quere. *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135. See dissenting opinion.

When Action Brought. — The action must be brought within six years after the auditing and filing of the account. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294. See dissenting opinion.

Suspension of Statute. — Where there was no one in esse from the death of the first administrator, till the qualification of the administrator de bonis non, who could sue upon the bond, that time should not be counted in applying the statute of limitations in an action against the sureties. *Brawley v. Brawley*, 109 N. C. 524, 14 S. E. 73.

§ 1-51. Five years.—Within five years—

1. No suit, action or proceeding shall be brought or maintained against a railroad company owning or operating a railroad for damages or compensation for right of way or use and occupancy of any lands by the company for use of its railroad unless the action or proceeding is commenced within five years after the lands have been entered upon for the purpose of constructing the road, or within two years after it is in operation.

2. No suit, action or proceeding shall be brought or maintained against a railroad company for damages caused by the construction of the road, or the repairs thereto, unless such suit, action or proceeding is commenced within five years after the cause of action accrues, and the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass on his property. (Rev., s. 394; 1893, c. 152; 1895, c. 224; 1897, c. 339; C. S. 440.)

I. In General.

II. Subsection One—Right of Ways.

III. Subsection Two—Damages for Construction and Repair.

I. IN GENERAL.

Local Modification.—Burke, McDowell: Pub. Loc., 1925, c. 535; Caldwell: Pub. Loc., 1927, c. 119; Haywood, Mitchell, Yancey: Pub. Loc., 1923, c. 433.

Law Prior to Section.—Before this section a railroad could acquire the prescriptive right to pond water on adjacent lands only by subjecting itself to an action for the injury continuously for twenty years. *Harrell v. Norfolk*, etc., R. R. Co., 122 N. C. 822, 29 S. E. 56; *Nichols v. Norfolk*, etc., R. R. Co., 120 N. C. 495, 26 S. E. 643.

The former law permitted the plaintiff to bring at his option, an action for permanent damages, in which case the entire damages, "past, present and prospective," could be sued for in one action to which twenty years was the

limitation, or, at plaintiff's election, from time to time, actions could be brought for the continuing damages, in which actions the recovery was limited to damages accruing within three years. *Parker v. Norfolk*, etc., R. R., 119 N. C. 677, 25 S. E. 722; *Ridley v. Seaboard*, etc., R. R. Co., 124 N. C. 34, 32 S. E. 325; s. c., 118 N. C. 996, 24 S. E. 730; *Beach v. Wilmington*, etc., R. Co., 120 N. C. 498, 506, 26 S. E. 703. From dissenting opinion.

Prior to this section, three years was the statutory limitation to actions for recovery of damages to crops. *Ridley v. Seaboard*, etc., R. Co., 124 N. C. 34, 32 S. E. 325.

Constitutionality. — This section is not a violation of the Fourteenth Amendment of the Constitution of the United States, prohibiting any State from denying to any person the equal protection of the laws. *Narron v. Wilmington*, etc., R. R. Co., 122 N. C. 856, 29 S. E. 356.

Power of Legislature to Change Period.—The Legislature may reduce or extend the time within which an action may be brought, subject to the restriction that when the limitation is shortened, "a reasonable time must be given for the commencement of an action before the statute works a bar." *Nichols v. Norfolk*, etc., R. R. Co., 120 N. C. 495, 26 S. E. 643.

Retroactive Effect.—This section does not apply to a suit begun before its passage. *Harrell v. The Norfolk*, etc., R. R. Co., 122 N. C. 822, 29 S. E. 56; *Nichols v. Norfolk*, etc., R. R. Co., 120 N. C. 495, 26 S. E. 643.

Section Restricted to Railroad Companies.—The period of the acquisition by user for five years, allowed to railroad companies by this section, does not extend to telegraph companies. *Teeter v. Postal Tel. Cable Co.*, 172 N. C. 784, 90 S. E. 941.

This section in express terms applies only to actions against railroad companies, and the courts have no authority to extend its provisions to actions of a different character. *Cherry v. Canal Co.*, 140 N. C. 422, 426, 53 S. E. 138.

The language in *Mullen v. Canal Co.*, 130 N. C. 496, 505, 41 S. E. 1027, which is said to have extended this section to include canal companies, is as follows: "While chapter 224, Laws 1895, applies only to railroads, yet as the Court has extended the rule of permanent damages to water companies and telegraphs, under the principle laid down in *Ridley v. R. R.*, 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708, we see no reason why it should not apply equally to canals." It will thus be observed that the Court here only declared that it would extend the rule of permanent damages to actions against the defendant company according to the principle announced and exploited in *Ridley v. R. R.*, and as contemplated by the statute in reference to railroads, but did not, and did not intend, to extend the application of the statute or the period of limitation therein established to cases not contained in its provisions. *Cherry v. Canal Co.*, 140 N. C. 422, 427, 53 S. E. 138.

In case of railroads, the period within which actions for continuing trespasses may be brought has been reduced to five years, but there being no such statute in respect of telegraph companies, the common-law period of twenty years is required. *Love v. Postal Telegraph-Cable Co.*, 221 N. C. 469, 20 S. E. (2d) 337, citing *Geer v. Durham Water Co.*, 127 N. C. 349, 37 S. E. 474.

When Statute Begins to Run.—The statute begins to run from the date of the first substantial injury. *Stack v. Seaboard*, etc., R. R., 139 N. C. 366, 51 S. E. 1024; *Staton v. Atlantic*, etc., R. R., 147 N. C. 428, 61 S. E. 455; *Ridley v. Seaboard*, etc., R. R., 118 N. C. 996, 24 S. E. 730; *Beach v. R. R.*, 120 N. C. 498, 26 S. E. 703; *Pickett v. Atlantic Coast Line R. R. Co.*, 153 N. C. 148, 150, 69 S. E. 8.

The right of action of a remainderman against railroad to recover lands accrues upon the death of the life tenant. *Young v. Atl. Coast Line R. R.*, 189 N. C. 238, 126 S. E. 600.

Quoted in *Blevins v. Northwest Carolina Utilities*, 209 N. C. 683, 184 S. E. 517.

II. SUBSECTION ONE—RIGHT OF WAY.

Section a Statute of Limitation — Affirmatively Plead. — This section in regard to bringing an action against a railroad for damages for a right of way taken by it without condemning the same or acquiring the easement by purchase, is a statute of limitation, and must be specially pleaded by the railroad company, if relied on; and it is not required of the owner to affirmatively show that he has commenced his action within the time specified, as it is not a condition annexed to his cause of action. *Abernathy v. South and Western R. Co.*, 159 N. C. 340, 74 S. E. 890.

Amount of Damages Recoverable.—The amount recovered is not the estimated sum of all future damages expected to result from a continuing trespass, for such damages, running indefinitely, perhaps forever, would be utterly incapable of calculation; and, moreover, it would be giving the

defendant a right to commit a wrong. The sum recoverable is the damage done to the estate of the plaintiff by the appropriation to the easement of so much of his land, or such use thereof as may be necessary to the easement. *Beach v. Wilmington & Weldon R. R. Co.*, 120 N. C. 498, 502, 26 S. E. 703.

Allowance of Interest.—It is within the power of the lower court, to allow interest on the amount found since the actual taking by the railroad company of the owner's land for its right of way, as a part of the damages. *Abernathy v. South & Western R. Co.*, 159 N. C. 340, 74 S. E. 890.

III. SUBSECTION TWO—DAMAGES FOR CONSTRUCTION AND REPAIR.

Amendment of 1895.—The Act of 1893 chap. 152, was merely a statute of limitation. The Act of 1895, chap. 224, professes an amendment to the Act of 1893, provides that all actions for damages caused by the construction or repair of any railroad, shall be commenced within five years after the cause of action occurs; and that "the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass upon his property." *Lassiter v. Norfolk, etc.*, R. R. Co., 126 N. C. 509, 512, 36 S. E. 48.

The provision in the Act of 1895 incidentally providing for a statutory easement, rather by implication than direct terms, in effect is but little more than a legislative affirmation of the rule already enunciated in other jurisdictions and adopted in *Ridley v. Seaboard, etc.*, R. R., 118 N. C. 996, 24 S. E. 730, which was decided a year after the act was passed. *Lassiter v. Norfolk, etc.*, R. R. Co., 126 N. C. 509, 513, 36 S. E. 48.

Recovery for Easement and Damages.—Where the railroad is damaging plaintiff, but not permanently, and does not wish to acquire the easement under this section, it may pay for the damage done and then abate the cause of the injury without being forced to purchase the easement under this section. *Lassiter v. Norfolk, etc.*, Ry. Co., 126 N. C. 509, 514, 36 S. E. 48.

Same—Ditches and Embankments as Permanent Structures.—A ditch is not necessarily a permanent structure. Suppose that a section master should carelessly dig a ditch that flooded a large brick building in such a manner that its continuance would probably eventually undermine its walls and cause its destruction. Could not the railroad fulfill its obligations by abating the nuisance and fully repairing the present damage, or would it be compelled to pay the full value of the building? Surely the statute never contemplated such injustice as the latter alternative. And yet, if it takes the easement, it must pay for it, and in any event must pay for the injury already done. *Lassiter v. Norfolk, etc.*, R. R., 126 N. C. 509, 515, 36 S. E. 48.

Ditches may be made permanent, as far as the plaintiff is concerned, by the refusal of the defendant to change them; and in that event, if the court refuses to compel the abatement, it must award permanent damages. Such permanent damages represent the damage done to the estate of the plaintiff by the appropriation of the easement of so much of his land, or such use thereof, as may be necessary to the easement. As this, being the value of a right, is essentially distinct from damages for the perpetration of a wrong, they are cumulative and may both be recovered in the same action, as clearly intended by the statute. *Lassiter v. Norfolk, etc.*, R. R. 126 N. C. 509, 515, 36 S. E. 48.

An action against a railroad company for damages caused to plaintiff's lands by an embankment built by the defendant's grantor, a railroad company, which at the time of its erection produced the same physical conditions, necessarily causing the same or substantial injury and interference on plaintiff's lands that have existed since, is barred by the statute of limitations after five years. *Campbell v. Raleigh, etc.*, R. R. Co., 159 N. C. 586, 75 S. E. 1105.

Same—Recurrent Injuries—When Action Barred by Section 1-52.—In an action for damages against a railroad company arising from alleged negligence with respect to its roadbed, it is held, that for injuries arising from the original and permanent construction of the road, properly maintained, this section applies; but those arising from the negligent failure of the defendant to properly maintain the road, such as keeping open culverts and the like, actions may be brought from time to time for the three years preceding the institution of the action, as in ordinary cases of recurrent injury. *Perry v. Norfolk Southern R. Co.*, 171 N. C. 38, 87 S. E. 948.

Same—Inclusiveness of Section Respecting Damages.—The damages to land caused by the building of a railroad and structures within contemplation of this section are the entire damages, past, present, and prospective, including not only the depreciation of the land incident to the trespass, but also the injury to growth of crops during the period

covered by the enquiry to the time of trial, which may be assessed by the jury on separate issues as to each. *Barclift v. Norfolk Southern R. Co.*, 175 N. C. 114, 95 S. E. 39.

The evident meaning of this act is that hereafter, in all actions against railroads for injuries from construction or repair of the road, the permanent damages must be assessed. *Strickland v. Draughan*, 91 N. C. 103. *Nichols v. Norfolk, etc.*, R. R. Co., 120 N. C. 495, 498, 26 S. E. 643.

Since this section all damages accruing from the construction of a railroad must be sued for within five years and the entire amount of damages must be recovered in one action. This is a very just enactment and protects such corporations from the oppression of being sued again and again ad infinitum on the ground of continuing damages. *Beach v. Wilmington & Weldon R. R. Co.*, 120 N. C. 498, 506, 26 S. E. 703. From dissenting opinion.

In actions brought in cases for damages to crops and personal injuries, since the passage of this section, only permanent damages, i. e., damages once for all, can be recovered; and such actions are barred by the lapse of five years. *Ridley v. Seaboard, etc.*, R. R. Co., 124 N. C. 34, 32 S. E. 325.

It is true the act uses the words "shall assess," but they are expressly applied to the damages to which the plaintiff is entitled. This act does not profess to restrict the right of the plaintiff to compensation for the injury suffered. If the plaintiff is otherwise entitled to yearly damages, he can recover them in addition to the just compensation to which he is entitled for the value of the easement if it is conveyed to the defendant. It is true that, if entitled thereto, he must recover them in the same action, but not necessarily in the same issue. In fact it is better to submit them in different issues, as they are distinct in principle. The one is compensation for a wrong; while the other is the conveyance of a right, as the allowance of permanent damages under this act is in effect the condemnation of land to the use of a statutory easement. *Lassiter v. Norfolk, etc.*, R. R. Co., 126 N. C. 509, 513, 36 S. E. 48.

Same—Damages Arising after Construction.—This section does not necessarily begin to run from the time the road or structures were originally erected if thereafter changes have been made therein which caused appreciable and substantial damages to adjoining lands. *Barclift v. Norfolk Southern R. Co.*, 175 N. C. 114, 95 S. E. 39.

The Statute of Limitations begins to run in cases where the injury is continual and gradual, not necessarily from the construction of the road, but from the time when the first injury was sustained. This means, of course, the first substantial injury, as it would be a hardship to require a plaintiff to bring an action when his recovery would necessarily be merely nominal, and yet would be a bar to any future action. *Beach v. Wilmington & Weldon R. R. Co.*, 130 N. C. 498, 502, 36 S. E. 703.

This section does not apply to damages for the diversion of water from a lateral ditch along the roadbed of a railroad company, caused by an insufficient culvert to carry it under the roadbed, until the culvert became insufficient. *Savage v. Norfolk Southern R. Co.*, 168 N. C. 241, 84 S. E. 292.

By this section actions for damages occasioned by the construction of railroads are to be commenced within five years after cause of action occurs, and the jury shall assess the entire amount of damages suffered by the party aggrieved. The statute does not begin to run until the damage is done. *Lassiter v. Norfolk etc.*, R. R. Co., 136 N. C. 509, 36 S. E. 48.

Same—Assessment of Permanent Damages Compulsory.—In the case of *Beasley v. Aberdeen, etc.*, Co., 147 N. C. 362, 61 S. E. 453, it was held that the assessment of "permanent damages" in a case against a railroad for injuries to land in construction or repair of its roadbed, is made compulsory by this subsection. *Pickett v. Atlantic Coast Line R. R. Co.*, 153 N. C. 148, 150, 69 S. E. 8.

The word "permanent," as applied to injuries and damages, is apt to mislead, as it is used not only in cases where the damage is all done at once, as, for instance, in the tearing down of a house, but also to those cases where the damage is continuing and prospective. In these latter cases the damage is called "permanent," because it proceeds from a permanent cause and will probably continue indefinitely as the natural effect of the same cause. Such is the case where the cause is apparently permanent and the damage necessarily continuing or recurrent. The interest and inconvenience of the public will not permit the abatement of the nuisance, and the law does not contemplate an indefinite succession of suits. *Beach v. Wilmington etc.*, R. R. Co., 120 N. C. 498, 502, 26 S. E. 703.

The confusion liable to arise from the word "permanent" as applied to damages is pointed out in *Beach v. R. R.*, 120

N. C. 498, 502, 26 S. E. 703, where the nature of such an easement is discussed. Whether the damage is permanent or not, must appear from the pleadings. If the damage is in itself irreparable, or if it will probably recur from a given state of things which the defendant refuses to change, and which the court from motives of public policy will not make him change, permanent damages are allowed as the only way of doing justice to the plaintiff, and at the same time preventing interminable litigation. As far as the plaintiff is concerned, permanent and recurring damages are the same to him, if they equally result in the destruction of his property. The latter are in some respects worse than the former, as they merely prolong his agony, and may cause even greater loss. For instance, if a farmer knows that the railroad has acquired a right to flood his land, he will not plant it; whereas if he relies upon their subsequent forbearance from unlawful injury, he may suffer not only the damage to his land, but also the loss of his labor, seed and fertilizer. In other words, the loss of the crop means the loss of everything that has been put into the crop. *Lassiter v. Norfolk etc., R. R. Co.*, 126 N. C. 509, 514, 36 S. E. 48.

Recovery by Present Owner. — The present owner of land may recover of a railroad company, under the provisions of this section, the entire damages to his land caused by permanent structures or proper permanent repairs of defendant, for a period of five years from the time when the structures or repairs caused substantial injury to the claimant's land, unless a former owner, entitled thereto, had instituted action therefor before his sale and conveyance of the land thus permanently injured by the trespass. *Louisville etc. R. Co. v. Nichols*, 187 N. C. 153, 120 S. E. 819.

Effect of Amendment of Pleadings as to Bar. — An amendment to the complaint in an action against a railroad company to recover damages to a crop caused by diversion of the natural flow of water, so as to allege permanent damages to the land does not add a new cause of action, but relates only to the measure of damages arising from the injury; and this section will not bar the plaintiff by reason of the amendment alone. *Pickett v. Atlantic Coast Line R. R. Co.*, 153 N. C. 148, 69 S. E. 8.

Applied in *Owenby v. Louisville, etc., R. R. Co.*, 165 N. C. 641, 81 S. E. 997.

§ 1-52. Three Years.—Within three years an action—

1. Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections.

2. Upon a liability created by statute, other than a penalty or forfeiture, unless some other time is mentioned in the statute creating it.

3. For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.

4. For taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery.

5. For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereinafter enumerated.

6. Against the sureties of any executor, administrator, collector or guardian on the official bond of their principal; within three years after the breach thereof complained of.

7. Against bail; within three years after judgment against the principal; but bail may discharge himself by a surrender of the principal, at any time before final judgment against the bail.

8. For fees due to a clerk, sheriff or other officer, by the judgment of a court; within three years from the rendition of the judgment, or the issuing of the last execution thereon.

9. For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved

party of the facts constituting the fraud or mistake.

10. For the recovery of real property sold for the nonpayment of taxes, within three years after the execution of the sheriff's deed. (Rev., s. 395; Code, s. 155; C. C. P., s. 34; 1895, c. 165; 1899, cc. 269, 218; 1899, c. 15, s. 71; 1901, c. 558, s. 23; 1913, c. 147, s. 4; C. S. 441.)

I. In General.

II. Subsection One—Contracts.

III. Subsection Two—Liability Created by Statute.

IV. Subsection Three—Trespass upon Realty.

V. Subsection Four—Goods or Chattels.

VI. Subsection Six—Sureties of Executors, etc.

VII. Subsection Seven—Bail.

VIII. Subsection Eight—Clerk Fees.

IX. Subsection Nine—Fraud or Mistake.

X. Subsection Ten—Realty Sold for Taxes.

I. IN GENERAL.

Section Not Retroactive. — A bond for the payment of money executed prior to this section, by the principal and his sureties, is exempted from the operation of the statute of limitations as contained in this section. *Knight v. Braswell*, 70 N. C. 709.

Burden of Proving Section. — When the statute of limitations is pleaded the burden devolves upon the plaintiff to show that the cause of action accrued within the time limited. *Parker v. Harden*, 121 N. C. 57, 38 S. E. 30. See also, *Hooper v. Carr Lbr. Co.*, 215 N. C. 308, 1 S. E. (2d) 818.

Effect of Equity upon Claim.—The enforcement of an equity will never be denied, on the ground of lapse of time, where the party seeking it has been in continuous possession of the estate to which the equity is an incident. *Mash v. Tiller*, 89 N. C. 423.

Effect of Disability. — This statute does not begin running against a person under disability, such as infancy, until the disability is removed; hence it does not begin running until then notwithstanding that the cause may have otherwise accrued prior to that time. *Settle v. Settle*, 141 N. C. 553, 574, 54 S. E. 445.

Insane Persons Presumed to Have Plead Section. — See section 1-16.

Section Supplemented by Section 1-22.—This statute cannot avail as a defense where within six months after the death of the intestate, the plaintiff had qualified as her administrator and had commenced a special proceeding, in the county where the lands of the intestate were situated, to subject them to the payment of debts. *Harris v. Davenport*, 132 N. C. 697, 700, 44 S. E. 406.

Part Payment by Joint Debtor.—A part payment by one joint debtor before the applicable statute of limitations has run against the demand will start the statute anew as well against the co-obligor as against him who made the payment. *Saieed v. Abeyounis*, 217 N. C. 644, 9 S. E. (2d) 399.

Subsection Five—Injury to Person or Rights of Another.—Where plaintiff's cause of action based upon the alleged wrongful and unlawful act of defendant in swearing out a warrant against plaintiff charging plaintiff with larceny, accrued within three years prior to the issuance of summons in this suit, it was not barred by this section. *Jackson v. Parks*, 216 N. C. 329, 4 S. E. (2d) 873.

Where plaintiff has taken a voluntary nonsuit and brings the identical action again, if the former action has not been barred by this section, the second action is in time if brought within one year from the time of the voluntary nonsuit. *Van Kempen v. Latham*, 201 N. C. 505, 160 S. E. 759.

When Proper to Decide Application in Appellate Court. — Upon the appeal it is unnecessary to decide whether this section or section 1-56 applies where there is an insufficient finding of fact to sustain a plea of either, and for this reason a new trial must be had. *Dayton v. Asheville*, 185 N. C. 12, 115 S. E. 827.

Application to Action to Recover Share of Estate. — An action by an administrator to recover his intestate's share of an estate, is governed by § 1-56, which provides that actions not otherwise provided for shall be brought within ten years, and not this section. *Hunt v. Wheeler*, 116 N. C. 422, 21 S. E. 915.

Section Not Applicable.—Where the plaintiff did not sign the note and was not bound thereby, having executed only a deed of trust on her land as additional security for the debt, this section has no application. *Carter v. Bost*, 209 N. C. 830, 184 S. E. 817. See § 1-47, analysis line IV.

Bar Applies to Remedy. — The bar is applied under this

section, not to the mode in which relief is sought, but to the relief itself. *Spruill v. Sanderson*, 79 N. C. 466, 471.

Applied in *Johnson v. Pilot Life Ins. Co.*, 215 N. C. 120, 1 S. E. (2d) 881.

Cited in *Bray v. Creemore*, 109 N. C. 49, 13 S. E. 723; *Muse v. London Assur. Corp.*, 108 N. C. 240, 243, 13 S. E. 94; *Griffith Proffitt Co. v. English*, 198 N. C. 66, 68, 150 S. E. 619; *Rhodes v. Tanner*, 197 N. C. 458, 149 S. E. 552; *Ritter v. Chandler*, 214 N. C. 703, 200 S. E. 398; *Powell v. Malone*, 22 F. Supp. 300; *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 213, 189 S. E. 873; *Currin v. Currin*, 219 N. C. 815, 15 S. E. (2d) 279; *Powers v. Planters Nat. Bank, etc., Co.*, 219 N. C. 254, 13 S. E. (2d) 431; *Lister v. Lister*, 222 N. C. 555, 24 S. E. (2d) 342; *Lee v. Johnson*, 222 N. C. 161, 22 S. E. (2d) 230.

II. SUBSECTION ONE—CONTRACTS.

Application to Agreement to Arbitrate.—An agreement to submit a controversy to arbitration is a contract between the parties, and an action thereon, when it is not under seal, in respect to the running of the statute of limitations, is governed by the three-year statute. *Sprinkle v. Sprinkle*, 159 N. C. 81, 74 S. E. 739.

Action for Money Had and Received.—An action by a county board of school directors for fines and penalties collected by a city is in the nature of one for money had and received, with none of the incidents of a fiduciary or trust relation, and this sub-section applies. *School Directors v. Asheville*, 128 N. C. 249, 251, 38 S. E. 874.

Contract to Pay Money.—Where land was conveyed to J. with condition that he pay certain sums to his brothers, and he accepted the land and took possession under the devise, he immediately became liable, and the right of action was barred in three years under this section. *Rice v. Rice*, 115 N. C. 43, 20 S. E. 185.

Action on New Promise.—Where plaintiff, the payee and holder of a note, alleged that the debtor advised him not to enter claim in bankruptcy, and made a promise after the filing of the petition but before the order of discharge was entered to pay the note, plaintiff's cause of action is on the new promise and not the original note, and the new promise being made more than three years prior to the institution of the action, plaintiff's cause is barred by the statute of limitations. *Westall v. Jackson*, 218 N. C. 209, 10 S. E. (2d) 674.

Action for Dividends Accrued on Cumulative Preferred Stock.—The right of a stockholder to have dividends accrued on her cumulative preferred stock at the time of the reorganization of the corporation declared and paid in accordance with the stipulation of the certificate before dividends are set aside or paid on any other stock is based on contract, and the request for an injunctive relief is merely ancillary thereto, and plaintiff's cause of action arises when dividends are paid on the new stock before accrued dividends on her stock are paid, and her action instituted within three years thereafter is not barred. *Clark v. Henrietta Mills*, 219 N. C. 1, 12 S. E. (2d) 682.

Guarantee of Prior Indorsement.—The statute of limitations within which to institute an action upon a guarantee of prior indorsement, is three years after the payment of the check. *United States v. National City Bank*, 28 F. Supp. 144.

Action for Damages against Carrier.—Where the demand in writing for damages of a carrier was made within thirty days, and action was brought within three years it was not barred by this section. *U. S. Watch Case Co. v. Southern Exp. Co.*, 120 N. C. 351, 352, 27 S. E. 74.

Application to Sealed Instruments—Sureties.—This section applies to actions upon all sealed instruments, not referred to in preceding sections. One of these not mentioned in the preceding sections is an action on a sealed note against the sureties thereto. Although such an action against the principal is not barred until ten years by section 1-47, subs. (2), that provision does not refer to sureties. This has been the settled law since *Welfare v. Thompson*, 83 N. C. 276, 279, was decided. *Redmond v. Pippen*, 113 N. C. 90, 92, 18 S. E. 50; *Flippen v. Lindsey*, 221 N. C. 30, 18 S. E. (2d) 824.

An action against the sureties on the bond of a clerk for defalcations in the office of the State Treasurer is barred after three years. *Jackson v. Martin*, 136 N. C. 196, 198, 48 S. E. 672.

This section applies to sureties on a note under seal, and as to the sureties the right of action on the note is barred after the lapse of three years. *Barnes v. Crawford*, 201 N. C. 434, 160 S. E. 464.

An action on a note under seal against a surety thereon is barred after the lapse of three years from the maturity of the note, or after three years from the expiration of an extension of time for payment binding on the surety un-

der this section. *Davis v. Alexander*, 207 N. C. 417, 177 S. E. 417.

Statute Bars Remedy of Claim and Delivery.—Where there had been no new promise or payment on the purchase price for over three years prior to the institution of the action, the three-year statute of limitations, under this section, barred the ancillary remedy of claim and delivery. *Lester Piano Co. v. Loven*, 207 N. C. 96, 176 S. E. 290.

Parol Evidence Admissible to Show in What Capacity Parties Signed Note.—In an action by the payee of a negotiable note under seal, appearing upon its face to have been signed by several makers, it may be shown upon the trial by parol evidence that with the knowledge of the payee before his acceptance only one of them signed as the original obligor, and that the others signed as sureties only, entitling the sureties to their release upon their defense of the statute of limitations under this section. *Furr v. Trull*, 205 N. C. 417, 171 S. E. 641.

Same—Effect of Payment after Statute Has Run.—Where a chattel mortgage on crops secures the payment of the maker's note and the mortgagee endorses the note, and mortgages to another, the bar of the three-years' statute of limitations which has otherwise run will not be repelled by payments on the note from the sale of the crop, as against the endorser, or without evidence of his intent to make the payment and thus impliedly at least acknowledge the debt; and his having attended the mortgage sale of the crop and become a purchaser, is not sufficient. *Nance v. Hulin*, 192 N. C. 665, 135 S. E. 774.

Indemnity or Fidelity Bond.—Where the liability of the insurer is expressly limited in an indemnity or fidelity bond to losses occasioned and discovered during a specified time, this section will not extend the period of indemnity for this is a statute of limitations and can have no effect upon the valid contractual relations existing between the indemnitor and indemnitee. *Hood v. Rhodes*, 204 N. C. 158, 159, 167 S. E. 558.

Breach of Express Trust.—Since occurrences which constitute a breach of an express trust amount in effect, and usually in fact, to a breach of contract, a cause of action for such breach is barred at the expiration of three years from such breach, under this section. *Teachy v. Gurley*, 214 N. C. 288, 199 S. E. 83.

A guaranty of the payment of a note is an obligation arising out of contract by which the guarantors assume liability for payment of the note in case the makers thereof do not pay same upon maturity, and right to sue upon such guaranty arises immediately upon failure of the makers to pay the note according to its tenor, and suit against the guarantors is barred by this section after three years from the maturity of the note. *Wachovia Bank, etc., Co. v. Clifton*, 203 N. C. 483, 166 S. E. 334.

Accrual of Cause.—A cause of action did not accrue at the date of the warranty, but at the date on which it was finally determined that a plant was not free from all defects and flaws. *Heath v. Moncrieff Furnace Co.*, 200 N. C. 377, 381, 156 S. E. 920.

Demand Necessary if Fiduciary Relation Exists.—Where a fiduciary relation exists between the parties, with respect to money due by one to the other, the statute of limitations does not begin to run until a demand and refusal. *Efrid v. Sikes*, 206 N. C. 560, 562, 174 S. E. 513.

Statute Not Suspended by War Measures.—An action to recover damages for a breach of contract for the sale of goods arising during federal war control of railroads is barred by our State statute of limitations after three years from the time of its accrual. *Vanderbilt v. Atlantic, etc., R. Co.*, 188 N. C. 568, 125 S. E. 387.

Unpaid Subscription to Corporate Stock.—While as to the stockholders the three-year statute of limitations on the amount unpaid on subscriptions to the capital stock of a corporation will run from the time of demand by the directors, it is otherwise as to the creditors where the corporation has become insolvent, for in the latter case the capital stock is regarded as a trust fund for the benefit of creditors, and the statute will begin to run from the demand of the receiver, representing the creditors, under the order of the court. *Windsor Redrying Co. v. Gurley*, 197 N. C. 56, 147 S. E. 676.

Same—Construed with Other Sections.—The application of this section with regard to the unpaid balance due a corporation by a subscriber to its capital stock, will be construed in pari materia with §§ 55-65 and 55-70. *Windsor Redrying Co. v. Gurley*, 197 N. C. 56, 147 S. E. 676.

Action on Check Given for Taxes.—A plea of the three-year statute of limitations will bar recovery in a civil action to collect a check given for the payment of taxes, when the action is not instituted within three years of the date the check was issued. *Miller v. Neal*, 222 N. C. 540, 23 S. E. (2d) 852.

Evidence of Matter Not Alleged.—Where defendant by answer denies liability on a note on the ground that it is barred by the three-year statute of limitations, evidence that defendant did not adopt the word "seal" after his name on the note was properly excluded. *Roberts v. Grogan*, 222 N. C. 30, 21 S. E. (2d) 829.

Jury Question.—In an action by a trustor to compel an accounting of the proceeds of sale by a trustee, the question of whether the action was barred under subsection 1 was properly submitted to the jury under authority of *Efrd v. Sikes*, 206 N. C. 560, 174 S. E. 513; *Garrett v. Stadiem*, 220 N. C. 654, 18 S. E. (2d) 178.

Applied in *Hall v. Hood*, 208 N. C. 59, 179 S. E. 27; *Howard v. White*, 215 N. C. 130, 1 S. E. (2d) 356; *Bynum v. Life Ins. Co.*, 222 N. C. 742, 24 S. E. (2d) 613.

III. SUBSECTION TWO—LIABILITY CREATED BY STATUTE.

Section Absolute Bar.—After the time prescribed in section 1-50, subsection 2, and this subsection, the Statute is an absolute bar to the next of kin. *Vaughan v. Hines*, 87 N. C. 445; *Spruill v. Sanderson*, 79 N. C. 466; *Woody v. Brooks*, 102 N. C. 334, 343, 9 S. E. 294. From dissenting opinion.

Liability of National Bank Stockholder for Assessment.—Though original liability of a national bank stockholder is contractual in nature, being based upon his original stock subscription, his liability under a stock assessment fixing amount of liability is "statutory" and not contractual, as respects running of limitations. *Briley v. Crouch*, 115 F. (2d) 443.

Partial payments by national bank stockholder on stock assessment did not toll the running of this section against his liability. *Id.*

Action for Failure to Collect Check.—An action against a bank for breach of its duty to collect a check and against another bank which took over the assets of the former is barred as against the latter bank by this section, where not commenced until five years after the transaction and four years after the transfer of the assets. *Standard Trust Co. v. Commercial Nat. Bank*, 240 Fed. 303.

Action to Recover Delinquent Taxes.—Neither the three nor the ten years' statute of limitations applies to an act authorizing the State or a county or city to recover delinquent taxes unless such act expressly so provides. *Wilmington v. Cronly*, 122 N. C. 383, 30 S. E. 9.

Application to Tort against Clerk Failing to Index Judgment.—In an action of tort against a Clerk of the Superior Court for failing to index a docketed judgment as required by section 1-233, this section is applicable. *Shackelford v. Staton*, 117 N. C. 73, 23 S. E. 101.

Application to Petition to Have Damages Assessed.—Where the charter of a railroad company provides that when the company has appropriated land without authority no action shall be brought by the owner except a petition to have the damage assessed, and fixes no limitation of the action, such petition is neither an action of trespass nor one on a liability created by statute within the meaning of this section, subsections (2) and (3), and the refusal of the trial judge to submit an issue upon the Statute of Limitations was not error. *Land v. Wilmington, etc., R. Co.*, 107 N. C. 72, 12 S. E. 125; *Utleigh v. Wilmington, etc., R. Co.*, 119 N. C. 720, 25 S. E. 1021.

IV. SUBSECTION THREE—TRESPASS UPON REALTY.

Amendment of 1895.—The last sentence of this subsection was added by the Act of 1895. *Culbreth v. Downing*, 121 N. C. 205, 28 S. E. 294.

Prior to the passage of this Act, in such cases, the lapse of 20 years was necessary to bar the action, when the presumption of a grant would arise. *Parker v. Norfolk, etc., R. Co.*, 119 N. C. 677, 25 S. E. 722; *Culbreth v. Downing*, 121 N. C. 205, 206, 28 S. E. 294.

Same—Application to Accrued Actions.—In changing the period of limitation a reasonable time must have been given to accrued actions which would otherwise be barred by the new regulation. A reasonable time for the commencement of an action before the statute works a bar, (*Nichols v. Norfolk, etc., R. Co.*, 120 N. C. 495, 26 S. E. 643), is the balance of the time unexpired according to the law as it stood when the amending act is passed, provided it shall never exceed the time allowed by the new statute. For example, if the action would have been barred in six years, and four years have elapsed before the amending Act, then two years more would be a reasonable time. If three years time would bar the action and three years had elapsed, as in the present case, before the amending act is passed, then three years thereafter would be the limit and no more, and

this rule will apply to all other periods of limitation on actions. *Culbreth v. Downing*, 121 N. C. 205, 206, 28 S. E. 294.

Presumption as to Date of Conversion.—In the absence of proof as to the date of the conversion of property, the presumption is that it was as of the date of taking the property into possession. *Parker v. Harden*, 121 N. C. 57, 28 S. E. 20.

Application in Action to Recover Damages Resulting from Sewage Disposal Plant.—Where the plaintiff executed a deed of trust, deeded his equity of redemption to his sons, and the deed of trust was foreclosed, all more than three years before the institution of the action, and the plaintiff did not again acquire title until less than a year before the action, it was held in an action to recover damages to the land resulting from defendant's sewage disposal plant that the measure of damages should have been predicated upon the difference in value at the time plaintiff again acquired title and the date of the institution of the action, and an instruction that the jury should assess as damages the difference in the market value of the land on the date of the institution of the action and the date three years prior thereto, constitutes reversible error. *Ballard v. Cherryville*, 210 N. C. 728, 188 S. E. 334.

Negligence in Logging Operations.—Where plaintiff instituted this action to recover for damages resulting from the overflow on his lands of waters of a river alleged to have resulted from the negligent acts and omissions of defendant in its logging operations, even if it be conceded that the alleged negligence constituted a continuing omission of duty toward the plaintiff by defendant, plaintiff must show that defendant was in possession and control of the upper lands within the statutory period. *Hooper v. Carr Lbr. Co.*, 215 N. C. 308, 1 S. E. (2d) 818.

Continuing Trespass Defined.—Speaking of this section in *Sample v. Roper Lumber Co.*, 150 N. C. 161, pp. 165-166, 63 S. E. 731, the Court said: "True, the statute declares that actions for trespass on real estate shall be barred in three years, and when the trespass is a continuing one such action shall be commenced within three years from the original trespass, and not thereafter; but this term, 'continuing trespass,' was no doubt used in reference to wrongful trespass upon real property, caused by structures permanent in their nature and made by companies in the exercise of some quasi-public franchise. Apart from this, the term could only refer to cases where a wrongful act, being entire and complete, causes continuing damage, and was never intended to apply when every successive act amounted to a distinct and separate renewal of wrong." *Teeter v. Postal Tel-Cable Co.*, 172 N. C. 783, 785, 90 S. E. 941.

Same—As Applied to Telegraph Line.—Where a telegraph company has constructed its line of poles and wires along a railroad right of way on the lands of the owner more than three years next before the commencement of the owner's action for trespass, but within three years has constructed an additional line of its wires thereon and repaired its old line, replacing some of the old poles with new ones, in the same holes, it was held that the plaintiff's right to damages for the construction of the old line is barred by the statute, but the wrongful maintenance of the old and the building of the new line was a separate and independent trespass for which permanent damages may be awarded. *Teeter v. Postal Tel. Cable Co.*, 172 N. C. 783, 90 S. E. 941.

An action against a telegraph company for the erection of poles on the land of the plaintiff, if brought within three years of the trespass, is not barred by limitation. *Hodges v. Western Union Tel. Co.*, 133 N. C. 225, 45 S. E. 572.

Where the owner of land seeks to recover for trespass and for permanent damages to his land resulting from the erection and maintenance by defendant telegraph company of its transmission lines over his land, the action for trespass is barred by the three-year statute of limitations, the trespass being a continuing trespass, but the action for permanent damages as compensation for the easement is not barred until defendant has been in continuous use thereof for a period of twenty years so as to acquire the right by prescription. *Love v. Postal Telegraph-Cable Co.*, 221 N. C. 469, 20 S. E. (2d) 337.

The law will not permit recovery for negligence which has become a fait accompli at a remote time not within the period specified by subsection 3, although injury may result from it within the period of limitation. *Davenport v. Pitt County Drainage Dist.*, 220 N. C. 237, 239, 17 S. E. (2d) 1, citing *Hooper v. Carr Lbr. Co.*, 215 N. C. 308, 1 S. E. (2d) 818.

Allegations that a drainage district failed to cause a canal to follow the channel of a creek as originally planned and stopped the canal on the lands of plaintiff, and failed to keep the mouth of the channel properly cleared out, resulting in plaintiff's land being flooded, commencing imme-

diately after the canal was finished and continuing practically every year thereafter, stated a cause of action for continuing trespass, and the right of action for damages to crops for all the years was barred after the lapse of three years from the original trespass. *Davenport v. Pitt County Drainage Dist.*, 220 N. C. 237, 17 S. E. (2d) 1.

Application to Diversion of River Water.—The unlawful diversion of river water is not a trespass on realty, but it is so nearly in the nature of an easement as to be governed by the same statute of limitations. *Geer v. Durham Water Co.*, 127 N. C. 349, 37 S. E. 474.

Application to Negligence in Widening Canal.—In an action brought in 1903 to recover permanent damages caused by the negligent widening of defendant's canal, where it appeared that the entire wrong was done in 1898 and 1899, the action was barred under this subsection. *Cherry v. Lake Drummond Canal, etc., Co.*, 140 N. C. 422, 53 S. E. 138.

Action for Cutting Timber.—The three years statute applies to actions to recover damages for trespass in cutting and removing trees from the land. *Tillery v. Whiteville Lumber Co.*, 172 N. C. 296, 90 S. E. 196.

Burden of Proof.—Where the defendant pleads this section to an action for trespass, with damages for cutting timber on lands, the burden is on the plaintiff to prove that he commenced his action within the time prescribed; and where from an analysis of the evidence it appears that this has not been done, a judgment of nonsuit is proper. *Tillery v. Whiteville Lumber Co.*, 172 N. C. 296, 90 S. E. 196.

Cited in *Ivester v. Winston-Salem*, 215 N. C. 1, 1 S. E. (2d) 88; *Teseneer v. Henrietta Mills Co.*, 209 N. C. 615, 184 S. E. 535.

V. SUBSECTION FOUR—GOODS OR CHATTELS.

Section Does Not Confer Title—Period Necessary.—Possession of a chattel for a sufficient period to bar its recovery under this section does not confer title. The prior law, ch. 65, section 20 Rev. Code, so provided, but it has been repealed so that now there is no statute fixing a period at the end of which title to personal property will vest in the possessor. It is true that if held for a sufficient time the title will vest, but four years possession is insufficient. *Pate v. Hazell*, 107 N. C. 189, 11 S. E. 1089.

Charging in Conjunction with Section 1-56.—Where if the action has not been barred by the provisions of subsections 4 and 9 of this section, it would have been barred under sec. 1-56, it was not error to tell the jury that the action was barred in three years, or in ten years. *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 285.

When Applicable to Funds Held by Trustee.—When a trustee notifies the party for whom he holds funds that he disavows the trust and will pay the funds over to another party, and does so, this is a conversion, and the statute of limitation begins to run, so that the cause of action is barred in three years. *County Board v. State Board*, 107 N. C. 366, 12 S. E. 452.

Bonds Held by Bank as Trustee.—In an action instituted against the statutory receiver of an insolvent bank to recover certain bonds which had been held by the bank, trustee, for safekeeping, there was evidence that plaintiffs received a letter from the attorney of the liquidating agent denying the claim for the bonds, and that action was instituted within three years from the receipt of this letter. Held: The action was not barred by the three-year statute, this section, since under the facts of this case the cause of action did not accrue until the disavowal or repudiation of the trust. *Bright v. Hood*, 214 N. C. 410, 199 S. E. 630.

Property Advanced by Father.—Where slaves advanced by A. to his son B were, on the death of the son, divided between his widow and children and held adversely thereafter for three years, A, the father is barred by the statute of limitations from afterwards reclaiming them. *Jones v. Gordon*, 55 N. C. 352.

Burden of Proof.—Where the three-year statute of limitations is pleaded in defense to an action for wrongful conversion of personal property, the burden of proof is on the plaintiff to show that the action was brought within the time allowed from the accrual of the cause, or that otherwise it was not barred. *Rankin v. Oates*, 183 N. C. 517, 112 S. E. 32.

VI. SUBSECTION SIX—SURETIES OF EXECUTORS, ETC.

Purpose of Section.—This section and the other related sections are intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and, after reasonable time, to give quiet and repose to the estates of dead men. *Andres v. Powell*, 97 N. C. 155, 160, 2 S. E. 235.

Section 1-56 Not Affected.—Section 1-56, limiting the time for the bringing of an action to ten years, and applying to an action against an executor or administrator for a final ac-

counting and settlement, is not affected by the provisions of this section, as to actions on their official bonds. *Pierce v. Faison*, 183 N. C. 177, 110 S. E. 857.

Sureties Also Protected by Section 1-50.—In addition to the protection of section 1-50, par. 2, the sureties on the bond are exonerated unless action is brought within three years after breach of the bond. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294. See dissenting opinion.

While the sureties have the protection of six years under section 1-50 in common with their principal, they have a further exoneration, unless sued within three years after breach of the bond. *Woody v. Brooks*, 102 N. C. 334, 337, 9 S. E. 294.

Section 1-50, par. 2, expressly applies to actions on the "official bond," this section to sureties only. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294. See dissenting opinion.

Effect of Surety Being Foreign Corporation.—The statute of limitations is not suspended against the surety on a guardian bond by reason of such surety being a foreign corporation when it is shown that it continuously had a general agent within the jurisdiction of our courts for executing judicial bonds and collecting premiums thereon for the company and had complied with the section authorizing service of process on the Insurance commissioner. *Anderson v. United States Fidelity Co.*, 174 N. C. 417, 93 S. E. 948.

Effect of Payment by Principal.—Payment made by a principal upon a bond, before the cause of action thereon is barred against the sureties, arrests the operation of the statute of limitations. *Moore v. Goodwin*, 109 N. C. 218, 13 S. E. 772.

Intervening Disabilities.—When this statute begins to run, the subsequent marriage of the feme plaintiff will not stop it. *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135. See § 1-17 and note.

When Statute Begins to Run—Demand.—From the demand of the plaintiff for an account and settlement made on the administrator, and his failure and refusal to do so, this section began to run in favor of the defendant sureties on the administration bond. If the action is brought within three years of this time it is not barred. *Stonestreet v. Frost*, 123 N. C. 290, 292, 31 S. E. 718; *Gill v. Cooper*, 111 N. C. 311, 313, 15 S. E. 316.

Whether the final account is or is not filed, if there is a demand and refusal, the action is barred as to both the principal and sureties on said bond in three years. *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135. See dissenting opinion.

This section is applicable only when there has been a settlement, either by the acts of the parties or a decree of court. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294.

An action against a guardian and his bondsman, where no final account has been filed, is barred after three years from the time of default and, at farthest, within three years from the ward's coming of age. *Anderson v. United States Fidelity Co.*, 174 N. C. 417, 93 S. E. 948.

The cause of action by the administrator d. b. n. under this section does not accrue until his appointment, and the action by such administrator therefore is not barred as against the bondsman until three years subsequent to his appointment. *Dunn v. Dunn*, 206 N. C. 373, 173 S. E. 900.

Action by Cestui against Trustee after Settlement.—Where there has been a settlement between the trustee and cestui que trust, or a final determination of the amount due by a decree of Court, the trust is closed, and an action will be barred within three years from a demand and refusal. *Spruill v. Sanderson*, 79 N. C. 466; *Whedbee v. Whedbee*, 58 N. C. 393; *Barham v. Lomax*, 73 N. C. 78; *Wyrick v. Wyrick*, 106 N. C. 84, 87, 10 S. E. 916.

Effect of Estate Being Unrepresented during Period.—When there was no one in esse from the death of the first administrator, till the qualification of the administrator de bonis non, who could sue upon the bond, that time should not be counted in applying the statute of limitations in an action against the sureties. *Brawley v. Brawley*, 109 N. C. 524, 14 S. E. 73.

Burden of Proof.—This section being pleaded, it was incumbent upon the plaintiff to show that the breach of the bond was within less than three years before the institution of this action against the appellee. *Hussey v. Kirkman*, 95 N. C. 63; *Moore v. Garner*, 101 N. C. 374, 7 S. E. 732; *Hobbs v. Barefoot*, 104 N. C. 224, 10 S. E. 170; *Nunnery v. Averitt*, 111 N. C. 394, 395, 16 S. E. 683. This was not done, and the surety is protected by the lapse of three years after demand and refusal. *Norman v. Walker*, 101 N. C. 24, 7 S. E. 468; *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294; *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135; *Brawley v. Brawley*, 109 N. C. 524, 14 S. E. 73; *Koonce v. Pelletier*, 115 N. C. 233, 235, 20 S. E. 391.

Action to Reopen Account.—An action or proceeding to reopen an account stated by an executor and readjust a set-

tlement made under the supervision of a Court, and sanctioned by a decree, must be brought within three years from the rendition of such decree, if the plaintiff (or petitioner) be under no disability, and the case involve no equitable element improper for the consideration of a Court of Law. This conclusion finds some support in the provisions of this subsection. *Spruill v. Sanderson*, 79 N. C. 466.

Action to recover for alleged breach of bond as administratrix accrues at the time the alleged breach is committed, this subdivision having no provision relating to discovery of the breach of the official bond as is provided for in cases under subdivision (9). *Hicks v. Purvis*, 208 N. C. 657, 182 S. E. 151.

Ward's Suit against Sureties.—A suit by a ward against the sureties on the bond of his deceased guardian comes within the terms of this section and must be brought within the three year limit. *Norman v. Walker*, 101 N. C. 24, 7 S. E. 468.

The running of the statute under this section as against the plaintiffs and in favor of the sureties was not suspended by the payment of interest by the guardian on the amount due by him to each of the plaintiffs. The liability of the sureties on the bond is a conditional liability, dependent upon the failure of the guardian to pay the damages caused by his breach of the bond. The guardian and the sureties are not in the same class. For that reason the payment by the guardian of interest on the amount due by him to his former wards did not suspend the statute of limitations which began to run against each of his wards, when she became twenty-one years of age. *State v. Fountain*, 205 N. C. 217, 220, 171 S. E. 85.

Applied in *Copley v. Scarlett*, 214 N. C. 31, 197 S. E. 623.

Cited in *State v. Purvis*, 208 N. C. 227, 230, 180 S. E. 88.

VII. SUBSECTION SEVEN—BAIL.

Effect of Bail Being Out of State.—The language and meaning of this action is clear. Proceedings against bail, in civil actions, are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the State in the meanwhile. *Albemarle Steam Nav. Co. v. Williams*, 111 N. C. 35, 15 S. E. 877.

VIII. SUBSECTION EIGHT—CLERK FEES.

Application to Judgment for Costs.—A plaintiff in a judgment on which costs only are due, is not barred by this section from the proper proceedings to enforce his claim, the same being in his favor and not of the officers of the court. *Cowles v. Hall*, 113 N. C. 359, 18 S. E. 329.

Not Applicable to Referee.—The claim of a referee for payment of services rendered in a cause which is still pending in the courts upon exceptions to his report is not barred by this section. *Farmers' Bank v. Merchants', etc., Bank*, 204 N. C. 378, 168 S. E. 221.

IX. SUBSECTION NINE—FRAUD OR MISTAKE.

Amendment of 1879.—Mistake.—This act was amended by the act of 1879, by inserting after the word "fraud," wherever it occurs, the words "or mistake." So that prior to the act of 1879, there was no statutory bar of three years to an action for relief on the ground of mistake. *Mask v. Tiller*, 89 N. C. 423, 425.

An action to correct a mistake should now be brought within the time limited in this section. *Lanning v. Commissioners*, 106 N. C. 505, 511, 11 S. E. 622.

The 1889 amendment of this section struck a provision limiting this section to cases solely cognizable in a court of equity. There are many cases decided prior to the amendment construing this section to be so limited. There are also cases so construing it since its passage but they are restricted to those arising before the statute became effective. See *Dunn v. Beaman*, 126 N. C. 766, 770, 36 S. E. 172; *Alpha Mills v. Watertown, etc., Co.*, 116 N. C. 797, 803, 21 S. E. 917; *Blount v. Parker*, 78 N. C. 128; *Jaffray v. Bear*, 103 N. C. 165, 9 S. E. 382; *Egerton v. Logan*, 81 N. C. 172; *Spruill v. Sanderson*, 79 N. C. 466; *Day v. Day*, 84 N. C. 408; *Batts v. Winstead*, 77 N. C. 238. See also dissenting opinions in *Kahnweiler v. Anderson*, 78 N. C. 133, 144.

The amendment applied to an action for a false warranty in a sale made before the amendment, so that, in actions where relief on the ground of fraud was sought, the cause of action was not deemed to have accrued until the discovery of the fraud complained of. *Alpha Mills v. Watertown, etc., Co.*, 116 N. C. 797, 21 S. E. 917.

This amendment leaves all actions subject to the same rule, whether they were heretofore cognizable solely in courts of equity or not, and makes all actions come under the same rule as if they had been originally cognizable in courts of equity. *Alpha Mills v. Watertown, etc., Co.*, 116 N. C. 797, 803, 21 S. E. 917; *Rouss v. Ditmore*, 122 N. C. 775, 778, 30 S. E. 335.

Purpose and Construction of Section.—The statute of limitations was mainly intended to suppress fraud, by preventing fraudulent and unjust claims from being asserted after a long lapse of time. It ought not, therefore, to be so construed as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation. The like spirit should govern the construction of the facts and circumstances of a transaction so as to take it out of the operation of the statute, where gross injustice would be worked by its application. *Mask v. Tiller*, 89 N. C. 423, 426.

When Applied to Exclusion of § 1-56.—This section cannot be applied where the allegations and proof are insufficient to sustain it, in preference to section 1-56, where there is a question as to which applies. *Shankle v. Ingram*, 133 N. C. 254, 255, 45 S. E. 578.

Applies to Actions at Law and Suits in Equity.—While this subsection originally applied only to actions for relief on the ground of fraud in cases solely cognizable by courts of equity, by statutory amendment and the decisions of our courts it now applies to all actions for relief on the ground of fraud or mistake. *Stancill v. Norville*, 203 N. C. 457, 166 S. E. 319.

Fraud or Mistake Prerequisite to Application.—This section has no application to an action to recover money for there is no evidence or allegation of fraud and mistake. *Barden v. Stickney*, 132 N. C. 416, 417, 43 S. E. 912; *Bonner v. Stotesbury*, 139 N. C. 3, 51 S. E. 781.

When Statute Begins to Run.—The statute runs from the discovery of the fraud or mistake, "or when it should have been discovered in the exercise of ordinary care"; and as it was the duty of plaintiff, as executor, to have laid off the land to the devisee and put her in possession, and as he could, by a simple calculation from the deed, have discovered that the description embraced 108 acres, and as for twenty years the various owners of the land had cultivated up to the boundaries, the statute had become a bar to the action. *Sinclair v. Teal*, 156 N. C. 458, 72 S. E. 487. See also *Stubbs v. Motz*, 113 N. C. 458, 459, 18 S. E. 387; *Peacock v. Barnes*, 142 N. C. 215, 55 S. E. 99.

In an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence. *Wimberly v. Furniture Stores*, 216 N. C. 732, 6 S. E. (2d) 512.

It is incumbent upon the plaintiff to show that he not only was ignorant of the facts upon which he relies in his action, but could not have discovered them in the exercise of proper diligence or reasonable business prudence. *Latham v. Latham*, 184 N. C. 55, 113 S. E. 623. See also, *Johnson v. Pilot Life Ins. Co.*, 219 N. C. 202, 13 S. E. (2d) 241.

This statute begins to run from the time of discovery of a breach of the trust relationship and not from the time the relation was brought to an end. *Egerton v. Logan*, 81 N. C. 172, 179.

In an action to reform a timber deed for an alleged mutual mistake of the parties, the statute will run three years after the plaintiff had knowledge of the mistake alleged. *Jefferson v. Roanoke R., etc., Co.*, 165 N. C. 46, 80 S. E. 882. See also *Lanning v. Commissioners*, 106 N. C. 505, 511, 11 S. E. 622.

Where plaintiff acquired title to real estate, subject to a contract to cut timber within 3 years, thinking the time for cutting was 18 months, and failed to examine the record or to bring suit for wrongful cutting until more than three years after being told that the time was 3 years, the action was barred by this section. *Blankenship v. English*, 222 N. C. 91, 21 S. E. (2d) 891.

Where insurance company rejected third application of insured for additional insurance on grounds that insured was no longer a satisfactory risk it was held that insured should have been put on notice thereby that company's agent's promise to redeliver a second policy within seven months after it was tendered to insured and refused because of illness, was false and that insured's claim, if any he had, has atrophied as a result of his procrastination and became barred by this section. *Jones v. Bankers Life Co.*, 131 F. (2d) 989, 994.

Upon the question of fraudulent concealment of funds, this section runs from the discovery of the facts constituting the fraud or mistake and not from the discovery by a party of rights hereto unknown to him. *Bonner v. Stotesbury*, 139 N. C. 3, 51 S. E. 781.

It is a question of grave doubt, if the point had been raised, whether the statute as to the plaintiff's cause of action began to run upon the mere declaration of insolvency of the bank, and did not in truth begin to run upon the actual discovery, later on (after the investigation of the receiver) that the bank was insolvent at the time the incorrect statements were put forth. *Houston v. Thornton*, 122 N. C. 365, 375, 29 S. E. 827.

Applying this section to an action to set aside a deed to lands made by the husband to the wife for fraud on the former's creditors, this section by correct interpretation is held to mean until the impeaching facts should have been discovered in the exercise of reasonable business prudence. *Ewbank v. Lyman*, 170 N. C. 505, 87 S. E. 348.

Where a clerk of the Superior Court embezzles funds and such fraud is not discovered until about 90 days prior to the institution of proceedings against the clerk and the surety on his bonds, and such fraud could not have been discovered earlier by reasonable diligence, this section and not § 1-50 applies. *State v. Gant*, 201 N. C. 211, 159 S. E. 427; *State v. American Surety Co.*, 201 N. C. 325, 160 S. E. 176.

The actual time of the discovery of the alleged mistake is not determinative, but the cause of action for reformation of the bonds accrued when the mistake should have been discovered by plaintiff in the exercise of due diligence, and plaintiff being an educated man, and there being no evidence of any effort to conceal the plain language of the bonds or to prevent plaintiff from reading them, plaintiff's cause of action was barred under this section. *Moore v. Fidelity, etc., Co.*, 207 N. C. 433, 177 S. E. 406. See also, in this connection, *Hargett v. Lee*, 206 N. C. 536, 539, 174 S. E. 498; *Hood v. Paddison*, 206 N. C. 631, 635, 175 S. E. 105.

Evidence did not show that guardian knew or should have known of the fraud and his failure to institute suit did not bar the ward. *Johnson v. Pilot Life Ins. Co.*, 217 N. C. 139, 7 S. E. (2d) 475, 128 A. L. R. 1375.

Same—Record as Notice of Fraud.—True, as indicated in *Tuttle v. Tuttle*, 146 N. C. 484, 59 S. E. 1008; *Modlin v. Roanoke R., etc.*, 145 N. C. 218, 58 S. E. 1075, and *Stubbs v. Motz*, 113 N. C. 458, 18 S. E. 387, the mere registration of a deed will not usually, in these and like cases, be imputed for constructive knowledge; but in the present case the deed under which feme defendant claims and now holds this property had been on the registry in the proper county for more than eleven years before this action was instituted, and plaintiff's judgment had been docketed in the county since 1897. *Ewbank v. Lyman*, 170 N. C. 505, 509, 87 S. E. 348.

While the mere registration of deed to lands from a husband to his wife will not usually be imputed for constructive knowledge that it was done in fraud of the husband's creditors, it may be otherwise regarded when taken in connection with other relevant circumstances, and under the circumstances of this case it is held that the failure of the plaintiff in not sooner investigating the records was such negligence as will be imputed to her for knowledge, and bar her cause of action. *Ewbank v. Lyman*, 170 N. C. 505, 87 S. E. 348.

Where a foreclosure sale of lands is attacked for fraud upon the ground that the trustee sold the timber on the land separate from the land and made deeds to each to separate parties, which were duly recorded, the record itself gives notice of the transaction, which with knowledge of the sale itself should have put the plaintiffs and their mother, as whose heirs at law they claim, and in whose lifetime foreclosure was had, upon reasonable notice of the fact, and bar their recovery after three years. *Sanderlin v. Cross*, 172 N. C. 234, 90 S. E. 213.

Same—Sale of Trust Land by Trustee as Notice.—Proceedings before clerk to sell trust lands to make assets to pay the debts of the deceased, and the open, notorious, and adverse possession of the purchasers of the land, under their registered deeds, were sufficient to put the plaintiffs, claiming under the children of the said son, the cestuis que trustent, upon notice of the fraud alleged, if any committed by the executor, and it would bar their right of action within three years therefrom. *Latham v. Latham*, 184 N. C. 55, 113 S. E. 623.

Same—Necessity for Newly Discovered Evidence.—One can derive no aid from this section in an action to reconsider a case which has been sanctioned by the court and settled by a decree from it, in the absence of newly discovered evidence showing fraud. Where the plaintiff knew all the facts at first that are now known the first action must stand notwithstanding this section. *Spruill v. Sanderson*, 79 N. C. 466, 471.

Same—Sufficiency of Evidence.—See *Latham v. Latham*, 184 N. C. 55, 113 S. E. 623; *Sanderlin v. Cross*, 172 N. C. 234, 90 S. E. 213.

Application to Foreign Corporation.—A foreign corporation cannot set up the statute of limitations in bar of an action for false warranty. *Alpha Mills v. Watertown, etc., Co.*, 116 N. C. 797, 21 S. E. 917.

Actions to Which Applicable.—The relief afforded by the statute has a broader meaning than the common-law actions of fraud and deceit and applies to any and all actions, legal or equitable, where fraud is the basis or an essential

element in the suit. *Little v. Wadesboro*, 187 N. C. 1, 121 S. E. 185.

Same—Fraudulent Conveyance.—Where the suit is to recover in money the difference between the grossly inadequate consideration paid for a conveyance of land, attacked upon the ground of fraudulent influence used upon the mind of the grantor for the grantee's benefit, and the reasonable value thereof, this section, limiting the action to three years in cases of fraud applies, and it is reversible error for the trial judge to hold, as a matter of law, that the ten years statute relating to actions to impress a trust upon property only was applicable. *Little v. Wadesboro*, 187 N. C. 1, 121 S. E. 185.

An action by the heirs of mortgagors to set aside a conveyance of the equity of redemption by mortgagors to the mortgagee is an action based on fraud and must be instituted within three years from the discovery of the acts constituting the fraud, and the ten-year statute has no application. *Massengill v. Oliver*, 221 N. C. 132, 19 S. E. (2d) 253.

Same—Reformation of Mortgage for Mistake.—Whether a cause of action for reformation of a mortgage for mistake was instituted within three years from discovery of the facts as provided by this section, or the time they should have been discovered in the exercise of due diligence, held for jury in this case. *Lowery v. Wilson*, 214 N. C. 800, 200 S. E. 861.

Same—A Fraudulent Distribution of Dividends.—This section relating to time to commence action after discovery of fraud, has no application to fraudulent distribution of dividends to shareholders of corporations under the facts of this case. *Chatham v. Realty Co.*, 180 N. C. 500, 105 S. E. 329.

Same—Proceeding to Set Aside Probate.—This section is not necessarily controlling upon the hearing upon petition before the clerk of the Superior Court to set aside for fraud or imposition on the court, the proceedings admitting a paper-writing to probate as a will; and were it otherwise, it is required that the petitioner show that he could not sooner have discovered the fraud by the exercise of ordinary care, which in the instant case he has failed to do. In re Will of *Johnson*, 182 N. C. 522, 109 S. E. 373.

Same—Setting Aside Settlement by Guardian.—The time within which settlement of a guardian may be set aside for fraud is by several adjudications and this section restricted to the period of three years. *Wheeler v. Piper*, 56 N. C. 249; *Whedbee v. Whedbee*, 58 N. C. 392; *Spruill v. Sanderson*, 79 N. C. 466. *State v. Smith*, 83 N. C. 306, 307.

Same—Action for Obtaining Deed by Fraud.—In an action for damages for obtaining by fraud or deceit a deed from plaintiff conveying a larger amount of timber than was intended to be conveyed, the statute of limitations applicable is this section. *Modlin v. Roanoke R., etc., Co.*, 145 N. C. 218, 58 S. E. 1075.

Same—Action to Declare Purchasing Partner a Trustee.—An action by the creditors of a partnership to hold the owners of the legal estate (who purchased the interest of one partner in the partnership property) as trustees for the surety of their debts, is not barred by this section. *Quaere*, as to the application of subsection 4. *Ross v. Henderson*, 77 N. C. 170.

Action for Omission from Deed.—Where a reversionary clause was omitted from a deed by mistake of the draftsman it was held that the registration of the deed was insufficient to constitute notice to plaintiffs, and the action was not barred until three years after plaintiffs discovered, or should have discovered, the mistake in the exercise of due diligence. *Ollis v. Board of Education*, 210 N. C. 489, 187 S. E. 772.

Action Barred by Negligence in Asserting Right.—The plaintiffs contended that usurious interest was paid defendant by their agent without their knowledge, and that therefore their action to recover the penalty for usury was not barred although instituted more than two years after the last usurious payment (see § 1-53). It was held that the plaintiffs are not entitled to invoke the statute, it appearing that plaintiffs did not institute action until more than three years after they had executed a note bearing six per cent interest in renewal of the original note upon which usury was paid, and that plaintiffs were negligent in asserting their rights if any they had. *Ghormley v. Hyatt*, 208 N. C. 478, 181 S. E. 242.

Where Purchaser Did Not Participate in Fraud.—Where there is no allegation or proof that a purchaser fraudulently concealed the fact of sale or participated in any fraud in connection therewith, then as to him the action is barred by the lapse of three years, this section not applying as to the action against him. *Johnson Cotton Co. v. Sprunt & Co.*, 201 N. C. 419, 160 S. E. 457.

Remedy Where Action on Contract Barred.—The remedy by the vendor of goods obtained by the fraud of the

purchaser, first discovered after the action on the contract has been barred, is by an action for damages under this section as amended by chap. 269, Acts of 1889. *Rouss v. Ditmore*, 122 N. C. 775, 30 S. E. 335.

When Replication Required.—When the date of the accruing of the cause of action appears in the complaint and the statute of limitations is pleaded, the court can, of course, pass judgment, unless matter in avoidance is pleaded as a new promise, or the like. It is only in such cases that a replication is now required. *Moore v. Garner*, 101 N. C. 374, 377, 7 S. E. 732, though under the former practice a replication was required, whenever the statute of limitations was pleaded. *Stubbs v. Motz*, 113 N. C. 458, 459, 18 S. E. 387.

Burden of Proof.—In an action to set aside a conveyance on account of fraud, the statute of limitations being pleaded thereto, the burden is on the plaintiff to show that the fraud was not discovered until within three years of the commencement of the action. *Hooker v. Worthington*, 134 N. C. 283, 46 S. E. 726.

The burden is on the plaintiff to show that neither they nor their predecessor in title, did not know of the fraud, or would not have discovered it in the exercise of reasonable business prudence. *Sanderlin v. Cross*, 172 N. C. 234, 90 S. E. 213.

The plea of the statute of limitations put the burden upon the defendant, in the cross-action, to show that the statute of limitation had not barred his right, by a lapse of more than three years from the time he discovered the mistake to the time he had filed his pleading, and in failing to introduce such evidence he is concluded as a matter of law. *Taylor v. Edmunds*, 176 N. C. 325, 97 S. E. 42.

Effect of Non-Residence of Plaintiff.—The nonresidence of a plaintiff, claiming lands here under an allegation of fraud, etc., does not affect the running of the statute of limitations adverse to his demand in his action. *Latham v. Latham*, 184 N. C. 55, 113 S. E. 623.

A nonresident creditor who seeks to set aside a deed of his debtor for fraud is not excused by his absence for not complying with the provisions of this section, requiring that he must bring his action within three years from the discovery of the fraud. *Ewbank v. Lyman*, 170 N. C. 505, 87 S. E. 348.

Erroneous Ruling Not Cured by Other Defects.—The reversible error of ruling that as a matter of law the evidence was insufficient under this section, is not relieved by the principle that the statute does not begin to run till the undue influence constituting fraud has been removed, when it does not appear on appeal that such influence had ever been removed, and the jury have found the issue of fraud without being permitted to pass upon this question. *Little v. Wadesboro*, 187 N. C. 1, 121 S. E. 185.

Effect of Failure of Referee to Find Facts.—When the referee to whom the case was referred failed to find the facts upon which this statute of limitations can be determined, the case must be remanded. *Lanning v. Commissioners*, 106 N. C. 505, 11 S. E. 622.

Statute in Life Ins. Co. v. Edgerton, 206 N. C. 402, 411, 174 S. E. 96.

Cited in Fort Worth, etc., R. Co. v. Hegwood, 198 N. C. 309, 151 S. E. 641; *McCormick v. Jackson*, 209 N. C. 359, 183 S. E. 369; *Thacker v. Fidelity, etc., Co.*, 216 N. C. 135, 4 S. E. (2d) 324.

X. SUBSECTION TEN—REALTY SOLD FOR TAXES.

This section does not apply where the owner remains in possession. *Bailey v. Howell*, 209 N. C. 712, 184 S. E. 476.

Application to Tenancy in Common.—The statute permits the sheriff to sell the lands of tenants in common for the nonpayment of taxes, and a tenant in common to pay his or her part of the tax and let the other shares go; and provides that three years possession by the purchaser under the tax deed bars the former rightful owners. *Ruark v. Harper*, 178 N. C. 249, 100 S. E. 584.

Application to Suit to Remove Cloud.—In *Price v. Slagle*, 189 N. C. 757, 128 S. E. 161, 166, the court said:

"This three-year statute has been held not to apply when the suit is to remove a cloud, as distinguished from a suit to recover the land sold for taxes from the tax sale purchaser, or his assigns, who are in possession of the lands so sold."

Application Where Deed Color of Title Only.—Where a sheriff's deed given for the nonpayment of taxes is not under seal, it is good as color of title, which seven years adverse possession will ripen into an absolute one, under section 1-38. *Ruark v. Harper*, 178 N. C. 249, 100 S. E. 584.

Applies to Action for and against Claimants.—The three-year statute of limitations barring the right of action in favor of a claimant under a tax deed is broad enough to

include actions for and against such claimant. *Jordan v. Simmons*, 169 N. C. 140, 85 S. E. 214.

Possession as Affecting Application.—"Semble, the three-year statute of limitations may not be successfully pleaded by the claimant under the tax deed against the original owner in possession of the lands." *Jordan v. Simmons*, 169 N. C. 140, 85 S. E. 214.

The purchaser's possession for three years under an irregular sheriff's deed would be sufficient to bar action thereon. *Lyman v. Hunter*, 123 N. C. 508, 31 S. E. 827; *Kivett v. Gardner*, 169 N. C. 78, 85 S. E. 145.

Necessity of Pleading Section.—The three-year statute of limitations in favor of or against the claimant under a tax deed to lands must be properly pleaded to be made available. *Jordan v. Simmons*, 169 N. C. 140, 85 S. E. 214.

In an action against the administrator of the deceased to recover taxes paid for him by the plaintiff, it is necessary that the defendant plead the statute of limitations in order to avail himself of it as a bar to the plaintiff's recovery thereon. *Smith v. Allen*, 181 N. C. 56, 106 S. E. 143.

§ 1-53. Two years.—Within two years—

1. All claims against counties, cities and towns of this state shall be presented to the chairman of the board of county commissioners, or to the chief officers of the cities and towns, within two years after the maturity of such claims, or the holders shall be forever barred from a recovery thereon; provided, however, that the provisions of this paragraph shall not apply to claims based upon bonds, notes and interest coupons.

2. An action to recover the penalty for usury.

3. The forfeiture of all interest for usury. (Rev., s. 396; Code, ss. 756, 3836; 1874-5, c. 243; 1876-7, c. 91, s. 3; 1895, c. 69; 1931, c. 231; 1937, c. 359; C. S. 442.)

I. Subsection One—Political Subdivisions of State.

II. Subsection Two—Penalty for Usury.

III. Subsection Three—Forfeiture of All Interest for Usury.

Cross References.

As to power of county, to be sued, see § 153-2, paragraph 1. As to power of city or town, to be sued, see § 160-2, paragraph 1. As to requirement of demand before suit, see § 153-64. As to penalty and forfeiture for usury, see § 24-2.

I. SUBSECTION ONE—POLITICAL SUBDIVISIONS OF STATE.

Local Modification.—Cartaret, Haywood: 1933, c. 386; Cherokee, Clay: 1933, c. 318.

Editor's Note.—The 1937 amendment added the proviso to subsection 1.

The 1937 amendment to this section does not operate retrospectively, and hence does not revive action previously barred for face value of unpaid coupons on bonds issued by county, in township's behalf. *Valleytown Tp. v. Women's Catholic Order, etc.*, 115 F. (2d) 459, reversing 32 F. Supp. 894.

Purpose of Section.—"The obvious purpose of the law is to enable those municipal bodies mentioned in it to ascertain and make a record of its valid outstanding obligations, and to separate them from such as are spurious or tainted with illegality and denounced in the Constitution." *Wharton v. Commissioners*, 82 N. C. 12, 16. See post this note, "Nature and Effect of Section."

Constitutionality.—Under the interpretation of this section, it may admit of question whether the condition engrafted by it upon the contract, as affecting the pre-existing rights of the creditor, does not impair its obligation within the prohibition of the federal constitution. *Wharton v. Commissioners*, 82 N. C. 12, 14. See the following catch-line.

Nature and Effect of Section.—The language of this section is plain and explicit, and there is room for but one construction of it. The court has said that the provision of the statute is not in strict terms a limitation of the time within which an action may be prosecuted, but that it imposes upon the creditor the duty of presenting his claim within a prescribed period of time, and, upon his failure to do so, forbids a recovery in any suit thereafter commenced. *Wharton v. Commissioners*, 82 N. C. 12, 16. See *Moore v. Charlotte*, 204 N. C. 37, 39, 167 S. E. 380.

In a later case the court held that "This is a statute of limitation, and such claims against the county should be presented within two years after maturity." *Lanning v. Commissioners*, 106 N. C. 505, 511, 11 S. E. 622, citing *Roys-*

ter v. Commissioners, 98 N. C. 148, 3 S. E. 739; Moore v. Commissioners, 87 N. C. 209, 215.

In Board v. Greenville, 132 N. C. 4, 43 S. E. 472, 473, the court said, "We think it is unnecessary to inquire or to decide whether the statute is strictly one of limitation, or whether it merely imposes a duty upon the holder of a claim against a municipal corporation, the performance of which is a condition precedent to his right of recovery. In either view of the nature of the statute the claimant, by its very words, is 'barred from a recovery' of any part of the claim that did not mature within the two years immediately preceding the date of his demand, and this conclusion as to the effect of the statute is all sufficient for the disposition of this appeal."

"This section is not strictly a statute of limitation, for it imposes this as a duty on the claimant as a condition upon which he may successfully maintain his action." Dockery v. Hamlet, 162 N. C. 118, 78 S. E. 13.

Liberal Construction. — In Wharton v. Commissioners, 82 N. C. 12, 16, the court said, "We are not disposed to give so strict an interpretation to the requirement of the act, which, as all its useful purposes are met, would be to sacrifice substance for form and convert a judicious measure of legislation into an instrument of injustice and wrong."

When Statute Begins to Run.—Where the plaintiff made a payment, the defendant promising to refund any excess of the amount due, and upon a reference a balance was reported in favor of the plaintiff it was held, in an action to recover the amount, that the statute begins to run only from the date of such finding. Moore v. Commissioners, 87 N. C. 209, 210.

Where the defendants and their predecessors in office had notice from the beginning of the origin, nature and amount of a claim against a county, and of the fact that it could not mature until the accuracy or inaccuracy of their previous settlement with the plaintiff could be ascertained, such a claim falls neither within the letter nor the spirit of this section. Moore v. Commissioners, 87 N. C. 209, 210, 215.

Effect of Failure to Present Claim in Time. — Where a creditor fails to present his claim in the prescribed time, any action thereon thereafter is barred. Board v. Greenville, 132 N. C. 4, 43 S. E. 472.

What Plaintiff Must Allege and Prove. — Where a claim has been made on the city for services rendered, and it nowhere therein appears when the services were rendered, in an action to recover therefor the plaintiff must not only show that the claim had been presented in the statutory period, but that the amount claimed had matured within that time; and when he has failed to make this necessary allegation in his complaint, a demurrer thereto should be sustained. Dockery v. Hamlet, 162 N. C. 118, 78 S. E. 13.

Same—When Defect Attacked by Demurrer. — Where upon the face of a complaint it does not appear that claim was made upon a town's officers as this section provides, within two years after its maturity, the claim is barred, and a demurrer that it states no cause of action should be sustained. Dockery v. Hamlet, 162 N. C. 118, 78 S. E. 13.

Same—When Action Amendable. — The complaint, not stating a cause of action under the requirements of this section, is demurrable; but as the complaint is a defective statement of a cause of action, and not necessarily a statement of a defective cause of action, it was error to dismiss the action, and the plaintiff may amend by setting out the matters required by the statute. Dockery v. Hamlet, 162 N. C. 118, 78 S. E. 13.

Nonsuit as Extending Time under Section 1-25. — One who began suit within the time prescribed, took a nonsuit and began a second action within one year after the nonsuit, but more than two years after the maturity of the claims, was not barred. Wharton v. Commissioners, 82 N. C. 12.

Application to Claim of Sheriff. — A sheriff must present his claim against a county for an allowance to him to pay off a county debt within the two years prescribed in the section. Lanning v. Commissioners, 106 N. C. 505, 11 S. E. 622.

Action for Services Rendered as Attorney.—Where plaintiff instituted this action to recover for services rendered defendant county by plaintiff as an attorney, plaintiff alleging as a basis of recovery services rendered in a certain civil action and services rendered relating to twenty-one different transactions extending over a period of more than a year, subsequent to the termination of the civil action, and defendants alleged that final judgment in the civil action was entered more than two years prior to the institution of the present suit, that plaintiff's cause of action for services rendered therein accrued at the time of the rendition of the judgment, and that plaintiff's cause of action for services rendered therein is barred, the plea of the statute

of limitations relates solely to the claim for services rendered in the civil action, and is not a plea in bar which would defeat plaintiff's claim in its entirety. Grimes v. Beaufort County, 218 N. C. 164, 10 S. E. (2d) 640.

Cited in Lightner v. Raleigh, 206 N. C. 496, 499, 174 S. E. 272; Fletcher v. Parlier, 206 N. C. 904, 173 S. E. 343; Ivester v. Winston-Salem, 215 N. C. 1, 1 S. E. (2d) 88; Reed v. Madison County, 213 N. C. 145, 195 S. E. 620; Mebane Graded School Dist. v. Alamance County, 211 N. C. 213, 189 S. E. 873.

II. SUBSECTION TWO—PENALTY FOR USURY.

Origin of Section. — The right of action to recover for usurious interest paid is purely statutory, and the plaintiff must comply with the terms of the statute as to the time of bringing his action. Roberts v. Life Ins. Co., 118 N. C. 429, 24 S. E. 780.

Section Not Retroactive. — The right added by the Act of 1876-77 to recover back interest paid could not apply to contracts made prior to its passage. Moore v. Beaman, 112 N. C. 558, 561, 17 S. E. 676.

The act of 1895 (chapter 69), which provides for the recovery of usurious interest if the action is brought within two years after the payment in full of the indebtedness, by its express terms, does not apply to contracts antedating its ratification. Roberts v. Life Ins. Co., 118 N. C. 429, 24 S. E. 780.

When Statute Begins to Run. — The act of 1895 provides for bringing an action to recover back double the amount of usurious interest paid if the action is brought within two years after the payment in full of such indebtedness, in this respect changing what is now section 24-2, which provided that "the action must be brought within two years from the time the usurious transaction occurred." Roberts v. Life Ins. Co., 118 N. C. 429, 435, 24 S. E. 780. The provision no longer appears in section 24-2.—Ed. Note.

The cause of action for the penalty for each payment of usury arises immediately and accrues upon the date of the payment. The action to recover the penalty for each usurious transaction is therefore barred under this section, upon the expiration of two years from the date of the payment. Sloan v. Piedmont Fire Ins. Co., 189 N. C. 690, 128 S. E. 2, 3.

Under this section the statute of limitations began to run at the date the cause of action accrued, and as service could have been made under the statute at any time before the commencement of this action, the statute continued to run against the plaintiffs. The defendant, although a nonresident or foreign corporation, was at all times from the date the cause of action accrued until the commencement of this action subject to the jurisdiction of the courts of this state and for that reason, two years having elapsed from the date the cause of action accrued to the date of the commencement of the action, the action is barred. Smith v. Finance Co., 207 N. C. 367, 369, 177 S. E. 183. See also, Ghormley v. Hyatt, 208 N. C. 478, 181 S. E. 242.

Same—Mutual Running Account. — Where the transaction constitutes a mutual running account an action for the penalty under our statute is not barred within two years next from the last item therein. English Lumber Co. v. Wachovia Bank, 179 N. C. 211, 102 S. E. 205.

Effect of Defendant Being Out of State. — This two-year prescription is subject to the provisions of § 1-21 that when a cause of action accrues against a person he shall be out of the State or shall thereafter depart therefrom and reside out of the State, "the time of his absence shall not be deemed or taken as a part of the time limited for the commencement of such action." Williams v. Iron Belt etc., Asso., 131 N. C. 267, 269, 42 S. E. 607.

The two years within which an action may be brought, under this section, is to be construed in connection with the provisions of section 1-21, which provides that if the defendant departs from or resides out of the State, such action may be brought within two years after process can be served upon him; otherwise the statute would be illusory and partial, in favor of nonresidents. Armfield v. Moore, 97 N. C. 34, 38, 2 S. E. 347; Williams v. Iron Belt, etc., Asso., 131 N. C. 267, 269, 42 S. E. 607.

Application to Action against Foreign Corporation. — An action against a foreign corporation to recover usury may be begun within two years from the time there is someone in the State upon whom service can be made. Williams v. Iron Belt, etc., Asso., 131 N. C. 267, 42 S. E. 607.

Bar of Counterclaim.—Where more than two years has elapsed from the payment of alleged usury until the institution of an action on the debt alleged to have been tainted with usury, the defendant's counterclaim for twice the

amount of usury charged is barred. *Farmers' Bank, etc., Co. v. Redwine*, 204 N. C. 125, 167 S. E. 687.

Attorney's Fee Held Not Usurious.—See *Woody v. Prudential Life Ins. Co.*, 209 N. C. 364, 183 S. E. 296.

Necessity of Pleading.—This section need not be specifically pleaded. *Roberts v. Ins. Co.*, 118 N. C. 429, 24 S. E. 780.

Must Be Pleaded When Relied on as a Defense.—In an action to recover the statutory penalty for usury the two-year statute of limitations must be pleaded when relied on as a defense, the clause relating thereto having been taken out of section 3836 of the Code and placed in this section and thereby made a statute of limitations, but when properly pleaded the burden is upon the plaintiff to prove that his suit is brought within two years from the time the cause of action accrued. *McNeill v. Suggs*, 199 N. C. 477, 478, 154 S. E. 729.

Section 24-2 Defines the Penalty for Usury.—The right to recover interest is governed by section 24-2 which permits a recovery of twice the amount of interest paid if brought within the time prescribed by this section. *Roberts v. Ins. Co.*, 118 N. C. 429, 24 S. E. 780.

Application Illustrated in *Rogers v. Bank*. 108 N. C. 574, 13 S. E. 245.

III. SUBSECTION THREE—FORFEITURES OF ALL INTEREST FOR USURY.

Editor's Note.—The Act of 1931 which added subsection 3 to this section provided that it should not affect pending litigation. It became effective April 1, 1931.

This section is prospective only, and is applicable only to a forfeiture under § 24-2, which has occurred, or shall occur, since its ratification on April 1, 1931. *Farmers' Bank, etc., Co. v. Redwine*, 204 N. C. 125, 130, 167 S. E. 687.

Continuing Injunction against Foreclosure.—Since a junior lienor seeking to enjoin foreclosure under a prior mortgage on the same land until a bona fide controversy as to the amount due under the prior debt is settled, is not entitled to invoke the forfeiture of all interest, but is required to tender the principal of the debt plus legal interest, a decree continuing the injunction to the final hearing is not error notwithstanding defendants' plea of the two-year statute of limitations for the forfeiture of interest, even if it be conceded that an action for forfeiture of the interest is barred by the statute. *Pinnix v. Maryland Cas. Co.*, 214 N. C. 760, 200 S. E. 874.

§ 1-54. One year.—Within one year an action—

1. Against a public officer, for a trespass under color of his office.

2. Upon a statute, for a penalty or forfeiture, where the action is given to the state alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation.

3. For libel, assault, battery, or false imprisonment.

4. Against a public officer, for the escape of a prisoner arrested or imprisoned on civil process.

5. An application for a widow's year's allowance. (Rev., s. 397; Code, s. 156; C. C. P., s. 35; 1885, c. 96; C. S. 443.)

Cross References.—As to actions in the nature of quo warranto, see § 1-514 et seq. See also § 28-175. As to liability for escape under civil process, see § 162-21. As to permitting escape of prisoners, see § 14-257. As to widow's year's allowance and application thereof, see § 30-15.

Subsection One—Extent to Which Application Limited—Town Officers.—This section is properly restricted to unlawful acts done by a public officer, under color of his office, to the person and property of another, by violence or force, direct or imputed, and does not apply to a breach of official duty in reference to the officials of a town as employees thereof, in wrongfully diverting the funds of the town to a railroad company in acquiring a right of way for it. *Brown v. Southern R. Co.*, 188 N. C. 52, 123 S. E. 633.

Same—Railroad Conspiring with Officials.—Where a railroad company, through its agents has participated in the unlawful appropriation of a town's funds, the mere fact that the trial court has dismissed the action as to the members of the municipal board participating in the commission of the wrongful act, under the plea of this section, will not likewise or necessarily bar the action against the railroad company, under the same plea, under an alleged

privity between them. *Brown v. Southern R. Co.*, 188 N. C. 52, 53, 123 S. E. 633.

Action against Justice of Peace.—A summons was issued to recover the penalty against a justice of the peace, for performing the marriage ceremony without the delivery of the license therefor to him, G. S. 51-6, within less than a year from the time he had performed it, it was held, the plea of this section could not be sustained. *Wooley v. Bruton*, 184 N. C. 438, 114 S. E. 628.

Subsection Two—Application to Clerk of Court.—An action against a clerk for a penalty, if not brought within one year, is barred by the statute of limitations. *State v. Nutt*, 79 N. C. 263.

Subsection Three—Disability Preventing Bar.—An action for assault and battery is barred upon the plea of this section, if not commenced within one year, but if the plaintiff alleges and shows that he could not sooner have brought the action because of his mental condition or insanity, the time of such disability will be deducted from the running of the statute. *Hayes v. Lancaster*, 200 N. C. 293, 156 S. E. 530.

Subsection Three—Action for Libel.—Where, in an action for libel, defendants admit that the article was published in defendant magazine on a certain date, and plaintiff shows that the action was instituted one day less than a year thereafter, defendant is not entitled to nonsuit upon his plea of the one-year statute of limitations. *Harrell v. Goerch*, 209 N. C. 741, 184 S. E. 489.

Subsection Three—Action for False Imprisonment.—Where it appeared that plaintiff's cause of action based upon the alleged wrongful act of defendant in causing plaintiff's detention in an insane asylum was instituted less than one year from the date plaintiff was discharged as sane, plaintiff's cause of action was not barred. *Jackson v. Parks*, 216 N. C. 329, 4 S. E. (2d) 873.

§ 1-55. Six months.—Within six months an action—

1. For slander.

2. Upon a contract, transfer, assignment, power of attorney or other instrument transferring or affecting unearned salaries or wages, or future earnings, or any interest therein, whether said instrument be under seal or not under seal. The above period of limitation shall commence from the date of the execution of such instrument.

3. For the wrongful conversion or sale of leaf tobacco in an auction tobacco warehouse during the regular season for auction sales of tobacco in such warehouse. This paragraph shall not apply to actions for the wrongful conversion or sale of leaf tobacco which was stolen from the lawful owner or possessor thereof. (Rev., s. 398; Code, s. 157; C. C. P., s. 36; 1931, c. 168; 1943, c. 642, s. 2; C. S. 444.)

Local Modification.—Cleveland, Rutherford: 1933, c. 167.

Cross Reference.—See also §§ 1-158, 95-31.

Editor's Note.—The Act of 1931 which added subsection 2 of this section was ratified on March 23, 1931.

The 1943 amendment added subsection 3.

See 11 N. C. L. R. 220.

Necessity for Affirmative Plea.—In an action for slander, if the defendant does not plead the Statute of Limitations, the plaintiff may recover, though the proof shows that the words were spoken more than six months before the commencement of the action. *Pegram v. Stoltz*, 67 N. C. 144.

Same—Where Mislead by Petition.—If the defendant has been misled by allegation of a different date from the one proved, so that he failed to set up this statute in his answer, the judge would, of course, allow him to amend his answer. *Pegram v. Stoltz*, 67 N. C. 144.

An action for slander begun more than six months after the publication of the alleged defamatory words is barred by the statute of limitations under this section, the right of action accruing from the date of publication, regardless of the fact that it is begun within six months from the discovery by plaintiff that defendants were the authors thereof. *Gordon v. Fredle*, 206 N. C. 734, 175 S. E. 126.

When Action Begun.—Where a writ in slander was issued, returnable to a term of the Court, and no alias issued from such return term, but a writ issued from the next term thereafter, it was held that the latter writ was the commencement of the suit, and the limitation to the action must be determined accordingly. *Hanna v. Ingram*, 53 N. C. 55.

Application Illustrated. — Where the plaintiff brought an action for slander more than six months after the cause accrued, and then afterwards amended his complaint so as to include words spoken within six months before the beginning of the action, but more than eighteen after the filing of the amended complaint, and the defendant pleaded the statute of limitations, it was held, (1) the plaintiff's cause of action was barred; (2) the amended complaint set up a new cause of action, and this was also barred. *Hester v. Mullen*, 107 N. C. 724, 12 S. E. 447.

§ 1-56. All other actions, ten years.—An action for relief not herein provided for must be commenced within ten years after the cause of action has accrued. (Rev., s. 399; Code, s. 158; C. C. P., s. 37; C. S. 445.)

I. In General.

II. Actions to Which Applicable.

I. IN GENERAL.

Purpose of Section. — This section was intended as a sweeping statute of repose and to cure omissions in former statutes. *Brown v. Morsey*, 124 N. C. 292, 296, 32 S. E. 687. From concurring opinion.

This section was intended to be a universal statute of repose, applying to all causes of action not included among those specifically enumerated in the preceding sections of the statute of limitation. It could have no other purpose. It being almost impossible to enumerate all cases for which a statute of repose was needed, this section was passed to embrace, in its very words, any "action for relief not herein provided for." *Woodlief v. Wester*, 136 N. C. 162, 169, 48 S. E. 578. From dissenting opinion.

See to same effect *Ex parte Smith*, 134 N. C. 495, 502, 47 S. E. 16; *Wyrick v. Wyrick*, 106 N. C. 84, 86, 10 S. E. 916.

When Statute Begins Running.—Where a covenant of warranty and seizin was breached at the time of delivery of the deed, this section begins running against an action for such breach from the time of the delivery. *Shankle v. Ingram*, 133 N. C. 254, 45 S. E. 578.

This section begins to run against an action by the vendor to recover possession from the vendee when the possession of vendee becomes hostile by a refusal to surrender after demand and notice. *Overman v. Jackson*, 104 N. C. 4, 10 S. E. 87.

An action to impeach the final account of a personal representative must be brought within ten years from the filing and auditing thereof as provided in this section. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294. See dissenting opinion.

In an action by one who claims as enterer of "Cherokee Lands," the cause of action is barred in ten years from the registration of the grant. *Frazier v. Gibson*, 140 N. C. 272, 52 S. E. 1035; *Phillips v. Buchanan Lumber Co.*, 151 N. C. 519, 66 S. E. 603.

This statute does not begin to run until there is a person in esse competent to begin the suit, that is, until the appointment of an administrator. This is a well recognized rule. *Murray v. The E. G. Co.*, 7 Eng. C. L. 66; *Godley v. Taylor*, 14 N. C. 178. *Lynn v. Lowe*, 88 N. C. 478, 483.

Application Immaterial Where Period Has Not Run.—Where ten years has not elapsed it is not necessary to determine whether this section applies. *Burgwyn v. Daniel*, 115 N. C. 115, 119, 20 S. E. 462.

Charging Section with Section 1-52.—Where, if the action had not been barred by the provisions of subsections 4 and 9 of section 1-52, it would have been barred under this section, it was not error to tell the jury that the action was barred in three years, or in ten years. *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 285.

Section Not Affected by Section 1-52.—This section applying to an action against an executor or administrator for a final accounting and settlement, is not affected by the provisions of sec. 1-52, as to actions on their official bonds. *Pierce v. Faison*, 183 N. C. 177, 110 S. E. 857.

Practice.—Under the former practice an objection that the equity of plaintiff seeking to declare a trust in land was barred could be taken by demurrer; under the present practice it may be taken by a motion to dismiss the action. *Marshall v. Hammock*, 195 N. C. 498, 502, 142 S. E. 776.

Applied in *Teachey v. Gurley*, 214 N. C. 288, 199 S. E. 83. Cited in *Tiefenbrun v. Flannery*, 198 N. C. 397, 398, 151 S. E. 857; *Mauney v. Coit*, 86 N. C. 464; *Smith v. Smith*, 72 N. C. 139; *United States v. Pastell*, 91 F. (2d) 575; *Creech v. Creech*, 222 N. C. 656, 24 S. E. (2d) 642.

II. ACTIONS TO WHICH APPLICABLE.

Creditor's Action against Purchasing Partners. — The

question as to whether an action by the creditors of a partnership to hold the owners of the legal estate (who purchased the interest of one partner in the partnership property) as trustees for the security of their debts, is barred by this section, was raised but not decided. *Ross v. Henderson*, 77 N. C. 170.

Passive Trust—Actions by Children against Trustee.—Where the testator creates his executor as trustee of a part of the estate "to collect and apply the rents and hires, and interests thereof, to the support of his certain named son and his family during the son's life and then to convey to his child or children," it constitutes an active trust during the life of the son which becomes passive at his death, at which time the relationship of the parties would be adverse to each other, and start the running of the statute of limitations, against the children, then of age, and not under legal disability, and bar their action for an accounting and settlement after ten years, especially when the relationship of trustee has been openly repudiated. *Latham v. Latham*, 184 N. C. 55, 113 S. E. 623.

Claim for Admeasurements of Dower.—This section is applicable to the claim for admeasurement of dower against the heirs, or one claiming under them. *Brown v. Morrissey*, 124 N. C. 292, 296, 32 S. E. 687.

Action to Test Validity of Stockholder's Election. — There is no statute of limitations applicable to an action brought by citizens to test the validity of an election held relative to subscribing stock to a railroad company, but such action must be brought within a reasonable time. *Jones v. Commissioners*, 107 N. C. 248, 12 S. E. 69.

Action of Cotenants to Protect Title.—Where one tenant in common in possession has obtained for himself the outstanding title to the locus in quo, equity will declare him to have purchased for the benefit of the others, to be held in trust for them, and the ten-year statute applying to his possession, this section in such instances, will not begin to run in his favor against his cotenants until some act of ouster on his part sufficient to put them to their action. *Gentry v. Gentry*, 187 N. C. 29, 121 S. E. 188.

Impeachment of Final Account of Representative.—When a final account of a representative is filed and audited, an action to impeach it must be brought within ten years from the filing and auditing of the same. The period of limitation is not specifically declared, but such a case falls within this section. *Woody v. Brooks*, 102 N. C. 334, 339, 9 S. E. 294.

When the administrator of A died eight years after filing an ex parte account, the plaintiff qualified as his executor within one month, and within seventeen months began a proceeding to make real estate assets, to which the administrator de bonis non of A became a party, and filed a complaint to recover the amount due on said final account, it was held, that although this section applied for the reason stated in *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294, it did not bar the action. *Wyrick v. Wyrick*, 106 N. C. 84, 10 S. E. 916.

Release of Right to Surcharge and Restate Final Account.—There was no express Statute as to the length of time necessary to presume a release of the right to surcharge and restate a final account, duly filed and audited, but by analogy it seems to have been ten years, the same length of time which is now required by this section to bar such action. *Nunnery v. Averitt*, 111 N. C. 394, 396, 16 S. E. 683.

Action for Balance Due Heirs.—Where the distributees, who until they became of age, had a guardian, did not bring suit for an alleged balance due under the testator's will for 15 years after the executor filed his final account, the action was barred by either section 1-50, par. 2 or this section. *Culp v. Lee*, 109 N. C. 675, 14 S. E. 74.

Partition Proceedings.—Where a petition in partition is filed, and the petitioners enter into possession of their respective shares, in accordance with the judgment of partition therein entered, and it is therein provided that the widow of the intestate should receive a certain sum monthly in lieu of dower, which sum is made a lien upon the lands, an action by the widow to enforce her claim against the land is barred after the lapse of more than ten years from the partition and decree of owelty in view of this section, and the fact that a second decree of confirmation was entered in the case several years thereafter for the purpose of recording the papers, the original papers having been destroyed by fire, does not alter this result. *Aldridge v. Dixon*, 205 N. C. 480, 171 S. E. 777.

Recovery of Real Estate.—This section does not apply to actions for the recovery of real estate because Secs. 1-39, 1-40 apply to its exclusion. *Williams v. Scott*, 122 N. C. 545, 551, 29 S. E. 877.

Same—Defendant in Ejectment.—The ten years statute

of limitations does not apply to defendants in ejectment who claim the land by adverse possession, where they have recognized plaintiff's claim and title thereto within that time. *Williams v. Scott*, 122 N. C. 545, 29 S. E. 877.

Same—To Declare Senior Grantee a Trustee.—An action brought by plaintiff, claiming under the junior grantee of public land, to have defendants, claiming under the senior grantee, declared to be trustees for plaintiff, and to require them to convey to plaintiff such title as they claimed, was barred, where not brought within 10 years from the registration of the senior grant, by this section. *Ritchie v. Fowler*, 132 N. C. 788, 44 S. E. 616.

Same—To Declare Vendee a Trustee.—Since the other statutes of limitations do not expressly mention the trust relation between vendor and vendee, it could be only included under this section, and it would then be allowed only where the possession was adverse or where it was necessary to prevent some wrong or gross injustice. *Bradsher v. Hightower*, 118 N. C. 339, 405, 24 S. E. 120.

Same—Enforcement of Parol Trust in Favor of Wife.—Section apparently not applicable, see *Spence v. Foster Pottery Co.*, 185 N. C. 218, 117 S. E. 32.

Same—To Recover Possession of Vendee.—In an action to recover possession by vendor against a vendee who enters under the contract, the only statute of limitation applicable is that of this section. *Overman v. Jackson*, 104 N. C. 4, 10 S. E. 87.

Same—Against Remainderman.—Where a remainderman, not being in possession, executes a mortgage, the foreclosure of the mortgage is not barred after ten years from the forfeiture thereof or from the last payment, such action being brought within ten years from the time of the acquisition of the possession by the remainderman. *Woodlief v. Wester*, 136 N. C. 162, 48 S. E. 578.

Same—Contract Action for Breach of Covenant.—An action in contract for the breach of covenants of seizin and warranty in a deed, and not in tort for fraud, is not governed by section 1-52, subsec. 9, but by this section. *Shankle v. Ingram*, 133 N. C. 254, 45 S. E. 578.

This section applies to an action which is brought upon the covenants in the deed and not upon the theory that there was fraud or mistake in the deed, nor upon the theory that the defendant had made a fraudulent representation as to the quantity or acreage, which would entitle the plaintiff to recover damages for deceit. *Shankle v. Ingram*, 133 N. C. 254, 257, 45 S. E. 578.

Same—Where No Possession by Either Party.—Where there is no possession by either the mortgagor or mortgagee there can be no running of the statute. If it were intended that this section should apply where there is no possession by either party, it was utterly useless to insert in section 1-47, subsec. 3 the provision in regard to possession, as the statute, under such a construction of this section, would run whether there was any possession or not, and the period of limitation is the same in both sections. *Woodlief v. Wester*, 136 N. C. 162, 169, 48 S. E. 578. But see dissenting opinion, and see the dissenting opinion in *Simmons v. Ballard*, 102 N. C. 105, 111, 9 S. E. 495.

Same—Action to Foreclose Mortgage.—Since section 1-47, subsec. 3 is an express provision of law directly applicable to an action to foreclose, it must be disregarded altogether before this section would be a complete reversal of the will of the legislature as plainly expressed. *Woodlief v. Wester*, 136 N. C. 162, 168, 48 S. E. 578.

Same—Where Mortgagee Sells and Repurchases.—Where the mortgagee sells and conveys to one who reconveys to him the mortgagor or his representatives can call upon the mortgagee for an account at any time within ten years after the cause of action accrues. *Bruner v. Threadgill*, 88 N. C. 361.

Same—To Declare Defendants in Execution Equitable Owners.—A suit to declare one of the defendants in execution, the equitable owner of lands for the purchase of which he has furnished the price, and his codefendants trustees, is barred by the ten-year statute of limitations. *Sexton v. Farrington*, 185 N. C. 339, 117 S. E. 172.

Same—Failure to Call for Grant of State Lands.—A failure of the enterer upon unappropriated and vacant state lands, or those claiming under him, to call for the grant within ten years after entry, would presume an abandonment in favor of those claiming under and by virtue of a junior grant. *Frazier v. Cherokee Indians*, 146 N. C. 477, 59 S. E. 1005.

Same—Taking of Land without Compensation.—Where in an action to recover damages from a city for the taking of plaintiff's land for a public use without compensation, in which the city pleaded the statute of limitations and there is no finding by the jury as to the time the first substantial injury, etc., was sustained by the plaintiff, the cause will be

remanded for a new trial, and upon this appeal it is held that it is unnecessary to decide whether the three-year or ten-year statute would be applicable to a suit of this kind. *Dayton v. Asheville*, 185 N. C. 12, 115 S. E. 827.

Enforcement of Decree.—An action to enforce the execution of a decree of court confirming a report that an alley was to be laid off in certain lands is barred by this statute. *Hunter v. West*, 172 N. C. 160, 90 S. E. 130.

Alimony—Accrual of Right.—In proceedings for alimony under the provisions of § 50-16, the right of a wife for alimony pendente lite arises to her, in application of the statute of limitations, when the action is commenced, and not from the time of the separation from her husband. *Garris v. Garris*, 188 N. C. 321, 124 S. E. 314. See note of this case under sec. 50-16.

Action to Declare Trust in Land.—In *Marshall v. Hammock*, 195 N. C. 498, 142 S. E. 776, this section was held applicable to plaintiff's right of action to declare a trust in land.

Action for Delinquent Taxes.—Neither the three nor the ten years' statute of limitations applies to an act authorizing the State or a county or city to recover delinquent taxes unless such act expressly so provides. *Wilmington v. Cronly*, 122 N. C. 383, 30 S. E. 9.

Application to Judgments of State Courts.—The words "any State" appearing in sec. 1-47, subsec. 1, must be taken to mean the judgment of a court of any State including our own, but it could make no material difference even if not construed to include this state, since, every action for relief not specially provided for must be commenced within the same period of ten years after the cause of action shall have accrued. *McDonald v. Dickson*, 85 N. C. 248, 252.

SUBCHAPTER III. PARTIES.

Art. 6. Parties.

§ 1-57. Real party in interest; grantees and assignees.—Every action must be prosecuted in the name of the real party in interest, except as otherwise provided; but this section does not authorize the assignment of a thing in action not arising out of contract. An action may be maintained by a grantee of real estate in his own name, when he or any grantor or other person through whom he derives title might maintain such action, notwithstanding the conveyance of the grantor is void, by reason of the actual possession of a person claiming under a title adverse to that of the grantor, or other person, at the time of the delivery of the conveyance. In case of an assignment of a thing in action the action by the assignee is without prejudice to any set-off or other defense, existing at the time of, or before notice of, the assignment; but this does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, upon good consideration, and before maturity. (Rev., s. 400; Code, s. 177; C. C. P., s. 55; 1874-5, c. 256; C. S. 446.)

I. Real Parties in Interest.

A. In General.

B. Personal Actions.

C. Actions Concerning Realty.

II. Actions by Grantees.

III. Assignments.

Cross References.

As to bonds of executors, administrators, and collectors, and right of action on such bonds, see §§ 28-34, 28-42. As to bonds of guardians and right of action thereon, see §§ 33-13, 33-14. As to actions on official bonds and bonds in suits, see §§ 109-33, 109-34, 109-35. As to negotiable instruments, rights of holder, see § 25-57 et seq.

As to real party in interest in assignment see hereunder part III of this annotation.

I. REAL PARTIES IN INTEREST.

A. In General.

Purpose.—The provision requiring every action to be prosecuted in the name of the real party in interest is significant, and was necessary to let in all defenses, equitable as well as legal, against the real party in interest, and save a

resort to another action, so as to harmonize with the constitution. Art. II, [IV] Sec. 1. *Abrams v. Cureton*, 74 N. C. 526.

Enabling Act.—The section does not confer a right of action; it only enables the enforcement of a right of action already accrued. *Usry v. Suit*, 91 N. C. 417.

Strict Compliance.—Under this section there is no middle ground; for whenever the action can be brought in the name of the real party in interest it must be so done. *Rogers v. Gooch*, 87 N. C. 444. See also, *McGuinn v. High Point*, 219 N. C. 56, 13 S. E. (2d) 48.

Who Is Real Party in Interest.—The real party in interest is the party who would be benefited or injured by the judgment in the case. An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject matter of the litigation. 5 *Western Law Monthly* 80.

The requirement that an action must be maintained by the real party in interest means some interest in the subject matter of the litigation and not merely an interest in the action. *Choate Rental Co. v. Justice*, 211 N. C. 54, 188 S. E. 609.

Exception Does Not Apply to Fire Insurance Companies.—If the exception in this section ("But this section does not authorize the assignment of a thing in action not arising out of contract") operated to prevent a fire insurance company, on paying a loss, from suing the one whose negligence caused the loss, it was repealed by Laws 1899, ch. 54, sec. 43 (see now § 58-177), which provides that the insurance company should be subrogated, to the extent of the payment by it, to all right of recovery by assured. *Buckner v. United States Fire Ins. Co.*, 209 N. C. 640, 647, 184 S. E. 520, citing *Hamburg-Bremen Fire Ins. Co. v. Atlantic Coast Line R. Co.*, 132 N. C. 75, 43 S. E. 548.

Right to Jury Trial.—On the issue as to whether the plaintiff was the real party in interest he was entitled to a trial by jury. *Hershey Corp. v. Atlantic Coast Line R. Co.*, 207 N. C. 122, 124, 176 S. E. 265.

Action Dismissed.—When it is shown that a plaintiff is not a real party in interest, his action to recover, brought in his own right, will be dismissed on a motion as of nonsuit upon the evidence. *Chapman v. McLawhorn*, 150 N. C. 166, 63 S. E. 721.

Actions should be brought by the real parties in interest. *Hyatt v. McCoy*, 194 N. C. 25, 138 S. E. 405.

Question Cannot Be Raised on Appeal.—Where an action is instituted by a corporation on the theory that it was a duly substituted trustee of an active trust, under § 1-63, and the plaintiff's right to sue is not raised in the lower court, the question of whether the plaintiff is the real party in interest may not be raised by the defendant for the first time in the Supreme Court. *Asheville Safe Deposit Co. v. Hood*, 204 N. C. 346, 168 S. E. 524.

Applied in Berwer v. Union Central Life Ins. Co., 214 N. C. 554, 200 S. E. 1.

Stated in Lawson v. Langley. 211 N. C. 526, 191 S. E. 229.

Cited in In re Wallace. 212 N. C. 490, 193 S. E. 819; *Nutt Corp. v. Southern Ry. Co.*, 214 N. C. 19, 197 S. E. 534; *Riddick v. Davis*, 220 N. C. 120, 16 S. E. (2d) 662.

B. Personal Actions.

Contract for Benefit of Third Person.—The principle, sanctioned by several respectable authorities, is this: If A, on receipt of a good and sufficient consideration, agrees with B to assume and pay a debt of the latter to C, then C may maintain an action directly on such contract against A, although C is not privy to the consideration received by A. This section provides that every action must be prosecuted in the name of the real party in interest. In all the cases close attention is given to the language of the agreement. We can see no reason why the plaintiffs may not do directly that which it must be admitted they can do indirectly, nor do we see how the defendant is prejudiced thereby. *Voorhees v. Porter*, 134 N. C. 591, 602, 47 S. E. 31; *Shoaf v. Insurance Co.*, 127 N. C. 311, 37 S. E. 451.

Presumption from Possession of Chose in Action.—The possession of a chose in action raises a presumption that the person producing it on trial is the real party in interest. *Jackson v. Love*, 82 N. C. 408; *Pate v. Brown*, 85 N. C. 166.

Where the plaintiff produces an unendorsed bill of lading, and the evidence tends to show that he had sold the shipment to a person named therein as consignee, it is sufficient of the intent of the consignee to transfer the title by delivery of the bill of lading, to sustain the plaintiff's right to maintain his action as the real party in interest. *Lawshe v. R. R.*, 191 N. C. 437, 132 S. E. 160.

Ward Equitable Owner of Bond Payable to Guardian.—A bond made payable to a guardian is in equity the property of the ward, and suit may be brought upon it by the ward when the same was turned over in the guardian's settle-

ment, notwithstanding the legal title may have been transferred by the guardian's endorsement to another. *Usry v. Suit*, 91 N. C. 407. See also, *Melbane v. Melbane*, 66 N. C. 334.

Rights of Subrogated Insurer.—When an insurer against fire has completely indemnified the insured, he is subrogated to the rights of the insured and can alone, under this section, as the real party in interest, maintain an action against the wrongdoer. *Cunningham v. Railroad*, 139 N. C. 437, 51 S. E. 1029.

Employer or Insurer Subrogated to Rights of Injured Employee.—Where an employee has accepted compensation awarded by the Industrial Commission for an injury sustained by him in the course of his employment he cannot maintain an action against a third person upon the allegations that the negligence of the third person was the cause of the injury, as the employer or insurance carrier were subrogated to the right of action against the third person and the injured employee was not the real party in interest. *McCarley v. Council*, 205 N. C. 370, 171 S. E. 323.

And May Sue Third Persons.—Under this section an insurance carrier who has paid compensation to an injured employee may proceed in an action which has been instituted against a third person by the injured employee or his personal representative. *Betts v. Southern Ry. Co.*, 71 F. (2d) 787.

Endorser Subrogated to Rights of Payee.—Where a person presenting a note to a bank is required to endorse it, and later to endorse the drawer's check payable to the bank and taken by it in payment of the note, and the check is not paid and is charged by the bank to the endorser's account therein, the endorser so paying the check is subrogated to the rights of the payee bank and becomes the real party in interest and may prosecute an action against the drawer, payee, and collecting banks under the provisions of this section to determine the liability of the parties. *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253.

Rights of Undisclosed Principal on Contract.—An undisclosed principal holding the business rights and interests under the contract, may sustain the action thereon. *Peanut Co. v. R. R.*, 155 N. C. 148, 71 S. E. 71; *Williams v. Honeycutt*, 176 N. C. 102, 96 S. E. 730.

Liability of Bank Directors to Each Other.—Where directors of a bank have paid the liability of others under an agreement, each one of them may maintain his action against each of the defaulting members under this section, and such is not a misjoinder of parties prohibited by statute. *Taylor v. Everett*, 188 N. C. 247, 124 S. E. 316.

Agent as Real Party in Interest.—Where, under agreement with his principal, the agent of a manufacturer is obligated to pay the freight charges on shipments made to him, and upon demand of the carrier he has paid its unlawful charges on a shipment, he is the party aggrieved, within the meaning of this section, and may maintain his actions to recover the excess, and also the penalty when entitled thereunto. *Tilley v. R. R.*, 172 N. C. 363, 90 S. E. 309.

Agent for Collection.—An agent for the collection of rents is not the real party in interest. *Martin v. Mask*, 158 N. C. 436, 74 S. E. 343.

A rental agent may not maintain a suit in ejectment or for the collection of rents, the owner being the real party in interest, under this section. *Home Real Estate, etc., Co. v. Locker*, 214 N. C. 1, 197 S. E. 555.

Assignee for Collection.—An assignee for purposes of collection is not a "real party in interest." *Bank v. Rochamora*, 193 N. C. 1, 136 S. E. 259; *Bank v. Exum*, 163 N. C. 199, 79 S. E. 498; *Abrams v. Cureton*, 74 N. C. 523; *Morefield v. Harris*, 126 N. C. 628, 36 S. E. 125; *Federal Reserve Bank v. Whitford*, 207 N. C. 267, 176 S. E. 584. See also, 5 N. C. Law Rev. 369.

The assignee of a chose in action may bring an action thereon in his own name, under this section, and a bond given to indemnify a bank from any loss it might sustain by reason of its taking over the assets and discharging the liabilities of another bank is assignable. *North Carolina Bank, etc., Co. v. Williams*, 201 N. C. 464, 160 S. E. 484.

Transferor of Claim.—A plaintiff having transferred the claim, upon which his action was subsequently brought, to an attorney at law, for collection, and with directions to apply the proceeds to demands which he held for collection against the said plaintiff, an action will not lie in the name of the plaintiff on the claim, he not being the real party in interest. *Wynne v. Heck*, 92 N. C. 415.

Transferee of Claim.—The discretion conferred by § 1-74 is a sound discretion to be exercised where the circumstances render it proper that the action be prosecuted in the name of the transferee rather than in that of the original plaintiff; and one circumstance calling for the exercise of

the discretion is the fact that the transferor, as in this case, has parted with all interest to the transferee, since this section requires that the action be prosecuted in the name of the real party in interest. *Hood v. Bell*, 84 F. (2d) 136, 138.

Action on Note by Liquidating Agent.—In an action on a note executed to a bank, the liquidating agent of the payee bank and the Reconstruction Finance Corporation, to which the note had been pledged as collateral security are both interested parties and may jointly sue the makers of the note. *Hood v. Progressive Stores*, 209 N. C. 36, 182 S. E. 694.

Shippers Are Real Parties in Interest in Action for Discrimination in Rates.—Where certain carriers by truck sought injunctive relief against railroad carriers for discrimination in rates against certain cities and against certain commodities, it was held that the basis for injunctive relief must be an interference or threatened interference with a legal right of the petitioner, not of a third party and that the shippers would be the real parties in interest not the contract truck carriers. *Carolina Motor Service v. Atlantic Coast Line R. Co.*, 210 N. C. 36, 38, 185 S. E. 479, 104 A. L. R. 1165.

Action on Fidelity Bond.—Where stockholders and directors gave their note to the bank for the amount of a shortage due to embezzlement by a cashier to prevent liquidation, and the bank neither surrenders nor assigns the fidelity bond of the defaulting cashier, the bank is the real party in interest and entitled to maintain an action upon the bond. *People's Bank v. Fidelity, etc., Co.*, 4 F. Supp. 379, 382.

Lessor Must Bring Action of Summary Ejectment.—Although an agent of the lessor may make the oath in writing required in summary ejectment under § 42-28, the action must be prosecuted in the name of the lessor as the real party in interest, and it may not be maintained in the name of the lessor's rental agent. *Choate Rental Co. v. Justice*, 211 N. C. 54, 188 S. E. 609.

Title to Public Office.—Taxpayers may not maintain an action to determine title to a public office, neither claimant to the office being a party, since plaintiffs are not the real parties in interest. *Freeman v. Board of Com'rs*, 217 N. C. 209, 7 S. E. (2d) 354.

Suit by Retiring State Officer.—Where a state officer goes out of office pending a suit by him in his official capacity, his incoming successor is entitled to be made a party in his stead, the state is the real party in interest, appearing in the name of its successive agents. *Lacy v. Webb*, 130 N. C. 546, 41 S. E. 549. See also, *Peebles v. Boone*, 116 N. C. 57, 21 S. E. 187, 44 Am. St. Rep. 429.

Quo Warranto.—Every action must be prosecuted by the party in interest, and hence, in a quo warranto, (now a proceeding by the Attorney General) while it need not appear that the relator is a contestant for the office, it must appear from the complaint that he is an inhabitant and taxpayer of the jurisdiction over which the officer, whose title is questioned, exercises his duties and powers. *Hines v. Vann*, 118 N. C. 6, 23 S. E. 932; *Foard v. Hall*, 111 N. C. 369, 16 S. E. 420.

Transfer beyond Authority of Agent.—When a special agent goes beyond the scope of his authority and sells a negotiable bond, without endorsement, the purchaser thereof is not a real party in interest. *McMinn v. Freeman*, 68 N. C. 342.

Actions by Executor or Administrator.—An executor or administrator must sue, upon causes of action to which the estate is the real party in interest, in his representative capacity. *Rogers v. Gooch*, 87 N. C. 442. See also *Sitzer v. Lewis*, 69 N. C. 133; *Danis v. Fox*, 69 N. C. 435.

When Action by Administrator d. b. n.—Where a bond for the payment of money is executed to an administrator as such, and he dies, an action on said bond can be maintained only by an administrator de bonis non of the testator. *Ballinger v. Curriton*, 104 N. C. 477, 10 S. E. 664.

Administrator of Deceased Guardian as Party.—An administrator of a deceased guardian cannot maintain an action to collect a note made payable to his intestate as guardian, unless it be shown that the money due thereon, had become the property of the intestate's estate. *Alexander v. Wriston*, 81 N. C. 193.

Personal Representative.—Where an action has been instituted by an injured employee who subsequently accepts an award of compensation, the insurance carrier should be made a party plaintiff; but this is not necessary in the case of suit instituted by the personal representative of a deceased employee. Such personal representative continues the suit which has been commenced; but after the acceptance of an award of compensation, the recovery goes, so far as necessary, to the reimbursement of the insurance carrier and only the excess to the persons entitled under the wrong-

ful death statute. *Betts v. Southern Ry. Co.*, 71 F. (2d) 787, 791.

Widow Entitled to Burial Expenses of Husband.—A widow who pays an account for burial expenses of her husband is the proper party plaintiff in an action against the administrator, being the real party in interest. *Ray v. Honeycutt*, 119 N. C. 513, 26 S. E. 127.

Action of Heirs at Law on Doubtful Claim.—Where a trustee in bankruptcy or the creditor has waived a doubtful claim in favor of a bankrupt's estate and he has long since been discharged by the court, after having filed his final account, a motion to dismiss the action of his heirs at law as not being the real parties in interest will be denied. *Cunningham v. Long*, 185 N. C. 613, 125 S. E. 265.

Parties to Interpretation of Will.—Persons who are interested neither as heirs at law of the deceased nor as beneficiaries under the writing propounded as the will, are neither necessary nor proper parties to a case agreed to interpret its provisions, nor to set it aside, nor to assert that an order made by the court be vacated on the ground that they had not been duly made parties or given consent that judgment be rendered out of term, etc. It is otherwise as to one who has been named as a beneficiary who has neither been duly made a party nor given consent to the agreed case or the further action of the court thereon. *Bank v. Dustowe*, 188 N. C. 777, 125 S. E. 546.

Claim under Workmen's Compensation Act.—It is required by this section, that an action be prosecuted in the name of the real party in interest, and where a statute names a person to receive funds and authorizes him to sue therefor, only the person named may litigate the matter, and where a claim under the Workmen's Compensation Act is litigated in the name of the deceased the proceeding is a nullity and will be dismissed on appeal to the Supreme Court. *Hunt v. State*, 201 N. C. 37, 158 S. E. 703.

Action for Seduction.—In an action brought to recover damages for seduction, if the female is under twenty-one years of age, the father is the real party in interest; if she be over twenty-one, then the wronged female is the real party in interest. *Tillaston v. Currin*, 176 N. C. 479, 97 S. E. 395; *Snider v. Newell*, 132 N. C. 614, 44 S. E. 354; *Williford v. Bailey*, 132 N. C. 404, 43 S. E. 929; *Scarlett v. Norwood*, 115 N. C. 285, 20 S. E. 459; *Hood v. Sudderth*, 111 N. C. 219, 16 S. E. 397.

Slander.—Where an action is brought by a husband, without making the wife a party thereunto, for slander of the wife, and the husband alleges no special damages, his action will not lie because he is not the real party in interest. *Harper v. Pinkston*, 112 N. C. 293, 17 S. E. 161.

Negligent Mutilation of Dead Body.—In order of their priority of inheritance of the personal property of the deceased, the next of kin may maintain an action to recover damages for the negligent mutilation of his dead body. *Floyd v. R. R.*, 167 N. C. 55, 83 S. E. 12.

Applied in *Hood v. Mitchell*, 206 N. C. 156, 173 S. E. 61.

C. Actions Concerning Realty.

Conveyance of Land Pendente Lite.—Where it is sought by the owner of land, to remove as a cloud upon his title the lien of one claiming under his mortgage, and pendente lite has conveyed the land to another with full warranty deed, he may continue to prosecute his suit against the mortgagee as to the title, being a real party in interest. *Plotkin v. Bank*, 188 N. C. 711, 125 S. E. 541.

Where a party has commenced an action concerning an interest in lands, the cause may be continued by his successors in interest as the real parties in interest. *Barbee v. Cannady*, 191 N. C. 529, 132 S. E. 572.

Action by Remaindermen.—An action brought by remaindermen, during the lifetime of the first taker, to recover the land will not lie, because they are not the real parties in interest. *Blount v. Johnson*, 165 N. C. 26, 80 S. E. 882.

Action to Vacate Grant When State Not Interested.—Where the state has no interest in the land, as where title would not revert in the state, an action to vacate a grant must be brought by the party in interest in his own name, the state not being such a party. *State v. Bland*, 123 N. C. 739, 31 S. E. 475. See also, *Carter v. White*, 101 N. C. 30, 7 S. E. 473; *State v. Bevers*, 86 N. C. 588; and *Henry v. McCoy*, 131 N. C. 586, 42 S. E. 955.

Action by Tenant.—Against any third person, the tenant is entitled to the possession of the land and the crop, and for any injury thereunto while it is being cultivated he may maintain an action in his own name for the injury. He is the real party in interest. *State v. Higgins*, 126 N. C. 1113, 36 S. E. 113; *Bridgers v. Dill*, 97 N. C. 222, 1 S. E. 767.

Where the land has broom sage growing thereon the tenant is not the owner thereof in the sense that he may

maintain an action against one who has negligently destroyed it by fire, except only for its value for farming purposes on the leased premises. *Chauchy v. Atlantic Coast Line R. Co.*, 195 N. C. 415, 142 S. E. 327.

Action of Tenant for Trespass. — Under the provisions of this section, the court has the power to order the owner of the title to be made a party in his tenant's action for trespass involving an injury both to the possession and to the inheritance. *Tripp v. Little*, 186 N. C. 215, 119 S. E. 225.

Feme Covert as Party. — The rents arising from the real estate of a feme covert belong to her under the constitution of 1868, Art. 10, sec. 6, therefore an action therefor must be brought by the wife, she being the real party in interest. *Thompson v. Wiggins*, 109 N. C. 509, 14 S. E. 301.

A suit by mortgagor to correct mortgage, which through fraud or mistake or the negligence of the register of deeds in cross-indexing has failed to give a priority of lien to one of several mortgages entitled thereto, will be entertained in equity, as he is a real party in interest. *Gray v. Mewborn*, 194 N. C. 348, 139 S. E. 695.

Reformation of Deed of Trust.—Where a substituted trustee brings an action to reform a deed of trust and certain mortgage notes which are negotiable, the holders of the notes are necessary parties. *First Nat. Bank v. Thomas*, 204 N. C. 599, 169 S. E. 189.

II. ACTIONS BY GRANTEES.

Constitutionality.—This section permitting a grantee of real estate to maintain an action in his own name is not unconstitutional. It is concerned only with the mode of procedure and does not affect the merits of the case. *Justice v. Eddings*, 75 N. C. 584; *Buie v. Carver*, 75 N. C. 563.

Rights of Grantee in Ejectment Suit. — An action of ejectment may be maintained by a grantee in his own name whenever the grantor has a right to sue, notwithstanding the person in actual possession claims under a title adverse to that of such grantor. *Osborne v. Anderson*, 89 N. C. 263; *Johnson v. Prairie*, 94 N. C. 775; *Buie v. Carver*, 75 N. C. 561; *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993. As to summary ejectment, see sec. 42-26, and the note thereto.

III. ASSIGNMENTS.

Effect in General. — A construction was given to this section in *Harris v. Burnwell*, 65 N. C. 584, where *Pearson, C. J.*, says, "it abrogates the principle of the common law, that a chose in action cannot be assigned—confers an unlimited right to assign 'anything in action' arising out of contract, and subjects the assignee to any set-off or other defense existing at the time of or before notice of the assignment; the only saving being in regard to 'negotiable promissory notes and bills of exchange transferred in good faith and upon good consideration before due.' This language is as broad as it well can be; so that a note assigned after it is due, a half dozen times, will be subject to any set-off or other defense that the maker had against any one or all of the assignees at the date of the assignment or before notice thereof."

General Rule. — It would seem that something of a general rule concerning the relation of this section to assignability was laid down in *Woodcock v. Bostic*, 118 N. C. 830, 24 S. E. 362, in which *Montgomery, J.* says: "If an assignee can make no possible use of the thing assigned to him, the assignment is a vain thing. If the courts would not and could not entertain a suit at the hands of an assignee, because of the uselessness to him in any event of the thing transferred, how can it be said that such a thing is assignable? The law could not say that a matter, even though based on contract, could be assigned if it could not possibly be of use to the assignee. The law means, when it says that a thing is assignable, that the assignment carries with it rights of property, and that those rights can be enforced in the courts. It would seem to be clear, too, that a thing to be assignable, must be the subject of assignment generally, to every one, and not to be confined in its application to particular persons."

Effect of Assignment of Negotiable Paper. — In *Holly v. Holly*, 94 N. C. 670, 672, it was said: "Unquestionably, the complete equitable title to, and the substantial ownership of, a note or bond, negotiable by endorsement, may, without endorsement, be passed by the payee or obligee, to another person, by a sale and delivery thereof, and in this State, the purchaser thus becomes so thoroughly the owner, that an action upon the note or bond so transferred, can only be maintained in the name of the real or equitable owner."

Assignee Sues in Own Name. — An assignee may sue in his own name, under this section, as an equitable assignee

or cestui que trust could formerly have done in equity. *Miller v. Tharie*, 75 N. C. 151. See also, *Sutton v. Owen*, 65 N. C. 124.

Equitable Owner Real Party in Interest. — In the case of an assignment of a bill or note, which transfers only the equitable ownership, as distinguished from an endorsement according to the law merchant, which transfers the legal title, the equitable owner being the real party in interest may sue in his own name. *Tyson v. Joyner*, 139 N. C. 73, 51 S. E. 803; *Ball-Thrash v. McCormick*, 162 N. C. 472, 78 S. E. 303; *Andrews v. McDaniel*, 68 N. C. 385; *Egerton v. Carr*, 94 N. C. 653; *Milley v. Gatling*, 70 N. C. 410.

Assignee of Negotiable and Non-Negotiable Notes. — The assignee of a promissory note or bill of exchange endorsed before maturity, takes it free from all equities and defenses it may be subject to in the hands of the payee, but the assignee of a non-negotiable instrument, even before maturity, takes it subject to all equities or counterclaims existing between original parties at the time of the assignment; bonds or sealed notes, are on the same footing with non-negotiable instruments. *Spence v. Tabscott*, 93 N. C. 248; *Hanens v. Potts*, 86 N. C. 31; *Loan Association v. Merritt*, 112 N. C. 244, 17 S. E. 296; See also, *Andrews v. McDaniel*, 68 N. C. 385; *Bank v. Bynum*, 84 N. C. 24.

Unauthorized Endorsement of Negotiable Paper. — The assignee of a negotiable note endorsed by the clerk of the payee without authority is simply the holder of unendorsed negotiable paper and, as such, has, *prima facie*, the equitable title, and can maintain a suit thereon. *Bresce v. Crumpton*, 121 N. C. 123, 28 S. E. 351.

Assignment of Note by One of Joint Payees. — A note payable to three persons as executors of their testator, assigned by one of them without the concurrence of the others, does not enable the assignee to sue the makers thereon, under this section. *Johnson v. Mangum*, 65 N. C. 148.

Past Due Notes Subject to Defenses. — A note taken after it is due is subject to any set-off, or any other defense existing at the time of or before notice of assignment. *Vaughan v. Jeffreys*, 119 N. C. 144, 26 S. E. 94; *Guthrie v. Moore*, 182 N. C. 24, 108 S. E. 334. See also *Capell v. Long*, 84 N. C. 17; *Mosby v. Hodge*, 76 N. C. 387.

Action on Assigned Non-Negotiable Note. — The assignee of a non-negotiable note can maintain an action thereon; and so can the owner where there is no written assignment. *Wilcoxon v. Logan*, 91 N. C. 452.

When Judgments Treated as Contracts. — While judgments are not treated as contracts for all purposes, they are so treated for the purpose of distinguishing them from causes of action arising *ex delicto*, and are not embraced by this section, forbidding the assignment of things in an action not arising out of contract. *Moore v. Norvell*, 94 N. C. 270; *Winbury v. Koonce*, 83 N. C. 351.

Assignment of a Judgment Pending Appeal. — Where an assignment of a judgment for one of the defendants against the plaintiff was made during the pendency of the appeal, and it appeared that the judgment was brought by another person, such person, and not the nominal assignee, should be substituted as plaintiff. *Field v. Wheeler*, 120 N. C. 270, 26 S. E. 812.

Assignor of Contract Not a Party. — The vendee under a contract for the sale and delivery of cotton cannot maintain an action thereon when it uncontradictedly appears from his own evidence and he has assigned the contract to a third party, not to the action, and has no further interest therein. *Vaughan v. Davenport*, 157 N. C. 156, 72 S. E. 842.

When Executory Contracts Assignable. — As a general rule, executory contracts of an ordinary kind are now assignable, except that contracts involving a personal relation, or imposing liabilities which by express terms or by the nature of the contracts themselves import reliance on the personal credit, trust, or confidence in the other party cannot be assigned. *R. R. v. R. R.*, 147 N. C. 368, 61 S. E. 185.

Installments of Pension. — Installments of a pension payable in the future are not assignable. *Gill v. Dixon*, 131 N. C. 87, 42 S. E. 538.

Cited in Atlantic Joint Stock Land Bank v. Foster, 217 N. C. 415, 8 S. E. (2d) 235.

§ 1-58. Suits for penalties.—Where a penalty is imposed by any law, and it is not provided to what person the penalty is given, it may be recovered, for his own use, by any one who sues for it. When a penalty is allowed by statute, and it is not prescribed in whose name suit therefor may be commenced, suit must be brought in the

name of the state. (Rev., ss. 401, 402; Code, ss. 1212, 1213; R. C., c. 35, ss. 47, 48; C. S. 447.)

Editor's Note. — The three provisions permitting the plaintiff to reply fraud to a plea of release in a suit for penalty; the defendant to plead satisfaction in a suit on bonds; and that the sum due, with interest and costs, discharges penalty bonds, were secs. 932, 933, 934 of the Code of 1883 and secs. 1521, 1522, 1523 of the Revisal of 1905. They were left out of the Consolidated Statutes, but were again inserted by Public Laws 1925, c. 21. See §§ 1-59 to 1-61.

The construction of this section in *Norman v. Dunbar*, 53 N. C. 319, is that the suit should be in the name of the person claiming the penalty, and to whom, upon a recovery, it belongs, while in the subsequent case of *Duncan v. Philpot*, 64 N. C. 479, it is held that it should be prosecuted in the name of the state for his use. But in looking to the cases which have been maintained in the Supreme Court, and to which no objection on this ground seems to have been taken, we find that all have been in the name of the person suing and none in the name of the state. *Branch v. R. R.*, 77 N. C. 347; *Katzenstein v. R. R.*, 84 N. C. 688; *Keeter v. R. R.*, 86 N. C. 346; *Whitehead v. R. R.*, 87 N. C. 255; *Branch v. R. R.*, 88 N. C. 570; *Middleton v. Wilmington, etc., R. Co.*, 95 N. C. 167, 169; *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890; *Carter v. R. R.*, 126 N. C. 439, 36 S. E. 14. This uniform practice, acquiesced in, if not sanctioned by the court, must be deemed a settlement of the construction of the statute.

Constitutionality. — This section does not conflict with the constitution. *Goodwin v. Fertilizer Works*, 119 N. C. 122, 25 S. E. 795; *Sutton v. Phillips*, 116 N. C. 502, 21 S. E. 968; *Hodge v. R. R.*, 108 N. C. 24, 12 S. E. 1041; *Katzenstein v. R. R.*, 84 N. C. 688.

Penalty against Railroads Recovered by Statute. — The penalty prescribed by statute against railroads for failure to make returns can only be recovered in an action brought by the state. *Hodge v. R. R.*, 108 N. C. 24, 12 S. E. 1041.

Applied, in fixing penalty for illegal weighing of cotton, in *State v. Briggs*, 203 N. C. 158, 165 S. E. 339.

§ 1-59. Suit for penalty, plaintiff may reply fraud to plea of release.—If an action be brought in good faith by any person to recover a penalty under a law of this state, or of the United States, and the defendant shall set up in bar thereto a former judgment recovered by or against him in a former action brought by any other person for the same cause, then the plaintiff in such action, brought in good faith, may reply that the said former judgment was obtained by covin; and if the collusion or covin so averred be found, the plaintiff in the action sued with good faith shall have recovery; and no release made by such party suing in covin, whether before action brought or after, shall be in anywise available or effectual. (Code, s. 932; R. C., c. 31, s. 100; 4 Hen. VII, c. 20; Rev., s. 1521; 1925, c. 21; C. S. 447(a).)

§ 1-60. Suit on bonds; defendant may plead satisfaction. — When an action shall be brought on any single bill or on any judgment, if the defendant had paid the money due upon such bill or judgment before action brought, or where the defendant hath made satisfaction to the plaintiff of the money due on such bill or judgment in other manner than by payment thereof, such payment or satisfaction may be pleaded in bar of such action; and where only part of the money due on such single bill or judgment hath been paid by the defendant, or satisfied in other manner than by payment of money, such part payment or part satisfaction may be pleaded in bar of so much of the money due on such single bill or judgment, as the same may amount to; and where an action is brought on any bond which hath a condition or defeasance to make void the same upon the payment of a lesser sum at a day or place certain, if the obligor, his heirs,

executors or administrators have, before the action brought, paid to the obligee, his executor or administrator, the principal and interest due by the condition or defeasance of such bond, though such payments were not made strictly according to the condition or defeasance; or if such obligor, his heirs, executors or administrators have before action brought made satisfaction to the plaintiff of the principal and interest due by the condition or defeasance of such bond, in other manner than by payment thereof, yet the said payment or satisfaction may be pleaded in bar of such action, and shall be effectual as a bar thereof, in like manner as if the money had been paid at the day and place, according to the condition or defeasance, and so pleaded. (Rev., s. 1522; Code, s. 933; R. C., c. 31, s. 101; 4 Hen. VII, c. 20; 1925, c. 21; C. S. 447(b).)

§ 1-61. Payment into court of sum due discharges penalty of bonds.—If at any time, pending an action on any bond with a penalty, the defendant shall bring into court, where the action shall be pending, all the principal money and interest due, and also all such costs as have been expended in any suit upon such bond, the said money shall be deemed and taken to be in full satisfaction and discharge of said bond, and the court shall give judgment accordingly. (Rev., s. 1523; Code, s. 934; R. C., c. 31, s. 102; 4 Anne, c. 16; 1925, c. 21; C. S. 447(c).)

§ 1-62. Action by purchaser under judicial sale.—Any one given possession under a judicial sale confirmed, where the title is retained as a security for the price, is the legal owner of the property for all purposes of bringing suits for injuries thereto, after the day of sale, by trespass or wrongful possession, in the same manner as if the title had been conveyed to him on day of sale, unless restrained by some order of the court directing the sale; and the suit brought is under the control of the court ordering the sale. (Rev., s. 403; Code, s. 942; 1858-9, c. 50; C. S. 448.)

No Rights Acquired by Bidder before Confirmation. — In *Attorney-General v. Navigation Co.*, 86 N. C. 411, it is said: "The doctrine has been settled in this state, that the bidder at a judicial sale acquired no right before the confirmation of the report of the commissioner who made the sale under the order of the Court." In *re Dickerson*, 111 N. C. 114, 15 S. E. 1025, holds: "The sale then, not having been confirmed, the commissioner's deed has not yet divested the title out of the petitioner. While a formal direction to make a title is not always necessary, a confirmation of the sale cannot be dispensed with." Both cases being quoted, approved and followed in *Vanderbilt v. Brown*, 128 N. C. 498, 500, 39 S. E. 36.

But when confirmation is made, the bargain is then complete, and it relates back to the day of sale. *Vass v. Arrington*, 89 N. C. 14.

Notice to Purchaser. — All that a purchaser at a judicial sale is required to know is that the court has jurisdiction of the subject matter and the person. *Cord v. Finch*, 142 N. C. 139, 54 S. E. 1009; *Hackley v. Roberts*, 147 N. C. 201, 60 S. E. 975; *Harris v. Bennett*, 160 N. C. 340, 76 S. E. 217.

Collection of Purchase Price. — The remedy to enforce a decree under a judicial sale of land for the collection of the purchase price of the land is by motion in the cause. *Davis v. Pierce*, 167 N. C. 135, 83 S. E. 182.

§ 1-63. Action by executor or trustee.—An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, includes a person with whom, or in

whose name, a contract is made for the benefit of another. (Rev., s. 404; Code, s. 179; C. C. P., s. 57; C. S. 449.)

An express trust is defined to be a trust created by the direct and positive acts of the parties, by some writing or deed, or will. 22 N. Y. 389; 28 Ind. 112. See Hepburn's cases on Code Pl. 546, 552 n.

It often seems difficult to distinguish between such trustees and those with whom or in whose name contracts are made for the benefit of others, and many of the Code states (including North Carolina by this section) make the term "trustee of an express trust" cover this latter class of persons. Bliss Code Pl. § 55.

As illustrations of the former may be mentioned: An assignee for the benefit of creditors, 4 Abb Pr. 106; an obligee of a statutory bond, 25 O. S. 567; 29 O. S. 452; one holding possession of money upon trust for the benefit of others, 1 C. C. 57; 13 Bull. 294; assignees of a contract in trust to reimburse out of the proceeds thereof third persons for advances made, 4 Keyes 514; a mortgage trustee for holders of promissory notes secured by mortgages, 29 O. S. 330; trustees appointed to take and collect subscriptions for colleges and other similar purposes, 34 Howard Pr. 320; insurance brokers holding an open policy for "those and whom it may concern," 6 O. S. 554; one to whom the legal title in a note and mortgage has been transferred for the purpose of collection, 3 Bull. 365; 7 Rec. 9; an assignee of stock subscriptions, 12 Wis. 688; see 41 O. S. 321.

Includes Suits by Agent.—This section, permitting "a trustee of an express trust" to maintain an action in his own name, by its explanation of such a trustee, that he "shall be construed to include a person with whom, or in whose name a contract is made for the benefit of another," extends the meaning of the statute so as to include an agent who sues upon a note to him, as an agent, with the consent and for the benefit of his principal. Martin v. Mask, 158 N. C. 436, 74 S. E. 343.

Excludes Personal Representative of Trustee.—The "trustee of an express trust," as used in this section, does not include the personal representative of such trustee. Alexander v. Wriston, 81 N. C. 192.

By this section, fiduciaries are not made the real parties in interest, but are empowered to bring an action for the real beneficiaries. Lawson v. Langley, 211 N. C. 526, 191 S. E. 229.

Exception to § 1-57.—Under the provisions of this section a trustee of an express trust may sue without joining the one for whose benefit the action is brought, this being an exception to § 1-57, requiring actions to be brought by the real party in interest. Sheppard v. Jackson, 198 N. C. 627, 152 S. E. 801.

When Name of Beneficiary Undisclosed.—Under this section, when a person contracts in his own name, but really for the benefit of another, he is to be regarded as the trustee of an express trust, whether the name of the beneficiary is disclosed or not. Winders v. Hill, 141 N. C. 694, 54 S. E. 440.

Where a note was made payable to "J, cashier," and collateral security delivered to him, he being a member and cashier of the firm of "C. & J," the owners of the debt, an action for the foreclosure of the mortgage security was properly brought in the name of the cashier, he being the holder of the collateral as trustee for the firm. Jenkins v. Wilkinson, 113 N. C. 532, 18 S. E. 696.

Beneficiary Not a Necessary Party.—This section provides that an executor or trustee of an express trust may sue without joining with him the party equitably interested. Biggs v. Williams, 66 N. C. 429; Davidson v. Elms, 67 N. C. 229. See also, Jones v. McKinnon, 87 N. C. 294.

When Beneficiary May Be a Party.—The section, does not apply so as to exclude the beneficiary as a necessary party in a suit involving the question as to whether the trustee has exceeded his authority under the terms of the instrument creating the trust, and wherein the interests of the beneficiary may be seriously affected. Barbee v. Penny, 172 N. C. 653, 90 S. E. 805.

Suit upon Administration Bond.—In a suit upon an administration bond, the next of kin of the intestate are not necessary parties, and in such a suit the administrator of the principal in the bond need not be joined. Flack v. Dawson, 69 N. C. 44.

When Assignor May Sue Alone.—This section applies where a judgment creditor has assigned the judgment as security, and in such case an action may be brought by the assignor without joining the assignee. Chatham v. Realty Co., 180 N. C. 500, 115 S. E. 329.

Transferee as Trustee of Express Trust.—Where a plaintiff transferred the claim, upon which his action was subsequently brought, to an attorney at law, for collection,

and with directions to him to apply the proceeds to demands which he held for collection against the plaintiff due other parties. The effect of the transfer was to vest ownership of the claim in the attorney, as a "trustee of an express trust," and the action should have been brought in his name alone, or in conjunction with those of the cestuis que trustent. Wynne v. Heck, 92 N. C. 414.

An answer setting forth that B is the real owner of a note sued upon, but that it was assigned to the plaintiff, is to be taken as meaning that the plaintiff is trustee of an express trust, and so is properly plaintiff. Rankin v. Allison, 64 N. C. 673.

Speaking Demurrer Not Allowed.—Where the holder of a promissory note in due course, etc., sues thereon, who, as it appears, is a trustee of an express trust to collect certain certificates of deposit, and apply the proceeds to its payment for the benefit of himself and the holders of the certificates, a demurrer that the plaintiff is, in fact, suing as the agent of the holders of the certificates, and that they are in truth parties, is a speaking demurrer, and bad. Union Trust Co. v. Wilson, 182 N. C. 166, 108 S. E. 500.

Question Cannot Be Raised on Appeal.—See note to § 1-57. Cited in Orr v. Twiggs, 210 N. C. 578, 187 S. E. 791.

§ 1-64. Infants, etc., sue by guardian or next friend.—In actions and special proceedings when any of the parties plaintiff are infants, idiots, lunatics, or persons non compos mentis, whether residents or nonresidents of this state, they must appear by their general or testamentary guardian, if they have any within the state; but if the action or proceeding is against such guardian, or if there is no such guardian, then said persons may appear by their next friend. The duty of the state solicitors to prosecute in the cases specified in chapter entitled Guardian and Ward is not affected by this section. (Rev., s. 405; Code, s. 180; 1893, c. 5; C. C. P., s. 58; 1870-1, c. 233; 1871-2, c. 95; C. S. 450.)

Court's Duty to Exercise Care in Making Appointment.—In Morris v. Gentry, 89 N. C. 248, 254, it was said, "It is the duty of courts to have special regard for infants, their rights and interests, when they come within their cognizance. The law makes this so, for the good reason, they cannot adequately take care of themselves. It is a serious mistake to suppose that a next friend or a guardian ad litem should be appointed upon simple suggestion; this should be done upon proper application in writing, and due consideration by the court. The court should know who is appointed, and that such person is capable and trustworthy. The appointment of guardians ad litem and their duties are prescribed by a statute. But while the statute allows infants to sue by their next friends, the manner of the appointment of them and their duties are left as at the common law."

Presumption of Proper Appointment.—Where the lands of infants are sold under an order of the Superior Court upon an ex parte petition, in which the infants are represented by next friends, it is presumed that the Court protected their interests, and was careful to see that they suffered no prejudice. Tyson v. Belcher, 102 N. C. 112, 9 S. E. 634.

Appointment of Next Friend in Justice's Court.—There being no statutory special method indicated by which a next friend may be appointed to represent an infant in an action properly brought in Justice's court, the appointment should be made by the Justice of the Peace, using the same care and circumspection in investigating the fitness of the person to be appointed as is required by the Clerk, in actions properly brought in the Superior Court. Houser v. Bonsal & Co., 149 N. C. 51, 62 S. E. 776.

Next Friend an Officer of Court.—The next friend of an infant ought always to be appointed by the court, and really he is an officer of the court, and under its supervision and control. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Removal of Next Friend.—The court has power, for good cause shown, to remove the next friend of an infant litigant, and appoint another as often as may be necessary. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Designation as Guardian Instead of Next Friend.—It would have been more regular if the representative of infants had been designated in a proceeding as next friend, rather than as guardian, but as he did not undertake to represent the infants otherwise than as next friend, it is immaterial that

he was designated as guardian and not as next friend. *Ex parte Huffstetler*, 203 N. C. 796, 798, 167 S. E. 65.

Interest of Guardian or Next Friend. — Any person who has an interest in the action hostile to that of the infant's will not be allowed to conduct it on their behalf—whether he be guardian or next friend. *George v. High*, 85 N. C. 113, 114.

Foreign Guardian Sues as Next Friend. — A guardian appointed in another state has no authority to represent his wards in suits and proceedings in this state, but when he brings suit for them as guardian it will be treated as if he were next friend. *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176.

Foreign or Domestic Corporation Can Not Be Appointed Next Friend.—Only a person whose fitness has first been ascertained by the court is eligible for appointment by the court as next friend of a minor to institute suit, and neither a foreign nor domestic corporation may be appointed next friend of an infant. *In re Will of Roediger*, 209 N. C. 470, 184 S. E. 74.

Suits by Persons Non Compos Mentis. — There can be no question but that persons non compos mentis may sue by their next friend when they have no general or testamentary guardian. *Smith v. Smith*, 106 N. C. 498, 502, 11 S. E. 188.

Same—Inquisition of Lunacy Not Essential. — Where allegation of insanity of husband is admitted by demurrer, suit may be brought by his next friend though no inquisition of lunacy was had; and the wife may bring the action as such next friend, being regularly appointed. *Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 268.

Widow May Sue by Next Friend. — In dissenting from her husband's will and applying for year's allowance, the widow, being a minor without guardian, may be represented by next friend, duly appointed. *Hollmon v. Hollmon*, 125 N. C. 29, 34 S. E. 99.

Infants Are Real Parties Plaintiff. — One who conducts a suit as guardian or next friend for infants is not a party of record, but the infants themselves are the real plaintiffs. *George v. High*, 85 N. C. 113, 114; *Krachanake v. Mfg. Co.*, 175 N. C. 435, 95 S. E. 851.

Infant Need Not Know of the Suit. — It is not essential that the infant should know that an action has been brought in his favor by a next friend, as his incapacity to judge for himself is presumed, but the court may inquire into the propriety of the action and take such steps as may be necessary. *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176.

When Infant Appears by Attorney. — A judgment for or against an infant, when he appears by attorney, but has no guardian or next friend, is not void, but only voidable. *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176.

Opposite Party Cannot Object to Appointment. — The defendant cannot object to the next friend appointed by the trial judge. *Carroll v. Montgomery*, 128 N. C. 278, 38 S. E. 874.

Not Subject to Collateral Attack. — The presence of a next friend or guardian ad litem to represent an infant party, as the case may be, and his recognition by the court, in proceeding with the cause, precludes an inquiry into his authority in a collateral proceeding. *Sumner v. Sessoms*, 94 N. C. 371, 376. See also, *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176.

Objection by a Plea in Abatement. — The objection that the next friend has not been regularly appointed should be taken by a plea in abatement. *Carroll v. Montgomery*, 128 N. C. 278, 279, 38 S. E. 874.

When Next Friend Pays Costs. — While the "next friend" is not, strictly speaking, a party to the action, and generally will not be taxed with costs, yet where the Court finds the fact that he officiously procured his appointment, or was guilty of mismanagement or bad faith, it may tax him with costs. *Smith v. Smith*, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113.

Attorney's Fees. — Where it is proper for the attorneys for a ward, employed by the next friend, to receive compensation out of the estate for the prosecution of an action against the guardian, the amount is for sole determination of the court, irrespective of any contract that may have been made, to be fixed with regard to the value of the services in relation to that of the estate. *In re Stone*, 176 N. C. 336, 97 S. E. 216.

Where Administrator Represents Minor Heir. — In an *ex parte* proceeding to sell land for assets, infant heirs are represented by a guardian or next friend, and the order of sale must be approved by the judge. While it is irregular for the administrator in such cases to represent a minor heir as guardian, yet, where there is no suggestion of any unfair advantage having been taken in the sale, confirmation or elsewhere in the proceeding, such irregularity will not vitiate the title of the purchaser. *Harris v. Brown*, 123

N. C. 419, 31 S. E. 877; *Syme v. Trice*, 96 N. C. 243, 1 S. E. 480.

When Infant Reaches Majority Pendente Lite. — Where an infant institutes an action in his own name and arrives at full age before the trial, the judgment is binding on both plaintiff and defendant. *Hicks v. Beam*, 112 N. C. 642, 646, 17 S. E. 490.

Infants Bound by Judgment. — Infants without general guardians may appear by their next friend, appointed in the manner prescribed by the statute, and judgments rendered in such proceedings, otherwise valid, are binding upon and conclusive of the rights of infants in the same manner and to the same extent as persons *sui juris*. *Settle v. Settle*, 141 N. C. 553, 54 S. E. 445; *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176.

Stated in Lawson v. Langley, 211 N. C. 526, 191 S. E. 229.

§ 1-65. Infants, etc., defend by guardian ad litem. — In all actions and special proceedings when any of the defendants are infants, idiots, lunatics, or persons non compos mentis, whether residents or nonresidents of this state, they must defend by their general or testamentary guardian, if they have one within this state; and if they have no general or testamentary guardian in the state, and any of them has been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, idiots, lunatics, or persons non compos mentis. The guardian so appointed shall, if the cause is a civil action file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After twenty days notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant, idiot, lunatic, or person non compos mentis, defendants. (Rev., s. 406; Code, s. 181; C. C. P., s. 59; 1870-1, c. 233, s. 5; 1871-2, c. 95, s. 2; C. S. 451.)

Cross Reference.—As to service of summons on minor or insane, see § 1-97, paragraphs 2 and 3.

See note under § 41-11.

Editor's Note. — This section and section 1-97, par. (2) were intended to afford protection to infants, persons non compos mentis, etc., against the able and the cunning who might seek to take advantage of their handicaps. There can be no question but what the requirement as to service of summons on persons falling within the purview of these sections should be strictly observed.

However, the question inevitably arises as to what is the legal effect of failure to make such summons. In *Allen v. Shields*, 72 N. C. 504, it is doubted by the court whether personal service on an infant is not indispensable, with a strong intimation that it is. But it appears that our authorities are fairly uniform on the point, and the doctrine has long and almost universally prevailed, that the interests of the minor having been presented, and an answer having been filed by his general guardian, or guardian ad litem, the failure to serve on the minor personally was only an irregularity, to be corrected, if at all, by motion in the cause. *Groves v. Ware*, 182 N. C. 553, 556, 109 S. E. 568; *Harris v. Bennett*, 160 N. C. 339, 76 S. E. 217; *Glisson v. Glisson*, 153 N. C. 185, 69 S. E. 55; *Rackley v. Roberts*, 147 N. C. 201, 60 S. E. 975; *Carraway v. Lassiter*, 139 N. C. 145, 91 S. E. 968; *Matthews v. Joyce*, 85 N. C. 258.

Should Be Strictly Observed. — The provisions of the statute in regard to the appointment of guardians ad litem should be strictly observed, but mere irregularities in observing them, not affecting a substantial right, will not vitiate judgments and decrees obtained in the action or proceeding in which such irregularities exist. *Ward v. Lowndes*, 96 N. C. 367, 2 S. E. 591; *White v. Morris*, 107

N. C. 93, 101, 12 S. E. 80; *Cox v. Cox*, 221 N. C. 19, 18 S. E. (2d) 713.

Enforced as Mandatory. — In *Moore v. Gidney*, 75 N. C. 34, 39; Bynum, J., speaking for the court, says: "Infants are, in many cases, the wards of the courts, and these forms, enacted as safeguards thrown around the helpless, who are often the victims of the crafty, are enforced as being mandatory, and not directory only. Those who venture to act in defiance of them must take the risk of their action being declared void, or set aside."

The object of the appointment of a guardian ad litem is to protect the interest of the infant defendant to which protection he is entitled at every stage of the proceeding. *Graham v. Floyd*, 214 N. C. 77, 81, 197 S. E. 873.

When Clerk May Appoint. — In a special proceeding by an executor to sell lands, the clerk has the power to appoint a guardian ad litem for an infant defendant, where the executor is the general guardian of such infant. *Carraway v. Lassiter*, 139 N. C. 145, 51 S. E. 968.

Removal of Guardian Ad Litem. — In *Carraway v. Lassiter*, 139 N. C. 145, 152, 51 S. E. 968, it was said: "The Superior Court has, independently of this section, the power to appoint a guardian ad litem for an infant defendant. It may at any time during the progress of the cause, for sufficient reason looking to the proper protection of the infant's interests, remove a guardian theretofore appointed and name some other person. We can see no good reason why the clerk who acts as and for the court, may not do the same in special proceedings pending before him. The object to be obtained is the protection of the infant, whose interest is the special care of the court; the guardian ad litem is the officer of the court, and we can see no good reason or conflict with well-settled principles why it may not for any good reason appoint such guardian."

When Husband Need Not Appear. — Where an infant feme covert cestui que trust who has no general guardian, appears in a proceeding for the appointment of a trustee by guardian ad litem, the husband need not appear. *Roseman v. Roseman*, 127 N. C. 494, 497, 498, 37 S. E. 518.

Ward Protected by Court. — Where a guardian ad litem has been duly appointed to represent a party, who is under disability, in an action, the court will protect his interest, and though our statute specifies that a summons must be served on such persons, no practical harm would result therefrom to the ward where a guardian ad litem has been appointed, and he accepts the service of summons and presumably performs his statutory duty; and the proceedings will not be declared void as to the ward when such has been done. *Groves v. Ware*, 182 N. C. 553, 109 S. E. 568.

Return as Evidence of Service. — Where it is sought to condemn the lands of an infant, such infant must defend by general guardian where one has been appointed; and where service of process has been made upon the general guardian, and it appears from the officer's return of notice that service has been executed, upon the infant, such return is sufficient evidence of its service to take the case to the jury upon the question involved in the issue. *Long v. Rockingham*, 187 N. C. 199, 121 S. E. 461.

Decree Not Conclusive When Guardian Negligent of Interest. — A decree for the sale of land in a special proceeding is not conclusive upon infant defendants who were not served with process, but who were represented by a guardian ad litem, appointed before the petition was filed on nomination of plaintiff, and who filed an answer prepared for him at plaintiff's instance and without inquiry as to the rights of the infant defendants. *Gulley v. Macy*, 81 N. C. 356; *Moore v. Gidney*, 75 N. C. 34.

Appointment on Day of Trial. — Where a guardian ad litem for infants and incompetents is appointed on the day of trial, and such guardian accepts service and copies of the pleadings, and files his answer the same day, the judgment is irregular and may be declared void or set aside. *Simms v. Sampson*, 221 N. C. 379, 20 S. E. (2d) 554.

Irregularities Cured. — The appointment of a guardian ad litem before service of summons upon the infant is an irregularity which may be cured by the service of summons upon the infant thereafter, and the filing of the answer of the guardian, etc. *Dudley v. Tyson*, 167 N. C. 67, 82 S. E. 1025.

Plaintiff Need Not Move for Appointment. — A plaintiff is not bound to move for the appointment of a guardian ad litem for an infant defendant; and his failure to do so is not such laches as will work a discontinuance of the action. *Turner v. Douglass*, 72 N. C. 127.

When Change of Venue is Erroneous. — In an action against an infant who appears by an attorney, an order changing the venue is not irregular or void; it is erroneous, and may be reversed or vacated upon application of the infant, upon his arriving at age. *Turner v. Douglas*, 72 N. C. 127.

Vacation of Irregular Judgment. — Where it appears that there was no service of process upon infant defendants, and no guardian was appointed to protect their interests, a judgment rendered against them is absolutely void ab initio, and may be set aside at any time for irregularity. *Larkins v. Bullard*, 88 N. C. 35, 36; *Mason v. Miles*, 63 N. C. 564. See also, *Pearson v. Nesbitt*, 14 N. C. 315; *White v. Albertson*, 14 N. C. 241.

Judgment Not Subject to Collateral Attack. — Where infant defendants are served with a summons in proceedings for the partition of land and a guardian ad litem is appointed, a judgment affirming the sale cannot be set aside in a collateral proceeding for alleged fraud or irregularity. *Smith v. Gray*, 116 N. C. 311, 21 S. E. 200.

Appointment Valid When Infant Not Regularly Served. — The appointment of a guardian ad litem is valid, although the infant has not been regularly served with process, but has only accepted service thereof. *Cates v. Pickett*, 97 N. C. 21, 1 S. E. 763.

Jury Trial Waived. — It is competent for the attorney and guardian ad litem to waive a jury trial for infants, even where they have not been regularly served with summons. *White v. Morris*, 107 N. C. 93, 12 S. E. 80.

Nominal Plaintiff Disqualified to Represent Infant. — A plaintiff of record, though nominal and made so without his consent, is utterly disqualified to appear for any infant defendants. His most faithful performance of duty and energetic and persistent defense, in every way commendable, and approved by the Court, do not relieve the impropriety of his appointment as guardian ad litem, so long as his name appears on the plaintiff side of the docket. *Ellis v. Massenburg*, 126 N. C. 129, 35 S. E. 240.

Mere Colorable Interest Disqualifies. — A mere colorable interest, if at all adverse, is sufficient to disqualify either a guardian ad litem or his attorney from appearing for an infant defendant. *Ellis v. Massenburg*, 126 N. C. 129, 134, 35 S. E. 240; *Molyneux v. Huey*, 81 N. C. 106.

Supreme Court May Appoint. — The Supreme Court may appoint a guardian ad litem. *Perry v. Perry*, 175 N. C. 141, 144, 95 S. E. 98; *Robeson v. Hodges*, 105 N. C. 49, 11 S. E. 263.

Applied in Wyatt v. Berry, 205 N. C. 118, 170 S. E. 131; as to service on insane persons, in *Hood v. Holding*, 205 N. C. 451, 171 S. E. 633.

§ 1-66. Appointment of guardian ad litem in actions begun by publication. — In all actions and special proceedings wherever any of the defendants are infants, idiots, lunatics, or persons non compos mentis, and it shall become necessary to serve the summons on said infants, idiots, lunatics, or persons non compos mentis by publication, it shall not be necessary to await the completion of the service of summons by publication before moving for the appointment of a guardian ad litem for said infants, idiots, lunatics, or persons non compos mentis, but a guardian ad litem may be appointed on motion at the time of the issuance of the order of publication; and the service of a summons, with a copy of the complaint or petition, can be made on the guardian ad litem returnable on the same date as the infant defendants are required to appear in the notice of publication; and after ten days notice of said summons and complaint in special proceedings and after answer filed as prescribed in § 1-65 under this article, the court may proceed in the same cause to final judgment and decree therein, in the same manner as if there had been personal service upon the said infant, idiot, lunatic, or person non compos mentis, defendants, and any decree or judgment in the cause shall conclude the infant, idiot, lunatic, or person non compos mentis, defendants, as effectually as if he, or they, had been personally summoned. (1919, c. 246; C. S. 452.)

Cross Reference. — As to service by publication, see § 1-98 et seq.

Cited in *Hines v. Williams*, 198 N. C. 420, 152 S. E. 39.

§ 1-67. Guardian ad litem to file answer. — When

a guardian ad litem is appointed, he shall file an answer in the action or special proceeding, admitting or denying the allegations thereof. The costs and expenses of the answer, in all applications to sell or divide the real estate of said infants, shall be paid out of the proceeds of the property, or in case of division shall be charged upon the land if the sale or division is ordered by the court, and, if not ordered, in any other manner the court directs. (Rev., s. 407; Code, s. 182; 1870-1, c. 233, s. 4; C. S. 453.)

Minors Not Properly Represented Not Bound.—Where, in a proceeding to caveat a will, the interests of minors are involved, who are not properly represented, the issue of *devisavit vel non* cannot be answered by consent of the parties to the action so as to bind the infants. *Holt v. Ziglar*, 159 N. C. 272, 74 S. E. 813. See also, *Moore v. Gidney*, 75 N. C. 34.

Applied in *Graham v. Floyd*, 214 N. C. 77, 197 S. E. 873.

§ 1-68. Who may be plaintiffs.—All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, either jointly, severally, or in the alternative, except as otherwise provided. If, upon the application of any party, it shall appear that such joinder may embarrass or delay the trial, the court may order separate trials or make such other order as may be expedient. (Rev., s. 409; Code, s. 183; C. C. P., s. 60; 1931, c. 344, s. 1; C. S. 455.)

Cross References.—As to rules governing plaintiffs generally, see § 1-57. As to suits for penalties, see § 1-58. As to what causes of action may be joined, see § 1-123.

Editor's Note.—The Act of 1931 added all of this section appearing after the word "plaintiffs," and omitted the phrase "except as otherwise provided" formerly ending the section. This is a form of alternative pleading explained in 9 N. C. Law Rev. 24.

There May Be Several Plaintiffs Whose Interests Are Not Identical.—In a suit for damages to a truck where the cause of action of the individual plaintiff for damage to his truck, as well as the cause of action of the corporate plaintiff for the loss of his security by reason of the damage to said truck, both arose out of the same transaction or transaction connected with the same subject of action, namely, the damage to the same truck proximately caused by the same negligent act of the same agent of the defendant, it was held that both parties could be joined as plaintiffs. Clearly both parties plaintiff had an interest in the subject of this action and in obtaining the relief demanded. Neither this section nor section 1-123 requires, by word or by implication, that the causes of action of the party plaintiffs shall be identical. *Wilson v. Horton Motor Lines*, 207 N. C. 263, 264, 176 S. E. 750.

The fact that the interests of plaintiffs are legally severable, or not common or identical, is no bar to their joinder where they have a common interest in the subject of the action and the relief sought. *Id.*

Trustee as Plaintiff.—A duly appointed trustee of a religious society may maintain an action for the removal of faithless or incompetent trustees, and compel them to convey the property held by them to the purposes for which it was designed, and such trustee may also maintain an action to set up a lost deed executed for the benefit of the cestui que trust. *Nash v. Sutton*, 109 N. C. 550, 14 S. E. 77.

Non-residents Not Barred.—Non-residents may be parties plaintiff in the courts of this state. *Thompson v. Western Union Tel. Co.*, 107 N. C. 449, 456, 12 S. E. 427; *Walters v. Breder*, 48 N. C. 64; *Miller v. Black*, 47 N. C. 342.

Uninterested Party as Co-Plaintiff.—It is wholly immaterial that an uninterested party is united with the true owner as plaintiff, in an action to recover a debt, because a reception of payment by either plaintiff would be with the assent of the other. *Perkins v. Berry*, 103 N. C. 131, 132, 9 S. E. 621.

Creditors as Plaintiff.—In *Pelletier v. Saunders*, 67 N. C. 261, 262, *Rodman J.*, who delivered the opinion; said, "In a proceeding for the sale of lands, the creditors are not necessary parties. Nevertheless, as they have an interest, as well in the taking of the administration accounts as in the terms on which the land shall be sold, and the

application of the proceeds, they must have a right to become parties at some stage of the proceedings, and we cannot see that any inconvenience, or injury to any interest, can arise by allowing them to come in at the beginning, by commencing the proceeding." See also, *Ex parte Moore*, 64 N. C. 90.

Cited in *Powell v. Smith*, 216 N. C. 242, 4 S. E. (2d) 524.

§ 1-69. Who may be defendants.—All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved. In an action to recover the possession of real estate, the landlord and tenant may be joined as defendants. Any person claiming title or right of possession to real estate may be made a party plaintiff or defendant, as the case requires, in such action. If the plaintiff is in doubt as to the persons from whom he is entitled to redress, he may join two or more defendants, to determine which is liable. (Rev., s. 410; Code, s. 184; C. C. P., s. 61; 1931, c. 344, s. 2; C. S. 456.)

Editor's Note.—The Act of 1931 inserted the words "jointly, severally, or in the alternative" appearing in the first sentence of this section, and added the last sentence. This is a form of alternative pleading explained in 9 N. C. Law Rev. 24.

Interest in Controversy.—In *Wade v. Sanlers*, 70 N. C. 277, 278, *Pearson C. J.*, while admitting the wording of the section to be very broad refused the construction of "any person may be made defendant who claims an interest in the controversy adverse to the plaintiff" to mean "any person who claims an interest in the thing which is the subject of controversy," as placed upon it by a Superior Court Judge. However, it would seem that cases subsequent to this decision have apparently given it a wider scope. *Bryant v. Kenlaw*, 90 N. C. 337, 342.

This section contemplates that all persons necessary to a complete determination of the controversy, the matter in litigation, and affected by the same in some way, as between the original parties to the action, may, in some instances, and must in others, be made parties plaintiff or defendant. But it does not imply that any persons who may have a cause of action against the plaintiff alone, or cause of action against the defendant alone, unaffected by the cause of action as between the plaintiff and defendant, may or must be made a party. It does not contemplate the determination of two separate and distinct causes of action, as between the plaintiff and a third party, or the defendant and a third party, in the same action. It is only when, as between the original parties litigant, other parties are material or interested, that it is proper to make them parties. *McDonald v. Morris*, 89 N. C. 99, 100; *Batchelor v. Macon*, 67 N. C. 181, 184; *Harkey v. Houston*, 65 N. C. 137, 139.

See also, *Attorney-General v. Simonton*, 78 N. C. 57, 59; *Emry v. Parker*, 111 N. C. 261, 264, 16 S. E. 236, and cases therein cited; *Gregory v. Gregory*, 69 N. C. 522, 526.

It is not everyone who may have a remote interest in a cause who must be made a party, but it will suffice if those are before the court who are in a legal sense necessary to the determination or settlement of the questions involved. *McCaskill v. Lancashire*, 83 N. C. 393, 399.

It has been held that this section applies only when the person applying is connected in interest with one or the other of the parties, as co-tenant with the plaintiff or in privity with the defendant, or on claim of a common possession with them. *Colgrove v. Koonce*, 76 N. C. 363. See also, *Harkey v. Houston*, 65 N. C. 137, 138.

Where alleged fraudulent conveyances are made to several grantees, they all have an interest in the subject-matter, and are necessary and proper parties in order to a final determination of the controversy. *Dawson Bank v. Harris*, 84 N. C. 206.

Where an injury is caused by the separate action of several persons whose interests are adverse to the plaintiff, it is proper to join them as defendants in an action for damages. *Long v. Swindell*, 77 N. C. 176; *Gill v. Young*, 82 N. C. 274, 276.

Same—Judgment Creditors.—The judgment creditors of the decedent, having an interest in the sale of realty to make assets to pay debts, are such necessary or proper parties as to entitle them to intervene in the proceedings

of the executor, and make themselves parties before final judgment. *Wadford v. Davis*, 192 N. C. 484, 485, 35 S. E. 353.

Under this section and section 1-73, a court has power to allow a judgment creditor of a corporation to interplead to an action in the nature of a quo warranto brought by the Attorney-General to annul and vacate the charter of the corporation. *Attorney-General v. Simonton*, 78 N. C. 57.

A creditor of the deceased has a right, to come in and be made a party defendant, for the purpose of excepting to an admeasurement of dower, in the course of a petition by the widow. *Ex parte Moore*, 64 N. C. 90, 91.

Same—Plaintiff in a Creditor's Bill. — A plaintiff in a creditor's bill may join causes of action for the recovery of an indebtedness not theretofore reduced to judgment; for the removal of an insolvent trustee; for the appointment of a receiver; to declare a conveyance to the creditor of the principal defendant void, and that a prior mortgage shall be foreclosed and the surplus money applied to the debts of the other creditors, and persons having an interest in these several causes of action should be made parties defendant. *LeDuc v. Brandt*, 110 N. C. 289, 14 S. E. 778.

Same — Wife as Defendant. — Where the plaintiff bought at an execution sale the interest of the husband in land claimed by the wife and whereon both resided, she was held entitled to come in and defend her estate and their possession. *Cecil v. Smith*, 81 N. C. 285.

Same—When Causes Are Separable. — Where there is no unity of design or concert of action, and the separate action of each defendant causes the single injury, the share of each in causing it, is separable and may be accurately measured. In such case the jury can properly assess several damages. *Long v. Swindell*, 77 N. C. 176.

Necessary Parties. — The law does not allow unnecessary and improper parties to be brought into an action. The plaintiff has the right to have his action tried upon its merits, uninfluenced and unaffected by persons who have no concern in it. *McDonald v. Morris*, 89 N. C. 99, 102.

In an action against the vendee under a conditional sales contract the joinder of one claiming title as purchaser for value from the vendee is not objectionable, the subject of the action being the same, and the claimant in possession being a necessary party to the action. *Andrews Music Store v. Boone*, 197 N. C. 174, 148 S. E. 39.

Same—Removal of Cause to Federal Courts. — A non-resident defendant surety of a contractor for the completion of the building may not remove the cause from the state to the federal court upon the ground that the resident defendants were not necessary parties to the determination of the controversy. *Morgantown v. Hutton, etc., Co.*, 187 N. C. 736, 122 S. E. 842; Cited in *Jackson County Bank v. Hester*, 188 N. C. 68, 123 S. E. 308. As to who are necessary parties, see § 1-57 and notes thereto.

Landlord and Tenant — When Two Persons Claim as Landlord. — Where two parties, each claiming to be landlord of a tenant in possession, and one sues, the other has an interest in the controversy and may be admitted to defeat the action. *Rollins v. Rollins*, 76 N. C. 264.

Same—Defenses of Landlord. — Under the provisions of this section, a landlord let in to defend in a civil action for the recovery of land is not restricted to the defenses to which his tenant is confined, nor is this principle varied by the circumstance that the plaintiff is the purchaser at execution sale against such tenant, and that the latter was in possession at the date of the sale and of the commencement of the action. *Maddrey v. Long*, 86 N. C. 383, 385; *Isler v. Foy*, 66 N. C. 547.

Action to Recover Land—Joint Owner Made Party Defendant. — In an action to recover land a third party, claiming to be joint owner with defendant, has the right, on affidavit, to be let in as a party defendant. *Lytle v. Burgin*, 82 N. C. 301, 303.

Same — Purchaser under Mortgage Sale as Party. — In *Keathly v. Branch*, 84 N. C. 202, the mortgagor was sued, and the purchaser of the land sold under the mortgage was allowed to come in and set up his own title.

Same—Action against Administrator. — Where a suit was pending by the next of kin against an administrator for the distribution of the estate in his hands, and the defendant died, the action could not be continued by the next of kin, and the court had no power to allow an administrator de bonis non to be made a party plaintiff in the pending action. *Merrill v. Merrill*, 92 N. C. 657.

Same—Undivided Interest in Lands. — One who claims an undivided interest in lands in proceedings to sell them and divide the proceeds among tenants in common and to pay debts, etc., may be properly made a party to such proceedings. *McKeel v. Holloman*, 163 N. C. 132, 79 S. E. 445.

Same—Adverse Holder to Title to Both Parties. — In an action for the recovery of real estate, a third person who claims title paramount and adverse both to plaintiff and defendant, should not be permitted to make himself a party to the action. *Colgrove v. Koonce*, 76 N. C. 363.

Same—Authority of Clerk. — The clerk of the Superior Court, under the general provisions of this section, has the authority to permit persons claiming an interest in the land to be made a party defendant. *Empire Mfg. Co. v. Spurill*, 169 N. C. 618, 86 S. E. 522.

Parties for Purpose of Setting up Counterclaim. — Where a mother has placed her son in a sanitarium for treatment and is personally responsible for the services therein rendered, in an action to recover therefor against her she may not qualify as guardian for her son and make herself and him parties for the purpose of recovering for him damages upon a counterclaim alleged to have been caused by malpractice, as such does not fall within the scope of the plaintiff's cause of action, and she in her capacity as guardian is not a necessary party under this section or § 1-73. *Michigan Sanitarium, etc., Ass'n v. Neal*, 194 N. C. 401, 139 S. E. 841.

Before allotment of dower is made in the lands of a deceased husband dying intestate his heirs at law should be made parties plaintiff or defendant. *Holt v. Lynch*, 201 N. C. 404, 160 S. E. 469.

Surety. — Where a contractor gives a surety bond for the faithful performance of a contract for the cutting of timber, it is not necessary to first ascertain by action or otherwise the amount of the liability of the contractor before uniting his surety as a party to an action for damages for its breach, the surety being a proper party for the complete determination or settlement of the question involved. *Watson v. King*, 200 N. C. 8, 156 S. E. 93.

Junior Mortgagee. — In an action to set aside a sale under a deed of trust the junior mortgagee should be made a party. *Lockbridge v. Smith*, 206 N. C. 174, 173 S. E. 36.

Assignee of Judgment and Levying Officer. — In an action against the makers of a note and to have a judgment obtained by one of the makers against the payee applied to the payment of the note, it was held that the assignee of the judgment and the sheriff, who was about to obtain execution on the judgments, were properly made parties defendant. The principal relief sought was against the makers and the relief sought against the other defendants was but incidental. *North Carolina Joint Stock Land Bank v. Kerr*, 206 N. C. 610, 175 S. E. 402.

In an action against a stockholder in an insolvent bank to collect the statutory assessment on his stock parties who had contracted to pay the liabilities of the bank in case of insolvency and save the stockholders from liability should have been made parties defendant on motion of defendant stockholder. *Hood v. Burrus*, 207 N. C. 560, 178 S. E. 362.

Joinder of Beneficiaries in Deeds of Trust. — In an action by a judgment creditor to set aside alleged fraudulent conveyances of property by deeds of trust and mortgages as made to hinder, delay and defraud him in the collection of his judgment under execution, the joinder therein of the grantees and beneficiaries in the deeds is not objectionable as a misjoinder and demurrer to the complaint alleging such conveyances entered on the ground of misjoinder of causes and parties, and that it failed to state a cause of action is properly overruled. *Moorefield v. Roseman*, 198 N. C. 805, 153 S. E. 399.

Action against Town or Officials. — Plaintiff sought to recover against a town on a contract or, if the town were not liable on the contract, to recover against individual defendants as mayor and clerk, for wrongfully inducing him to enter into an unauthorized contract. It was held that the facts alleged were not in the alternative, but that the complaint alleged a series of transactions forming one whole and connected story, and under the provisions of this section, plaintiff, being in doubt as to those from whom he is entitled to redress, may seek to recover of defendants in the alternative under § 1-123, and defendants' demurrer for misjoinder of parties and causes is properly overruled. *Peitzman v. Zebulon*, 219 N. C. 473, 14 S. E. (2d) 416.

Review on Appeal. — The action of the trial judge in making necessary parties to an action is reviewable on appeal, and the making of proper parties is addressed to his sound discretion and not reviewable. *Williams v. Hooks*, 200 N. C. 419, 157 S. E. 65.

Applied in *State v. Griggs*, 219 N. C. 700, 14 S. E. (2d) 836.

Cited in *Jeffreys v. Hocutt*, 195 N. C. 339, 344, 142 S. E. 226; *Mack Truck Corp. v. Wachovia Bank & Trust Co.*, 199 N. C. 203, 154 S. E. 42; *Shemwell v. Lethro*, 198 N. C. 346, 151 S. E. 729; *Andrews Music Store v. Boone*, 197 N. C. 174, 148 S. E. 39; *Robertson v. Robertson*, 215 N. C. 562, 2 S. E. (2d) 552; *Ebert v. Dishier*, 216 N. C. 36, 3 S. E. (2d)

301; *Powell v. Smith*, 216 N. C. 242, 4 S. E. (2d) 524; *Ridick v. Davis*, 220 N. C. 120, 16 S. E. (2d) 662; *Bost v. Metcalfe*, 219 N. C. 607, 14 S. E. (2d) 648.

§ 1-70. **Joinder of parties; action by or against one for benefit of a class.**—Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint. When the question is one of a common or general interest of many persons, or where the parties are so numerous that it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. Any and/or all unincorporated, beneficial organizations, fraternal benefit orders, associations and/or societies, or voluntary fraternal beneficial organizations, orders, associations and/or societies issuing certificates and/or policies of insurance, foreign or domestic, now or hereafter doing business in this state, shall have the power to sue and/or be sued in the name commonly known and/or used by them in the conduct of their business to the same extent as any other legal entity established by law, and without naming any of the individual members composing it: Provided, however, this section shall apply only in actions concerning such certificates and/or policies of insurance. (Rev., s. 411; Code, s. 185; C. C. P., s. 62; 1933, c. 182; C. S. 457.)

Cross References.—As to real parties in interest, see § 1-57. As to plaintiffs and defendants generally, see §§ 1-68, 1-69. As to amendments to proceeding by adding or striking out parties, see § 1-163.

See note under § 1-123.

Editor's Note.—The last sentence of this section, relating to unincorporated, beneficial organizations, fraternal orders, etc., was added by Public Laws 1933, c. 182.

Parties Not Necessary to Determination.—See note under § 1-127.

Persons in Interest.—Persons in interest are necessary parties to a final adjudication. *Meadows v. Marsh*, 123 N. C. 189, 193, 31 S. E. 476.

But it is necessary as a rule that all defendants have a responsible interest; a judgment that determines points of law adverse to a person, is not sufficient ground for making him defendant. *Clark v. Bonsal & Co.*, 157 N. C. 270, 72 S. E. 954.

Where the stockholders of an insolvent bank authorize the trustee of the bank to bind them individually, but not jointly, for money to be borrowed on their credit and agree to repay the same in proportion to the amount of the stock held by each, they are properly joined as defendants in an action to recover money so lent, since the subject of action is of common and general interest. *Hanover Nat. Bank v. Cocke*, 127 N. C. 467, 37 S. E. 507.

No Consolidation Where Parties Not United in Interest.—An action in the nature of quo warranto was instituted by the person elected to the office by the municipal aldermen against the person previously elected to the office by the aldermen, to try title to the office. Another action was instituted by a taxpayer against the town and its aldermen to restrain them from paying the emoluments of office to the person elected by them upon the contention that the person previously elected to the office by the aldermen and discharging the duties of the office, was entitled to the emoluments thereof up to the time he surrendered possession of the office. Held: Neither the parties nor the purposes of the two separate causes of action are the same and the respective plaintiffs therein are not united in interest, and therefore the causes cannot be joined in the same action under this section. *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265.

Where the parties are not the same, the purposes are not the same, the plaintiffs are not united in interest, and separate causes of action are alleged, two causes of action cannot be joined. *Osborne v. Canton*, 219 N. C. 139, 147, 13 S. E. (2d) 265.

Representation of Community by Members.—Where property was conveyed to trustees for use as a community house

or playground for the benefit of the residents of the community, and an action was instituted involving title to the property in which representative members of the community were made parties, the judgment in the action is binding upon the minors and all members of the community not made parties under provision of this section for class representative. *Carswell v. Creswell*, 217 N. C. 40, 7 S. E. (2d) 58.

Breach of Trust.—The principal actress in a breach of trust and fraud, must be joined with the other defendants, alleged to have concurred with her as coadjutors. *Paxton v. Wood*, 77 N. C. 11, 15.

Will Not Yet Established.—One who claims under a will, which is not established, must have before the court all the parties interested, to establish it. *Thompson v. Applewhite*, 16 N. C. 460.

Joint Contractors.—If a quarry company and a stone company contracted jointly to furnish rock, both companies were interested in an action to recover the amount due to each company, and were properly joined as plaintiffs. *Balfour Quarry Co. v. West Const. Co.*, 151 N. C. 345, 66 S. E. 217.

A petition to vacate a grant, brought against a person in possession by purchase from the original grantee, where such grantee is not before the court, will be dismissed. *Tyrell v. Logan*, 10 N. C. 319.

When Wife an Unnecessary Party.—A wife is an unnecessary party to a bill to set aside a deed for her land, fraudulently procured from her husband alone, her right being unaffected by the conveyance. *Browning v. Pratt*, 17 N. C. 44.

The executor, and not the heirs, represents the estate where land is directed by will to be sold and converted into money, and the latter are not necessary parties to a suit concerning the disposition of and charges on such estate. *Harris v. Bryant*, 83 N. C. 568.

It is not necessary to join as parties the heirs of a deceased tenant in common who disposed of his interest in the common property pendente lite. *Dawkins v. Dawkins*, 93 N. C. 283.

Ultior Legatees as Parties.—In an action against an executor, the ultior legatees should be parties where it is sought to charge him with a fund arising out of a sale of land under a power in a will, the land being bequeathed to plaintiff for life, and after his death to his children, with a remainder over in case of his death without children. *Peacock v. Harris*, 85 N. C. 147.

Donee in Suit by Donor.—A deed by a feme covert conveying slaves to her after the death of the donor, creates an interest which survives to her, after the death of her husband, and she is a necessary party to a bill by him, seeking relief upon her title. *Kornegay v. Carroway*, 17 N. C. 403.

Unconnected Parties with Common Interest.—When several persons, although unconnected with each other, are made defendants, a demurrer will not lie if they have a common interest centering in the point in issue in the cause. *Virginia-Carolina Chemical Co. v. Floyd*, 158 N. C. 455, 74 S. E. 465.

Joinder Necessary to Disposition of Cause.—Demurrer for misjoinder of parties is properly overruled, where it appears that the two defendants are so intimately connected with the transactions that it would be almost impossible to investigate any of the grounds of complaint unless both are made parties. *Oyster v. Iola Min. Co.*, 140 N. C. 135, 52 S. E. 198.

Insolvency of Defendant.—Mere insolvency of a defendant can not alone determine the right of a plaintiff to join him with others in an action for tort, if he is liable, since the test is in the validity of the cause of action and the good faith of the plaintiff in making the joinder, and insolvency does not destroy the remedy, but merely effects the prospects of collection. *Hough v. Southern R. Co.*, 144 N. C. 692, 57 S. E. 469.

Party Unheard of for Years.—Where a person concerned in interest is stated in the bill to have moved away and not since heard of for many years, so that he cannot be served with process, that is a good reason as between third parties for not making him; and the court will proceed to a hearing notwithstanding. *Ingram v. Lanier*, 2 N. C. 221.

Tenant in Common May Sue Alone.—One tenant in common may sue without joining his cotenants for the recovery of the possession of the common property. *Thames v. Jones*, 97 N. C. 121, 1 S. E. 692. See also, *Wilson v. Arentz*, 70 N. C. 670.

Suit against Unincorporated Society.—This section permitting the joinder of parties and recognizing representation by common interests, cannot have application to an attempted suit against an unincorporated society, when no

individual has been made a party defendant, or appears to defend the action in behalf of himself or other members of the society. *Tucker v. Eatough*, 186 N. C. 505, 120 S. E. 57.

An unincorporated labor union is without capacity to sue or be sued in the name of the association, since in law it has no legal entity, and there being no statutory provisions enabling it to sue or be sued as an association, since this section and § 1-97 apply only to suits by or against mutual benefit associations on certificates or policies of insurance. *Hallman v. Wood, Wire, etc., Union*, 219 N. C. 798, 15 S. E. (2d) 361.

Action by Member of Congregation.—Where, there is no higher governing body in any denomination than the congregation, every member has such a beneficial interest as would enable him, in behalf of his brethren and associates, to maintain an action to restore a lost title deed for the church at which he worships, and for the removal of trustees who have attempted to defraud their beneficiaries, and for the substitution of others or the adjudication that the title is in the congregation at large. *Nash v. Sutton*, 109 N. C. 550, 553, 14 S. E. 77.

A complaint in an action by the state on the relation of certain parties claiming to be school trustees against defendants, also claiming to be such officers, is not subject to demurrer for misjoinder of parties because of no community of interest between plaintiffs; their terms being separate and distinct. *School Trustees v. Baker*, 164 N. C. 382, 80 S. E. 415.

That the defendants have separate defenses does not affect the plaintiff's right to sue them jointly, if he has a cause of action against them in which they may be properly joined. *Davis v. Rexford*, 146 N. C. 418, 59 S. E. 1002.

One having a joint and several cause of action in tort against several may sue such of them as he may elect. *Gudger v. Western, etc., R. Co.*, 87 N. C. 325.

Consent of Proper Plaintiff.—Notice to a person to show cause why he should not be made a party was an invitation to make him a party plaintiff if he chose, or notice to make him a party defendant in invitum. It was therefore a substantial compliance with the statute to serve such notice on him. *Emry v. Parker*, 111 N. C. 261, 264, 16 S. E. 236; *McCormac v. Wiggins*, 84 N. C. 278.

Same—Suit by Purchaser against Mortgagee.—A purchaser of land from a mortgagor upon consideration that the former pay off the mortgage, the amount of which the latter agreed to ascertain, but failed or refused so to do, may maintain his action against the mortgagee as a necessary party under this section as the mortgagee refused to be joined as a party plaintiff, for an accounting, in order that he may relieve the land from the lien of the mortgage, and remove the cloud upon his title. *Elliott v. Brady*, 172 N. C. 828, 90 S. E. 951.

Same—Administrator d. b. n.—If an administrator de bonis non refuse to join as plaintiff; he must be made a party defendant. *Hardy v. Miles*, 91 N. C. 131; *Wilson v. Pearson*, 102 N. C. 290, 9 S. E. 707.

Necessity for Summons.—When additional parties plaintiff are made, no summons issues. because the plaintiff is the moving party, and comes into court voluntarily. *Reynolds v. Smathers*, 87 N. C. 24; *Jarrett v. Gibbs*, 107 N. C. 303, 12 S. E. 272. But if the party objects to appearing as plaintiff and he is made a party defendant, under this section, he must be served with summons. *Plemmons v. Southern Improve. Co.*, 108 N. C. 614, 13 S. E. 188.

Existence of Common Interest of Many Persons.—The construction of this section, "has been established by the courts, and the rule is settled, as already stated, that where the question to be decided is one of common or general interest to a number of persons, the action may be brought by or against one or all the others, even though the parties are not so numerous that it would be impracticable to join them all as actual plaintiffs or defendants; but, on the other hand, when the parties are so very numerous that it is impracticable to bring them all into court, one may sue or be sued for all the others, even though they have no common or general interest in the question at issue, and the necessary facts to bring the case within one or the other of these conditions must be averred." *Bronson v. Wilmington, N. C. Life Ins. Co.*, 85 N. C. 411, 414, quoting *Pom. Rem. sec. 391*. The cases of *Glenn v. Farmers Bank*, 72 N. C. 626; *Von Glahn v. De Rosset*, 81 N. C. 467, are cases sustaining the proposition here laid down. See also, *Thames v. Jones*, 97 N. C. 121, 1 S. E. 92.

The exception to the general rule that all persons interested in and to be affected by the determination of the suit must be made parties on one or the other side obtains when they "may be very numerous and it may be impracticable to bring them all before the court," a rule prevailing in the former equity practice, and recognized by the express terms of this section. *Bronson v. Wilmington N.*

C. Life Ins. Co., 85 N. C. 411, 414; *Glenn v. Farmers Bank*, 72 N. C. 626; *Foster v. Hackett*, 112 N. C. 546, 554, 17 S. E. 426; *Story Eq. Pl.*, sec. 122.

But where one rests his right to sue alone in behalf of himself and others on the ground that the parties in interest are so numerous that it is impractical to bring them before the court, he must so allege. *Foster v. Hackett*, supra; *Thames v. Jones*, 97 N. C. 121, 1 S. E. 692; *McMillan v. Reeves*, 102 N. C. 550, 9 S. E. 449.

Common Grantor of Plaintiff and Defendant Made Party Defendant after Mutual Mistake.—Where there is allegation of mutual mistake of the common grantor of the plaintiff and defendant, and of the plaintiff and defendant as grantees in the deeds simultaneously executed and delivered to them by said grantor, it was held proper for the court to make the grantor a party defendant. *Smith v. Johnson*, 209 N. C. 729, 731, 184 S. E. 486.

Cited in *Bost v. Metcalfe*, 219 N. C. 607, 14 S. E. (2d) 648.

§ 1-71. Persons severally liable.—Persons severally liable upon the same obligation, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff. (Rev., s. 412; Code, s. 186; C. C. P., s. 63; C. S. 458.)

Cross Reference.—As to joint and several debtors, see § 1-113.

Makers and Endorsers of Bills and Notes.—The makers and endorsers of bills of exchange and promissory notes, or any of them, may be joined as defendants. *Wooten v. Maultsby*, 69 N. C. 462, 463.

Judgment as a Merger.—Between the parties to an action wherein a judgment is rendered the judgment is a merger and the note or instrument sued upon is extinguished; but as to sureties or indorsers who are not parties to the judgment, there is no merger or extinguishment of the note or instrument. *Bank v. Eureka Lumber Co.*, 123 N. C. 24, 27, 31 S. E. 348.

Action on Surety Bond.—In an independent action by plaintiff in claim and delivery to recover upon the defendant's surety bond damages for the deterioration, etc., of the property wrongfully detained, the surety may be sued alone without joining the principal defendant in the former action. *Moore v. Edwards*, 192 N. C. 446, 135 S. E. 302.

In an action against one surety on an official bond, the other sureties need not be joined. *Brown v. McKee*, 108 N. C. 387, 391, 13 S. E. 8. See also, *Syme v. Bunting*, 86 N. C. 175; *Flack v. Dawson*, 69 N. C. 42.

Action for Trust Funds Loaned by Guardian.—Where a guardian lent trust funds to a firm of which he was a member and took their note payable to himself, it cannot be objected that the guardian is not made a party to a suit brought thereon by the husband of the cestui que trust, to whom the guardian had assigned it, as under this section, persons severally liable may all or any be included as defendants. *Gudger v. Baird*, 66 N. C. 438, 441.

Action on Promissory Note.—Since the holder of a note may sue any or all persons severally liable thereon, an endorser may not attack for fraud a judgment entered against him on the note in a suit maintained by the maker in his capacity of administrator of the holder, in which suit he takes a nonsuit against himself as maker of the note. *Castleberry v. Sasser*, 210 N. C. 576, 187 S. E. 761.

Cited in *Wachovia Bank, etc., Co. v. Black*, 198 N. C. 219, 151 S. E. 269.

§ 1-72. Persons jointly liable.—In all cases of joint contracts of partners in trade or others, suit may be brought and prosecuted against all or any number of the persons making such contracts. (Rev., s. 413; Code, s. 187; R. C., c. 31, s. 84; 1871-2, c. 24, s. 1; C. S. 459.)

Editor's Note.—Contracts made by copartners (or other joint obligors) were made separate by statute, and the plaintiff could sue one or more at his election without impairing his right to proceed against others afterwards, by the Revised Code, c. 31, sec. 84. This provision was not introduced into the C. C. P., and hence, the principle governing contracts as construed at common law was restored. The necessity for remedy arose. The omitted section, which in *Merwin v. Ballard*, 65 N. C. 168, was decided to have been repealed, was enacted at the session of the general assembly of 1871-72, c. 24, sec. 1, which was sec. 187 of the Code, and now constitutes this section. See

Ruffy v. Claywell, 93 N. C. 306, 308; and Merwin v. Ballard, *supra*.

Effect.—In Ruffy v. Claywell, 93 N. C. 306, 308, it was said: "The result is to render contracts joint in form, several in legal effect, and to neutralize, if not displace, those provisions which operate only upon contracts that are joint. * * * That the contract possesses the two-fold quality of being joint as well as several in law, cannot render available provisions which, in terms, are applicable to such as are joint only. It is solely to remove the resulting inconveniences of an action prosecuted to judgment against part of those whose obligation is joint only, that the remedy is provided, and it becomes needless when the obligation is several also. Such is the construction adopted in the courts of New York. *Standard v. Mattin*, 7 How. Pr. 4; *Lahey v. Kingan*, 13 Abb. Pr., 192."

A firm in Maryland gave its promissory note to A signed in the name of the firm, and A sued one of the partners alone, he was permitted to do so, as this section does not affect the contract, but only extends the remedy. *Palyart v. Goulding*, 1 N. C. 691.

Partnership Liability.—Members of a partnership are jointly and severally bound for all its debts; and because of the joint liability the creditor and each partner has a right to demand that the joint property shall be applied to the joint debts; and because of the several liability, a creditor may, at will, sue any one or more of the partners, *Hanstein v. Johnson*, 112 N. C. 253, 17 S. E. 155. See also, *Daniel v. Bethell*, 167 N. C. 218, 83 S. E. 307; *Bain v. Clinton Loan Ass'n*, 112 N. C. 248, 253, 17 S. E. 154.

Where a judgment has been obtained in an action against a partnership and summons therein has been issued and served only on one of the partners, and the other has not made himself a party or taken proper steps by independent action to prevent it, execution may issue on the partnership property and on the property of the individual member who has been served with process. *Daniel v. Bethell*, 167 N. C. 218, 83 S. E. 307.

Procedure in Partnership Actions.—Where a judgment is taken against two or three partners who are liable jointly and severally, the proper method to enforce the liability of the third partner is a new action and not a motion in the action in which such judgment was rendered, it is only when the liability is joint and not several that the motion in the cause is proper. *Davis v. Sanderlin*, 119 N. C. 84, 25 S. E. 815.

Cited in *Jones v. Rhea*, 198 N. C. 190, 192, 151 S. E. 255.

§ 1-73. New parties by order of court.—The court either between the terms, or at a regular term, according to the nature of the controversy, may determine any controversy before it, when it can be done without prejudice to the right of others, but when a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in. When in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in its subject matter, applies to the court to be made a party, it may order him to be brought in by the proper amendment. A defendant against whom an action is pending upon a contract or for specific real or personal property, upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt or property without collusion with him, may at any time before answer apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property or its value to such person as the court directs. The court may make such an order. (Rev., s. 414; Code, s. 189; C. C. P., s. 65; C. S. 460.)

Cross References.—As to amendments to proceeding by adding or striking out parties, in discretion of court, see § 1-163. As to necessary and proper parties, see § 1-57 et seq. As to demurrer for defect of parties, see § 1-127, paragraph 4. As to intervention in attachment, see § 1-471. As to intervention in claim and delivery, see § 1-482.

Court Brings in New Parties.—The court, to the end that substantial justice may be done, may before or after judgment direct the bringing in of new parties. *Walker v. Miller*, 139 N. C. 448, 5 S. E. 125, 1 L. R. A. (N. S.) 157, 111 Am. St. Rep. 805; *Bullard v. Johnson*, 65 N. C. 436.

In General.—In construing the section of the Ohio Code which is practically identical with the first sentence of this section, the court, in 14 Ohio State Reports, 302, 306, holds that the language of the section is permissive with the exception of the last clause which is mandatory. Note the employment of the words "may" and "must" in the first sentence of this section.

This section serves to confer upon the trial court the power if not as a matter of right, then as a matter in his discretion, to allow an intervener to claim property while it is still in custodia legis. *Unaka, etc., Nat. Bank v. Lewis*, 203 N. C. 644, 166 S. E. 800.

Necessary Parties.—When a complete determination of the matter cannot be had without the presence of other parties, the court must cause them to be brought in. *McKeel v. Holloman*, 163 N. C. 132, 134, 79 S. E. 445; *Maxwell v. Bar-ringer*, 110 N. C. 76, 84, 14 S. E. 516; *Parton v. Allison*, 111 N. C. 429, 431, 16 S. E. 415; *Kornegay & Co. v. Farmers, etc., Co.*, 107 N. C. 115, 117, 12 S. E. 123; *Burnett v. Lyman*, 141 N. C. 500, 54 S. E. 412; *Barbee v. Cannady*, 191 N. C. 529, 132 S. E. 572; *Fry v. Pomona Mills*, 206 N. C. 768, 175 S. E. 156.

It is the duty of the court to bring in all parties necessary to a complete determination of the controversy. *State v. Griggs*, 219 N. C. 700, 14 S. E. (2d) 836.

Persons Entitled to Intervene.—A claimant under another title to land in dispute between parties to a suit cannot intervene. *Asheville Division v. Aston*, 92 N. C. 588; *Keathly v. Branch*, 84 N. C. 202; *Bryant v. Kinlaw*, 90 N. C. 337, 341.

The right of an outside claimant to intervene is well settled by precedent, and, if not directly authorized by statute, subserves the general policy of the new system which aims to adjust in one action, when practicable, conflicting claims to the same property. *Sims v. Goettle Bros.*, 82 N. C. 269, 271.

A party may intervene who has an interest in the controversy, but not when he claims an interest in the thing which is the subject of controversy. *Wade v. Sanders*, 70 N. C. 277; *Asheville Division v. Aston*, 92 N. C. 588, 589.

But when the action is for the recovery of real or personal property, a person not a party to it, who has an interest in the subject-matter of the action, may, upon his application, be made a party by proper amendment. *Kornegay & Co. v. Farmers, etc., Co.*, 107 N. C. 115, 117, 12 S. E. 123.

The right of interpleader given by this section was intended to apply to a controversy or action properly constituted in court. *Bates v. Lilly*, 65 N. C. 232, 233; *Millikan v. Fox*, 84 N. C. 107, 108, 109.

Necessity Must Clearly Appear.—An order to bring additional parties into an action will not be granted until the necessity for making them parties clearly appears. *Lee v. Eure*, 92 N. C. 283.

To Order New Process.—A court has no power to order a new process to bring in a new defendant during the pendency of a suit. *Camlin v. Barnes*, 50 N. C. 296.

To Validate Action by Making Necessary Parties.—The court has no authority to correct a pending action, that cannot be maintained, into a new one by admitting a new party plaintiff solely interested, and allow him to assign a new and different cause of action, if the defendant shall object. There is neither principle, nor statute, nor practice that allows such a course of procedure. An action separate and distinct from the pending one, must be begun according to the ordinary course of procedure. *Merrill v. Merrill*, 92 N. C. 657, 665; *Turner v. Turner*, 96 N. C. 416, 2 S. E. 51.

Consent of the Parties.—Unless by consent of the parties, only such new parties can regularly be admitted, by amendment, to the action as are necessary to its proper determination; but, where defendants do not object to such amendment introducing new plaintiffs, their assent is to be taken as implied. *Richards v. Smith*, 98 N. C. 509, 4 S. E. 625.

Determination of Right Preliminary to Proceeding with Suit.—Where one is entitled, as a matter of right, to intervene in a suit and applies for leave to do so, it is error to proceed with the case until the question of such right is determined. *Jones v. Asheville*, 116 N. C. 817, 21 S. E. 691, citing *Keathly v. Branch*, 84 N. C. 202.

Pleadings.—Amendments by the court to the complaint, and the bringing in of new parties, which merely broadens the scope of the action so as to take in the whole controversy for its settlement in one action, and made without substantial change in the action as originally constituted, do not change the original cause, but are within the contemplation of our statute, and may be allowed by the court.

Lumberman's Mut. Ins. Co. v. Southern R. Co., 179 N. C. 255, 102 S. E. 417.

On appeal to the superior court in summary ejectment brought by the rental agent of the owner of the property, the trial court has the power to allow an amendment making the owner of the property a party plaintiff and to allow it to adopt the pleadings and affidavits filed by its rental agent, and although the rental agent is not a necessary party, it is a proper party, whose continuance in the case is a matter within the discretion of the trial court and not subject to review. *Choate Rental Co. v. Justice*, 212 N. C. 523, 193 S. E. 817.

A party permitted to intervene under its claim of an interest in the subject matter of the action, must file its pleading to be entitled to an adjudication of its rights. *Sykes v. Aetna Ins. Co.*, 216 N. C. 353, 4 S. E. (2d) 875.

A Partner Made a Party after Judgment.—Where a partner was not served with summons, he may be made a party after judgment is rendered, and then execution may issue against his separate property. *Daniel v. Bethell*, 167 N. C. 218, 83 S. E. 307.

Proceedings Supplemental to Execution.—Proceedings supplemental to execution are in the nature of a creditor's bill, and it being the policy of the law to settle the entire controversy in one action, it is not error to permit a third party to interplead and assert title to the property which is sought to be subjected. *Munds v. Cassidey*, 98 N. C. 558, 4 S. E. 353, 355.

Action for Conveyance of Land.—During the pendency of an action relating to land between P and C, in which there was subsequently a decree directing P to convey the land to C upon the payment by the latter of the balance of the purchase money, P conveyed to other parties; thereafter C brought suit for the land against P and his grantees, who were in possession: Held, that P was not a necessary party, and it was not error to allow plaintiff to enter a nonsuit as to P, the grantor of the other defendants. *Carr v. Alexander*, 112 N. C. 783, 17 S. E. 577.

Real Owners as Parties in Action between Lessor and Lessee.—Where lessors sued lessees for rent, and the latter showed, as a counter claim, that the lessors had no right to make the lease, and that the real owners thereof had brought suit against one of the lessees, and would recover damages for its use during such lease, the persons claiming as real owners should be made parties to the action. *McKesson v. Mendenhall*, 64 N. C. 286.

In an action to set aside a deed to a purchaser at a foreclosure of a tax sale certificate, the purchaser at the sale, the owners of the property and all persons having any interest in the property should be made parties for a complete determination of the controversy. *Buncombe County v. Penland*, 206 N. C. 299, 173 S. E. 609.

Limitation of Parties.—The statute does not confer the power to make parties to actions generally, but it designates particularly a variety of classified cases in which it may be done, thus clearly indicating a limitation upon the power conferred, and recognizing its importance to the original parties to the action. Who shall and who shall not be made additional parties, are questions in many cases of serious moment, and we can see no reason why the decision of a question of law, arising in the exercise of the power to make it, shall not be reviewed like the decision of any other question of law affecting the merits in the progress of an action. There is nothing in the statute or in the nature of the power that forbids it, and justice may require it. *Merrill v. Merrill*, 92 N. C. 657, 660.

When Trustee is Necessary Party.—Where the plaintiff claims under a voluntary conveyance made by cestui que trust, he cannot, in any form of action, obtain the legal title and possession until the trustee is made a party, which may be done under this section. *Matthews v. McPherson*, 65 N. C. 191.

Action against Sheriff.—When a sheriff has money in his hands raised under executions against the same defendant, in favor of two or more different creditors, and the money is claimed by one of the creditors, to the exclusion of the others, he may, for the purpose of asserting his claim, obtain a rule against the sheriff, and under this section cause the other creditors to be brought in by notice. *Dewey v. White*, 65 N. C. 225.

After Nonsuit.—No one can be made a party to an action after nonsuit therein. *Shell v. West*, 130 N. C. 171, 41 S. E. 65.

Quoted in *Peterson v. McManus*, 208 N. C. 802, 182 S. E. 483; *Bynum v. Fidelity Bank*, 219 N. C. 109, 12 S. E. (2d) 898.

Cited in *Shemwell v. Lethco*, 198 N. C. 346, 348, 151 S. E. 729; *Mack Truck Corp. v. Wachovia Bank & Trust Co.*, 199 N. C. 203, 154 S. E. 42; *Bost v. Metcalfe*, 219 N. C. 607, 14 S. E. (2d) 648.

§ 1-74. Abatement of actions.—1. No action abates by the death, or disability of a party, or by the transfer of any interest therein, if the cause of action survives, or continues. In case of death, except in suits for penalties and for damages merely vindictive, or in case of the disability of a party, the court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued, by, or against, his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action.

2. After a verdict is rendered in any action for a wrong, the action does not abate by the death of a party.

3. At any time after the death or disability of the party plaintiff, the court in which an action is pending, upon notice to such persons as it directs and upon application of any person aggrieved, may order that the action be abated, unless it is continued by the proper parties, within a time to be fixed by the court, not less than six nor more than twelve months from the granting of the order.

4. No action against a receiver of a corporation abates by reason of his death, but, upon suggestion of the facts on the record, it continues against his successor, or against the corporation in case a new receiver is not appointed. (Rev., s. 415; Code, s. 188; 1901, c. 2, s. 85; C. C. P., s. 64; R. C., c. 1, s. 4; c. 46, s. 43; C. S. 461.)

Cross References.—As to survival of actions, see § 28-172. As to actions which do not survive, see § 28-175. As to receivers for corporations, see § 55-147 et seq.

Section Changes Common Law Rule.—The rule of the common law that a personal right of action dies with the person has been changed by this and § 28-172 and, except in the instances specified in § 28-175, an action originally maintainable by or against a deceased person is now maintainable by or against his personal representative. *Suskin v. Maryland Trust Co.*, 214 N. C. 347, 199 S. E. 276.

The discretion conferred by this section is a sound discretion to be exercised where the circumstances render it proper that the action be prosecuted in the name of the transferee rather than in that of the original plaintiff; and one circumstance calling for the exercise of the discretion is the fact that the transferor, as in this case, has parted with all interest to the transferee, since § 1-57 requires that the action be prosecuted in the name of the real party in interest. *Hood v. Bell*, 84 F. (2d) 136.

Death of a Party.—No action abates with death except as herein provided. *Wood v. Watson*, 107 N. C. 52, 55, 12 S. E. 49; *Sledge v. Reid*, 73 N. C. 440, 443; *Baggarly v. Calvert*, 70 N. C. 688, 689.

In case of death, except in suits for penalties and for damages merely vindictive, the court, on motion, may allow the action to be continued by or against the personal representative of the deceased. *Shields v. Lawrence*, 72 N. C. 43, 45; *Latham v. Latham*, 178 N. C. 12, 100 S. E. 131.

If a defendant to a cause in the Supreme Court die pending the suit there, his representative may be made a party by process from that court. *Justices v. Crawford*, 8 N. C. 17.

Actions for Penalties.—"The court has no power in actions for penalties to make the personal representative of a deceased defendant a party, and in this condition of the record the action must abate." *Wallace v. McPherson*, 139 N. C. 297, 51 S. E. 897.

Where an action was brought against the administrator of a clerk on his official bond, for the penalty, for issuing a writ without requiring security to the protection of the bond, the court held that the right to sue for the penalty abated at the death of the clerk. *Fite v. Lander*, 52 N. C. 247.

Continuance of Action.—In case of death, the court, at any time within one year thereafter or afterwards, on a supplemental complaint, may allow the action to be con-

tinued by or against his representative or successor in interest. *Pennington v. Pennington*, 75 N. C. 356, 359.

State's Action upon Official Bond.—In an action brought by the state upon official bonds, the relator is but an agent of the state in seeking to recover the moneys due, and if he dies or goes out of office the action does not abate. *Davenport v. McKee*, 98 N. C. 500, 508, 4 S. E. 545.

Petition to Make Assets.—An administrator d. b. n. cannot be compelled by the creditors of an estate to proceed with a petition to make assets begun by the former administrator, deceased. *Brittain v. Dickson*, 111 N. C. 529, 16 S. E. 326.

Right of Counterclaim Survives to Executor.—Under the laws of New York State, and of North Carolina and under this section which provide that, on the death of any person, all demands against him with certain exceptions and the right to prosecute any action or proceeding thereon shall survive against his executors, a claim against a firm of factors doing business in New York, arising out of a consignment of goods to such firm for sale, may be set up as a counterclaim in an action brought in North Carolina against the owner of such claim by the executors of a general partner in such firm of factors. *Davis v. Bessemer City Cotton Mills*, 178 Fed. 784.

Survival of Insurance Due.—The member of an insurance order becomes entitled, as a matter of right, to the sick benefits accruing to him under his policy of insurance, and upon his death without having received payment thereof the cause of action against the order survives and is enforceable under this section. *Kelly v. Trimont Lodge*, 154 N. C. 97, 69 S. E. 764.

Assignment Pendente Lite.—Under this section a cause may proceed, notwithstanding a transfer of the property, in the name of the original party, or the assignee may be allowed to be substituted in his place by the express provisions hereof. *Davis v. Higgins*, 91 N. C. 382, 388.

Actions for Personal Torts.—At common law, a right of action sounding in tort for personal injuries inflicted does not survive the tortfeasor, and the doctrine is not changed where the injury does not cause death by this section, providing that no action shall abate by death, etc., or that the court may allow the action to continue, etc.; these provisions relating to such actions as survive, and not to actions for personal injuries, which do not survive. *Watts v. Vanderbilt*, 167 N. C. 567, 83 S. E. 813.

Personal Injuries.—An action brought by a plaintiff against a railroad company, to recover damages for personal injuries, does not abate by the death of the plaintiff. *Peebles v. North Carolina R. Co.*, 63 N. C. 238, 239. See also, *Collier v. Arrington*, 61 N. C. 356, 357.

An action for damages resulting from an automobile collision does not abate upon the death of the defendant, but may be continued upon the joinder of defendant's personal representative as a party, and the personal representative may set up therein a counterclaim for damages for the death of her intestate arising out of the same accident. *Johnson v. Smith*, 215 N. C. 322, 1 S. E. (2d) 834.

Action for Trespass.—In an action for trespass by two plaintiffs, in which one died pending the action, his devisee cannot be made a party and recover in his stead, but his administrator must be joined. *Rowe v. Cape Fear Lumber Co.*, 133 N. C. 433, 45 S. E. 830.

Breach of Promise.—An action for damages for breach of marriage does not abate upon the death of the defendant. *Allen v. Baker*, 86 N. C. 92; *Shuler v. Millsaps*, 71 N. C. 297.

Action for Seduction.—An action by a father for the seduction of his daughter abates by the death of the father, and cannot be revived by his executors. *McClure v. Miller*, 11 N. C. 133.

Mental Anguish.—An action against a telegraph company to recover for mental anguish caused by its delay in delivering a telegram dies with the person. *Morton v. Western Union Teleg. Co.*, 139 N. C. 299, 41 S. E. 484.

Action of Deceit.—An action of deceit may be brought against an executor for the deceit of testator in selling an unsound slave. *Helme v. Sanders*, 10 N. C. 563, 565; *Arnold v. Lanier*, 4 N. C. 143.

Trover.—An action of trover does not abate by the death of the party doing the wrong. *Weare v. Burge*, 32 N. C. 169.

Right of Appeal.—The right of appeal is not lost on account of the death of the adverse party. *Wood v. Watson*, 107 N. C. 52, 12 S. E. 49.

Want of Jurisdiction.—The want of jurisdiction is a ground of abatement. *Newman v. Tabor*, 27 N. C. 231; *Allison v. Hancock*, 13 N. C. 296; *Green v. Mangum*, 7 N. C. 39.

Administrator d. b. n. Bound by Judgment.—A privity exists between an administrator de bonis non and the first

administrator, as well in the case of plaintiff as of defendants, so that a judgment against the first administrator is conclusive evidence against the administrator de bonis non in an action to renew it. *Thompson v. Badham*, 70 N. C. 141.

When Action Abates.—Where a cause of action survived, the action does not abate by the death of the plaintiff ipso facto, but only upon the application of the party aggrieved; and then only in the discretion of the court, and in a time to be fixed, not less than six months nor more than one year from the granting of the order. *Moore v. North Carolina, R. Co.*, 74 N. C. 528.

In *Moore v. Moore*, 151 N. C. 555, 557, 66 S. E. 598, *Hoke, J.*, said: "Under this section, where the right survives, an action does not abate by the death of a party, except by order of the court, *Burnett v. Lyman*, 141 N. C. 500, 54 S. E. 412, 115 Am. St. Rep. 691; and while we have held in *Rogerson v. Leggett*, 145 N. C. 7, 58 S. E. 596; that a failure of the court to make such order for a period of eight years or more, and when there was nothing to indicate that the heirs of deceased were aware that an action was pending against them, was such an abuse of legal discretion as to constitute error, and might be available in some instances as a defense, the principle does not apply, we think, to the facts presented here, when the mother of these heirs was and continued to be a party of record, and these heirs themselves, or all who were resident in the state, were served within two years from the death of their ancestor and within the time fixed by order of the court; for we hold that the order which was made in this case, by fair intendment, meant the next civil term, and did not contemplate the intervening criminal term of the court; and there was no error, therefore, in denying defendants' motion for abatement of the action."

Death of Part of Plaintiffs.—Where two of several plaintiffs died and, there being no personal representative within a year thereafter, no motion was made to continue the action as to them, but the cause remained upon the docket and was proceeded with by the remaining plaintiffs, whose rights were finally determined, and the defendants did not apply to have the action abated as to the deceased parties, it was within the discretion of the presiding judge to allow the personal representative of such deceased parties to file a supplementary complaint and prosecute the action, his motion to be allowed to do so having been made before the final judgment was rendered in the cause. *State v. Flythe*, 114 N. C. 274, 19 S. E. 701.

Judgment Ex Mero Motu.—A judgment is necessary to abate an action, for the court may, ex mero motu, enter judgment when it appears that plaintiff failed for a year to prosecute his action against the "representatives or successors in interest" of the original defendant, whose death has been suggested though the records show there had been no discontinuance of the action. *Rogerson v. Leggett*, 145 N. C. 7, 58 S. E. 596.

Applied in *People's Bank v. Fidelity, etc., Co.*, 4 F. Supp. 379; *Betts v. Southern Ry. Co.*, 71 F. (2d) 787.

§ 1-75. Procedure on death of party.—When a party to an action in the superior court dies pending the action, his death may be suggested before the clerk of the court where the action is pending, during vacation. It is then the duty of the clerk to issue a summons to the party who succeeds to the rights or liabilities of a deceased defendant, commanding him to appear before him on a day named in the summons, which must be at least twenty days after its service, and answer the complaint, and the issue joined by the filing of the answer stands for trial at the succeeding term of the superior court. It is the duty of the clerk to issue a notice to the party succeeding to the rights of a deceased party who will be necessary to the prosecution of the action to final judgment to appear and become party plaintiff; and if the party made plaintiff files an amended complaint, the defendant has twenty days after notice of same in which to file an answer thereto, and the issue thus made up stands for trial at the succeeding term. (Rev., ss. 416, 417, 418; 1887, c. 389; C. S. 462.)

Cross Reference.—As to substitution of administrator d.

b. n. or c. t. a. as party in proceeding for final settlement, see § 28-168.

Continuity of Action. — In an action begun by or against a person who has since died, and the action is continued by or against his representative or successor in interest, this section requires that, in such instances, the summons shall be returnable before the clerk and in effect the action shall be ready for a speedy trial, thus recognizing the continuity of the action and the trial thereof in the county in which it had been brought. *Latham v. Latham*, 178 N. C. 12, 100 S. E. 131.

Duty of Adverse Party. — When either party to a suit dies before judgment, it is the duty of the adverse party to suggest the death to the court. *Wood v. Watson*, 107 N. C. 52, 12 S. E. 49.

Upon the suggestion of death of defendant, it is the duty of the clerk to issue summons to the representatives or persons who succeed to the rights or liabilities of the deceased defendant; the law does not contemplate that plaintiff may keep his action in semidormant condition until it suits his pleasure or interest to call the heir at law into court, when by such conduct he has become disabled to make his defense. *Rogerson v. Leggett*, 145 N. C. 7, 58 S. E. 596.

Presumption When Administrator Defends. — Where the record shows that a party through his counsel assumed the defense of an action as administrator, the regularity of his admission as a party in place of his intestate is sufficiently established, though the death of the intestate as having occurred during the progress of the cause was not suggested, and no service of the notice issued to him appeared to have been made. *Alexander v. Patton*, 90 N. C. 557.

Administrator of Oblige on Bond Made a Party. — Where the obligor on a bond given for the support of another for life, and for a valuable consideration, has failed to comply therewith, and the obligee has since died, leaving the obligor responsible under the terms of the bond for moneys due for the former's reasonable support, the action upon the bond, brought by the obligee, does not abate upon his death, and the superior court clerk has the authority to make his administrator a party under this section. *Martin v. Martin*, 162 N. C. 41, 77 S. E. 1104.

Action for Account. — In an action for an account and settlement, the death of the defendant being suggested, his executor comes in and is made a party defendant. *Grant v. Bell*, 91 N. C. 495.

Judgment Set Aside Where No One Authorized to Represent Estate at Trial. — Where it appears that at the time of trial there was no one authorized to represent the estate, this constitutes a meritorious reason for setting aside the judgment, and this result is not affected by the payment of fees to the attorneys purporting to represent defendant by the executor c. t. a., under order of court, since the executor c. t. a. was not made a party to the suit, and did not appear therein. *Taylor v. Caudle*, 208 N. C. 298, 180 S. E. 699.

SUBCHAPTER IV. VENUE.

Art. 7. Venue.

§ 1-76. Where subject of action situated.—Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power to the court to change the place of trial, in the cases provided by law:

1. Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.
2. Partition of real property.
3. Foreclosure of a mortgage of real property.
4. Recovery of personal property. (Rev., s. 419; Code, s. 190; 1889, c. 219; C. C. P., s. 66; C. S. 463.)

- I. In General.
- II. Actions Relating to Real Property.
- III. Partition of Realty.
- IV. Foreclosure of Mortgage of Real Property.
- V. Recovery of Personal Property.

Cross References.

As to change of venue, see § 1-83. As to removal for fair and impartial trial, see § 1-84. As to venue in criminal actions, see § 15-128 et seq. As to venue in indictment for

beating way on trains, see § 60-104; for receiving stolen goods, see § 14-71; for discrimination against the Atlantic and North Carolina Railroad, see § 60-8. As to venue in partition proceedings, see § 46-2.

See note under § 1-82.

I. IN GENERAL.

Editor's Note. — That the differences between venue and jurisdiction have been the source of some confusion in North Carolina, as elsewhere, is apparent from a perusal of the cases pertaining to the subject of this article. In order to point out the nice distinctions existing between these two subjects the following excerpt, appearing in most of the later text treatises, is quoted insofar as it is applicable to North Carolina.

Dean Lile, of the University of Virginia, in his admirable treatise on Equity Pleading and Practice contrasts jurisdiction and venue as follows:

"1. Jurisdiction connotes the powers of the court—venue the place of suit.

"2. Jurisdiction is a question of law—venue a question of fact to be established by testimony.

"3. Jurisdiction must appear from the allegation of the bill—venue need not so appear.

"4. Jurisdiction (potential) may not be conferred by consent—venue may.

"5. Error in jurisdiction is fatal—error in venue, not pleaded in abatement, is harmless.

"6. ***

"7. Jurisdiction (potential) contemplates subject-matter only—venue contemplates locality only; error in the one is in the selection of the court, in the other in the selection of the place.

"8. Jurisdiction is essential to confer venue; but venue is not essential to jurisdiction."

These sections relating to venue all refer to "actions" and have no reference to the writ of habeas corpus which has been denominated a "high prerogative writ." *McEachern v. McEachern*, 210 N. C. 98, 102, 185 S. E. 684.

Venue a Matter of Legislative Control. — The venue of civil actions is a matter for legislative regulation, and is not governed by the rules of the common law. *Interstate Cooperage Co. v. Eureka Lumber Co.*, 151 N. C. 455, 456, 66 S. E. 434. It deals with procedure and is not jurisdictional, in the absence of statutory provision to that effect. *State v. Seaboard Air Line Railway*, 146 N. C. 568, 60 S. E. 506; *Latham v. Latham*, 178 N. C. 12, 13, 100 S. E. 131; *Clark v. Carolina Homes*, 189 N. C. 703, 128 S. E. 20, 25.

This subchapter is in restraint of the common law, as, without such express enactment, the plaintiff might make a choice of venue anywhere within the state. *State v. Stone*, 52 N. C. 382.

Contract Stipulation Regarding Venue. — There is a difference between the venue of an action, the place of trial, and jurisdiction of the court over the subject-matter of the action, and the parties to a contract may not, in advance of any disagreement arising thereunder, designate a jurisdiction exclusive of others, and confine the trial thereto in opposition to the will of the Legislature expressed by this section; and a motion to remove a cause brought in the proper jurisdiction on the ground that the contract otherwise specified it, will be denied. *Gaither v. Charlotte Motor Car Co.*, 182 N. C. 498, 109 S. E. 362.

Determining Nature of Transaction. — In *Councill v. Bailey*, 154 N. C. 54, 59, 69 S. E. 760, it is said; "This Court has recently held in *Bridgers v. Ormond*, 148 N. C. 375, 62 S. E. 422, that such a motion as this one (as to proper venue) must be considered with reference to the questions that may be raised by the pleadings, and do not depend for their decision solely upon the allegations of the complaint."

Applicability to Trials before Justices. — In *Fisher v. Bullard*, 109 N. C. 574, 13 S. E. 799; the Court said: "We do not find any statute making the provisions of the Code of Civil Procedure (this section), as to the place for trial, applicable to trials before a justice." But section 7-149 provides that the whole chapter on civil procedure is applicable in certain attachment cases before justices. *Mohn v. Creesey*, 193 N. C. 568, 571, 137 S. E. 718.

An action by an administrator is not within any of the subdivisions of this section. *Whitford v. North State Life Ins. Co.*, 156 N. C. 42, 72 S. E. 85.

Cited in *Bohannon v. Virginia Trust Co.*, 198 N. C. 701, 153 S. E. 262; *Guy v. Gould*, 199 N. C. 820, 155 S. E. 925; *Miller v. Miller*, 205 N. C. 753, 172 S. E. 493; *Guilford County v. Estates Administration*, 212 N. C. 653, 194 S. E. 298.

II. ACTIONS RELATING TO REAL PROPERTY.

A suit to set aside a deed of trust for lands, and to establish a prior lien thereon in plaintiff's favor, involves an estate

or interest therein, within the intent and meaning of this section. *Henrico Lumber Co. v. Dare Lumber Co.*, 180 N. C. 12, 103 S. E. 915.

Where the wife of a debtor is made party defendant in an action in the nature of a creditors' bill in order to set aside his deed to her for fraud and subject the land to the satisfaction of the demands of his creditors, the suit to establish the plaintiffs' claims will be considered as incident to the essential and controlling purpose of setting aside the deed, and the venue is governed by this subdivision. *Wofford-Fain & Co. v. Hampton*, 173 N. C. 686, 92 S. E. 612.

Setting Sale Aside.—A suit by a purchaser of land to set aside the purchase and to cancel certain of his notes given for the deferred payment of the purchase price, alleging a fraudulent representation by the owner as to the quantity of land in dispute in one of the lots, without which he would not have purchased, the controversy involves an interest in the lands as required by this section, to be brought in the county where the land is situated. *Vaughan v. Fallin*, 183 N. C. 318, 111 S. E. 513.

An action to impress a parol trust upon lands and for an accounting involves a determination of an interest in lands, and the proper venue, under this section, therefore, is in the county in which the land is situated. *Williams v. McRackan*, 186 N. C. 381, 119 S. E. 746.

Action on Note Secured by Deed of Trust.—An action against the endorser of a negotiable note, secured by a deed of trust on land, is not an action involving an estate or interest in land and does not have to be brought where the land is located. *White v. Rankins*, 206 N. C. 104, 173 S. E. 282.

Specific Performance.—The fact that there are other questions to be determined in the action, does not alter the case when the chief purposes of the suit are to compel one defendant (trustee) to sell and another defendant to convey lands situated in a county other than that in which the action is pending. *Falls, etc., Mfg. Co. v. Brower*, 105 N. C. 440, 11 S. E. 313.

An action for subrogation to the rights of the vendor must be tried in the county where the land is situated. *Frale y. March*, 68 N. C. 160.

Conversion as Aggravation of Damages.—Where the intent of the pleading was to sue for a trespass on the land, and an allegation of a conversion was inserted in aggravation of damages, the refusal of the lower court upon motion properly made in due time, to remove the cause to the county in which the land was situated, was erroneous. *Richmond Cedar Works v. Roper Lumber Co.*, 161 N. C. 103, 77 S. E. 770.

Setting Aside Grant or Patent.—This section applies to the exclusion of section 146-67, which controls where there are separate transactions affecting distinct pieces of property lying wholly in different counties. *Kanawha Hardwood Co. v. Waldo*, 161 N. C. 196, 76 S. E. 680.

Docketed judgments confer no estate or interest in real estate within the meaning of this subdivision of the section, but merely the right to subject the realty to the payment of the judgments by sale under execution, and hence an action to set aside judgments as fraudulent and for the appointment of a receiver need not be brought in the county where the property upon which such judgments are liens is situated. *Baruch v. Long*, 117 N. C. 509, 23 S. E. 447.

An action for the breach of covenants of seizin and the right to convey is not required to be tried in the county in which the realty is situated. *Eames v. Armstrong*, 136 N. C. 392, 48 S. E. 769.

Petitions for dower should be filed in the county of the husband's usual residence, but the jury of allotment may assign the same in one or more tracts situated in one or more counties. *Askew v. Bynum*, 81 N. C. 350.

Injuries to Land.—The fact that a complaint for injuries to real estate fails to expressly allege in what county the land lies is immaterial where the complaint sets up as a cause of action a breach of an agreement contained in a former judgment between the same parties which is appropriately referred to in the complaint and set out in the answer and which shows the proper county. *Lucas v. Carolina Cent. R. Co.*, 121 N. C. 506, 28 S. E. 265.

In an action for wrongful conversion of oysters taken from oyster beds, the defendant is not entitled to a change of venue to the county in which the beds are situated. *Makely v. Boothe Co.*, 129 N. C. 11, 39 S. E. 582.

The action to recover for injuries to land caused by backing water upon it is transitory. *Cox v. Oakdale Cotton Mills*, 211 N. C. 473, 190 S. E. 750.

Same—Burning Timber.—An action against a railroad company to recover damages for burning land is a local one in its nature and triable in the county in which the injury occurred irrespective of section 1-81. *Perry v. Seaboard*

Air Line R. Co., 153 N. C. 117, 66 S. E. 1060. See note of this case under section 1-81.

Same—By Public Officers.—Section 1-77, providing for venue in actions against public officers, constitutes an exception to this section; see note to sec. 1-77.

Pollution of Stream.—An action for damages caused by the pollution of a stream resulting in forcing the plaintiff to shut down his clay mining machine appears to be a transitory one and is not such as contemplated by this section. *Harris Clay Co. v. Carolina China Clay Co.*, 203 N. C. 12, 164 S. E. 341.

Cutting and Removing Timber.—The character of trees severed by a trespasser from the lands is changed from realty to personality, and when the trees have been carried away, the owner of the lands and trees may sue in trover and conversion, or in trespass *de bonis asportatis*, for the value of the trees, both of which actions are transitory, or for trespass *quare clausum fregit*, which is local, and should be brought in the county wherein the land is situated. *Blevens v. Kitchen Lbr. Co.*, 207 N. C. 144, 146, 176 S. E. 262.

An action to recover the value, or "worth," of timber cut, removed and converted to its own use by the defendant is an action of trover and conversion, or of trespass *de bonis asportatis*, and is therefore transitory. *Id.*

Action was one to determine amounts to be paid for extension of rights under timber and not one affecting realty. *Hilton Lbr. Co. v. Estate Corp.*, 215 N. C. 649, 2 S. E. (2d) 869.

A complaint alleging that defendant entered upon the land of plaintiff and cut and removed therefrom a specified amount of timber and praying that plaintiff recover the value of the timber wrongfully cut and removed states a transitory cause of action, and defendant's motion to remove from the county of plaintiff's residence to the county wherein the land is situated, was properly denied. *Bunting v. Henderson*, 220 N. C. 194, 16 S. E. (2d) 836.

Fraudulent Representations Inducing Conveyance of Lands.—When an action sounds in damages arising from a fraudulent representation inducing the purchase and conveyance of lands for which purchase money notes have been given, and not a foreclosure of a mortgage or the nullification of the transaction, it does not involve an interest in or title to lands under subsection 1 of this section and the action is not removable as a matter of the movant's right, and the plaintiff may select the county of his residence as the venue under § 1-82. *Causey v. Morris*, 195 N. C. 532, 142 S. E. 783.

Removal of Action to County Where Land Lies.—Where on the facts alleged in his complaint, the plaintiff is entitled not only to a judgment that he recover of the defendant the amount of his debt, but also to a decree for the foreclosure of the mortgage by which his debt is secured, and the action was begun and is pending in the county in which the plaintiff resides, but the land conveyed by the mortgage is in another county, the plaintiff cannot deprive the defendant of his right, under the statute, to the removal of the action to the county in which the land is situated, for trial, by his failure to pray for a foreclosure of the mortgage, at least, when he prays judgment for his debt, and also for such other and further relief as he may be entitled to, in law or in equity, on the facts alleged in his complaint. *Carolina Mtg. Co. v. Long*, 205 N. C. 533, 536, 172 S. E. 209.

Appeal from Order of Removal.—See note under § 1-583.

III. PARTITION OF REALTY.

Editor's Note.—Section 46-2, in the article on Partition, is substantially the same as subdivision two of this section. The two provisions seem to constitute simply an illustration or application of the first subdivision of this section, as proceedings for partition certainly determine "a right or interest" in real property.

This sub-section has never received a direct construction from the courts, but in *The Matter of Skinner*, 22 N. C. 63, decided prior to the merger of the courts of law and equity, it is held that land situated in two counties could be sold for partition by a decree of the court of equity of either county.

IV. FORECLOSURE OF A MORTGAGE OF REAL PROPERTY.

Vendor's Lien.—When it appears from the complaint in an action to enforce specific performance by the vendee of a contract to convey lands that a court of equity would decree a vendor's lien on the land and order it sold for the payment of the purchase price, if the alleged facts were established, the suit partakes in substance of the nature of one for the foreclosure of a mortgage, and is within this subdivision. *Councill v. Bailey*, 154 N. C. 54, 69 S. E. 760.

Subrogation.—An action by the holder of certain notes given for the purchase of land against the purchaser of the land, and others, to be subrogated to the rights of the vendor, in the contract of sale of the land, which is substantially the same as an action "for the foreclosure of a mortgage of real estate," must be tried in the county in which the land is situate within the meaning of this subdivision. *Fraley v. March*, 68 N. C. 160.

In *Connor v. Dillard*, 129 N. C. 50, 39 S. E. 641, it is said: The action is "substantially for the foreclosure of a mortgage" (*Fraley v. March*, 68 N. C. 160), and the judgment could be enforced only by subjecting a particular tract of real estate in another county. The enforcement of the judgment against that land is the sole object of the action. *Falls, etc., Mfg. Co. v. Brower*, 105 N. C. 440, 11 S. E. 313. If the action had been for a mere personal judgment, though on a mortgage note, it could have been brought where plaintiff resides, and docketing the judgment would not convey to plaintiff any estate in debtor's land. *Gammon v. Johnson*, 126 N. C. 64, 35 S. E. 185; *McLean v. Shaw*, 125 N. C. 491, 34 S. E. 634.

Land in Two Counties.—A foreclosure sale of land lying in two counties under a mortgage registered in but one is authorized by this subdivision. *King v. Portis*, 81 N. C. 382.

Injunction.—The similar section of the Ohio code was held not applicable to an injunction against enforcing a lien claimed to be invalid. 8 Circuit Court Reports 614, 619.

V. RECOVERY OF PERSONAL PROPERTY.

Editor's Note.—In *Smitheal v. Wilkerson*, 100 N. C. 52, 6 S. E. 71, it was held that the requirements of subsection 4 of this section, were restricted to personal property, "dis-trained for any cause." Thereupon the act of 1889, chapter 219, struck out the restriction and made the venue for the "recovery of personal property" in all cases in the county where the property is situated. *Brown v. Cogdell*, 136 N. C. 32, 33, 48 S. E. 515.

It is now held that the venue of actions for the recovery of personal property is in the county where the property is situated, though the ancillary remedy of claim and delivery is not resorted to. *Brown v. Cogdell*, 136 N. C. 32, 48 S. E. 515.

Recovery as Sole Object.—Where the recovery of personal property is not the sole or chief relief demanded, an action need not necessarily be brought in the county in which the property is located. *Woodard v. Sauls*, 134 N. C. 274, 46 S. E. 507; *Bowen Piano Co. v. Newell*, 177 N. C. 533, 98 S. E. 774.

Thus an action being for an accounting, and the question of ownership of notes and bonds being raised only incidentally, it need not be brought in the county in which they are situated. *Clow v. McNeill*, 167 N. C. 212, 83 S. E. 308.

But where it appears that the relief sought is not the recovery of the debt or to enjoin a sale, but the recovery of the specific personal property with the injunctive restraint as an incident thereto, the cause is within this subdivision. *Fairley Bros. v. Abernathy*, 190 N. C. 494, 130 S. E. 184.

Where the recovery of personal property is the sole relief demanded or even the chief, main or primary relief, other matters being incidental, the county in which the personal property or some part thereof is situated is the proper venue. *Marshallburn v. Purifoy*, 222 N. C. 219, 22 S. E. (2d) 431.

Setting Aside Transfer.—An action to set aside the transfer of personal property as fraudulent, and for the appointment of a receiver, is not an action for the recovery of such property, and hence need not be brought in the county where the same is located, as provided by this subdivision of the section. *Baruch v. Long*, 117 N. C. 509, 23 S. E. 447.

§ 1-77. Where cause of action arose.—Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:

1. Recovery of a penalty or forfeiture, imposed by statute; except that, when it is imposed for an offense committed on a sound, bay, river, or other body of water, situated in two or more counties, the action may be brought in any county bordering on such body of water, and opposite to the place where the offense was committed.

2. Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a per-

son who by his command or in his aid does anything touching the duties of such officer. (Rev., s. 420; Code, s. 191; C. C. P., s. 67; C. S. 461.)

Cross References.—As to suit on official bond, by board of county commissioners, of sheriff, etc., see § 155-18. As to neglect of duty by member of board of county commissioners, a misdemeanor, see § 153-15. As to actions against registers of deeds, see §§ 161-16, 161-27. As to corporate powers of municipal corporation, see § 160-2. As to quo warranto, see § 1-514 et seq. As to mandamus, see § 1-511 et seq.

Editor's Note.—In spite of the fact that section 1-76 provides that actions for injuries to realty must be brought in the county where the land lies, it is held that damage to land occasioned by the acts of public officers, officiating in counties other than where the land lies, must be brought, as provided in this section, where the cause arose. For example in *Cecil v. High Point*, 165 N. C. 431, 81 S. E. 516 it was held that the venue of an action to recover from an incorporated town damages to the lands of an owner situated in an adjoining or different county, caused by the improper method of emptying its sewage into an insufficient stream of water, is properly in the county wherein the town is situated, for such cause arose by reason of the official conduct of municipal officers and consequently is regulated by this section.

This interpretation is not irreconcilable with the provision of the preceding section; it merely constitutes an illustration of the doctrine that the courts will be reluctant to declare any part of a statute inoperative when the same may be harmonized with other seemingly inconsistent parts—in this instance by interpreting this section as an exception to the preceding section whenever necessary, i. e. whenever the land is in one county and the acts of the officers take place in another.

Nature of Acts of Officer.—An action is controlled by this section irrespective of the question as to whether the damages arose from a negligent discharge by the officer of an administrative duty or a technically governmental one. *Light Company v. Comm.*, 151 N. C. 558, 66 S. E. 569.

Thus a cause of action for damages for breach of contract made by a board of a municipal corporation is within the meaning of this subsection. *Id.*

"By His Command" or "In His Aid."—The words, "in his aid," immediately following the words, "by his command," were meant to extend the immunity to all who assisted and took part in the act with his assent, though not by his direct orders, for all such stand upon the same footing. *Harvey v. Brevard*, 98 N. C. 93, 94, 3 S. E. 911.

The obligors on a bond to indemnify a sheriff against loss, etc., in seizing and selling property under execution, are not included in that class of persons "who by his command or in his aid shall do anything touching the duties of such officer." *Harvey v. Brevard*, 98 N. C. 93, 3 S. E. 911.

Officers of Counties and Cities.—The Supreme Court has repeatedly and uniformly held that actions against county commissioners and other officers must be brought in the county of which they are officers, and cities and towns are of the like nature, and should stand upon the same footing as to actions against them. *Johnston v. Board*, 67 N. C. 101; *Alexander v. Commissioners*, 67 N. C. 330; *Jones v. Board*, 69 N. C. 412; *Steele v. Commissioners*, 70 N. C. 137; *Jones v. Statesville*, 97 N. C. 86, 88, 2 S. E. 346.

In *Jones v. Statesville*, 97 N. C. 86, 2 S. E. 346, this section was construed by this Court, in the following language, to embrace a municipal corporation: "The defendant is a municipal corporation, public in its nature; it is an artificial person, created and recognized by the law, invested with important corporate powers, public and, in a sense, artificial in their nature, and charged with public duties, which it executes by and through its officers and agents. We therefore think that actions against it fairly come within the meaning of and are embraced by the statutory provision first above recited (this section)." *Brevard Light, etc., Co., v. Board*, 151 N. C. 558, 560, 66 S. E. 569.

Action against Municipality Is Action against Public Officer.—Since a municipality may act only through its officers and agents, an action against a municipality is an action against "a public officer" within the meaning of this section. *Murphy v. High Point*, 218 N. C. 597, 12 S. E. (2d) 1.

Venue of Action against Municipality.—The proper venue of an action against a municipality is the county where the cause of action, or some part thereof, arose. *Murphy v. High Point*, 218 N. C. 597, 12 S. E. (2d) 1.

Where Cause of Action Arose.—The complaint alleged damage to plaintiff's land resulting from the negligent operation of defendant municipality's sewage disposal plant. The action was instituted in the county in which the land

lies and in which the municipality maintained and operated its sewage disposal plant. The municipality made a motion that the action be removed to the county in which it is located. Held: The alleged negligent acts resulting in the injury to the land occurred at the point where defendant municipality maintained its sewage disposal plant and the cause of action there arose, and therefore the municipality's motion for change of venue was erroneously granted. *Murphy v. High Point*, 218 N. C. 597, 12 S. E. (2d) 1.

Against Register of Deeds.—An action for the penalty against a register of deeds for unlawfully issuing a marriage license is controlled by this section. *Dixon v. Haar*, 158 N. C. 341, 74 S. E. 1.

Action Dismissed as to Town Is Properly Remanded to County of Origin.—Where the plaintiff instituted a suit in the county of her residence, the county in which defendant administrator qualified, and upon joinder of a town as a party defendant, the action was removed to the county in which the town is located, the town's demurrer being sustained and the action dismissed as to it, it was held that the court properly remanded the action to the county in which it was originally instituted. *Banks v. Joyner*, 209 N. C. 261, 183 S. E. 273.

Acts Not Done by Virtue of Office.—In an action in Catawba county, residence of plaintiff, for an alleged wrongful conspiracy and damages therefor which occurred in Wilkes county, against a corporation and two individuals acting as the corporation's agents, one of the individuals being described as a deputy sheriff of Wilkes county, a motion for change of venue to Wilkes county, under this section was properly denied, there being no allegation that the acts complained of were done by the deputy sheriff by virtue of his office. *Potts v. United Supply Co.*, 222 N. C. 176, 22 S. E. (2d) 255.

Quo Warranto and Mandamus.—This section should apply in the writs of quo warranto (no longer used in this state) and mandamus, where an official act of usurpation, or failure to do some act which the duties of the office require, constitute the charge, and in effect amounts to a criminal action, or an action to subject the parties to pains and penalties. *Johnston v. Board*, 67 N. C. 101.

An action by an administrator does not come within this section. *Whitford v. North State Life Ins. Co.*, 156 N. C. 42, 72 S. E. 85.

Co-defendants—Nol Pros of Officers.—An action against the sheriff of X county instituted in Y county does not entitle the co-defendant of the sheriff to have the suit removed to X county where the cause is nol prossed as to the sheriff. *Harvey v. Rich*, 98 N. C. 95, 3 S. E. 912.

Proving Defendants are Officers.—If made to appear properly by affidavit or otherwise that the defendants came within the terms of this section, the fact that they insist that the action was brought against them as individuals and not as public officers, is immaterial. *Shaver v. Huntley*, 107 N. C. 623, 629, 12 S. E. 316.

Venue in Other Cases.—Section 1-82 may constitute an exception to this section. See notes to sec. 1-82.

Trial of Whole Controversy in County Where Offense Occurred.—Where in an action against the clerk of the Superior Court of one county and the sheriff of another county the clerk makes motion for removal of the cause as to him to the county of his office under this section, the motion should have been denied in order to avoid the possibility of conflicting verdicts and judgments and to dispose of the controversy in one action, the spirit of this section being effected in such instances by trial of the whole controversy in the county where the offense occurred. *Kellis v. Welch*, 201 N. C. 39, 158 S. E. 742.

Actions for Penalties—Applicability to Justice's Court.—This section, providing that actions for recovery of penalties, must be brought in the county where the cause of action arose, applies to those actions of which the Superior Court has jurisdiction; it does not embrace those within the jurisdiction of justices of the peace (i. e. \$200. or less). *Fisher v. Bullard*, 109 N. C. 574, 13 S. E. 799; *Dixon v. Haar*, 158 N. C. 341, 342, 74 S. E. 1.

Same—Applied.—In *State v. Seaboard Air Line Railway*, 146 N. C. 568, 60 S. E. 506.

Cited in *McFadden v. Maxwell*, 198 N. C. 223, 151 S. E. 250.

§ 1-78. Official bonds, executors and administrators.—All actions against executors and administrators in their official capacity, except where otherwise provided by statute, and all actions upon official bonds must be instituted in the county where the bonds were given, if the principal or any surety on the bond is in the county; if not,

then in the plaintiff's county. (Rev., s. 421; Code, s. 193; 1868-9, c. 258; C. S. 465.)

Applicable to All Actions Against Administrators.—"The object of the statute," says Mr. Justice Reade, speaking for the Court, "was to have suits against these persons, whether upon their bonds or not, in the county where they took out letters and where they make their returns and settlements and transact all the business of the estate in their hands." *Stanley v. Mason*, 69 N. C. 1; *Foy v. Morehead*, 69 N. C. 512; *Bidwell v. King*, 71 N. C. 287. And the same principle is recognized, in reference to an action upon a guardian bond, in *State v. Staton*, 78 N. C. 235, where the same eminent judge delivers the opinion also.

These cases were followed in *Farmers State Alliance v. Murrell*, 119 N. C. 124, 25 S. E. 785 where it said:

Under this section an action against an administrator of a decedent, whether upon the official bond of the administrator or for the purpose of holding him liable for any act of his, or for any liability of his intestate incurred in his lifetime, must be brought in the county where the bond was given if the principal or any of his sureties is in such county.

The same case criticizes and refuses to follow the dictum in *State v. Peebles*, 100 N. C. 348, 351, 6 S. E. 798, where it is stated that: "manifestly this section exempts from the operation of the preceding sections suits upon official bonds, and none other, and this appears in the fact that such bonds, as giving rise to the action, are mentioned three times in the section."

A personal action against an administrator is not, of course, within the meaning of this section. *Craven v. Munger*, 170 N. C. 424, 87 S. E. 216.

To Foreclose Tax Liens.—An action against the estate of a deceased person to foreclose a tax sale certificate must be brought in the county where the land is situate. *Guilford County v. Estates Administration, Inc.*, 212 N. C. 653, 194 S. E. 195.

Applies to Actions against Not by Administrators.—This section applies only to actions against administrators and not to actions brought by them. *Whitford v. North State Life Ins. Co.*, 156 N. C. 42, 72 S. E. 85.

The clear inference from this section is that it was the purpose of the Legislature to make a distinction between actions by and against administrators, and when it is said that actions against administrators shall be brought in the county where the bond is filed, and nothing is said as to actions by administrator, it excludes the idea that actions instituted by the administrator are necessarily to be brought in the county in which letters are granted. *Whitford v. North State Life Ins. Co.*, 156 N. C. 42, 72 S. E. 85.

"Instituted."—The word "instituted" as used in this section signifies the commencement of the proceedings—to institute an action is to bring an action. Here a difference is apparent from the language of the other sections pertaining to venue as they provide that the action shall be "tried."

In consequence of this distinction it is held that this section has no application where an action has been commenced in another county against a defendant, who has since died, and his administrator has been made a party. *Latham v. Latham*, 178 N. C. 12, 100 S. E. 131.

Where plaintiff instituted an action in the county of his residence to collect damages resulting from an automobile collision, and the defendant died prior to service of process and thereupon defendant's administratrix was joined as a party defendant, the administratrix may not claim that the action is not properly pending because not instituted in the county in which she had given bond, since venue is governed by the status of the parties at the commencement of the action, but defendant administratrix may move for a removal of the cause to the county of her residence and the scene of the collision involved for the convenience of witnesses and the promotion of the ends of justice. *Johnson v. Smith*, 215 N. C. 322, 1 S. E. (2d) 834.

Action for Account and Settlement.—Where an action involves an account and settlement of an estate, by the express words of this section, such an action must be instituted in the county where the administrator qualified. The case of *Roberts v. Connor*, 125 N. C. 45, 34 S. E. 107, does not conflict with this position. That was a suit which concerned the conduct of a bank operated by an executor, and the decision was put on the express ground that the official acts and conduct of the executor were in no wise involved. *Thomas v. Ellington*, 162 N. C. 131, 132, 78 S. E. 12.

Suits against Successor of Administrator.—A qualified as administrator of B, in Halifax County, and gave bond there. Afterwards A died in Northampton, and C qualified as his administratrix in that county. C, administratrix, and D, one of the sureties on the bond of A, resided in Northampton, and were sued in Halifax County on the bond of A, by a

resident of Halifax: Held, that the action was properly brought in Halifax, under this section. *State v. Peebles*, 100 N. C. 348, 6 S. E. 798.

An action against an executrix to recover on a guardianship bond executed by testator is properly brought in the county in which the bond was given and the sureties thereon resided and in which the administrators of the sureties qualified, and the motion of defendant executrix to remove as a matter of right to the county in which she qualified is properly denied, the primary and controlling intent of this section being that actions on official bonds should be instituted in the county in which the bonds were given if the principal or any surety on the bond is in the county. *State v. Patterson*, 213 N. C. 138, 195 S. E. 389.

In an action on a guardianship bond instituted in the county in which the bond was given and the sureties resided, the contention that the sureties were insolvent and that their administrators were joined to prevent removal to the county in which the executrix of the principal on the bond qualified, is untenable, since the controlling factors are the place where the bond was given and the residence of the sureties and not the solvency or insolvency of the sureties. *Id.*

Compelling Institution of Action in Particular County Does Not Prevent Motion for Removal.—Where a plaintiff was compelled to institute his action in a particular county by reason of the mandate of this section, his act in so doing could not therefore be imputed to him as a voluntary choice of venue so as to prevent him from lodging a motion for removal under § 1-83, par. (2). *Pushman v. Dameron*, 208 N. C. 336, 337, 180 S. E. 578.

Hence the trial judge in the exercise of a sound discretion has the power to remove the cause to another county for trial since the wording of this section does not necessarily mean that the cause should be actually tried in the county where the cause was instituted. *Id.*

Quoted in *Bohannon v. Wachovia Bank, etc., Co.*, 210 N. C. 679, 188 S. E. 390.

§ 1-79. Domestic corporations.—For the purpose of suing and being sued the principal place of business of a domestic corporation is its residence. (Rev., s. 422; 1903, c. 806; C. S. 466.)

Cross Reference.—As to actions against railroads, see § 1-81.

Editor's Note.—Prior to the passage of this section, there was no express statute regulating the venue in actions against domestic corporations and such actions were controlled by sec. 1-82. *Farmers State Alliance v. Murrell*, 119 N. C. 124, 25 S. E. 785. See also *Cline v. Bryson, etc., Co.*, 116 N. C. 837, 21 S. E. 791.

The purpose of this section was not to change the provisions of section 1-81 or to deny plaintiff's right to sue a domestic corporation in the county of his residence; but to remedy the defect of section 1-81 so that a domestic corporation can be sued in the same venue as an individual, excepting railroads in certain specified instances, and where the venue is fixed by sections 1-76, 1-77 and 1-78. *Robertson v. Greenleaf Johnson Lumber Co.*, 153 N. C. 120, 68 S. E. 1064.

This section is for the purpose of determining the residence of domestic corporations, and does 1. affect the question of the venue of an action in the nature of a creditors' bill to set aside a husband's deed to his wife alleged to be in fraud of the creditors' rights. *Wofford-Fain & Co. v. Hampton*, 173 N. C. 686, 92 S. E. 612.

"Principal Place of Business" — The words "principal place of business," as used in this section must be regarded as synonymous with the words "principal office," as used in secs. 55-2, 55-34, 55-105, and other sections of the General Statutes. *Robertson v. Greenleaf Johnson Lumber Co.*, 153 N. C. 120, 122, 68 S. E. 1064.

Same—Fixed by Charter. — The residence of a corporation for the purpose of suing and being sued is where the governing power is exercised, and is fixed by the charter, without power on the part of the corporation to affect it by a change of its principal place of business. *Garrett & Co. v. Bear*, 144 N. C. 23, 56 S. E. 479.

Applied in *Eastern Cotton Oil Co. v. New Bern Oil, etc.*, Co., 204 N. C. 362, 168 S. E. 411.

Cited in *McCue v. Times-News Co.*, 199 N. C. 802, 803, 156 S. E. 129; *Occidental Life Ins. Co. v. Lawrence*, 204 N. C. 707, 169 S. E. 636.

§ 1-80. Foreign corporations.—An action against a corporation created by or under the law of any other state or government may be brought in the superior court of any county in which the cause

of action arose, or in which the corporation usually did business, or has property, or in which the plaintiffs, or either of them, reside, in the following cases:

1. By a resident of this state, for any cause of action.

2. By a nonresident of this state in any county where he or they are regularly engaged in carrying on business.

3. By a plaintiff, not a resident of this state, when the cause of action arose or the subject of the action is situated in this state. (Rev., s. 423; Code, s. 194; C. C. P., s. 361; 1876-7, c. 170; 1907, c. 460; C. S. 467.)

Cross References.—As to actions against railroads, see § 1-81. As to foreign corporations doing business in state, requisites, see § 55-118.

See notes to sec. 1-81 and sec. 1-82.

Does Not Affect Jurisdiction. — This section is under the subject of venue and not jurisdiction, and, though it enumerates certain cases, it does not purport to restrict the jurisdiction of the court or to prevent the exercise of such jurisdiction as theretofore existed; and under our own decisions and those of New York, from which the statute was adopted, it does not interfere with the jurisdiction of our courts of transitory causes of actions. *Ledford v. Western Union Tel. Co.*, 179 N. C. 63, 101 S. E. 533.

In *Robinson v. The Oceanic Steam Co.*, 112 N. Y. 322, construing the prototype of this section, it is said: "This section did not assume to define all the cases in which actions could be brought against foreign corporations, and did not absolutely limit the power and jurisdiction of the courts mentioned. It specified the cases in which foreign corporations could compulsorily, by service or process in the mode prescribed by law, be subjected to the jurisdiction of the courts. It did not deprive the courts of any of their general jurisdiction." See *Ledford v. Western Union Tel. Co.*, 179 N. C. 63, 66, 101 S. E. 533.

Section 1-81 an Exception.—The enactment of section 1-81 does not repeal this section, but the latter will be confined to corporations, other than railway companies, which have been chartered by any other state, government or country. *Propst v. Railroad*, 139 N. C. 397, 51 S. E. 920.

Applicability to Justices Court. — This section refers only to actions of which the superior court has jurisdiction, and was not intended to give such courts jurisdiction of civil actions founded on contract wherein the sum demanded shall not exceed \$200. *Howard v. Mutual Reserve Fund Life Ass'n*, 125 N. C. 49, 53, 34 S. E. 199.

Cutting Timber. — Where a nonresident plaintiff sues to recover from a nonresident defendant the value of timber alleged to have been cut and removed by the defendant to a different county from that wherein the lands are situated, and brings his action in the county where the conversion is alleged to have occurred, to maintain his action in the latter county he must show that the defendant conducted business or had property therein, or the cause is removable to the county where the land is situated that being the county wherein the cause of action arose. *Richmond Cedar Works v. Roper Lumber Co.*, 161 N. C. 603, 604, 77 S. E. 770.

An action for a penalty can be brought against a foreign defendant before a justice of the peace in any county in which the defendant does business or has property, or where plaintiff resides. *Allen-Fleming Co. v. Southern R. Co.*, 145 N. C. 37, 58 S. E. 793.

Fraternal Lodge. — Where defendant, the head lodge, had a local lodge in the county of the venue, in which members were received, the usual business of such lodges transacted, and membership fees collected and remitted to it: Held, the transactions of the local lodge were such usual or continuous business as contemplated by the statute, and the cause was improperly transferred to the county in which the plaintiff resided and the injury was alleged to have been received. *Ange v. Sovereign Camp, W. O. W.*, 171 N. C. 40, 87 S. E. 955.

Claim of State. — Where a receiver of an insolvent foreign corporation was appointed under the corporation act of 1901, a claim by the state which chartered the corporation, for annual license fees, was provable; this section, as to actions against foreign corporations, not applying to this proceeding. *Holshouser v. Copper Co.*, 138 N. C. 248, 50 S. E. 650.

Garnishment against Salesmen. — The courts of this state have jurisdiction to proceed against a foreign corporation in

garnishment proceedings in an action brought in the state against its salesmen; the cause of action against it and in favor of the salesmen having arisen here, and the subject of the action being situated here. *Goodwin v. Claytor*, 137 N. C. 224, 225, 49 S. E. 173.

Action by Administrator for Death by Wrongful Act. — A foreign corporation may be sued by an administrator for the wrongful death of his intestate either in the county wherein the cause of action arose or that of the personal representative of the deceased. *Hannon v. Southern Power Co.*, 173 N. C. 520, 92 S. E. 353.

§ 1-81. Actions against railroads.—In all actions against railroads the action must be tried either in the county where the cause of action arose or where the plaintiff resided at that time, or in some county adjoining that in which the cause of action arose, subject to the power of the court to change the place of trial as provided by statute. (Rev., s. 424; C. S. 468.)

Editor's Note. — This section was first enacted as a proviso to section 424 of the Revisal. Section 424 of the revisal is now section 1-82; it contains the language "in all other cases." It was held that this language modified the proviso, this section, and that the proviso did not operate as a repeal or modification of sec. 1-76. In view of this pronouncement of the legislative intent, it is to be presumed that the language of section 1-82 still applies to this section, although the two sections are now apparently independent.

The Acts of 1905, chapter 367, amending the Code, section 192 (Revisal, section 424) [now §§ 1-81, 1-82], expressly included actions for injury to lands by making it apply to other cases than those specified in the previous sections, and does not repeal or modify section 1-76, in regard to the venue of actions of this character, since it is for damages for personal injuries. *Propst v. Railroad*, 139 N. C. 397, 51 S. E. 920; *Perry v. Seaboard Air Line R. Co.*, 153 N. C. 117, 68 S. E. 1060.

Effect of Section in General. — This section does not affect the bringing of an action in the county where the plaintiff resides, but only prohibits the selection at will of any county for that purpose where the defendant had a track, unless the injury occurred, or plaintiff resided, therein. *Watson v. North Carolina R. Co.*, 152 N. C. 215, 67 S. E. 502.

Section Pertains to Venue Not Jurisdiction. — This section relates solely to venue and has no application to taking jurisdiction of an action brought here by a nonresident plaintiff, against a railroad company, incorporated in North Carolina. *McGovern & Co. v. Atlantic Coast Line R. Co.*, 180 N. C. 219, 104 S. E. 534.

Applies to All Railroads. — This section applies to all railroad companies, both domestic and foreign. *Forney v. Black Mountain R. Co.*, 159 N. C. 157, 74 S. E. 884.

Actions against Railroads under Federal Control. — It was within the power of the director general to prescribe the venue of suits against railroads under federal control. Federal Control Act, March 21, 1918, § 10; *Alabama, etc., R. Co. v. January*, 257 U. S. 111, 66 L. Ed. 15, 42 S. Ct. 6.

Same—That Are Sole Defendants. — This section should be construed and held to apply to cases where a railroad company alone is defendant, and that the venue in actions where there are other parties defendant is not controlled by the section. *Smith v. Patterson*, 159 N. C. 138, 140, 74 S. E. 923.

Where both plaintiff and defendant are corporations, non-resident of the state, an action concerning land brought in a different county from the situs of the property, wherein neither has property, nor conducts its business, the case falls within the intent and meaning of section 1-80 and this section. *Henrico Lumber Co. v. Dare Lumber Co.*, 180 N. C. 12, 103 S. E. 915.

Suits by Administrators. — Authoritative interpretations of this and legislation of similar import elsewhere would seem to favor the position that in respect to actions instituted by an administrator and coming within the effect of the section, the terms appearing therein, "where plaintiff resided at the time the cause of action arose," have reference to the residence of the individual holding the office and not to the official residence or place where he may have qualified. *Whitford v. North State Life Ins. Co.*, 156 N. C. 42, 72 S. E. 85; *Roberson v. Greenleaf, etc., Co.*, 153 N. C. 120, 68 S. E. 1064; *R. R. v. Stith*, 120 Ky. 237; *Turner v. R. R.*, 110 Ky., 819; *Smith v. Patterson, etc., R. Co.*, 159 N. C. 138, 140, 74 S. E. 923. Dictum.

Applied in *Nutt Corp. v. Southern Ry. Co.*, 214 N. C. 19, 197 S. E. 534.

§ 1-82. Venue in all other cases.—In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement; or if none of the defendants reside in the state, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the state, then the action may be tried in any county which the plaintiff designates in his summons and complaint, subject to the power of the court to change the place of trial, in the cases provided by statute. (Rev., s. 424; Code, s. 192; C. C. P., s. 68; 1868-9, cc. 59, 277; 1905, c. 367; C. S. 469.)

See note under § 1-76.

Editor's Note. — The Rev. Chap. 31, Sec. 37, (prior to the enactment of this section) appointing the venue for transitory actions, made no provision for the case of a resident plaintiff and a non-resident defendant, and it was held, therefore, that the case remains as at common law, which allows the plaintiff to sue in any county, subject to the power of the court to change the venue according to certain rules governing its course. *Covill v. Moffitt*, 52 N. C. 381.

The purpose of this section as originally enacted and as amended was primarily to serve the convenience of resident parties. *Palmer v. Lowe*, 194 N. C. 703, 705, 140 S. E. 718.

Construed with Other Provisions for Venue. — This section is general in its terms and subject to the provisions of section 1-76. *Wofford-Fain & Co. v. Hampton*, 173 N. C. 686, 92 S. E. 612.

Section 1-77, providing, among other things, that an action against a public officer be brought in the county wherein the cause of action arose, subject to the power of the court to change the place of trial, is general in its terms, and this section should be construed as an exception thereto, allowing an administrator to sue at his election in his own county for the wrongful death of his intestate. *Hannon v. Southern Power Co.*, 173 N. C. 520, 92 S. E. 353.

Section Pertains to Venue Not Jurisdiction. — This section relates solely to venue and has no application to taking jurisdiction of an action brought here by a nonresident plaintiff, against a railroad company, incorporated in North Carolina. *McGovern & Co. v. Atlantic Coast Line R. Co.*, 180 N. C. 219, 104 S. E. 534.

The word "parties" as used in this section means parties to the record. *Rankin v. Allison*, 64 N. C. 673.

Action for Personal Services to Administrator. — An action brought to recover for services rendered personally to an administrator, is a personal action against the administrator, etc., and can be brought at the election of the plaintiff in the county where either he or the defendant resides. *Craven v. Munger*, 170 N. C. 424, 87 S. E. 216.

Action by Administrator. — An action by an administrator upon a life insurance policy of his intestate is properly brought in the county where the administrator resides, not necessarily where the bond is filed, the addition of the words, "administrator, etc.," being descriptive of his title or the capacity in which he sues. *Whitford v. North State Life Ins. Co.*, 156 N. C. 42, 72 S. E. 85. See notes of this case under section 1-78.

Personal Action against Administrator.—Where judgment was rendered against the estate of plaintiff's deceased guardian for money due the guardianship estate, and after reaching his majority plaintiff instituted this action alleging that defendant as executrix of the deceased guardian had paid over to herself, as sole devisee and legatee, money sufficient to discharge plaintiff's claim, the action is not against defendant as executrix but against her individually on a liability imposed upon her as legatee and devisee, and defendant's motion to remove from the county of plaintiff's residence to the county in which she qualified as executrix, was properly denied. *Rose v. Patterson*, 218 N. C. 212, 10 S. E. (2d) 678.

Action by Nonresidents on Foreign Judgment.—In an action on a judgment of another state, plaintiff's attachment of lands of defendant situate in a county in this state was rendered immaterial by defendant's general appearance. The court found that both parties are nonresidents. Plaintiff was entitled to maintain the action in any court of this state she might designate, the defendant's motion to remove to the county in which the real estate attached is situate and of which he asserted he is a resident, was properly denied. *Clement v. Clement*, 216 N. C. 240, 4 S. E. (2d) 434.

Action by Receiver. — Where a receiver of a corporation

resides in a different county from the concern he represents, the venue of the action brought by him for breach of contract is determined by the place of residence of the receiver and not necessarily by that of insolvent corporation. *Biggs v. Bowen*, 170 N. C. 34, 86 S. E. 692.

Action by Unemancipated Illegitimate Child.—Such a child sues in county of mother even though living in different county with grandparents. *Thayer v. Thayer*, 187 N. C. 573, 122 S. E. 307.

Suit for Alimony without Divorce.—Where a husband forced his wife to leave his home at night and she was compelled to take refuge in the home of a neighbor she could acquire a separate domicile, and may sue the husband for alimony without divorce in the county of her residence and he cannot remove the case to the county of his residence. *Miller v. Miller*, 205 N. C. 753, 172 S. E. 493.

In an action for alimony without divorce, although § 50-16 provides that "the wife may institute an action in the superior court of the county in which the cause of action arose," the venue, thus prescribed, is not exclusive, if either plaintiff or defendant reside in another county at the commencement of the action. *Dudley v. Dudley*, 219 N. C. 765, 14 S. E. (2d) 787.

Where Bank and Its Officers Sued Jointly.—Where in good faith a citizen and resident of one county, sues jointly in tort a national bank located in another county, and its officer, the defendants may not as of right have the cause removed for trial to the county wherein the bank conducts its business. *Curlee v. National Bank*, 187 N. C. 119, 121 S. E. 194.

An action on a note by the commissioner of banks, etc., is properly brought in the county in which the insolvent bank is situate and of which the liquidating agent is a resident, and defendants' motion for change of venue to the county of their residence is properly refused. *Hood v. Progressive Stores*, 209 N. C. 36, 182 S. E. 694.

Nonresident Plaintiffs.—The county of the residence of the defendant, in an action upon alleged breach of contract, by a nonresident plaintiff, is the proper venue. *Southern Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598.

The venue of an action brought by a nonresident of the State in a different county herein from that where the defendants reside or do business, and wherein the defendant has no property, is an improper one. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

An action to enforce a lien for materials furnished and used in a building is not specifically required to be brought in the county wherein the building is situated, but comes within the provisions of this section. *Sugg v. Pollard*, 184 N. C. 494, 495, 115 S. E. 153.

Where Principal Office of Corporation Is in County Other than Residence of Defendants.—Where the plaintiff is a corporation, organized and doing business under the laws of the United States, with its principal office in the city of Durham, in Durham County, North Carolina, and the defendants are citizens of this state, and residents of Sampson County, Durham County is the proper venue for the trial of the action. *North Carolina Joint Stock Land Bank v. Kerr*, 206 N. C. 610, 614, 175 S. E. 102.

Action against Foreign Corporation and Resident Defendant.—Where a nonresident plaintiff brings action against a foreign corporation, with the joinder of a resident defendant, and the venue in the action is laid here in a different county from that of the resident defendant, to recover damages alleged to have been caused by a negligent act, the venue is in the county of the resident defendant, and the action is removable thereto upon his motion duly made. Sections 1-76, 1-80 and 1-81 do not apply. *Palmer v. Lowe*, 194 N. C. 703, 140 S. E. 718; *Brown v. Brevard Auto Service Co.*, 195 N. C. 647, 143 S. E. 258.

Effect of Change of Residence.—The defendant by a mere change of residence cannot change the venue as fixed by this section. *Taylor v. Sharp*, 108 N. C. 377, 382, 13 S. E. 138; *Hannon v. Southern Power Co.*, 173 N. C. 520, 92 S. E. 353.

Applied in *Carolina Mtg. Co. v. Long*, 205 N. C. 533, 172 S. E. 209; *Atlantic Coast Line R. Co. v. Thrower*, 213 N. C. 637, 197 S. E. 197.

Stated in *Lawson v. Langley*, 211 N. C. 526, 191 S. E. 229.

Cited in *McCue v. Times-News Co.*, 199 N. C. 802, 803, 156 S. E. 129; *Howard v. Queen City Coach Co.*, 212 N. C. 201, 193 S. E. 138.

§ 1-83. Change of venue.—If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in

writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

The court may change the place of trial in the following cases:

1. When the county designated for that purpose is not the proper one.

2. When the convenience of witnesses and the ends of justice would be promoted by the change.

3. When the judge has, at any time, been interested as party or counsel. (Rev., s. 425; Code, s. 195; C. C. P., s. 69; R. C., c. 31, ss. 115, 118; 1870-1, c. 20; C. S. 470.)

I. In General.

II. The Application for Removal.

A. Time of Demand.

B. Jurisdiction of Application.

III. Waiver of Right to Change.

IV. Appeal.

A. Where County Designated Not Proper.

B. Convenience of Witnesses and Ends of Justice Promoted.

Cross References.

As to motions, when and where made, etc., see § 1-577 et seq. See also, § 1-76.

I. IN GENERAL.

Section Relates to Venue Not Jurisdiction.—It has been held repeatedly that these statutes, sections 1-76 to 1-83, relate to venue and not jurisdiction, and that if an action is brought in the wrong county it should be removed to the right county, and not dismissed, if the motion is made in apt time, and if not so made, that the objection is waived. *Davis v. Davis*, 179 N. C. 185, 188, 102 S. E. 270.

Under the present practice, venue may be waived because it is not jurisdictional, and is available to the objecting party, not by demurrer, but by motion in the cause. *Shaffer v. Morris Bank*, 201 N. C. 415, 418, 160 S. E. 481.

All Inclusive.—This section indiscriminately embraces all the previously enumerated actions of this sub-chapter as well as those for the recovery of real estate, which under the former system of pleading were called local actions, as those which were transitory or personal actions; all are embraced in the sweeping enactment. *Lafoon v. Shearin*, 91 N. C. 370, 371.

An action for wrongful conversion of severed timber is not removable as a matter of right to the county in which the land from which the trees were severed is situated. *Foreman-Blades Lumber Co. v. Tunis Heading, etc.*, Co., 196 N. C. 38, 144 S. E. 297.

Power of Clerk.—See note under § 1-583.

Stated in *Lawson v. Langley*, 211 N. C. 526, 191 S. E. 229.

Cited in *Murchison Nat. Bank v. Broadhurst*, 197 N. C. 365, 369, 148 S. E. 452; *Miller v. Miller*, 205 N. C. 753, 172 S. E. 493; *Howard v. Queen City Coach Co.*, 212 N. C. 201, 193 S. E. 138; *Guilford County v. Estates Administration*, 212 N. C. 653, 194 S. E. 25; *Atlantic Coast Line R. Co. v. Thrower*, 213 N. C. 637, 197 S. E. 197; *Cox v. Oakdale Cotton Mills*, 211 N. C. 473, 190 S. E. 750.

II. THE APPLICATION FOR REMOVAL.

A. Time of Demand.

This section is explicit and the cases are uniform in holding that the demand to remove to the proper county must be made before the time for answering expires. See *Lafoon v. Shearin*, 91 N. C. 370; *Riley v. Pelletier*, 134 N. C. 316, 46 S. E. 734; *Garrett v. Bear*, 144 N. C. 23, 56 S. E. 479; *Calcano v. Overby*, 217 N. C. 323, 7 S. E. (2d) 557.

The objection must be taken not only "before the time of answering expires," as required by this section, but it must be taken in limine and before answering to the merits. *County Board v. State Board*, 106 N. C. 81, 10 S. E. 1002, and cases there cited. *Shaver v. Huntley*, 107 N. C. 623, 627, 12 S. E. 316.

But if the motion is based on clause 2 of this section, i. e., when the convenience of witnesses and the ends of justice demand, the motion may be made at any time in the progress of the cause. *Riley v. Pelletier*, 134 N. C. 316, 46 S. E. 734.

"While this language is slightly different from the Federal statute regulating motions to remove to the Federal Court, which specifies that said motion must be made 'at the time or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought, to answer or plead to the declaration or

complaint of the plaintiff,' we think the tenor and object of the two statutes are the same, i. e., to require the defendant to object to the jurisdiction in limine by moving to remove as soon as he is afforded opportunity from filing the complaint to know definitely the scope of the action.' *Riley v. Pelletier*, 134 N. C. 316, 318, 46 S. E. 734.

If the application for removal of an action to the proper county be made before time for answering expires, it matters not when the motion is heard. *Farmers State Alliance v. Murrell*, 119 N. C. 124, 25 S. E. 785.

A motion for change of venue, under this section, must be made before a demurrer to the action may be filed for misjoinder of the parties. *Cedar Works v. Lumber Co.*, 161 N. C. 604, 77 S. E. 770.

Before Time for Filing Answer.—A motion for removal made before the time for the filing of an answer to the complaint had expired, was made in apt time. *Carolina Mtg. Co. v. Long*, 205 N. C. 533, 534, 172 S. E. 209.

During Term.—"Motions for removal, which may be allowed or disallowed, in the discretion of the court, should be made before the judge, at any time during a term of the court. *Howard v. Hinson*, 191 N. C. 366, 131 S. E. 748." *Casey v. Morris*, 195 N. C. 532, 534, 142 S. E. 783.

Instituting Action under § 1-78 Does Not Prevent Motion for Change.—Where the plaintiff under § 1-78 is bound to institute the action in the county in which defendant gave bond, his act in so doing cannot be imputed to him as a voluntary choice of venue, so as to prevent the lodging of a motion under this section. *Pushman v. Dameron*, 208 N. C. 336, 180 S. E. 578.

Right of Defendant after Complaint Filed.—Where an order for the examination of an adverse party is granted before the filing of the complaint, a motion for change of venue as a matter of right may be denied without prejudice to defendant's right to move for change of venue after the filing of the complaint, the right of defendant to object to venue, applying after complaint is filed. *Bohannon v. Wachovia Bank, etc., Co.*, 210 N. C. 679, 188 S. E. 390.

B. Jurisdiction of Application.

Editor's Note.—It was formerly held that the filing of an affidavit and motion for change of venue in vacation before the clerk was invalid. *Riley v. Pelletier*, 134 N. C. 316, 46 S. E. 734. The motion was required to be made in the district and during the term of court. *Garrett v. Bear*, 144 N. C. 23, 56 S. E. 479.

By P. L. 1919, c. 304 and P. L. 1920, c. 96 it was provided that the defendant could file in motion with the clerk instead of applying to the court, the clerk could not, however, order the removal—as he may under the most recent legislation, which is discussed in the next paragraph. See *Southern Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598.

Power of Clerk under Section 1-583.—The power to entertain a demand of defendant to remove an action to the proper venue under the provisions of this section, is now conferred by a recent statute (§ 1-583) upon the clerk, subject to the right of appeal to the judge at the next term, when the motion shall be heard and passed upon *de novo*. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728; *Southern Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598.

Where defendant has made his motion before the clerk to remove the action to the proper venue, the question is then a matter of substantial right, and the clerk is without power to proceed further in essentials until the right to remove is considered and passed upon. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

Appeal to Judge.—Where the clerk of the Superior Court orders the action upon contract removed to the county of the defendant's residence, and the plaintiff, a nonresident, has appealed therefrom to the judge, who in term orders the cause transferred and the defendant has complied with the requisites of the statute in filing a written motion in apt time, the action of the trial judge is a valid exercise of his jurisdictional authority. *Southern Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598.

III. WAIVER OF RIGHT TO CHANGE.

Effect of Failure to Comply with Section.—The matter of venue is not jurisdictional in the first instance, and the defendant will lose his right to have an action against him removed from an improper to the proper county by failing to comply with the provisions of this section, that before the expiration of the time for filing his answer he must demand in writing that the trial be conducted in the proper county. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

Venue cannot be jurisdictional and it may always be waived. *Clark v. Carolina Homes*, 189 N. C. 703, 128 S. E. 20, 25. See also, *Wynne v. Conrad*, 220 N. C. 355, 17 S. E. (2d) 514.

Waiver occurs when motion was neither "made in writ-

ing" nor "before the time of answering expired." *McMinn v. Hamilton*, 7 N. C. 300; *Lafoon v. Shearin*, 91 N. C. 376 (which was an action of ejectment); *Morgan v. Bank*, 93 N. C. 352; *County Board v. State Board*, 106 N. C. 81; 10 S. E. 1002; *Baruch v. Long*, 117 N. C. 509, 23 S. E. 447; *Lucas v. Carolina Central R. Co.*, 121 N. C. 506, 508, 28 S. E. 265.

Where a defendant moves to transfer a cause to another county, and he is allowed to a certain day of the term to file affidavits, which he failed to do, and his motion for removal is denied, without his excepting or appealing, his conduct will waive all of his rights thereto. *Oettinger v. Hill Live Stock Co.*, 170 N. C. 152, 86 S. E. 957.

Filing Answer to Merits.—The defendant who files a formal answer to the merits within the time allowed, thereby waives his privilege of amendment. *Trustees v. Fetzer*, 162 N. C. 245, 78 N. C. 152; *Stevens Lumber Co. v. Arnold*, 179 N. C. 269, 102 S. E. 409.

An agreement between counsel for time to file answer is an acceptance of jurisdiction and a waiver of any right to remove. *Garrett v. Bear*, 144 N. C. 23, 56 S. E. 479, and cases cited.

Withdrawing Answer.—Where answer has been filed and withdrawn for the purpose of the motion, to remove at the proper term, the right to remove will be taken as waived. *Trustee v. Fetzer*, 162 N. C. 245, 78 S. E. 152.

Accepting Continuances.—A defendant who has moved to transfer a cause to another county waives his right to the same by accepting continuances from time to time. *Oettinger v. Hill Live Stock Co.*, 170 N. C. 152, 86 S. E. 957.

Enter of Default.—Where a defendant has waived his rights to transfer a cause to another county or the same has been refused in the discretion of the trial court, and he has permitted the time to file his answer to expire, it is within the discretion of the trial judge to refuse his motion to file an answer later, and a judgment final by default thereof may be entered in proper instances. *Oettinger v. Hill Live Stock Co.*, 170 N. C. 152, 86 S. E. 957.

When Judgment by Default Vacated.—When a judgment by default final has been entered against a defendant for the want of an answer, and it appeared that the defendant had lodged his motion in apt time, for a change of venue in accordance with the provisions of this section, which has not been determined, the failure or inability of the defendant to have given the plaintiff ten days notice of his motion, sec. 1-581, before time for answering has expired, will not affect his right to have the judgment by default against him vacated. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

When the defendant has proceeded by motion before the clerk to have plaintiff's action against him removed to the proper county for improper venue, and this before the time for filing his answer has expired, a judgment by default final for the want of an answer is entered contrary to the due course and practice of the courts, and on appeal to the Supreme Court will be set aside, and the cause remanded for the clerk to consider and pass upon defendant's motion for a change of venue. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

IV. APPEAL.

A. Where County Designated Not Proper.

No Discretion in Court.—The question of removal, when the action is not brought in the proper county, is not one of discretion, but "may" means shall or must, as it is construed in every act imposing a duty. *Pelletier v. Saunders*, 67 N. C. 262; *Jones v. Statesville*, 97 N. C. 86, 2 S. E. 346; and cases there cited. *Neuse Mfg. Co. v. Brower*, 105 N. C. 400, 444, 11 S. E. 313. See also, *Lewis v. Sanger*, 216 N. C. 724, 6 S. E. (2d) 494.

Appeal Lies.—Consequently, that an appeal lies from an order denying a motion for the removal of a case to the proper county for trial has been thoroughly settled by repeated decisions of the Supreme Court. *Neuse Manufacturing Co. v. Brower*, 105 N. C. 400, 11 S. E. 313; *Connor v. Dillard*, 129 N. C. 50, 39 S. E. 641; *Brown v. Cogdell*, 136 N. C. 32, 48 S. E. 515; *Perry v. R. R.*, 153 N. C. 117, 68 S. E. 1060; *Cedar Works v. Roper Lumber Co.*, 161 N. C. 603, 606, 77 S. E. 770.

Not Premature.—An appeal from the refusal of the Superior Court judge to remove a case to the proper county is not premature. *Dixon v. Haar*, 158 N. C. 341, 74 S. E. 1.

Appeal for Delay.—A party to an action cannot be permitted to move repeatedly at each succeeding term for a change of venue and then appeal from each successive refusal for purposes of delay. *Ludwick v. Uwarra Mining Co.*, 171 N. C. 60, 62, 87 S. E. 949.

B. Convenience of Witnesses and Ends of Justice Promoted.

Discretion of Court.—The removal of a case from one county to another for the convenience of witnesses is discretionary with the trial judge. *Belding v. Archer*, 131 N.

C. 287, 42 S. E. 800; *Fames v. Armstrong*, 136 N. C. 392, 48 S. E. 769; *Oettinger v. Stock Co.*, 170 N. C. 152, 86 S. E. 957.

In *Craven v. Munger Lumber Co.*, 170 N. C. 424, 426, 87 S. E. 216, it is said: "The statute is explicit that the judge 'may' remove the cause to another county when it appears that the convenience of witnesses or the ends of justice may be served thereby. The language of itself makes it a matter of discretion in the court, and in the only four cases in which the matter has ever been contested by appeal this Court has sustained the plain meaning of the words as giving the judge a discretionary power * * *."

A motion for the removal of a cause from one county to another for convenience of witnesses and to promote the ends of justice under this section is addressed to the sound discretion of the trial judge, and is not subject to review in the Supreme Court. *Western Carolina Power Co. v. Klutz*, 196 N. C. 358, 145 S. E. 681; *Causey v. Morris*, 193 N. C. 532, 142 S. E. 783. Except upon abuse of this discretion. *Grimes v. Fulton*, 197 N. C. 84, 147 S. E. 680.

Matters Not Presented on Appeal.—Where, on appeal from the clerk's order removing the action on this ground and on the ground of movant's legal right, the court sustains the order on the latter ground alone, the clerk's right to issue the discretionary order is not presented on appeal to the Supreme Court, but the correctness of the order based on movant's legal right is left to be determined. *Causey v. Morris*, 195 N. C. 532, 142 S. E. 783.

When the trial judge in the proper exercise of his discretion under this section, has transferred a cause from one county to another for trial, the question of his ultimate purpose to consolidate the cause with other like cases does not arise on appeal to the Supreme Court. *Western Carolina Power Co. v. Klutz*, 196 N. C. 358, 145 S. E. 681.

No Appeal Lies.—Consequently, refusal of superior court judge to order removal of cause for convenience of witnesses and in the interest of justice, is not reviewable in the supreme court. *Garrett v. Baar*, 144 N. C. 23, 56 S. E. 479; *Perry v. Perry*, 172 N. C. 62, 89 S. E. 999; *Byrd v. Carolina Spruce Co.*, 170 N. C. 429, 435, 87 S. E. 241. Except upon evidence of abuse of discretion. *Ludwick v. Mining Co.*, 171 N. C. 60, 87 S. E. 949; *Craven v. Munger Lumber Co.*, 170 N. C. 424, 87 S. E. 216.

What Constitutes Abuse of Discretion—Illustrated.—Under the provisions of secs. 1-82, 1-83, it is within the sound discretion of the trial judge to change the venue of an action sounding in tort, to another, when in his judgment the county in which the action was brought does not best subserve the ends of justice, or when justice would be promoted by the change requested, and upon his findings upon the evidence in this case, it is held, that his discretion in refusing to remove the cause was not such an abuse thereof as to reverse his judgment on appeal. *Curlee v. National Bank*, 187 N. C. 119, 121 S. E. 194.

In *Craven v. Munger Lumber Co.*, 170 N. C. 424, 426, 87 S. E. 216, it is said: "This (an abuse of discretion), we cannot impute to the learned judge who refused this motion, and upon the evidence before him refused to find as a fact that the ends of justice would be served by such removal or to remove the case for the convenience of witnesses."

Second Appeal.—Upon refusal of defendant's motion to transfer a cause for improper venue, the defendant gave notice of appeal which he did not perfect, and at some subsequent term renewed the motion, but upon another ground—for the convenience of witnesses and to promote the ends of justice, etc., and appealed from the refusal of this motion, and perfected it. Held, the granting or refusing of the second motion was in the discretion of the trial judge, and upon the record the appeal will be held frivolous by the Supreme Court and dismissed upon appellee's motion therein properly made. *Ludwick v. Mining Co.*, 171 N. C. 61, 87 S. E. 949.

§ 1-84. Removal for fair trial.—In all civil and criminal actions in the superior and criminal courts, when it is suggested on oath or affirmation, on behalf of the state or the traverser of the bill of indictment, or of the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the county in which the action is pending, the judge may order a copy of the record of the action removed to some adjacent county for trial, if he is of the opinion that a fair trial cannot be had in said county, after hearing all the testimony of-

ferred on either side by affidavits. The county from which the cause is removed must pay to the county in which the cause has been tried the full amount paid by the trial county for jurors' fees, and the full costs in the cause which are not taxable against or cannot be recovered from a party to the action, and for which the trial county is liable. (Rev., s. 426; Code, s. 196; 1879, c. 45; 1899, cc. 104, 508; 1806, c. 693, s. 12; 1917, c. 44; C. S. 471.)

Reasons for Removal.—An affidavit for the removal of a cause, which does not set forth the reason of affiants' belief that justice cannot be done in the county from which it is removed, is insufficient. *State v. Turttly*, 9 N. C. 248. A statement that a fair and impartial trial cannot be had will not suffice. Id. p. 259.

Discretion of Trial Judge.—Change of venue on ground of local prejudice is addressed to the discretion of the trial judge. *Stroud v. United States*, 251 U. S. 15, 64 L. Ed. 103, 40 S. Ct. 50. See also *State v. Davis*, 203 N. C. 13, 26, 164 S. E. 736; *State v. Godwin*, 216 N. C. 49, 3 S. E. (2d) 347.

Counter Affidavit.—When the judge is not satisfied by the affidavits offered, it is immaterial that counter affidavits were not presented. *Benton v. R. R.*, 122 N. C. 1009, 30 S. E. 333.

Appeal.—The findings of fact by the court that the defendants could secure a fair trial is conclusive, and the granting or refusal of a motion to remove under this section is not reviewable. *Albertson v. Terry*, 109 N. C. 9, 13 S. E. 713, and cases cited. *State v. Smarr*, 121 N. C. 669, 28 S. E. 549; *State v. Turner*, 143 N. C. 641, 57 S. E. 158; *State v. Johnson*, 104 N. C. 780, 10 S. E. 257.

This is true, even though the judge further states in his order that his findings were based on his personal observation. *Gilliken v. Norcom*, 193 N. C. 352, 137 S. E. 136.

The rule of law governing motions for removal for the causes specified, is thus declared in *Phillips v. Lentz*, 83 N. C. 240; "The distinction seems to be where there are no facts stated in the affidavit as grounds for removal, the ruling of the court below may be reviewed; but where there are facts set forth, their sufficiency rests in the discretion of the judge and his decision upon them is final." See *Gilliken v. Norcom*, 193 N. C. 352, 137 S. E. 136.

Admission of Facts.—The affidavit is required to make the facts appear to the Court, but if they are admitted, or agreed on by the parties, this is sufficient, and it is not necessary that they should appear in the record or order of removal. *Emry v. Hardee*, 94 N. C. 787.

It is within the power of counsel to consent that the Court might hear and consider the facts as if stated in an affidavit. *Emry v. Hardee*, 94 N. C. 787.

When it is stated in the order, that the motion is heard "as on affidavit," the implication is, nothing else appearing, that all the parties consented to accept the facts as if stated under oath. *Emry v. Hardee*, 94 N. C. 787.

Cited in *McFadden v. Maxwell*, 198 N. C. 223, 151 S. E. 250.

§ 1-85. Affidavits on hearing for removal; when removal ordered.—No action, civil or criminal, shall be removed, unless the affidavit sets forth particularly and in detail the ground of the application. It is competent for the other side to controvert the allegations of fact in the application, and to offer counter affidavits to that end. The judge shall order the removal of the action, if he is satisfied after thorough examination of the evidence as aforesaid that the ends of justice demand it. (Rev., s. 427; Code, s. 197; 1879, c. 45; 1899, c. 104, s. 2; C. S. 472.)

See notes to preceding section.

§ 1-86. Additional jurors from other counties instead of removal.—Upon suggestion made as provided by § 1-84 or on his own motion, the presiding judge, instead of making order of removal may cause as many jurors as he deems necessary to be summoned from any county in the same judicial district or in an adjoining district by the sheriff or other proper officer thereof, to attend, at such time as the judge designates, and serve

as jurors in said action. The judge may direct the required number of names to be drawn from the jury box in said county in such manner as he may direct, and a list of the same to be delivered to the sheriff or other proper officer of the county, who shall at once summon the jurors so drawn to appear at the time and place specified in the order. In case a jury is not obtained from those so summoned the judge may, in like manner, from time to time, order additional jurors summoned from any county in the same judicial district or in an adjoining district, or from the county where the trial is being held, until a jury is obtained. These jurors are subject to challenge for cause as other jurors, but not for nonresidence in the county of trial, or service within two years, or not being freeholders, and all jurors so summoned are entitled to compensation for mileage and time, to be paid by the county to which they are summoned, at the rate now provided by law for regular jurors in the county of their residence. Provided, that when the judge shall determine that it is necessary to have a special venire drawn from an adjoining county, instead of directing the jurors to appear at the courthouse in the county where the trial is pending, he may order them to appear at the courthouse of their own county and in lieu of their receiving mileage in going from their own county to the county in which the trial is held, it shall be optional with the county where the trial is held to provide transportation to said jurors from their own county seat to the place of trial and return instead of paying mileage to the jurors in going from their county seat to the place of trial. (1913, c. 4, ss. 1, 2; 1931, c. 308; 1933, c. 248; C. S. 473.)

Local Modification.—Ashe, Durham: 1933, c. 248.

Cross Reference.—As to jurors generally, see § 9-1 et seq.

Editor's Note.—The Act of 1931 amended this section to allow the presiding judge "on his own motion" to cause additional jurors to be summoned from any county in "an adjoining district" to try a case in the county where it is pending and from which removal of the cause was sought because of the possibility of an unfair trial by a local jury. He was restricted to "any adjoining county or any county in the same judicial district" by the former law. See 9 N. C. Law Rev. 379.

The proviso at the end of this section relating to special venires to save mileage allowance, was added by Public Laws 1933, c. 248.

Discretion of Judge. — The trial judge, when refusing defendant's motion to remove an action for homicide to another county, may, in the exercise of his sound discretion, have the jurors summoned from any adjoining county, or from any county in the same judicial district, or have jurors drawn from the jury box of such county. *State v. Kincaid*, 183 N. C. 709, 110 S. E. 612; *State v. Baxter*, 208 N. C. 90, 179 S. E. 450.

Under this section the granting of a solicitor's motion that the jury be drawn from the body of another county is within the court's discretion. *State v. Shipman*, 202 N. C. 518, 163 S. E. 487.

Applied in *State v. Beard*, 207 N. C. 673, 178 S. E. 242.

Cited in *State v. Green*, 207 N. C. 369, 177 S. E. 120.

§ 1-87. Transcript of removal; subsequent proceedings. — When a cause is directed to be removed, the clerk shall transmit to the court to which it is removed a transcript of the record of the case, with the prosecution bond, bail bond, and the depositions, and all other written evidences filed therein; and all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties in writing duly filed, or by order of court. (Rev., s. 428; Code, ss. 195, 198;

R. C., c. 31, s. 118; 1806, c. 694, s. 12; 1810, c. 787; C. C. P., s. 69; C. S. 474.)

Time to Deposit. — When an action is ordered removed to another county, it is error in the Judge presiding in the Superior Court of the county from which the cause is removed, at the next term thereof, and before the term of the Court in the county to which it was removed, to direct that the action be dismissed if the cost of the transcript be not paid in a time specified. The party procuring the order of removal has until the term of the Court to which the cause is removed to deposit his transcript. *Fisher v. Cid. Copper Mining Co.*, 105 N. C. 123, 10 S. E. 1055.

Quoted in *Clark v. Peebles*, 100 N. C. 352, 6 S. E. 798.

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

Art. 8. Summons.

§ 1-88. Civil actions commenced by.—Civil actions shall be commenced by issuing a summons; but no summons need issue in controversies submitted without action, and in confessions of judgment without action. (Rev., s. 429; Code, s. 199; C. C. P., s. 70; C. S. 475.)

Cross References.—As to submission of controversy without action, see § 1-250. As to confessions of judgments, see § 1-247. As to summons in special proceedings, see § 1-394. As to summons in attachment, see § 1-444. As to action commenced when summons is issued, see § 1-14.

Necessity for Service of Summons. — Service of process or notice to appear is essential to the jurisdiction of all courts, as sufficiently appears from the well known legal maxim, that no one shall be condemned in his person without notice, and an opportunity to be heard in his defense. *Smith v. Woolfolk*, 115 U. S. 143, 149, 5 S. Ct. 1177, 29 L. Ed. 357; *Renaud v. Abbott*, 116 U. S. 277, 288, 6 S. Ct. 1194, 29 L. Ed. 629.

If jurisdiction is taken where there has been no service of process, or notice, or a statutory substitute for it, the proceeding is not only voidable but absolutely void, and may be collaterally attacked. *Windsor v. McVeigh*, 93 U. S. 274, 277, 23 L. Ed. 914; *Cox v. United States*, 131 U. S. Appx. c., 19 L. Ed. 500.

The object of the summons is to advise the defendant of the plaintiff's action, and that he must appear at the time and place named and make his defense. *Scott v. Jarrell*, 167 N. C. 364, 365, 83 S. E. 563; *Rector v. Laurel River Logging Co.*, 179 N. C. 59, 61, 101 S. E. 502; *Jester v. Baltimore Steam Packet Co.*, 131 N. C. 54, 55, 42 S. E. 447. Its office is to bring the parties into court. *Barneycastle v. Walker*, 92 N. C. 198.

Distinguished from Complaint. — The summons in no way indicates the cause of action which is to be learned from the complaint. In this respect it differs from the writ, under the old practice, which did to some extent indicate the plaintiff's cause of action. *Battle v. Baird*, 118 N. C. 854, 861, 24 S. E. 668.

When Necessary. — A civil action shall be commenced by issuing a summons, except, in cases where the defendant is not within reach of the process of the court and cannot be personally served, when it shall be commenced by the filing of the affidavit to be followed by publication. *McClure v. Fellows*, 131 N. C. 509, 42 S. E. 951, overruled. *Grocery Co. v. Bag Co.*, 142 N. C. 174, 55 S. E. 90.

Same—Injunction Prior to Summons. — An injunction ordered by the judge upon reading the complaint, coupled with an order at the same time to issue a copy of the complaint and a summons to the defendant, was irregular and premature, and therefore should be dissolved. *Patrick v. Joyner*, 63 N. C. 573. But this irregularity, if waived by the defendant, will not be noticed by the court sua sponte. *Heilig v. Stokes*, 63 N. C. 612.

Where no process was issued the injunction can not be sustained. *Horne v. Board*, 122 N. C. 466, 29 S. E. 581; *Armstrong v. Kinsell*, 164 N. C. 125, 80 S. E. 235.

A summons is "issued" within the meaning of this section when it passes from the clerk's office, or the office of a justice of the peace, under the sanction and authority of such officer, for the purpose of being served. *Morrison v. Lewis*, 197 N. C. 79, 80, 147 S. E. 729.

An action is pending from the issuance of summons until final determination by judgment. *McFetters v. McFetters*, 219 N. C. 731, 14 S. E. (2d) 833.

Suit Pending from Issuance of Summons.—A civil action is commenced when the summons is issued and, as this

section fixes the inception of the action, suit is pending from that time and not exclusively from the time when the summons is served. *Atkinson v. Greene*, 197 N. C. 118, 120, 147 S. E. 811; *Morrison v. Lewis*, 197 N. C. 79, 147 S. E. 729.

Delivery to Sheriff. — A summons is issued when it is delivered to the sheriff, or some one for him; this is the consummation and it then relates back to the time of filling out and dating by the clerk. *McClure v. Fellows*, 131 N. C. 509, 42 S. E. 951; *Smith v. Cashie, etc.*, *Lumber Co.*, 142 N. C. 26, 54 S. E. 788.

A summons simply filled in and lying in the office of an attorney, while he waited for the prosecution bond would not constitute an issuance. *Webster v. Sharpe*, 116 N. C. 466, 468, 21 S. E. 912.

As to officer's notation of delivery as controlling issuance, see section 1-94 and notes thereto.

How Jurisdiction in Actions in Personam Acquired. — In *Hatch v. Alamance R. Co.*, 183 N. C. 617, 112 S. E. 529, it was said:—"An action is commenced as to each defendant when the summons is issued against him (section 1-14, and this section), but in actions in personam jurisdiction of a cause of parties litigant can be acquired only by personal service of process within the territorial jurisdiction of the court, unless there is an acceptance of service or a general appearance, actual or constructive. *Bernhardt v. Brown*, 118 N. C. 700, 701, 24 S. E. 527; *Vick v. Flournoy*, 147 N. C. 209, 212, 60 S. E. 978; *Warlick v. Reynolds & Co.*, 151 N. C. 606, 610, 66 S. E. 657, 21 R. C. L., 1315." The various forms of service are prescribed by the following sections of this article. *Ed. Note.*

Effect of Nonsuit.—Where certain named individuals, directors of a corporation, are served with summons as trustees, and as to them the plaintiff takes a voluntary nonsuit and moves that the corporation be made the defendant in the action, and the complaint amended, the effect of the motion is to commence a new action against the corporation, and not to amend the original complaint. *Jones v. Vanstory*, 200 N. C. 582, 157 S. E. 867.

Cited in *Western Carolina Power Co. v. Yount*, 208 N. C. 182, 179 S. E. 804; *O'Briant v. Bennett*, 213 N. C. 400, 196 S. E. 336; *Massachusetts Bonding, etc., Co. v. Knox*, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438 (dis. op.).

§ 1-89. Contents, return, seal.—The summons must run in the name of the State, be signed by the Clerk of the Superior Court having jurisdiction to try the action, and be directed to the sheriff or other proper officers of the county or counties in which the defendants or any of them reside or may be found. It must be returnable before the clerk and must command the sheriff or other proper officer to summon the defendant, or defendants, to appear and answer the complaint of the plaintiff within thirty (30) days after its service upon defendant, or defendants; and must contain a notice stating in substance that if the defendant or defendants fail to answer the complaint within the time specified the plaintiff will apply to the court for the relief demanded in the complaint; and must be dated on the date of its issue. Every summons addressed to the sheriff or other officer of a county, other than that from which it issued, must be attested by the seal of the court; but when addressed to the sheriff or other officer of the county in which it issued, such seal is unnecessary. Summons must be served by the sheriff to whom it is addressed for service within ten (10) days after the date of its issue; and upon serving the same, the officer shall note in writing upon the copy thereof, delivered to the defendant, the date of service, but failure to comply with this requirement shall not invalidate the service, and, if not served within ten (10) days after the date of its issue upon every defendant, must be returned by the officer holding the same for service, to the clerk of the court issuing the summons, with notation thereon of its non-service and the reasons therefor as to every defend-

ant not served. In all cases where service of summons is made by publication, such service by publication shall be completed within fifty days from the order of publication. Provided, that in all actions for tax foreclosures, street assessment foreclosures and sidewalk assessment foreclosures, summons must be served by the sheriff to whom it is addressed for service within sixty (60) days after the date of its issue; and upon serving the same, the officer shall note in writing upon the copy thereof, delivered to the defendant, the date of service, but failure to comply with this requirement shall not invalidate the service, and, if not served within sixty (60) days after the date of its issue upon every defendant, must be returned by the officer holding the same for service, to the clerk of the court issuing the summons, with notation thereon of its non-service and the reasons therefor as to every defendant not served. (Rev., ss. 430, 431; Code, ss. 200, 203, 213; C. C. P., s. 74; 1876-7, cc. 85, 241; 1919, c. 304, s. 1; Ex. Sess. 1920, c. 96, s. 1; Ex. Sess. 1921, c. 92, s. 1; 1927, c. 66, s. 1; 1927, c. 132; 1929, c. 237, s. 1; 1935, c. 343; 1939, c. 15; C. S. 476.)

Local Modification.—Beaufort: 1937, c. 65.

Cross References.—As to amendments in the discretion of the court, see § 1-163. As to summons in courts of justices of the peace, see § 7-135 et seq. As to issuance of summons on Sunday, see § 103-3. As to duty of sheriff to execute summons, see § 162-16.

For analysis of this section, see 13 N. C. Law Rev., No. 4, p. 371.

Editor's Note. — In view of the importance of the changes in this section effected by recent sessions of the legislature, it is thought that an outline of the procedure under the various acts may be of service.

Prior to the amendment of 1935 service was required to be completed within fifty days from the commencement of the action instead of from the order of publication. The 1939 amendment added the proviso at the end of the section. The proviso does not affect litigation pending on February 8, 1939.

Same—Under the Original Code of Civil Procedure. — "The original Code of Civil Procedure required the defendant to appear and answer within a certain number of days after service of summons, in no case to be less than twenty days, thus making the day of service fix the time within which answer was to be filed. When summons was made returnable to the term, if issued less than ten days before the next term, the second term thereafter became the return term, the case was placed on the summons docket for that term and if issued more than ten days before the next term, and the pleadings were made up at the next succeeding term." 1 N. C. Law Rev. 281.

One of the striking features of the new procedure, effective with the adoption of the original Code of Civil Procedure in 1868, was that all summonses should be returnable before the clerk, and that all pleadings should be made up and perfected before him; and when an issue of law is raised an appeal should lie to the judge at chambers, and be promptly acted on by him and returned. And further, that when an issue of fact arose upon the pleadings, and in such cases only, the cause should be transferred to be tried before the judge at term. This eliminated very much delay and expense in legal proceedings, for no cases could be on the docket before the judge at term for trial except those in which the issues of fact had been formulated before the clerk by the pleadings. See *Campbell v. Campbell*, 179 N. C. 413, 415, 102 S. E. 737.

In *Campbell v. Campbell*, 179 N. C. 413, 102 S. E. 737, it was said: "This system has been continued in all the States, unchanged, in which the new procedure had been adopted, it is believed, except in this State. In this State, at that time, our people were much embarrassed by the results of the war, and instead of desiring expedition in the determination of actions there was a desire to put off as long as possible the rendition of judgments for debt. Accordingly, what was commonly known as the 'Batchelor Act,' entitled, an act suspending the Code of Civil Procedure in certain cases," ch. 76 Laws 1868-9, ratified 22 March, 1869, was enacted, which provided that summons should be made returnable to the term instead of before the clerk. This act

provided, sec. 13, that the suspending act should be temporary and in force only 'until 1 January, 1871.' But, owing to the financial conditions of the time, it was later continued indefinitely, and then by oversight, though contradictory to concept and intent of the Code of Civil Procedure (which required all process to be issued returnable before the clerk), it has endured to this time though such anomaly has not obtained, it is believed, in any other State."

Same—Under Section 470 [G. S. 1-81] of the Consolidated Statutes.—By the Public Laws of 1919 what is commonly known as the "Crisp Act" was passed, and this law was written into the Consolidated Statutes. According to the provision of the "Crisp Act" the summons was required to be returnable before the clerk at a date named therein, not less than ten nor more than twenty days from its issue, and the defendant was required to answer within twenty days of its return.

Same—Under Public Laws of 1923.—The Public Laws of 1923, c. 53, s. 2, read as follows:

"When any summons issue: by any clerk of the Superior Court in North Carolina is not served upon any one or more of the defendants therein named ten days before the return day thereof, but is served before the return day thereof, such failure to serve the said summons shall not affect the pendency of the action, and as touching the defendant or defendants therein named upon whom service has not been made ten days before the return day named in the summons, the return day as to such defendants shall be the tenth day after the service of the summons on the said defendant or defendants."

The original return day under this act was the same as that pointed out in discussing the law under the Consolidated Statutes; but if the sheriff did not serve the summons within ten days of the original return day then the return day was postponed automatically to ten days from the date of the service. For example if a summons issued on June 1 and the return day was named as June 20 and the service was not perfected until June 15 the return day was extended to June 25.

This act was repealed by the act of 1927 which amended this section (as explained in a succeeding paragraph). The act was subjected to the following criticism in 1 N. C. Law Rev. 281: "The present change introduces again the element of uncertainty, since the plaintiff cannot know when the summons will be served, and his right to proceed at a definite time depends upon the diligence of the officer or other circumstances not within his control. It would seem desirable that the definite return day named in the summons should still control, not only for the sake of definiteness and uniformity in procedure, but because it enables the plaintiff to know when to look after his case, and at the same time gives reasonable protection to the defendant by giving him twenty days in all cases to answer, with the power in the clerk to extend the time for good cause shown." 1 N. C. L. R. 281.

This criticism probably prompted the passage of the 1927 Act.

Same—The Extra Session of 1921.—This act provided that the "summons must be served as now provided by law." This provision was omitted in the 1927 amendment, as the method of service is there specifically mentioned.

Same—Public Laws of 1927.—This section as amended in 1927 constitutes more or less a reversion to the procedure extant before the passage of the "Crisp Act." There is now no specified return day; appearance and answer are always thirty days after service (in conformance with the criticism cited above); service must be ten days after issuance; if not served within ten days it must be returned with reasons for nonservice. If the reason was lack of time the issuing officer executed (within three days) an alias or pluries summons, as the case required; but this provision was struck out by the Act of 1929, as noted in a succeeding paragraph. The directory provision that the officer shall note the date of service is also new.

Same—The Extra Session of 1920.—"In *Campbell v. Campbell* (179 N. C. 413, 102 S. E. 727) the summons was issued on July 21, returnable before the clerk on August 8; but since the defendant was a nonresident, and service was to be made by publication, the time of publication did not expire until August 23. It was held that the time was necessarily extended by operation of law, so that the return day for the defendant was August 23." See 1 N. C. Law Rev. 9.

To meet this case, ch. 96, of the Public Laws, Extra Session 1920 enacted a proviso that the summons was to be returnable within forty days. This proviso was amended by the Act of 1927, and the time is extended from forty to fifty days.

Same—Public Laws of 1929.—This act amended this section

by striking out the following: "Upon the return of a summons unserved for want of time to make service, as to any defendant or defendants not served, the Clerk shall, within three (3) days thereafter issue an alias or pluries summons, as the case may require."

Previous to this amendment the clerk was required to issue such summons if the process officer has not had time to serve the original within the time prescribed by statute, without the necessity of the plaintiff in the action applying therefor. *Neely v. Minus*, 196 N. C. 345, 145 S. E. 771. See note under § 1-95.

Notice that Relief Will Be Demanded.—Whether the omission of notice that "the plaintiff will apply to the court for the relief demanded in the complaint" would be futile seems. *Davis v. Ely*, 100 N. C. 283, 285, 5 S. E. 239. The Court stated that this has become a material part of the pleading.

Excuse for Failure to Answer or Demur in Time.—See note of *Helderman v. Hartseil Mills Co.*, 192 N. C. 626, 135 S. E. 627, in 5 N. C. Law Rev. 269.

Ten Days After Issuance.—The construction given section 200 of the Code of 1883, providing that personal service should be "ten days before the beginning of the term," was that service before midnight of Friday, the tenth day before court, was a sufficient compliance. See *Taylor v. Harris*, 82 N. C. 25; *Guilford County v. Georgia Co.*, 109 N. C. 310, 311, 313, 13 S. E. 861. It would seem, then by analogy, that a service before midnight of the tenth day after issuance would constitute a sufficient compliance with the requirement of this section that service must be ten days after issuance. *Ed. Note.*

Summons in Quo Warranto Proceedings Must Meet Requisites of Section.—In order for a valid service of summons in quo warranto proceedings under the provisions of § 1-526, it is necessary that the true copy of the summons provided for in that section meet the requisites of this section. *McLeod v. Pearson*, 208 N. C. 539, 181 S. E. 753.

Substantial Compliance.—There is a substantial compliance with this section where the summons commanded the plaintiff to appear and show cause why a trustee should not be appointed in the place of the original trustee. The plaintiff could readily understand what the summons meant. *Nall v. McConnell*, 211 N. C. 258, 262, 190 S. E. 210.

Effect of Summons Calling for Premature Appearance.—The rights of the defendant cannot be abridged by irregularity in making the summons require an appearance within less than the twenty days (now thirty after service) allowed by this section. Such summons is not necessarily on that account void, and the probate judge is not bound to dismiss it but he should allow the defendants the time allowed by this section for an appearance. *Guion v. Melvin*, 69 N. C. 242.

Meaning of Return.—The Code of 1883, sec. 200, expressly required a sheriff to whom a summons was directed to execute the same and return it to the Superior Court of the county from which it was issued. "The term 'return' implies that the process is taken back to the place from which it was issued." In *re Crittenden*, 2 Flip., 215. It is the "bringing of a process into Court with such endorsements as the law requires, whether they in fact be true or false." *Harman v. Childress*, 3 Yerg., 329. As the statute requires the officer to make his return to the Superior Court of Northampton County, and as the return could not be made elsewhere, it must follow that the cause of action arose in the said county. *Watson v. Mitchell*, 108 N. C. 364, 12 S. E. 836.

When Summons Returnable.—Public Laws 1927, made material changes in the law theretofore existing. Formerly a summons was returnable before the clerk "at a date named therein not less than ten nor more than twenty days from its issuance." The law now in force provides that a summons must be returnable before the clerk and must notify the defendant to appear and answer the complaint within thirty days after service thereof. It is further provided, however, that the sheriff to whom the summons is addressed, must serve the same within ten days after the date of issuance, and if not served within ten days, it must be returned by the officer holding the same for service to the clerk of the court issuing the summons, "with notation thereon of its nonservice and the reasons therefor as to every defendant not served." By implication only, it would appear that a summons in a civil action is now returnable within ten days. *Neely v. Minus*, 196 N. C. 345, 145 S. E. 771.

This Section and Section 1-209 Construed Together.—In *Young v. Davis*, 182 N. C. 200, 204, 108 S. E. 630, it was said that this section and section 1-209 providing for default judgment are not necessarily repugnant, but on the contrary it is clear, that the one is an exception to the other, or rather the first affords an additional and more speedy method of relief in the stated class of suits.

The similarity of this section and § 7-136 is striking and it follows that the two should be interpreted the same. *Johnson v. Chambers*, 219 N. C. 769, 770, 14 S. E. (2d) 789.

Signature of Sheriff.—Where a summons was properly served and the sheriff's return was unsigned, though endorsed in proper form, the judge at the trial did not exceed his powers in permitting the sheriff to sign the return *nunc pro tunc*. *Luttrell & Co. v. Martin*, 112 N. C. 593, 17 S. E. 573.

Seal.—A writ issuing to one county from the superior court of another county must have the seal of the court from which it issues impressed on it. *Shackelford v. M'Rea*, 10 N. C. 226. The rule is that when the process is to be executed within the county where it issued, no seal is required, but if it goes beyond such county the seal is required, and without it the process is void. This difference applies to all precepts or process, such as summons, execution and the like. This distinction has been sustained by numerous decisions of the supreme court. *Freeman v. Lewis*, 27 N. C. 91; *Taylor v. Taylor*, 83 N. C. 116; *McArter v. Rhae*, 122 N. C. 614, 615, 30 S. E. 128; *Shackelford v. M'Rea*, 10 N. C. 226; *Seawell v. Bank*, 14 N. C. 279; *Finley v. Smith*, 15 N. C. 95. *Vick v. Flournoy*, 147 N. C. 209, 60 S. E. 978.

While this section requires that a summons directed to the sheriff of a county other than that from which it is issued shall be attested by the seal of the court, the absence of a seal would not invalidate a judgment where service has been accepted and the defendant has voluntarily appeared. *Mosley v. Deans*, 222 N. C. 731, 24 S. E. (2d) 630.

Same—Omission from Copy.—Where the original summons bore the proper seal and the copy purported to have been attested in like manner, and the copy included every material part of the original except the seal, the omission of the seal, not affecting the substance of the writ did not impair the efficacy of the service or in any way mislead or prejudice the defendant. In affixing the seal the object is to evidence the authenticity of the summons, but the seal is not a part of the summons in the sense that its impress upon the copy is essential to the validity of the original. *Elramy v. Abeyounis*, 189 N. C. 278, 126 S. E. 743, 744.

§ 1-90. Issued to several counties.—The plaintiff may issue a summons, directed to the sheriff of any county where a defendant is most likely to be found, noting on each summons that it is issued in the same action. When the summons is returned, it shall be docketed as if only one had issued, and if any defendant is not served with such process, the same proceeding shall be had as in other cases of similar process not executed. (Rev., s. 432; Code, s. 204; R. C., c. 31, s. 44; 1789, c. 314, ss. 1, 2; 1831, c. 14, s. 2; C. S. 477.)

§ 1-91. When directed to officer of adjoining county.—If at any time there is not in the county a proper officer to whom summons or other process of a court of record is or ought to be directed, who can lawfully execute it; or if such officer refuses or neglects to execute the same, the clerk of the court from which it has issued or shall issue, upon the facts being verified before him by written affidavit, subscribed by the plaintiff or his agent, shall issue such summons or process to the sheriff of any adjoining county, who has power to and shall execute the same in like manner as if he were sheriff of the county. In all cases where the sheriff of any county is interested, if there is no coroner in the county, process may be issued to and shall be executed by the sheriff of any adjoining county. (Rev., ss. 1530, 1531; Code, ss. 929, 930; R. C., c. 31, s. 55; 1779, c. 156; 1821, c. 1080; 1882, c. 1132; 1846, c. 61; 1869-70, c. 175; C. S. 478.)

Applied in an anonymous case in 2 N. C. 422.

§ 1-92. Uniform pleading and practice in inferior courts where summons issued to run outside of county.—In all cases in which any court in North Carolina inferior to the Superior Court, except courts of Justices of the Peace, shall issue

any summons to run outside the county of such inferior court, the case in which such summons is issued shall, as to the summons and the filing of all pleadings, be subject to, and governed by, the laws and rules applicable to actions in the Superior Court of North Carolina. (1931, c. 420.)

Cross Reference.—As to when coroner acts as sheriff, see § 152-8. As to rules of pleading generally, see § 1-143.

The recorder's court of Reidsville Township was authorized by the statute creating it to issue a summons running out of the county, and the issuance of a summons to another county addressed to the sheriff of that county was authorized by this section. *Williams v. Cooper*, 222 N. C. 589, 591, 24 S. E. (2d) 484.

§ 1-93. Amount requisite for summons to run outside of county.—No summons in civil suits or civil proceedings shall run outside the county where issued, unless the amount involved in the litigation is more than two hundred dollars in matters arising out of contract and more than fifty dollars in matters arising in tort: Provided, that this section shall not affect or limit the provisions of §§ 7-138, 7-140 to 7-143. (1939, c. 81.)

Cross Reference.—See also, §§ 7-121, 7-122.

Demurrer to the jurisdiction on ground that summons was issued out of a recorder's court to another county in an action *ex contractu* involving less than \$200.00, is bad as a speaking demurrer, since the defect does not appear upon the face of the complaint. *Four County Agricultural Credit Corp. v. Satterfield*, 218 N. C. 298, 10 S. E. (2d) 914.

§ 1-94. When officer must execute and return.—The officer to whom the summons is addressed must note on it the day of its delivery to him and serve it by delivering a copy thereof to each of the defendants. In all cases when a summons is issued by any court of this state, and the officer to whom said summons is directed shall find that the person or persons against whom said summons is issued cannot be served without danger of injury to said person or persons on account of the condition of said person or persons arising from illness, accident or otherwise, the officer shall file with his returns a certificate from a reputable physician certifying to this fact, and said returns shall relieve the said officer from any liability by reason of failure to actually serve the summons. The said officer shall as soon as possible make actual service of said summons, and when actually served the cause of action shall be deemed to have been commenced as of the date of the original summons, and the defendant shall have thirty days from the date of actual service within which to demur, answer or otherwise plead. (Rev., s. 433; Code, s. 200; 1876-7, c. 85; 1919, c. 304, s. 1; Ex. Sess. 1921, c. 92, s. 1; 1923, c. 62; 1943, c. 543; C. S. 479.)

Cross Reference.—As to action commenced when summons is issued, see § 1-14.

Editor's Note.—The Public Laws of 1923 added the part of the section, relating to service in case of danger of injury to the person. "This applies to all courts, since the words used are 'when the summons is issued by any court of this state.' The first purpose is to relieve the officer from liability to a penalty for failure to serve the summons in proper time, (sections 162-14, 162-16). It may be that such facts stated in his return, as an excuse for failure to serve the summons, would exonerate the officer in any case (21 R. C. L. 1318), but this places it beyond question." 1 N. C. Law Rev. 279.

The 1943 amendment substituted "thirty" for "twenty" in the sixth line of the last sentence of this section.

Effect of Officer's Notation.—A summons is issued when the clerk delivers it to the sheriff to be served, and where there is no intermediary, but the process is delivered by the clerk himself to the officer, the notation of the officer on it as to the date of its receipt by him must be controlling

evidence as to when it was issued. *Smith v. Cashie, etc., Lumber Co.*, 142 N. C. 26, 54 S. E. 788.

A civil action is commenced when the summons is issued, and the presumption when nothing else appears is that the summons passed from the control of the Clerk and was delivered to the sheriff, and therefore issued at the time when the sheriff received it; and this is generally determined by the entry on the process of the date it was received by the sheriff, as he is required by statute to make such an entry. *Smith v. Cashie, etc., Lumber Co.*, 142 N. C. 26, 30, 54 S. E. 788, explaining *Houston v. Thornton*, 122 N. C. 365, 375, 29 S. E. 827.

Failure to Make Notation.—The sheriff ought regularly to note on the summons the day of its delivery to him, as required by the statute but his failure to do so does not vitiate or render the summons void. Such a notation is not of the essence of the summons, or the service of it by the sheriff. Its purpose is to provide evidence convenient to fix the day the summons passed into the hands of the sheriff for any proper purpose. *Strayhorn v. Blalock*, 92 N. C. 293, 294.

Summons Issued from Justice's Court.—Construing sec. 7-149, sub-sec. 16, and this section together, it is clear that a summons issued from a court of a justice of the peace must be served in the same manner as a summons issued from the Superior Court. *Pass v. Elias*, 192 N. C. 497, 498, 185 S. E. 291.

Return of Sheriff Generally.—See secs. 162-14 et seq. and the notes thereto.

Cited in *Dunn v. Wilson*, 210 N. C. 493, 187 S. E. 802.

§ 1-95. Alias and pluries.—When the defendant in a civil action or special proceeding is not served with summons within ten days, the plaintiff may sue out an alias or pluries summons, returnable in the same manner as original process. An alias or pluries summons may be sued out at any time within ninety (90) days after the date of issue of the next preceding summons in the chain of summonses. Provided, however, that in case of tax suits brought under the provisions of § 105-391, as amended, an alias or pluries summons may be sued out at any time within two years after the issuance of the original summons, whether any intervening alias or pluries summons has heretofore been issued or not, and after the issuance of such alias or pluries summons, the chain of summonses may be kept up as in any other action. (Rev., s. 437; Code, s. 205; R. C., c. 31, s. 52; 1777, c. 115, ss. 23, 71; 1929, c. 237, s. 2; 1931, c. 264; C. S. 480.)

Editor's Note.—The second sentence of this section was added by the Act of 1929 which also amended § 1-89 by striking out the provisions relating to issuance of an alias or pluries summons by the clerk. The Act of 1931 added the proviso.

It was held in *McGuire v. Montvale Lumber Co.*, 190 N. C. 806, 808, 131 S. E. 274, that the word "may" as herein used means "must." The *McGuire* case further states that "the true office of an alias summons is to continue the action referable to its original date of institution, when the first summons issued had not been served," and cites *Powell v. Dail*, 172 N. C. 261, 90 S. E. 194; *Rogerson v. Leggett*, 145 N. C. 7, 58 S. E. 596.

Alias summons must be sued out within ninety days next after the date of the original summons. *Mintz v. Frink*, 217 N. C. 101, 6 S. E. (2d) 804.

Motion to Abate.—If there has been a discontinuance of the action by failure to duly issue alias summons, defendant must take advantage thereof by motion to abate before he files answer. *Asheboro v. Miller*, 220 N. C. 298, 17 S. E. (2d) 105.

Cited in *Neely v. Minus*, 196 N. C. 345, 145 S. E. 771; *Gomer v. Clayton*, 214 N. C. 309, 199 S. E. 77.

§ 1-96. Discontinuance.—A failure to keep up the chain of summonses issued against a party, but not served, by means of an alias or pluries summons, is a discontinuance as to such party; and if a summons is served after a break in the chain, it is a new action as to such party, begun when the summons was issued. (Rev., s. 438; C. S. 481.)

When Discontinuance Occurs.—A discontinuance under this section occurs only when the summons has not been served. *Rogerson v. Leggett*, 145 N. C. 7, 10, 58 S. E. 596; *Gomer v. Clayton*, 214 N. C. 309, 199 S. E. 77.

The failure of service of the original summons in an action must be followed by an alias or pluries writ or a summons successively and properly issued in order to preserve a continuous single action referable to the date of its issue, for otherwise it is a discontinuance as to the defendant. And another summons served after the break in the chain is a new action. *Hatch v. Alamance R. Co.*, 183 N. C. 617, 112 S. E. 529.

Under this section where in a civil action alias or pluries summonses are issued in the event of nonservice of the original, a break in the chain of summonses works a discontinuance, and where a summons is thereafter served it commences a new action. *Neely v. Minus*, 196 N. C. 345, 145 S. E. 771.

Where service of the original summons in this action was void because made on a Sunday and an "alias" summons thereafter issued was ineffective because not in the form prescribed by statute, upon the expiration of 90 days from the date of the original summons there was a discontinuance, and the court was without authority thereafter to order the issuance of an alias summons. *Mintz v. Frink*, 217 N. C. 101, 6 S. E. (2d) 804.

§ 1-97. Service by copy.—The manner of delivering summons in the following cases shall be as hereinafter stated:

1. If the action is against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof. Any person receiving or collecting money in this state for a corporation of this or any other state or government is a local agent for the purpose of this section. Such service can be made in respect to a foreign corporation only when it has property, or the cause of action arose, or the plaintiff resides, in this state, or when it can be made personally within the state upon the president, treasurer or secretary thereof.

2. If against a minor under the age of fourteen years, to the minor personally, and also to his father, mother or guardian, or if there are none within the state, to any person having the care and control of the minor, or with whom he resides, or in whose service he is employed.

3. If against a person judicially declared of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee or guardian has been appointed, to such committee or guardian, and to the defendant personally. If the superintendent or acting superintendent of an insane asylum informs the sheriff or other officer who is charged with the duty of serving a summons or other judicial process, or notice, on an insane person confined in such asylum, that the summons, or process, or notice, cannot be served without danger of injury to the insane person, it is sufficient for the officer to return the same without actual service, but with an endorsement that it was not personally served because of such information; and when an insane person is confined in a common jail it is sufficient for an officer charged with service of a notice, summons, or other judicial process, to return the same with the endorsement that it was not served because of similar information as to the danger of service on such insane person given by the physician of the county in which the jail is situated.

4. Every unincorporated, fraternal, beneficial organization, fraternal benefit order, association and/or society issuing certificates and/or policies

of insurance, whether foreign or domestic, now or hereafter doing business in this state, shall be subject to service of process, in the same manner as is now or hereafter provided for service of process on corporations: Provided, this paragraph shall only apply in actions concerning such certificates and/or policies of insurance.

5. Every nonresident individual who is engaged in business in this state and who conducts such business through an agent, employee, trustee, or other representative in this state, or who is a member of a partnership, firm, or unincorporated organization or association, or beneficiary or shareholder in a business trust doing business in this state, shall be subject to process in any action or proceeding in any court of competent jurisdiction in this state arising out of or connected with such business in this state, and such process may be served upon such agent, employee, trustee, or other representative or upon any person in this state receiving or collecting money with respect to such business, or upon any member of such partnership, firm, organization or association residing in this state or upon any person residing in this state who is authorized to act or contract for or collect or receive money on behalf of such partnership, firm, organization, association, or business trust with respect to its business in this state. Within five days after such service the plaintiff or petitioner or his attorney shall send by registered mail to said nonresident individual at his last address, if known, a copy of the summons and a copy of the complaint or petition with a statement calling attention to the provisions hereof and of the expiration of the time to answer or demur. Such service shall bind such individual as fully and effectually as if it had been made upon him personally.

6. Any unincorporated association or organization, whether resident or nonresident, desiring to do business in this state by performing any of the acts for which it was formed, shall, before any such acts are performed, appoint an agent in this state upon whom all processes and precepts may be served, and certify to the clerk of the superior court of each county in which said association or organization desires to perform any of the acts for which it was organized the name and address of such process agent. If said unincorporated association or organization shall fail to appoint the process agent pursuant to this subsection, all precepts and processes may be served upon the secretary of state of the state of North Carolina. Upon such service, the secretary of state shall forward a copy of the process or precept to the last known address of such unincorporated association or organization. Service upon the process agent appointed pursuant to this subsection or upon the secretary of state, if no process agent is appointed, shall be legal and binding on said association or organization, and any judgment recovered in any action commenced by service of process, as provided in this subsection, shall be valid and may be collected out of any real or personal property belonging to the association or organization.

Any such unincorporated association or organization, now performing any of the acts for which it was formed, shall, within thirty days from the ratification of this subsection, appoint an agent

upon whom processes and precepts may be served, as provided in this subsection, and in the absence of such appointment, processes and precepts may be served upon the secretary of state, as provided in this subsection. Upon such service, the secretary of state shall forward a copy of the process or precept to the last known address of such unincorporated association or organization. (Rev., s. 440; Code, s. 217; C. C. P., s. 82; 1874-5, c. 168; 1889, c. 89; 1933, c. 24; 1941, c. 256; 1943, c. 478; C. S. 483.)

I. In General.

II. Service on Corporations.

A. Corporations Generally.

B. Foreign Corporations.

III. Service on Minors.

IV. Service on Insane Persons.

Cross References.

As to resident process agent and service through secretary of state, see §§ 55-38, 55-39. As to service of process on insurance commissioner for foreign insurance company, see § 58-153. As to infants, idiots, etc., to defend by guardians ad litem, see § 1-65. As to privilege from service of process in certain civil actions of persons brought into state by extradition, see § 15-79.

I. IN GENERAL.

Editor's Note.—The 1933 amendment added subsection 4, the 1941 amendment added subsection 5 and the 1943 amendment added subsection 6.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 460.

Applicability to Criminal Actions. — This section though primarily intended as a regulation in the institution of a civil action, is equally appropriate in a criminal action, and its terms are sufficiently comprehensive to embrace both. *State v. Western, etc., R. Co.*, 89 N. C. 584, 586.

Applicability in Justices' Court. — This section does not embrace a process returnable before a magistrate, *Kirkland v. Hogan*, 65 N. C. 144; but those provisions, in regard to the service of process upon corporations, apply to justices' courts. *Katzenstein v. Raleigh, etc., R. Co.*, 78 N. C. 286, 287.

What Constitutes Delivery. — It would seem that the use of the word "delivery" in this section contemplates a delivery to the defendant in person, or his qualified agent as specified in the section. It has been held that leaving a copy of the summons with the wife of the person named in the summons will not suffice, *First Nat. Bank v. Wilson*, 80 N. C. 200; nor does leaving a copy at the dwelling house constitute a delivery. *State v. Jacobs*, 47 N. C. 52.

Same—Delivery of Original. — The service is void where the original summons only is delivered to an officer of the corporation, who after reading it, returned the same to the officer making the service. *Aaron v. Pioneer Lumber Co.*, 112 N. C. 189, 16 S. E. 1010.

Unincorporated Labor Union.—Attempted service of process in any way upon an unincorporated labor union is void, since such association has no legal entity and may not sue or be sued in the name of the association. *Hallman v. Wood, Wire, etc., Union*, 219 N. C. 798, 15 S. E. (2d) 361, decided prior to 1943 amendment.

Cited in *Welch v. Welch*, 194 N. C. 633, 637, 140 S. E. 436; *Tinker v. Rice Motors*, 198 N. C. 73, 74, 150 S. E. 701; *Smith v. Finance Co. of America*, 207 N. C. 367, 177 S. E. 183; *Manney v. Luzier's, Inc.*, 212 N. C. 634, 194 S. E. 323; *Cox v. Cox*, 221 N. C. 19, 18 S. E. (2d) 713.

II. SERVICE ON CORPORATIONS.

A. Corporations Generally.

Requirement Mandatory. — This requirement as to the mode of service on corporations must be strictly observed. *Hatch v. Alamance R. Co.*, 183 N. C. 617, 621, 112 S. E. 529, quoting *Amy v. Watertown*, 130 U. S. 301, 317, 32 L. Ed. 946, 9 S. Ct. 530.

The provisions of this section must be strictly followed, and a separate copy of the summons must be served on and left with the agent for each corporate defendant. *Hershey Corp. v. Atlantic Coast Line R. Co.*, 203 N. C. 184, 165 S. E. 550.

The provisions of this section as to service of summons on private corporations must be observed, and where individuals, directors of a corporation, are served with process as trustees, it will not be effectual as service on the corporation, but only on the individuals named. *Jones v. Vanstory*, 200 N. C. 582, 157 S. E. 867.

Local Agent. — The term local pertains to place, and a local agent to receive and collect money, *ex vi termini*, means an agent residing either permanently or temporarily for the purpose of his agency, and was not intended to embrace a mere transient agent. *Moore v. Freeman's Nat. Bank*, 92 N. C. 590, 596.

But the authority to receive money is not the exclusive test of a local agent upon whom service of process may be made. *Copeland v. American De Forest Wireless Tel. Co.*, 136 N. C. 11, 48 S. E. 501; *Pardue v. Absher*, 174 N. C. 676, 679, 94 S. E. 414.

This language was not intended to limit the service to such a class of agents, but rather to extend the word "agent" to embrace them. The authority to receive money, of itself, makes one a local agent for the purpose of the statute, but this is not the exclusive test of agency. *Cape Fear Rys. v. Cobb*, 190 N. C. 375, 377, 129 S. E. 828.

A local agent receiving premiums or commissions for a bonding company doing business in this State is within the contemplation of this section. *Pardue v. Absher*, 174 N. C. 676, 94 S. E. 414.

Service on Bank Director. — The service of process authorized to be made on a director of a corporation, under this section, as applied to a bank, means one of the eleven principal directors, annually elected by the stockholders, and not a director appointed by the authorities of the bank for its branches or agencies. *Webb v. President and Directors*, 50 N. C. 288.

Service on Receiver. — An action against the receivers of a corporation is in fact an action against the corporation; hence, under this section, service of summons on a local agent is service on the receivers. *Farris v. Richmond, etc., R. Co.*, 115 N. C. 600, 20 S. E. 167.

Service of a summons upon the receivers of a corporation is service upon the corporation itself as fully as if made upon the president and superintendent, and service upon the local agent of the receivers has the same legal effect as if made upon the receivers personally. *Grady v. Richmond, etc., R. Co.*, 116 N. C. 952, 21 S. E. 304.

A person acting for a corporation as a caretaker as a matter of friendship, without compensation, is not an agent of such company for receiving and paying out moneys upon whom process may be served under this section. *Kelly v. LeFaiver & Co.*, 144 N. C. 4, 56 S. E. 510.

President before Court in Individual Capacity. — Where a bill was amended so as to make a corporation a party, it was held to be proper to serve the president of the corporation with a copy of the bill, although he was already before the court in his individual capacity. *McRae v. Guion*, 58 N. C. 129.

Agent of Telephone Company as Agents of Telegraph Company. — In *Brown v. Western Union Tel. Co.*, 169 N. C. 509, 86 S. E. 290, it was held that the fact that an agent of a telephone company received messages for a telegraph company and telephoned them to a nearby town, collected for telegrams, etc., was sufficient to be submitted to the jury on the question of whether the agent of the telephone company was such an agent of the telegraph company as is contemplated by this section.

For other cases applying the agency doctrine of this section to Foreign Corporations, see post, this note, the next analysis line.

B. Foreign Corporations.

In General. — "The several cases respecting a foreign corporation, it will be observed, are put disjunctively; and the meaning is, that in either of the first three cases service may be made by delivery of a copy of the summons to one of the offices named in the first clause of the section, among which is the managing agent. In the last case, that is, when the foreign corporation has no property within the State, and the cause of action did not arise therein, and the plaintiff does not reside therein then service may be made on the president, treasurer or secretary, if he can be found within the State, but it may not be made on a management agent found here. A reason for the difference may be discovered. The first three classes of cases embraced all of which would usually occur, and in them every reasonable facility for the service of process is provided. But there was a fourth class of cases, not likely; but still possible, and therefore needing to be provided for, viz.; where a non-resident might be allowed to sue in this State a foreign corporation having no property here, on a cause of action arising elsewhere. The necessity of suing here, might arise out of the fact, that the chief officers were to be found here, and not elsewhere. In such a case, either because the corporation could not well have a managing agent here, or for other reasons, which may be imagined, it was provided that service

should be made on some one of the principle officers." *Cunningham v. Southern Exp. Co.*, 67 N. C. 425, 427.

The construction of this statute, which has been uniformly followed, in *Cunningham v. Southern Exp. Co.*, 67 N. C. 425, 426, and all cases since, is thus clearly stated by Hoke, J., in *Whitehurst v. Kerr*, 153 N. C. 76, 68 S. E. 913; "Construing a statute of similar import, it has been held that the first clause enumerates the persons on whom service of process can be made, to wit, on the president or other head of the corporation, secretary, treasurer, director, managing or local agent thereof, and in that respect applies to all corporations, both domestic and foreign. Then follows the proviso as to who shall be considered local agents for the purpose of the section, and the last clause establishes certain conditions, restrictive in their nature, which are required and necessary to a proper and valid service on foreign corporations. That is, service on the persons designated in the first clause, shall only be good as to foreign corporations: (1) when they have property in the State, or (2) when the cause of action arose therein, or (3) when the plaintiff resides in the State. And then a fourth method is established, (4) when service can be made within this State personally on the president, treasurer, or secretary thereof."

This construction has been held also in *McDonald v. McArthur Bros. Co.*, 154 N. C. 122, 69 S. E. 832; *Higgs & Co. v. Sperry, etc., Co.*, 139 N. C. 299, 51 S. E. 1020; *Greenleaf v. People's Bank*, 133 N. C. 292, 45 S. E. 638; *Jester v. Baltimore Steam Packet Co.*, 131 N. C. 54, 42 S. E. 447; *Clinard v. White*, 129 N. C. 250, 39 S. E. 960; *Jones v. Hartford Ins. Co.*, 88 N. C. 499; *Menefee v. Riverside, etc., Cotton Mills*, 161 N. C. 164, 165, 76 S. E. 741.

An attorney for a foreign corporation, who has claims to collect for it in this State, is not a local agent upon whom process can be served. *Moore v. Freeman's Nat. Bank*, 92 N. C. 590.

Superintendent. — The agent of a foreign corporation who superintends all its work in this State and has general charge of its employees is its "managing agent" within the meaning of this section. *Clinard v. White*, 129 N. C. 250, 39 S. E. 960.

President. — Service of summons on the president of a foreign corporation is valid, if made within the State, whether the president is in the State on private or official business. *Jester v. Baltimore Steam Packet Co.*, 131 N. C. 54, 42 S. E. 447.

Where a foreign corporation does not do business within the state, does not maintain a process agent or any other agent here, and has not domesticated, and owns no property in the state, service of process on its president while he is within the state on personal business in no wise connected with the business of the corporation, is not a valid service of process under this section. *Langley v. Planters Tobacco Warehouse*, 215 N. C. 237, 1 S. E. (2d) 558, following *Riverside, etc., Cotton Mills v. Menefee*, 237 U. S. 189, 35 S. Ct. 579, 59 L. Ed. 910, the effect of which was to overrule former decisions of the North Carolina supreme court to the contrary.

A traveling auditor of a foreign corporation, who presented an account to the plaintiff and requested payment to himself, but presented the account without authority and received no money, is not a "local agent" (under this section) for the purpose of service of summons. *Higgs & Co. v. Sperry, etc., Co.*, 139 N. C. 299, 51 S. E. 1020.

See *Blades Lbr. Co. v. Finance Co.*, 204 N. C. 285, 168 S. E. 219, following *Higgs & Co. v. Sperry, etc., Co.*, 139 N. C. 299, 51 S. E. 1020, and holding also that the fact that such agent received money for the corporation on a single instance does not alter this result.

A local agency for a foreign corporation acting as its general sales agent, and collecting and receiving money on such capacity, is of such character as to make it an agency upon which service of summons for the foreign corporation can be made under our statute. *Cape Fear Rys. v. Cobb*, 190 N. C. 375, 129 S. E. 828.

Where service of process was had on a non-resident defendant corporation by service on its traveling soliciting agent in this state, which agent was not authorized to, and actually did not, receive or collect money for the corporate defendant, and exercised no control or management over the corporate functions, it was held that the agent was not a "local agent" for the purpose of service of summons within the meaning of this section, and service upon him as agent of the corporate defendant was properly stricken out. *Plott v. Michael*, 214 N. C. 665, 200 S. E. 429.

A foreign corporation may be sued on a transitory cause of action in any jurisdiction where it can be found in the sense that service may be perfected upon an agent or officer transacting business for the corporation within that jurisdiction, and that the residence of the plaintiff and the

place at which the cause of action arose are not material questions to be determined to maintain jurisdiction if the corporation can be found and served. *Steele v. Western Union Tel. Co.*, 206 N. C. 220, 224, 173 S. E. 583.

When a foreign corporation has property in this state and is here present transacting its corporate business through local agents, such corporation is amenable to service of process according to the provisions of this section in a transitory cause of action arising in another state and brought by a non-resident of this state and this statute neither offends against the commerce clause of the Federal Constitution nor runs counter to the Fourteenth Amendment. *Id.*

A "local" agent of a foreign corporation for the purpose of service of summons under this section is a person or corporation residing in this state permanently or temporarily for the purpose of the agency. *McDonald Service Co. v. People's Nat. Bank*, 218 N. C. 533, 11 S. E. (2d) 556.

In the absence of any express authority, the question of whether a person or corporation residing in this state is the local agent of a foreign corporation for the purpose of service of summons under this section, depends upon the surrounding facts and the inferences which the court may properly draw from them. *Id.*

An "agent" of a foreign corporation for the purpose of service of summons under this section is a person or corporation given power to act in a representative capacity with some discretionary supervision and control over the principal's business committed to his care, and who may be reasonably expected to notify his principal that process had been served on him. *Id.*

The facts found by the court below upon the uncontroverted evidence appearing by affidavit and by stipulation of the parties, were to the effect that the bank, chartered by this state, upon which process was served, acted as a depository for the nonresident defendant bank, received money of the defendant for deposit, honored checks of the defendant drawn on it, charged currency to defendant as and when requested, and discounted notes of defendant's customers for defendant. Held: The depository bank was engaged in the discharge of the very functions for which it was organized, and it was conducting its own business and not that of the defendant, and the relation existing between the banks was that of creditor and debtor and not that of principal and agent, and therefore the depository bank was not the local agent of the nonresident bank for the purpose of service of summons under this section. Further, it would seem that the nonresident bank was not doing business in North Carolina, since the business transacted here was the business of the depository bank. *Id.*

A foreign express company, while a member of the Federal Government Control Act, a war measure, does not fall within the provision of this section as to local process agent. *McAlister v. American Ry. Exp. Co.*, 179 N. C. 556, 103 S. E. 129.

A foreman, acting under the direction of the superintendent of a corporation, is neither an "officer" nor "a managing or local agent," within the meaning of this section. *Simmons v. Defiance Box Co.*, 148 N. C. 344, 62 S. E. 435.

An operator of a wireless telegraph in sole charge of defendant's property, and in control of its business, is a local agent within the meaning of this section. *Copeland v. American De Forest Wireless Tel. Co.*, 136 N. C. 11, 48 S. E. 501.

Service of process on the bookkeeper of a foreign corporation who was apparently the only financial agent of the corporation in the state will suffice under this section. *Whitehurst v. Kerr*, 153 N. C. 76, 68 S. E. 913.

A buyer for the defendant foreign corporation, who made the contract with plaintiff on which the action is based, was held a "managing agent." *Royal Furniture Co. v. Wichita Furniture Co.*, 180 N. C. 531, 105 S. E. 176.

III. SERVICE ON MINORS.

Service upon Minor over Fourteen. — "Service of the summons by reading it to a minor is good unless he is under the age of 14 years, and, as to a purchaser, it so appears on the face of the record or he has actual knowledge of the fact." *Yarborough v. Moore*, 151 N. C. 116, 65 S. E. 763, 765.

Service upon Minor under Fourteen. — "Formerly an infant was brought into court just as any other defendant was. If he had a general guardian, process was served upon the guardian, if there was no general guardian, the court acquired jurisdiction by service of process upon the infant, and appointed some suitable person—frequently some officer of the court—as guardian ad litem, who accepted service and defended for him; but since the Code of Civil Procedure (this section), the service upon a minor

under the age of fourteen must be upon him personally, and also his father, mother or guardian, or, if there be none in the state, then upon any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed." *White v. Morris*, 107 N. C. 92, 93, 98, 12 S. E. 80. See also, *Ward v. Lowndes*, 96 N. C. 637, 2 S. E. 591.

Process on Infant Personally. — In *Matthews v. Joyce*, 85 N. C. 258, the court said, "while according to recent decisions jurisdiction over the person of infants is acquired only as in the other cases by the service of process on them, and then it is competent to appoint, in case there is no general guardian, a guardian ad litem, to act in their behalf and to protect their interests, so as to bind them by judicial action, a different practice has long and almost universally prevailed in this state, and this power of appointment has been generally exercised without the issue of process, for the reason that no practical benefit would result to the infant from such service on him, and the court always assumed to protect the interests of such party, and to this end committed them to the defense of this special guardian." *Groves v. Ware*, 182 N. C. 553, 109 S. E. 568, 570.

Process Served on General Guardian. — The general guardian is the proper person on whom process against infant defendants should be served, and it is his duty to protect their interest in the suit, *Chambers v. Penland*, 78 N. C. 53, 55.

Service on Guardian ad Litem. — As to failure to serve summons on Guardian ad Litem, see Editor's note under section 1-65.

Appearing by Guardian Ad Litem. — Where an infant appears by guardian ad litem, a copy of the summons having been left with him, and served on his guardian, the fact that no copy of summons was left with his "father, mother or guardian," is immaterial. *Roseman v. Roseman*, 127 N. C. 494, 37 S. E. 518.

Slight Irregularity Does Not Vitiolate. — A judgment will not be vacated because some of a number of infant defendants, united in interest, appeared only by a guardian ad litem, appointed without process previously served on such infants. *Matthews v. Joyce*, 85 N. C. 258.

In an action for the recovery of the possession of land, the defendant, in support of his title, offered in evidence a special proceeding and order for sale of land for assets and deed thereunder, to which plaintiff objected because it did not appear that the guardian ad litem appointed for the feme plaintiff, who was a party to the proceeding, was served with summons, or appeared or filed any answer. Summons was served upon the infant according to law: Held, there was not such irregularities as made the proceeding void. *Coffin v. Cook*, 106 N. C. 376, 11 S. E. 371.

It has been held that where a judgment has been rendered against an infant on whom summons was not served as required by this section, but for whom a guardian ad litem was appointed by the court, and an answer was filed by such guardian ad litem in good faith, the judgment is conclusive on the infant, notwithstanding the irregularity, until set aside on motion in the cause. But such judgment is not conclusive and binding on the infant, where it appears upon the face of the record that the interests of the infant in the subject-matter of the action were not presented to the court in good faith by the guardian ad litem, and passed upon by the court. *Wyatt v. Berry*, 205 N. C. 118, 122, 170 S. E. 131.

Nonresident Infant. — A court cannot obtain jurisdiction of a bill against a nonresident infant, as the statute gives no provision for any other than personal service. *Jones v. Mason*, 4 N. C. 561.

Applied in *Graham v. Floyd*, 214 N. C. 77, 197 S. E. 873.

IV. SERVICE ON INSANE PERSONS.

Section Not Applicable to Summary Proceeding. — A proceeding to have declared sane and competent a person theretofore declared incompetent is a summary proceeding not requiring service of notice on the guardian nor service of summons on the incompetent under this section, it being necessary only that the incompetent be given notice. *In re Dry*, 216 N. C. 427, 5 S. E. (2d) 142.

Delivery of Summons to Committee of Insane Person Is Necessary. — Where an action is brought against a person judicially declared to be of unsound mind or incapable of conducting his own affairs for whom a committee or guardian has been appointed a copy of the summons must be delivered to the committee or guardian and to the defendant personally. *Hood v. Holding*, 205 N. C. 451, 455, 171 S. E. 633.

Or Final Judgment Cannot Be Entered. — If the declared incompetent has no committee or guardian, service of notice may be made upon him personally or the notice may be returned without actual service with the endorsement

required by the statute when service cannot be made without the danger of injury to him; but in no event should final judgment be rendered against him without adequate notice to his committee, or to his general or testamentary guardian, or to a guardian ad litem duly appointed by the court. *Hood v. Holding*, 205 N. C. 451, 455, 171 S. E. 633.

Ex parte proceedings brought by a husband to have his wife declared sane, without any notice or service upon the guardian to whom the law had confided the protection of her rights, were a nullity under this section. *Sims v. Sims*, 121 N. C. 297, 300, 28 S. E. 407.

§ 1-98. **Service by publication.**—Where the person on whom the service of the summons is to be made cannot, after due diligence, be found in the state, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof and it in like manner appears that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an action relating to real property in this state, such court or judge may grant an order that the service be made by publication of a notice in either of the following cases:

1. Where the defendant is a foreign corporation and has property, or the cause of action arose, in the state.

2. Where the defendant, a resident of this state, has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of a summons.

3. Where he is not a resident, but has property in this state, and the court has jurisdiction of the subject of the action.

4. Where the subject of the action is real or personal property in this state, and the defendant has, or claims, or the relief demanded consists wholly or partly in excluding him from any actual or contingent lien or interest therein.

5. Where the action is for divorce.

6. Where the stockholders of a corporation are deemed to be necessary parties to an action and their names or residences are unknown; or where the names or residences of parties interested in real estate the subject of an action are unknown, if the name of at least one of the parties to the action and interested in the subject matter thereof is known, and he is a resident of the state, the court having jurisdiction may, upon affidavit that after due diligence the names or residences of such parties cannot be ascertained, authorize service by publication.

7. Where in actions for the foreclosure of mortgages on real estate, if any party having any interest in, or lien upon, such mortgaged premises, is unknown to the plaintiff, and his residence cannot, with reasonable diligence, be ascertained, and such fact is made to appear by affidavit.

8. Where no officer or agent of a domestic corporation upon whom service can be made can, after due diligence, be found in the state, and such facts are made to appear by affidavit. This subsection also applies to all summonses, orders to show cause, orders and notices issued by any board of aldermen, board of town or county commissioners, or by individuals. (Rev., s. 442; Code, ss. 218, 221; 1885, c. 380; 1889, cc. 108, 263; 1895, c. 334; C. S. 484.)

I. In General.

II. Service by Publication on Foreign Corporations.

III. Service by Publication on Nonresident with Property within State.

IV. Service by Publication where Lien is Subject of Litigation.

V. Service by Publication in Actions for Divorce.

VI. Service by Publication on Domestic Corporation.

Cross References.

As to personal service on nonresident, see § 1-104. As to service of summonses by publication in attachment, see § 1-444. As to service of summonses by publication on parties in proceeding to sell land for assets, see § 28-87. As to defense after judgment has been rendered by defendant served by publication, see § 1-108. As to publication of notice to nonresident parties of taking of deposition in action or proceeding, see § 8-73. As to service of summonses on executor without bond by publication, see § 28-179. As to manner of publication, see § 1-588.

See, note to § 1-104.

I. IN GENERAL.

Strictly Construed.—The service of the summons or notice, as an original process in the action by publication, must be made strictly in accordance with the requirements of the statute. This method of service of process and giving the court jurisdiction is peculiar, and out of the usual course of procedure. The statute prescribes, with particularity and caution, the cases and causes that must exist and appear by affidavit to the court in order that it may be allowed. The court must see that every prerequisite prescribed exists in any particular case before it grants the order of publication. Otherwise the publication will be unauthorized, irregular and fatally defective, unless in some way such irregularity shall be waived or cured. *Spiers v. Halstead, etc., Co.*, 71 N. C. 209; *Windley v. Bradway*, 77 N. C. 333; *Wheeler v. Cobb*, 75 N. C. 21; *Faulk v. Smith*, 84 N. C. 501; *Bacon v. Johnson*, 110 N. C. 114, 116, 14 S. E. 508.

Unless the provisions of this section are observed the service of a summons by publication in such cases will be ineffective. *Martin v. Martin*, 205 N. C. 157, 159, 170 S. E. 651.

Not only must it be shown that the defendant has property in this state; the cause of action must be stated with such clearness and comprehension as may enable the court to determine its sufficiency. *Id.*

The Affidavit—By Whom Made.—The affidavit required by this section may be made by an agent or attorney. *Weaver v. Roberts*, 84 N. C. 494.

Same—When Made.—It seems that the affidavit may be made after the order, provided the order remains in abeyance until the affidavit is filed. *Bank v. Blossom*, 92 N. C. 695.

Same—Allegations.—Everything necessary to dispense with personal service must appear by affidavit. *Wheeler v. Cobb*, 75 N. C. 21.

Same—Proper Party and Cause of Action Must Be Shown.

—A brief summary of the facts constituting the cause of action, or of the facts showing that the parties are necessary parties to the action, should be stated so that the court can see and determine that there exists a cause of action, or that the parties are necessary for some appropriate purpose. The party demanding the order shall not be the judge to determine that a cause of action exists, or that the parties sought to be made parties are necessary parties. It is the province and duty of the court to see the facts and determine the legal question as to whether there is a cause of action or not. Nor is it sufficient to state that the party is a necessary party to an action to compel specific performance of a contract to convey land in a particular locality. The facts must be stated with sufficient fullness to develop the contract and the relation of the parties to it. Otherwise the party demanding the order will determine that he has a cause of action, while the statute requires the court to do so upon facts appearing by affidavit. *Clafin v. Harrison*, 108 N. C. 157, 12 S. E. 895, and the cases cited, *Bacon v. Johnson*, 110 N. C. 114, 117, 14 S. E. 508.

Where, upon the facts alleged, no judgment can be rendered affecting lands, it must follow that the defendant is not a proper or necessary party, such as is contemplated by this section. *Clafin v. Harrison*, 108 N. C. 157, 158, 12 S. E. 895.

Same—Necessity for Averment of Due Diligence.—The authorities seem to be decisive that, under this section as now framed, the allegation that a defendant can not be found in the state, after diligent search, is an essential averment to a service of original process by publication. *Sawyer v. Camden Run Drainage Dist.*, 179 N. C. 182, 183, 102 S. E. 273; *Wheeler v. Cobb*, 75 N. C. 21; *Faulk v. Smith*, 84 N. C. 501; *Grocery Co. v. Collins Bag Co.*, 142 N. C. 174, 55 S. E. 90; *Denton v. Vassilades*, 212 N. C. 513, 193 S. E. 737.

This allegation as to diligence is the very cornerstone to obtain jurisdiction by publication. *Fowler v. Fowler*, 190 N. C. 536, 540, 130 S. E. 315.

An averment, by affidavit or otherwise, that the defendants "cannot, after due diligence, be found in the state," is an essential requirement to obtain service of summons by publication, under this section, and it must be made to appear "to the satisfaction of the court." *Groce v. Groce*, 214 N. C. 398, 399, 199 S. E. 388.

And the fact that the defendant is a nonresident, is not a sufficient averment in the affidavit, it being necessary to show that after due diligence he cannot be found within the state. *Davis v. Davis*, 179 N. C. 185, 102 S. E. 270. A publication based upon the mere allegation that the defendant is a nonresident does not give the court jurisdiction under the section. *Flint v. Coffin*, 176 Fed. 872.

Same—What Constitutes Due Diligence.—When the affidavit for publication sets out the return of the sheriff and avers that the defendants cannot be found "after due search," this is tantamount to "due diligence." *Rose v. Davis*, 140 N. C. 266, 269, 52 S. E. 780.

But, as will be seen from a later paragraph, this section does not require the issuance and return of summons not served. The preceding paragraph is only an illustration of the diligence that will suffice. *Ed. Note.*

Same—Specific Allegation of Jurisdiction.—There is no requirement in this section that an allegation as to the court's jurisdiction shall be made specifically in the affidavit. If the jurisdiction of the court, as to the subject of the action, appears from the facts alleged in the affidavits, and in the complaint, which was on file at the time the orders were made, this was sufficient. *Page v. McDonald*, 159 N. C. 28, 43, 74 S. E. 642; *Bacon v. Johnson*, 110 N. C. 114, 14 S. E. 508; *Davis v. Davis*, 179 N. C. 185, 102 S. E. 270; *County Sav. Bank v. Tolbert*, 192 N. C. 126, 129, 133 S. E. 558.

Same—Other Allegations.—Specific allegations necessary to obtain the order under the particular subdivisions of the section will be found under the following analysis line of this note. *Ed. Note.*

Same—Amendment.—Where the affidavit for the publication of a summons was defective, it was proper for the judge to permit an amendment and grant an alias order of publication instead of dismissing the action. *Mullen v. Norfolk, etc., Canal Co.*, 112 N. C. 109, 16 S. E. 901.

Affidavit Not Required in Proceedings to Foreclose Tax Certificate.—Where the summons in proceedings to foreclose a tax certificate of the sale of lands in the action against the listed owner of the lands has been returned the defendant "not to be found," it is not required as under the provisions of this section, that this fact be made to appear by affidavit to the satisfaction of the court in order for valid service by publication. *Orange County v. Jenkins*, 200 N. C. 202, 203, 156 S. E. 774.

Process Must Name Parties Correctly.—In actions for foreclosure of mortgages on real estate, in the nature of which are tax foreclosure proceedings, under § 105-414, "if any party having an interest in, or lien upon, such mortgaged premises, is unknown to the plaintiff, and his residence cannot, with reasonable diligence, be ascertained, and such fact is made to appear by affidavit," the court may order that service be made by publication of a notice of the action. But, in accordance with the rule that notice to a party defendant is required in order to give the court jurisdiction, the process, must correctly name the parties. This requirement is mandatory. *Board of Com'rs v. Gaines*, 221 N. C. 324, 328, 20 S. E. (2d) 377.

Issuance and Return of Summons Not a Prerequisite.—This section does not require the issuance and return of summons not served as the basis of or condition precedent to the publication. *Grocery Co. v. Collins Bag Co.*, 142 N. C. 174, 55 S. E. 90, overruling *McClure v. Fellows*, 131 N. C. 509, 42 S. E. 951, and reinstating *Best v. British, etc., Morte. Co.*, 128 N. C. 351, 38 S. E. 923.

Rights of Heirs May Be Determined Where Service Is by Publication.—A judgment entered in an action to determine the heirs at law of intestate for the purpose of distributing funds in the hands of his administrator, in which the court has jurisdiction of the administrator and the funds in his hands, and some of the heirs appear in court and the other heirs are duly served by publication, is not void, the judgment being one in rem, and service valid under this section. *Ferguson v. Price*, 206 N. C. 37, 173 S. E. 1.

Where the suit is merely in personam to determine the personal rights and obligations of the defendants, constructive service upon a resident is ineffectual for any purpose. *Hinton v. Penn. Mut. Life Ins. Co.*, 126 N. C. 18, 35 S. E. 182.

Cited in *Cutter v. American Trust Co.*, 213 N. C. 686, 197 S. E. 542.

II. SERVICE BY PUBLICATION ON FOREIGN CORPORATION.

Editor's Note.—Section 55-38, providing for service on a statutory agent of a foreign corporation, would seem to apply in nearly all the instances in which the circumstances prescribed by this subsection would occur. In view of the holding in *Pardue v. Absher*, 174 N. C. 676, 94 S. E. 414, it is probable that the two sections would be construed as cumulative, one of the other, and that the plaintiff might exercise an option as to the method of procedure.

Under this subsection, the unpaid balances due a foreign corporation on subscriptions to its stock by subscribers residing in this state are property of such corporation. *Cooper v. Adel Security Co.*, 122 N. C. 463, 30 S. E. 348.

III. SERVICE BY PUBLICATION ON NONRESIDENT WITH PROPERTY WITHIN STATE.

In General.—A valid service by publication cannot be made on a nonresident unless he has property within the state. *Everitt v. Austin Bros.*, 169 N. C. 622, 86 S. E. 523, and it is necessary to set forth this fact in the affidavit. *Bacon v. Johnson*, 110 N. C. 114, 14 S. E. 508.

A chose in action is property, and embraced in the terms of this subsection. *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198.

Where the summons has been duly returned "defendant not to be found in the State," and at the time of its issuance it was alleged in a verified complaint and in supporting affidavits that the cause of action was for money had and received, and that the defendant was beyond the limits of the State, and was a resident of another State, this section has been substantially complied with and the validity of the service is upheld. *Bethell v. Lee*, 200 N. C. 755, 158 S. E. 493.

Attachment Necessary.—In an action in personam, in which no attachment has been or can be issued, service by publication on a nonresident is ineffectual for any purpose. *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198. See also *Price v. Cox*, 83 N. C. 261; *Wilson v. St. Louis Cook Mfg. Co.*, 88 N. C. 5.

Where an action is for the recovery of a debt and there is no attachment of the property to confer jurisdiction there can be no service by publication of the summons, or hence, actual service in another state "in lieu of publication" would be invalid. *Long v. Home Ins. Co.*, 114 N. C. 465, 466, 19 S. E. 347; *Bernhardt v. Brown*, 118 N. C. 700, 701, 24 S. E. 527.

General Judgment Cannot Be Taken.—A plaintiff cannot take a general and personal judgment against a defendant, who is a nonresident, upon a service by publication and not even when an attachment has been levied on his property, the court having jurisdiction to adjudge against him only to the extent of the property seized. *May v. Getty*, 140 N. C. 310, 53 S. E. 75.

One who has left the State for an indefinite time, his return depending upon a doubtful contingency, is a nonresident for the purpose of service of summons by publication within subsection 3 of this section even though he may have retained his domicile in this state. And the cause of his absence from the state is immaterial if such absence prevents personal service for an indefinite period of time. *Brann v. Hanes*, 194 N. C. 571, 140 S. E. 292. See note under § 1-441.

IV. SERVICE BY PUBLICATION WHERE LIEN IS SUBJECT OF LITIGATION.

In General.—In *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, it is said: "Such service (by publication) may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, where the public is a party, to condemn and appropriate it for a public purpose." This is cited and approved in *Winfree v. Bagley*, 102 N. C. 515, 684, 9 S. E. 198; and *Long v. Home Ins. Co.*, 114 N. C. 465, 19 S. E. 347; *Bernhardt v. Brown*, 118 N. C. 700, 701, 706, 24 S. E. 527, 715.

A judgment to enforce a mechanic's lien is a proceeding in rem, and service by publication is authorized by this subsection. *Bernhardt v. Brown*, 118 N. C. 700, 701, 706, 24 S. E. 527, 715.

V. SERVICE BY PUBLICATION IN ACTIONS FOR DIVORCE.

For article on "North Carolina and Jurisdiction for Divorce," mentioning this section, see 1 N. C. Law Rev. 95 et seq.

The Affidavit.—The requirements of this section are mandatory, and must be followed in good faith in actions of divorce to obtain an order of publication of service of summons, and where the plaintiff in divorce fails to make affi-

davit that the defendant cannot after due diligence be found in the state, knowing that she was residing in another county therein, subject to personal service, and the summons has been returned endorsed that defendant cannot be found within the county or its issuance, etc., the judgment rendered therein by the superior court is void, and may be vacated by the court granting it within its inherent powers. *Fowler v. Fowler*, 190 N. C. 536, 130 S. E. 315. For cases pertaining to the affidavit generally, see ante, this note, "In General" I.

Order of publication of service of summons in an action by the wife for divorce is not objectionable as irregular, for the failure of the affidavit to set forth a good cause of action, when there are therein allegations that the husband had abandoned his wife, had left the State after having wrongfully appropriated her separate property to his own use, leaving her without support, and had subjected her to an inquisition of lunacy, and is now professionally engaged in another State upon a good salary, etc.; and this principle also applies to a suit of the wife to recover lands purchased by the husband with her separate money, and title taken in himself without her consent, and in either case publication may be made. *White v. White*, 179 N. C. 592, 103 S. E. 216.

The Supreme Court has the power to permit an amendment therein to an affidavit made for the publication of a summons; but where the action is for divorce a vinculo, and the defect is in omitting the averment that the defendant cannot after due diligence be found in this state, and it is admitted that the defendant is a nonresident and at the time embraced by the publication, was absent from the state, the Supreme Court may remand the case to the Superior Court to hear and consider the evidence, and the Superior Court Judge, for the purpose of being advised may submit the question to a jury. *Davis v. Davis*, 179 N. C. 185, 102 S. E. 270.

Applied in *King v. King*, 84 N. C. 32; *Burrowes v. Burrowes*, 210 N. C. 788, 188 S. E. 648.

VI. SERVICE BY PUBLICATION ON DOMESTIC CORPORATION.

Editor's Note.—As in the case of service of process by publication on a foreign corporation, discussed ante this note under the analysis line, "Service by Publication on a Foreign Corporation," II, it would appear that this subsection 55-38 which were taken from the Public Laws of 1901. The exact effect of this latter act is conjectural as the point has not been adjudicated by the cases.

In General.—Until the passage of this section there was no means provided for service of process against a domestic corporation whose officers and agents could not be found. It was simply a *casus omissus*. *Bernhardt v. Brown*, 118 N. C. 701, 707, 24 S. E. 527, 715.

"Certainly it is competent for the legislature to provide that, as to a corporation created by it, if no officer or agent of such corporation can be found in the state, then service can be had by publication." *Bernhardt v. Brown*, 118 N. C. 700, 701, 708, 24 S. E. 527, 715.

§ 1-99. Manner of publication. — The order must direct the publication in one or two newspapers to be designated as most likely to give notice to the person to be served, and for such length of time as is deemed reasonable, not less than once a week for four successive weeks, of a notice, giving the title and purpose of the action, and requiring the defendant to appear and answer, or demur to the complaint at a time and place therein mentioned; and no publication of the summons, or mailing of the summons and complaint, is necessary. The cost of publishing in a newspaper shall not exceed one dollar and fifty cents an inch of solid type, and shall in no case exceed six dollars for the notice. (Rev., s. 443; Code, s. 219; 1903, c. 134; C. C. P., c. 84; 1876-7, c. 241, s. 3; C. S. 485.)

Cross Reference.—As to cost of legal advertising, see § 1-596.

Sufficiency of Publication.—It is sufficient if the publication contains the substantial elements of the summons, and the fact that it is not a literal copy will not render the service void. *Guilford County v. Georgia Co.*, 109 N. C. 310, 13 S. E. 861.

Service of summons made by publication from 3 o

August to 31 of August, the term of the court to which the process was returnable beginning on the latter day, is a sufficient publication of "once a week for four weeks," and a compliance with the statutes in that respect. *Guilford County v. Georgia Co.*, 109 N. C. 310, 13 S. E. 861.

There being no specific requirement of statute that an order for the publication of summons state that the paper in which the publication is ordered to be printed is the one "most likely to give notice to the person to be served," a judgment that the clerk be restrained from ordering publication in a certain paper without such finding in the order is beyond the terms of the statute and would seem to be discriminatory, and on appeal the judgment will be modified; an order for publication of summons being made by a court of record there is a presumption in favor of the rightfulness of its decrees, and it will be presumed that the statutory findings and determination had been made, without specific adjudication in the order to that effect. *Elias v. Commissioners of Buncombe County*, 198 N. C. 733, 153 S. E. 323.

Warrant of Attachment Insufficient.—The publication of the warrant of attachment does not serve the purpose of this section, as the section specifies that the publication of notice must be in a newspaper. *Ditmore v. Goins*, 128 N. C. 325, 327, 39 S. E. 61.

§ 1-100. When service by publication complete.

—In the cases in which service by publication is allowed, the summons is deemed served at the expiration of the time prescribed by the order of publication, and the party is then in court; and the defendant shall have twenty days thereafter in civil actions and ten days in special proceedings in which to answer or demur. (Rev., s. 444; Code, s. 227; C. C. P., s. 88; 1939, c. 49, s. 1; C. S. 487.)

Editor's Note.—The 1939 amendment added the part of this section appearing after the semicolon.

For comment on the 1939 amendatory act, see 17 N. C. Law Rev. 345.

§ 1-101. Jurisdiction acquired from service.—

From the time of service of the summons, in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings. (Rev., s. 445; Code, s. 229; C. C. P., s. 90; C. S. 488.)

Cross Reference.—As to when action is commenced, see § 1-14.

Cited in *O'Briant v. Bennett*, 213 N. C. 400, 196 S. E. 336.

§ 1-102. Proof of service.—Proof of the service of the summons or notice must be—

1. By the certificate of the sheriff or other proper officer.

2. In case of publication, the affidavit of the printer, or of his foreman or principal clerk, showing the same.

3. The written admission of the defendant. (Rev., s. 446; Code, s. 228; C. C. P., s. 89; C. S. 489.)

This section is exhaustive and proof of the service of a notice must be such as is required by this section. *Allen v. Strickland*, 100 N. C. 225, 6 S. E. 780.

Necessity for Proof.—Where service of process on nonresidents was necessary it is error for the judge of probate (or clerk) to make an order for the sale of lands without adjudging by the proofs required by this section that the defendants had been regularly served with process by publication. *Hyman v. Jarnigan*, 65 N. C. 96.

Written Admission.—Where service is accepted in writing, it will be treated as "the written admission of" service as contemplated by this section. *First Nat. Bank v. Wilson*, 80 N. C. 200; *Nicholson v. Cox*, 83 N. C. 44. *Godwin v. Mondes*, 106 N. C. 448, 450, 10 S. E. 1044.

It is manifest that no verbal admission of service or assent to the service as made will be a service within the provision of this section. *First Nat. Bank v. Wilson*, 80 N. C. 200, 202.

Personal service of a copy of the summons on a defendant, or his written admission thereof, is necessary to constitute a case in court. A copy left with defendant's wife is not a legal service, and proof of its delivery to him by her, or of

his recognition of or verbal assent thereto, will not make it sufficient. *First Nat. Bank v. Wilson*, 80 N. C. 200.

Cited in *Brann v. Hanes*, 194 N. C. 571, 140 S. E. 292; *Dunn v. Wilson*, 210 N. C. 493, 187 S. E. 802.

§ 1-103. Voluntary appearance by defendant.—

A voluntary appearance of a defendant is equivalent to personal service of the summons upon him. (Rev., s. 447; Code, s. 229; C. C. P., s. 90; C. S. 490.)

Effect of General Appearance. — A general appearance waives all defects and irregularities, and is sufficient even if there has been no service at all of the summons shown. *Ashford v. Davis*, 185 N. C. 89, 116 S. E. 162. *Burton v. Smith*, 191 N. C. 599, 132 S. E. 605; *Asheboro v. Miller*, 220 N. C. 298, 17 S. E. (2d) 105; *Moseley v. Deans*, 222 N. C. 731, 24 S. E. (2d) 630; *Harris v. Bennett*, 160 N. C. 339, 76 S. E. 217.

"By making a general appearance and filing an answer upon the merits the defendant waived any defect in the service of the summons. The statute provides that the voluntary appearance of a defendant is equivalent to personal service of the summons." *McCollum v. Stack*, 188 N. C. 462, 465, 124 S. E. 864; *Moody v. Moody*, 118 N. C. 926, 23 S. E. 933.

An appearance for the purpose of filing a demurrer or answer to the complaint is a general appearance to its merits and confers jurisdiction by waiving a proper service of summons. *Reel v. Boyd*, 195 N. C. 273, 141 S. E. 891; *Abbitt v. Gregory*, 195 N. C. 203, 141 S. E. 587.

The giving of a replevy bond is equivalent to a general appearance entered by a defendant in attachment, and is a waiver of the irregularities, if any, in the service of summons, or the necessity of such service, and estops the defendant from denying ownership of the property levied on, but it does not estop defendant from traversing the truth of the allegation on which the attachment is based. *Bizzell v. Mitchell*, 195 N. C. 484, 142 S. E. 706.

What Constitutes a General Appearance.—A motion to dismiss for failure of plaintiff to file security for costs, pertains to a procedural question apart from the merits of the action, and an appearance for the purpose of making this motion, and a motion to dismiss for want of jurisdiction, does not constitute a general appearance. *Mintz v. Frink*, 217 N. C. 101, 6 S. E. (2d) 804.

Cited in *Brann v. Hanes*, 194 N. C. 571, 140 S. E. 292.

§ 1-104. Personal service on nonresident.—

When the place of residence of a person out of the state is known and the same is made to appear by affidavit, in lieu of publication in a newspaper it is sufficient to mail a copy of the summons, notice or other process, accompanied by a statement as to the nature of the action or proceeding, to the sheriff or other process officer of the county and state where the defendant resides, who shall serve same according to its tenor. The process officer who serves the paper shall, in making his return, use a form of certificate substantially as follows:

State of
County of

Affidavit of

Service of Summons;

Clerk's Certificate

I,, [Sheriff or other process officer] of the county [or city] of, State of, being duly sworn, do certify that on the day of, 19 .., I served the summons and accompanying statement hereto attached by delivering a copy of the same to, the defendant(s) therein named.

..... [Sheriff or other process officer]

I,, Clerk of the Court of the County [or City] of, State of, do certify that said court is a court of record having the seal hereto attached; that is well known to me as [Sheriff or other process officer]

of said county [or city] of, and that he has full power and authority to serve any and all legal processes issuing from courts of this state; that said personally appeared before me this day and made and subscribed the above affidavit relative to service of summons on

This the day of, 19...

[L. S.]

Clerk of the

Court of the County [or

City] of, State

of

(Rev., s. 448; 1891, c. 120; 1943, c. 543; C. S. 491.)

Editor's Note.—The 1943 amendment inserted the form of affidavit of service of summons, and changed the form of the clerk's certificate.

When Service by Mail Permitted. — The service of summons and other process authorized by this section is "in lieu of publication in a newspaper," and can only be made in those cases where publication could be made, to wit, in actions which are virtually proceedings in rem or quasi in rem, and in which the jurisdiction as to nonresidents only authorizes a judgment acting upon the property, *Long v. Home Ins. Co.*, 114 N. C. 465, 19 S. E. 347.

Cumulative Method. — The method of mailing the process is optional and not exclusive of service by publication in cases in which this last is proper. *Mullen v. Norfolk, etc., Canal Co.*, 114 N. C. 8, 19 S. E. 106.

Jurisdiction Acquired. — The courts of this State have jurisdiction of the persons of nonresident defendants to the extent required in proceedings in rem or quasi in rem, when personal service is made by complying with the requirements of this section and the property is situated here. *Vick v. Flournoy*, 147 N. C. 209, 60 S. E. 978.

Omission of Clerk's Seal.—A summons issued without the seal of the clerk of the court, personally served upon nonresident defendants under this section, is an irregularity. *Vick v. Flournoy*, 147 N. C. 209, 60 S. E. 978.

Objection made to the summons, which was issued under this section without the seal of the clerk of the court to nonresident defendants, cannot be sustained when it appears that the defendants have been actually notified of the time and place of the trial and informed of the nature and purpose of the action. Such defect may now be cured by the act of the clerk in supplying the seal pursuant to an order properly made in the cause. *Vick v. Flournoy*, 147 N. C. 209, 60 S. E. 978.

Application. — A motion, by special appearance of the nonresident defendants, to disavow the action for want of jurisdiction of the person will not be granted in a suit to redeem lands and to enforce a contract solely in respect of the same, when the locus in quo is situated within the State and personal service was made in compliance with this section. *Vick v. Flournoy*, 147 N. C. 209, 60 S. E. 978.

Where from the verified pleadings of a party the location of the defendant is determined and personal service has been made, an exception to the validity of the service on the ground that the place of residence of defendant in another state was not made to appear by affidavit to the clerk prior to the mailing of the summons cannot be sustained, the provisions of this section having been substantially complied with. *Fidelity, etc., Co. v. Green*, 200 N. C. 535, 157 S. E. 797. But a different rule applies to § 1-98, relating to service by publication where the defendant's rights may be lost through lack of knowledge and lapse of time.

This section has no application to service of subpoenas in criminal actions. There is no statute which authorizes service on witnesses beyond the state in such cases. *State v. Means*, 175 N. C. 820, 824, 95 S. E. 912.

Applied in *Vestal v. Moseley Vending Machine Exch.*, 219 N. C. 468, 14 S. E. (2d) 427.

Cited in *Cutter v. American Trust Co.*, 213 N. C. 686, 197 S. E. 542.

§ 1-105. Service upon non-resident drivers of

motor vehicles.—The acceptance by a non-resident of the rights and privileges conferred by the laws now or hereafter in force in this state permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such non-resident on the public highways of this state, or the operation by such non-resident of a

motor vehicle on the public highways of the state other than as so permitted or regulated, shall be deemed equivalent to the appointment by such non-resident of the Commissioner of Motor Vehicles, or of his successor in office, to be his true and lawful attorney upon whom may be served all summonses or other lawful process in any action or proceeding against him, growing out of any accident or collision in which said non-resident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highway of this State, and said acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally. Service of such process shall be made by leaving a copy thereof, with a fee of one dollar, in the hands of said Commissioner of Motor Vehicles, or in his office, and such service shall be sufficient service upon the said non-resident: Provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff or the Commissioner of Motor Vehicles to the defendant and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the summons or other process and filed with said summons, complaint and other papers in the cause. The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action. (1929, c. 75, s. 1; 1941, c. 3t, s. 4.)

This section is constitutional and valid. *Bigham v. Foor*, 201 N. C. 14, 158 S. E. 548; *Wynn v. Robinson*, 216 N. C. 347, 4 S. E. (2d) 884.

Section Not Retroactive.—This section providing that a nonresident by using the highways of the State, will be deemed to have appointed the Commissioner of Revenue as his agent for the service of process is not remedial or curative, but affects a substantial right, and the appointment of the Commissioner thereunder is contractual, and the statute is not to be given retroactive effect, and service of process thereunder in an action accruing before the effective force of the statute is void. *Ashley v. Brown*, 198 N. C. 369, 151 S. E. 725.

Car Must Be Under Control of Nonresident Defendant.—In order to hold an attempted service upon a nonresident valid under this section there must be sufficient evidence to support a finding that the automobile was operated under the "control or direction, express or implied" of the nonresident defendant. *Smith v. Haughton*, 206 N. C. 587, 174 S. E. 506.

An affidavit of a salesman that the details of his schedule and the control of his automobile were determined by him, subject to the approval of his corporate employer, supports the finding of the court that the automobile was being operated for the corporate employer and under its control and direction, express or implied, within the meaning of this section and, in an action to recover for alleged negligent operation of the car, service of process on the corporate employer through the commissioner of revenue is valid. *Wynn v. Robinson*, 216 N. C. 347, 4 S. E. (2d) 884. See also, *Queen City Coach Co. v. Chattanooga Medicine Co.*, 220 N. C. 442, 17 S. E. (2d) 478.

Averments in affidavits that the automobile causing the injury in suit, admittedly owned by the nonresident corporate defendant and driven in this state by its salesman, was being driven here with the corporation's permission for the purpose of effecting a sale, is sufficient evidence to support the court's finding that the automobile was being driven at the time of the injury for the corporation or was under its implied control and direction so as to support service of process on it by service on the commissioner of revenue. *Crabtree v. Burroughs-White Chevrolet Sales Co.*, 217 N. C. 587, 9 S. E. (2d) 23.

Where a deputy sheriff of the state of South Carolina was traveling through this state to return a prisoner to that state in his own car, which was driven by another whom he engaged to drive the car and to assist in re-

turning the prisoner, it was held that the deputy sheriff was without authority to designate another to act for the sheriff, and the driver of the car was not operating same for the sheriff and under the sheriff's direction and control within the purview of this section, and therefore service of process on the sheriff by service on the commissioner of revenue was void. *Blake v. Allen*, 221 N. C. 445, 20 S. E. (2d) 552.

Nonresident wife living with her husband in another state may serve summons on him by service on commissioner of revenue in her action instituted in a county in this state, to recover for injuries sustained in an automobile accident which occurred in this state and which resulted from his alleged negligence. *Alberts v. Alberts*, 217 N. C. 443, 8 S. E. (2d) 523.

Where plaintiff is the wife of defendant, both are nonresidents, and the action was instituted to recover for injuries sustained by plaintiff in an automobile accident which occurred in this state, service of process on defendant by service on the commissioner of revenue under the provisions of this section is valid. *Bogen v. Bogen*, 219 N. C. 51, 12 S. E. (2d) 649.

Findings by Trial Court That Defendant Was a Nonresident Is Conclusive on Appeal.—Upon motion to dismiss an action on the ground that the defendant was a resident of this state and was served with summons under a statute authorizing service on nonresidents, the finding of fact by the superior court judge that the defendant was a nonresident, based upon competent evidence, is conclusive on appeal. *Bigham v. Foor*, 201 N. C. 14, 158 S. E. 548.

This section makes no provision for service on the personal representative of a deceased automobile owner who dies after an accident occurring in this state and before service of process, and service under the statute upon such personal representative confers no jurisdiction on our courts, since an agency, unless coupled with an interest, is terminated by the death of the principal. *Dowling v. Winters*, 208 N. C. 521, 181 S. E. 751.

This section does not warrant service upon a nonresident owner in an action for abuse of process based upon such owner's arrest of plaintiff after a collision between their cars in this state, since the action for abuse of process does not arise out of a collision in which defendant was involved by reason of the operation of his automobile in this state. *Lindsay v. Short*, 210 N. C. 287, 186 S. E. 239.

Cited in Howard v. Queen City Coach Co., 212 N. C. 201, 193 S. E. 138.

§ 1-106. Record of such processes; delivery of return.—The Commissioner of Motor Vehicles shall keep a record of all such processes, which shall show the day and hour of service upon him. When the registry return receipt shall be returned to the Commissioner of Motor Vehicles, he shall deliver it to the plaintiff on request and keep a record showing the date of its receipt by him and its delivery to the plaintiff. (1929, c. 75, s. 2; 1941, c. 36, s. 4.)

§ 1-107. Alternative method of service upon nonresident defendants.—In addition to the method provided in §§ 1-105 and 1-106, the plaintiff may adopt the following method of giving notice to a non-resident defendant or defendants:

When the place of residence of the defendant or defendants in the action described in §§ 1-105 and 1-106 is made to appear by affidavit filed with the Commissioner of Motor Vehicles and the plaintiff files with the Commissioner of Motor Vehicles at least five (\$5.00) dollars to pay the costs of the service hereinafter provided for, then it shall be sufficient for the Commissioner of Motor Vehicles to mail a copy of the summons, together with a statement sufficient to show the nature of the action or proceedings, accompanied by his certificate that the summons and complaint had been served on him, to the sheriff or other process officer of the county and state where the defendant or defendants reside. This sheriff or other process officer, authorized to serve process in the state to which it is sent, shall serve the same according to its

tenor. This sheriff or process officer, who serves the papers, shall, in making his return, use a form of certificate substantially as follows; and this form of certificate shall accompany the other papers in the case:

State of	} Affidavit of Service of Summons; Clerk's Certificate
County of	

I, [Sheriff or other process officer] of the County [or city] of State of, being duly sworn, do certify that on the day of, 19.., I served the summons and accompanying statement hereto attached by delivering a copy of the same to, the defendant(s) therein named.

..... [Sheriff or other process officer]

I,, Clerk of the Court of the County [or City] of, State of, do certify that said court is a court of record having the seal hereto attached; that is well known to me as [Sheriff or other process officer] of said county [or city] of, and that he has full power and authority to serve any and all legal processes issuing from courts of this state; that said personally appeared before me this day and made and subscribed the above affidavit relative to service of summons on

This the day of, 19...

[L. S.]
Clerk of the Court of
the County [or City] of.....
State of

Said sheriff or process officer shall immediately upon the execution of this evidence of service, return the same with the original papers in the cause to the Commissioner of Motor Vehicles, Raleigh, North Carolina. When the Commissioner of Motor Vehicles shall receive these papers, thus served, he shall deliver the same to the plaintiff on request, and keep a record showing the date of their receipt by him and their delivery to the plaintiff. Upon the filing of these papers in the court where the action is pending, accompanied by evidence of service upon the Commissioner of Motor Vehicles, as required by § 1-105, that shall constitute presumptive evidence of actual notice to the defendant or defendants of the pendency of the action and of its nature and effect. (1931, c. 33, s. 1; 1941, c. 36; 1943, c. 543.)

Editor's Note.—The 1943 amendment made changes in the return form prescribed by this section.

§ 1-108. Defense after judgment on substituted service. — The defendant against whom publication is ordered, or who is served under the provisions of §§ 1-104 through 1-107, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce or in an action for the foreclosure of county or municipal taxes, the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within five years after its rendition, on such terms as are just; and if the defense is suc-

cessful and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected. No fiduciary officer or trustee who has made distribution of a fund under such judgment in good faith is personally liable if the judgment is changed by reason of such defense made after its rendition; nor in case the judgment was rendered for the partition of land, and any persons receiving any of the land in such partition sell it to a third person; the title of such third person is not affected if such defense is successful, but the redress of the person so defending after judgment shall be had by proper judgment against the parties to the original judgment and their heirs and personal representatives, and in no case affects persons who in good faith have dealt with such parties or their heirs or personal representatives on the basis of such judgment being permanent. (Rev., s. 449; Code, s. 220; C. C. P., s. 85; 1917, c. 68; 1943, cc. 228, 543; C. S. 492.)

Editor's Note.—The first 1943 amendment, which inserted in the first sentence the words "or in an action for the foreclosure of county or municipal taxes," provided that it should not apply to members of the armed forces of the United States of America during the present war and six months thereafter.

The second 1943 amendment substituted in the third line "§§ 1-104 through 1-107" for "§ 1-104."

This section will be broadly construed to include within the term "representatives" all persons succeeding the rights of such party, in this case a mortgage creditor. *Hood v. Freel*, 206 N. C. 432, 174 S. E. 310.

Right to Remedy Afforded by Section.—Where the judgment affects the rights of the petitioner's debtor and is based upon substituted service, the petitioner's debtor is entitled to invoke the remedy contained in this section. *Hood v. Freel*, 206 N. C. 432, 435, 174 S. E. 310.

Not Applicable to Justices' Court. — This section is not applicable to a proceeding in a justice's court. *Thompson v. Lynchburg Notion Co.*, 160 N. C. 519, 76 S. E. 470.

Effect and Sufficiency of Findings by Clerk—Extension of Time to Plead.—A nonresident defendant served by publication, and failing to file answer within the time prescribed by law, may make application to the clerk before judgment for good cause shown to be allowed to file pleadings and defend the action, as provided by this section, and where upon such application and affidavits filed by him setting forth facts showing prima facie good cause and a meritorious defense, the clerk finds as a fact that he has a meritorious defense and has shown good cause, the clerk's order allowing him to file answer and defend the action will not be held for error for the clerk's failure to more specifically find the facts constituting such meritorious defense, and it is within the discretion of the judge of the Superior Court on appeal to enter an order allowing an extension of time for filing answer as provided by sections 1-152, 1-276. *Vann v. Coleman*, 206 N. C. 451, 174 S. E. 301.

Judgment as Bar to Action against Administrator.—Where an administrator has disbursed the funds in his hand in accordance with the judgment and filed his final account, the judgment will bar an action against the administrator by those heirs unknown at the time of the institution of the action and who did not see the notice by publication and did not appear in the action, this section providing that no fiduciary officer acting in good faith shall be personally liable for such disbursement. *Ferguson v. Price*, 206 N. C. 37, 173 S. E. 1.

Vacation of Judgment. — Under this section the defendant, where his affidavit fully justifies the findings of fact made by the court and brings him within the terms of the section, has a legal right to have the judgment vacated. Such a right is absolute and not within the discretion of the presiding judge. *Rhodes v. Rhodes*, 125 N. C. 191, 34 S. E. 271; *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642; *Moore v. Rankin*, 172 N. C. 599, 600, 90 S. E. 759.

The allegations of the complaint particularly describing the lands situate here of the nonresident husband sought to be subjected to the wife's claim for alimony in her suit for divorce, and the judgment therein directing it to be

sold accordingly, practically amount to an attachment of the lands indicated. *White v. White*, 179 N. C. 592, 103 S. E. 216.

Good Cause. — Allegations by the movant to set aside a judgment, for irregularity, that he has "a good and meritorious defense," is but his own opinion, and is insufficient; nor is it aided by erroneous statements of matters of law or of conflicting facts that have been judicially found adverse to his contentions. *White v. White*, 179 N. C. 592, 103 S. E. 216.

No "good cause is shown" to set aside a judgment allowing alimony to the wife pendente lite her action for divorce, or in a suit to declare him her trustee in taking title to lands bought with her money and without her consent, where publication of summons has been regularly made under this section, and in proceedings regular upon their face, when the motion has been made after a lapse of nearly five years, the defendant had actual knowledge of the action, and the death of the wife has caused the loss of the evidence upon which the judgments were rendered. *White v. White*, 179 N. C. 592, 103 S. E. 216.

The words of this section "upon such terms as are just" ought not to be construed as limiting or modifying the right to defend, which is an absolute, legal right of the defendant. They should be construed as conferring upon the court, by whose order the defendant obtains his legal right to defend, power, by the imposition of just terms, to put plaintiff and defendant, as near as may be, in the same relative position, with reference to the subject-matter of the litigation, as they were in at the time the action was begun, or at least at the time the defendant would have been required to answer the complaint if the summons had been personally served upon him. The court has power to do this by orders with reference to the costs that have accrued, or by interlocutory orders, with respect to property within its jurisdiction, or by such orders, designed to protect the plaintiff who had recovered the judgment, set aside and vacated upon the motion of the defendant, upon service of summons on the defendant as provided by the laws of this state, from loss which might result to him from the action of the court. It ought not to be held that the court has power to impose terms upon the defendant which would result in depriving him of a right guaranteed to him by law. The right to defend an action necessarily involves a right to answer or demur to the complaint, in accordance with the provisions of the statute or general rule of court, and thus to raise issues of fact to be tried by a jury, or issues of law to be tried by the court. It cannot be said that although this right is absolute a defendant can enjoy it only at the discretion of the court. *Burton v. Smith*, 191 N. C. 599, 605, 132 S. E. 605.

Any Exception. — Being a remedial statute, a just construction allows the party against whom a judgment has been taken to set up any exception which would have prevented or modified the judgment, e. g. re, inequality of partition. *Rhodes v. Rhodes*, 125 N. C. 191, 34 S. E. 271.

The defense intended to be allowed, under this section, to one who has not been actually but only constructively in court (by publication), is not confined to matters which if pleaded in apt time would defeat the action. *Rhodes v. Rhodes*, 125 N. C. 191, 34 S. E. 271.

Facts Must Be Found by Court. — Upon a motion to be allowed to defend under this section, the facts in the case must be found by the court in which the motion is made. *Utey v. Peters*, 72 N. C. 525.

Judgments by Default. — Where a judgment by default in the state court in an action against a nonresident defendant by a resident plaintiff, in which summons by publication was made, has been set aside on defendant's motion, the mere fact that the judge has allowed him the statutory time in which to answer or demur, without defendant's objection, does not call for the exercise of the court's discretion, and the defendant may therein apply file his petition and bond for the removal of the cause to the Federal Court as a matter of his legal right. *Burton v. Smith*, 191 N. C. 599, 132 S. E. 605.

A judgment by default final in favor of material furnishers, etc., for a building erected on the lands of a nonresident owner, by service of summons by publication, may be set aside upon defendant's motion under this section, made in two days after he had notice of the pendency of the action, upon a finding of a meritorious defense. *Burton v. Smith*, 191 N. C. 599, 132 S. E. 605, and other cases, cited as controlling. *Bassett Lumber Co. v. Rhyne*, 192 N. C. 735, 135 S. E. 926.

Where service has been made by publication, upon defendant's motion to set aside a judgment by default in plaintiff's favor, within five years from its date, or one

year after notice, this section applies to the exclusion of section 1-220. *Foster v. Allison Corp.*, 191 N. C. 166, 131 S. E. 648.

By appearing and moving to set aside a judgment by default rendered, a nonresident defendant upon whom summons by publication had been made, and who brings himself within the provisions of this section by moving within a reasonable time after notice, has as a matter of right twenty days from the time such judgment had been set aside in which to answer or demur, and only by requesting or acquiescing in a longer time granted by the court is there a waiver of his right to file a petition and bond for the removal of the cause to the United States Court, under the Federal Statute. *Burton v. Smith*, 191 N. C. 599, 132 S. E. 605.

Exception as to Lands Sold in Divorce Proceedings. — The provisions of this section, as to setting aside judgments against nonresident defendants served by publication, upon motion showing sufficient cause, made within a year after notice, and within five years after its rendition on such terms as may be just, with restitution, etc., does not apply where the lands have been regularly sold under an order of court in divorce proceedings, of which the defendant had notice, to pay the wife alimony which had been allowed her. *White v. White*, 179 N. C. 592, 103 S. E. 216. See note of this case under § 50-15.

Same — Attachment of Lands — Alimony — Notice. — Attachment of the lands situated here of the nonresident husband, is not necessary to subject it to the payment of alimony regularly allowed the wife pendente lite her suit for divorce, upon publication of summons, or to declare the husband her trustee in his purchase of lands with her separate money, to which he had taken title in himself, without her consent, nor in either case is any notice required beyond publication of summons. *White v. White*, 179 N. C. 592, 103 S. E. 216.

Record Held to Disclose "Good Cause Shown" and a Meritorious Defense. — See *Blankenship v. DeCasco*, 211 N. C. 290, 189 S. E. 773.

Art. 9. Prosecution Bonds.

§ 1-109. Plaintiff's, for costs.—Before issuing the summons the clerk shall require the plaintiff to do one of the following:

1. Give an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that it will be void if the plaintiff pays the defendant all costs which the latter recovers of him in the action.

2. Deposit two hundred dollars with him as security to the defendant for these costs, in which event the clerk must give to the plaintiff and defendant a certificate to that effect.

3. File with him a written authority from a judge or clerk of a superior court, authorizing the plaintiff to sue as a pauper: Provided, however, that the requirements of this section shall not apply to cities and towns; provided, further, that cities and towns may institute civil actions and special proceedings without being required to give a prosecution bond or make deposit in lieu of bond. (Rev., s. 450; Code, s. 209; R. C., c. 31, s. 40; C. C. P., s. 71; 1935, c. 398; C. S. 493.)

Cross References.—As to mortgage in lieu of bond, see § 109-29. As to bond executed or guaranteed by surety company, see § 109-17. As to costs generally, see § 6-1 et seq.

Editor's Note.—The amendment of 1935 adds the two provisos, at the end of subsection (3), relating to cities and towns.

The object of the prosecution bond is not to secure the officers but to secure the defendant in the recovery of costs wrongfully paid out. *Waldo v. Wilson*, 177 N. C. 461, 100 S. E. 182.

Who Can Take Bond. — The action of the Clerk in taking prosecution bonds was always held to be ministerial. They may be taken by a deputy clerk, and are habitually taken by attorneys, who have authority from the clerks for that purpose, but are not their deputies. *Shepherd v. Lane*, 13 N. C. 148; *Croom v. Morrissey*, 63 N. C. 591; *Marsh & Co. v. Cohen*, 68 N. C. 283, 288.

When Bond Not Given. — When the prosecution bond

has not been given, but the plaintiff has been permitted to go on and prepare his case for trial, the court will not, on motion of the defendant, dismiss the action preemptorily for want of the bond, but will permit the plaintiff to prepare and file his bond. *Brittain v. Howell*, 19 N. C. 107; *Russell v. Saunders*, 48 N. C. 432; *Albertson v. Terry*, 109 N. C. 8, 13 S. E. 713; *Cooper v. Warlick*, 109 N. C. 572, 673, 14 S. E. 106.

A motion to dismiss for the failure of the plaintiff to file a prosecution bond required by this section, made for the first time in the Supreme Court on appeal, will be denied when it has been properly made to appear that plaintiff had filed a proper bond after the issuance of the summons. *Costello v. Parker*, 194 N. C. 221, 139 S. E. 224.

Undertaking Under Seal. — Where an undertaking to secure the costs of the defendant is given in the form of a bond, the seal does not defeat its purpose, and it will be treated as an undertaking under seal. *Holly v. Perry*, 94 N. C. 30.

Undertaking Written On Summons. — Where an undertaking under seal to secure the defendant's costs, was written on the back of the summons, but did not specify the name of either the plaintiff or defendant, or the surety, it was held to be sufficient. *Holly v. Perry*, 94 N. C. 30.

Increasing Penalty of Bond. — The court can increase the penalty on the bond, which is not an unusual procedure in the courts. *Jones v. Cox*, 46 N. C. 373; *Adams v. Reeves*, 76 N. C. 412; *Vaughan v. Vincent*, 88 N. C. 116; *Rollins v. Henry*, 77 N. C. 467; *Kenney v. Seaboard Air Line R. Co.*, 166 N. C. 566, 571, 82 S. E. 849.

Same — When Exercised. — Where the defendant has been successful on his appeal to the Supreme Court, and his judgment for costs against the sureties on the prosecution bond of the plaintiff results in making insecure the costs in the superior court, the remedy is by application to increase the penalty of the bond. *Kennedy v. Seaboard Air Line R. Co.*, 166 N. C. 566, 567, 82 S. E. 849.

Same—Court Has Discretion. — Where a plaintiff has given a bond for costs which has become insufficient, the court has the power to allow him to proceed with his case without giving additional security. *Holder v. Jones*, 29 N. C. 191; *Dale v. Presnell*, 119 N. C. 489, 491, 26 S. E. 27.

What Undertaking Covers. — The undertaking provided for by this section may cover the defendant's costs on appeal. *Kenney v. Seaboard Air Line R. Co.*, 166 N. C. 566, 82 S. E. 849.

Same — Does Not Apply to Plaintiff's Costs. — In contemplation of law, the parties pay the cost of the litigation as the action proceeds and this bond is given, it is true, entirely for the benefit of defendants. The surety is not bound for plaintiff's cost. *Hallman v. Dellinger*, 84 N. C. 1; *Smith v. Arthur*, 116 N. C. 871, 873, 21 S. E. 696.

No Appeal from Judge's Refusal to Require Bond. — The refusal of the trial judge to require a prosecution bond is not appealable. *Christian v. Atlantic, etc., R. Co.*, 136 N. C. 321, 48 S. E. 743; *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850.

Special Appearance.—A motion to dismiss for failure of plaintiff to file security for costs as required by this section pertains to a procedural question, and an appearance to make this motion and a motion to dismiss for want of jurisdiction is not a general appearance. *Mintz v. Frink*, 217 N. C. 101, 6 S. E. (2d) 804.

Appeal by Surety. — Though a surety on a prosecution bond is not a party to the action, yet, when he is made a party to a proceeding to tax the costs in a case, he may appeal from the order allowing the motion to retax. *Smith v. Arthur*, 116 N. C. 871, 872, 21 S. E. 696.

County Trustee Suing On Sheriff's Bond. — A suit by a county trustee, suing upon a sheriff's official bond, as relator in the name of the State, is within the meaning of this section requiring clerks to take prosecution bonds before issuing a leading process. *King v. Wooten*, 52 N. C. 533.

§ 1-110. Suit as a pauper; counsel.—Any judge or clerk of the superior court may authorize a person to sue as a pauper in their respective courts when he proves, by one or more witnesses, that he has a good cause of action, and makes affidavit that he is unable to comply with the preceding section. The court to which such summons is returnable may assign to the person suing as a pauper learned counsel, who shall prosecute his action. (Rev., ss. 451, 452; Code, ss. 210, 211; C. C. P., s. 72; 1868-9, c. 96, s. 2; C. S. 494.)

Local Modification.—Durham, Forsyth, Nash, Northampton: 1937, c. 381.

Cross References.—As to costs in suits in forma pauperis, see § 6-24. As to appeals in forma pauperis, see § 1-288.

Exception to Preceding Section. — This section is in the nature of an exception to the general rule in section 1-109. *Dale v. Presnell*, 119 N. C. 489, 492, 26 S. E. 27.

Section Does Not Apply to Appeals. — The leave to sue as a pauper, under this section and section 6-24, does not extend in civil actions, beyond the trial in the superior court, his appeal being governed by section 1-288, which only relieves him from giving security for the costs of the appeal, but he must pay the fees as to the appeal due the officers of both courts for services rendered. *Speller v. Speller*, 119 N. C. 356, 26 S. E. 160. See *Martin v. Chasteen*, 75 N. C. 96; *Bailey v. Brown*, 105 N. C. 127, 129, 10 S. E. 1054.

Court Has Discretion. — The right to sue as a pauper is a favor granted the plaintiff, and is in the power and discretion of the Court. *Dale v. Presnell*, 119 N. C. 489, 492, 36 S. E. 27.

When the action is by the personal representative to recover on a contract or other claim due his testator or intestate, or the action is to recover property belonging to the estate, the court may well refuse leave to sue as a pauper, under its discretion. *Dale v. Presnell*, 119 N. C. 489, 36 S. E. 27, unless, as said in *McKiel v. Cutler*, 45 N. C. 139, it appears that the beneficiaries of the estate cannot give bond, for the officers of the court ought not needlessly be deprived of pay for their services. *Christian v. Atlantic, etc., R. Co.*, 136 N. C. 321, 323, 48 S. E. 743.

Judge, Clerk or Justice May Grant. — A judge or clerk of the superior court may, in cases within the jurisdiction of said court, make an order authorizing any person complying with the provisions of the said act to sue in forma pauperis. A justice of the peace has like power, in cases within the jurisdiction of his county. *Rowark v. Gaston*. 67 N. C. 291.

Plaintiff's Affidavit Necessary. — Whether the application be to commence the action or to appeal from an adverse determination without security, it must be supported by the affidavit of the party, and no provision is made for any other mode of proving the fact that he is unable to give security. The necessity of such affidavit is held in *Miazza v. Calloway*, 74 N. C. 31; *Stell v. Barham*, 85 N. C. 88, 89.

Sufficiency of Affidavit.—A typewritten statement, purporting to have been signed by plaintiff, that plaintiff was unable to comply with the preceding section, which statement is followed by an unsigned, unsealed and unauthenticated jurat is not an affidavit, and will not support an order allowing plaintiff to prosecute the action as a pauper, but the deficiency does not necessarily require the dismissal of the action, since the court may give plaintiff a reasonable time to supply the deficiency. *Ogburn v. Sterchi Bros. Stores*, 218 N. C. 507, 11 S. E. (2d) 460.

Proving Good Cause of Action. — In granting an order for a person to sue in forma pauperis, it is sufficient compliance with this section for the presiding judge to be satisfied, by a certificate of counsel or otherwise, that the plaintiff has an honest cause of action on which he may reasonably expect to recover. *Miazza v. Calloway*, 74 N. C. 31.

Security for Costs. — Under this section the judge may, in his discretion, require a plaintiff who has been allowed to sue in forma pauperis to give security for costs. *Dale v. Presnell*, 119 N. C. 489, 26 S. E. 27.

Pauper Must Pay Witnesses. — Although this section, allowing a party to sue as a pauper, excuses such party from paying fees to any officer and deprives him of the right to recover costs, it is held, that it does not excuse the pauper from liability for his witnesses. *Morris v. Rippey*, 49 N. C. 533; *Bailey v. Brown*, 105 N. C. 127, 129, 10 S. E. 1054.

Who Can Sue in Forma Pauperis. — "A guardian can sue in forma pauperis." *Christian v. Atlantic, etc., R. Co.*, 136 N. C. 321, 322, 48 S. E. 743.

Same — Non-Resident. — The words of this section are broad enough to include any litigant whatever, and hence residents of another state can sue here in forma pauperis. *Porter v. Jones*, 68 N. C. 320; *Christian v. Atlantic, etc., R. Co.*, 136 N. C. 321, 48 S. E. 743.

Same — Personal Representative. — It has been the unquestioned practice since the adoption of the Code, that a personal representative could sue as a pauper upon proper affidavit and certificate. *Allison v. Southern R. Co.*, 129 N. C. 336, at p. 344, 40 S. E. 91; *Christian v. Atlantic, etc., R. Co.*, 136 N. C. 321, 48 S. E. 743.

No Presumption of Contingent Fee. — The bringing of

a pauper suit does not raise the presumption that the attorney took the case for a contingent fee and was therefore a party in interest. *Allison v. Southern R. Co.*, 129 N. C. 336, 40 S. E. 91.

Where Plaintiff Assigns Interest Pending Action.—Where a plaintiff, pending an action brought in forma pauperis, assigned his interest in the land which was the subject of the action, the court will require the assignee to give security, or it will withdraw the privilege given to the assignor and dismiss the action. *Davis v. Higgins*, 91 N. C. 382; *Dale v. Fresnell*, 119 N. C. 489, 491, 26 S. E. 27. Cited in *Costello v. Parker*, 194 N. C. 221, 139 S. E. 224.

§ 1-111. Defendant's, for costs and damages in actions for land.—In all actions for the recovery or possession of real property, the defendant, before he is permitted to plead, must execute and file in the office of the clerk of the superior court of the county where the suit is pending an undertaking with sufficient surety, in an amount fixed by the court, not less than two hundred dollars, to be void on condition that the defendant pays to the plaintiff all costs and damages which the latter recovers in the action, including damages for the loss of rents and profits. (Rev., s. 453; Code, s. 237; 1869-70, c. 193; C. S. 495.)

Cross References.—As to judgment by default final upon failure of defendant to file undertaking or of his sureties to justify, see § 1-211, paragraph 4.

Purpose of Section.—The purpose of the Legislature in passing the statute was to indemnify the plaintiff in such actions for costs, in case he should prevail. It was never intended that the requirements should be made an engine of oppression, and that a party having merit should, on technical grounds, forfeit his right to be heard when he is ready to secure costs, and when, in the opinion of the presiding judge, it is proper to give further time to plead, in order to permit the filing of the bond. *Henning v. Warner*, 109 N. C. 406, 408, 14 S. E. 317.

Relation to Other Sections of Code.—This section and section 1-211, par. 4 are in pari materia with section 1-125, and should be construed together. *Battle v. Mercer*, 187 N. C. 437, 446, 122 S. E. 4.

Time in Which to File Bond.—Where the complaint in an action has not been served with the summons, the defendant has twenty days after its return date in which to answer or demur; and when the defendant is in possession of land, and the action is to recover the lands the defendant has also twenty days, under the circumstances, before pleading, in which to file the bond required, by this section, conditioned upon his paying to plaintiff all costs and damages which the latter may recover, including damages for the loss of rents and profits. *Jones v. Jones*, 187 N. C. 589, 122 S. E. 370. As to change in the time of answer after service, see section 1-89 and the note thereto.

Judge May Grant Extension.—Section 1-152 confers on the judge the discretion to extend the time for filing the defense bond. *Taylor v. Pope*, 106 N. C. 267, 271, 11 S. E. 257; *Tennessee River Land Co. v. Butler*, 134 N. C. 50, 45 S. E. 956; *White v. Lokey*, 131 N. C. 72, 42 S. E. 445.

Same—Effect of Amendments of 1921.—Under the provisions of chapter 92, section 1, par. 18, Extra Session, Public Laws of 1921, the power of the superior court judge, to allow amendments to pleadings (given by section 1-163), or to allow answer to be filed (section 1-152), applying also to the defendant, in possession of lands and claiming an interest therein, giving bond (this section) is not affected. *Battle v. Mercer*, 187 N. C. 437, 122 S. E. 4.

Same—No Appeal.—Extension of time to file a defense bond is a matter in the discretion of the judge, for which no appeal will lie. *Dunn v. Marks*, 141 N. C. 232, 233, 53 S. E. 845.

Failure to File Answer or Give Bond.—Where, in an action to recover possession of land, the defendant failed to file an answer or the bond required by this section and did not ask leave to answer without giving bond until the time for answering had expired, it was proper, under sec. 1-211 to give judgment against the defendant of the land without damages. *Jones v. Best*, 121 N. C. 154, 28 S. E. 187. *Junge v. MacKnight*, 135 N. C. 105, 107, 47 S. E. 452.

Same—Excusable Neglect Immaterial.—Where, in an action to recover land, the defendant fails to file, or is not excused from filing, the bond required by this section, a judgment by default is authorized by G. S. section 1-211 even if there has been a failure to file an answer arising

from excusable neglect. *Vick v. Baker*, 122 N. C. 98, 29 S. E. 64.

Failure to Give Undertaking.—Where a defendant in ejectment fails to file the undertaking required by this section, or procure leave to defend without bond, section 1-112, the court, at such term, may strike out the answer and render judgment by default. *Patrick v. Dunn*, 162 N. C. 19, 77 S. E. 995.

Where the defendant in a petition for partition pleaded sole seizin, it was error to strike out his answer without notice, because no defense bond had been filed, but he should have been given an opportunity to file a bond or obtain leave to defend without it under section 1-112. *Cooper v. Warlick*, 109 N. C. 672, 14 S. E. 106.

Same—When No Objection Made.—When an answer has been filed without any bond, and has remained on file for some time without objection, it is held to be irregular to strike it out and give judgment without notice or rule to show cause, or without giving the defendant opportunity to file a defense bond. *McMillan v. Baker*, 92 N. C. 111; *Cooper v. Warlick*, 109 N. C. 672, 14 S. E. 106; *Becton v. Dunn*, 137 N. C. 559, 563, 50 S. E. 289.

Same—Waiver.—The failure for three years to move for judgment by default for failure to file a defense bond waives the right thereto. *Tennessee River Land, etc., Co. v. Butler*, 134 N. C. 50, 45 S. E. 956.

Defective Bond May Be Cured.—A failure to file a "justified" defense bond as required by this section and 1-211, par. 4, and 1-286 does not necessarily avoid the bond, but it is a defect which may be cured by waiver, and an exception to the filing of the bond entered by the plaintiff on the back thereof, but no action taken by the court in reference to it, does not authorize the court to give judgment by default without notice to the defendant. *Becton v. Dunn*, 137 N. C. 559, 50 S. E. 289; *McMillan v. Baker*, 92 N. C. 111.

When Landlord and Tenant Joint Defendants.—Where a landlord is joined as a defendant with his tenant, the tenant and landlord thus defending must under this section each give bond with good security to pay costs and damages if the plaintiff recovers; or if he be not able to give such bond, he must make affidavit of that fact under section 1-112, and get the certificate of an attorney practicing in the court that, in his opinion, the plaintiff is not entitled to recover. *Harkey v. Houston*, 65 N. C. 137.

When the tenant fails to give such bond, or to swear to his answer when the plaintiff has sworn to his complaint, the plaintiff may take a judgment against him; but he cannot have an execution against him until the further order of the court, which will not be made until after the trial of the issues between him and the landlord defendant. *Harkey v. Houston*, 65 N. C. 137.

A tenant in common in possession claiming title holds such possession for his cotenants by one common title, and in an action to recover the lands, he comes within the meaning of this section, and must file the bond therein required, according to law, before answering the complaint. *Battle v. Mercer*, 187 N. C. 437, 122 S. E. 4.

Vendee in Possession.—Where a vendee is let into possession before the purchase money is paid, and the vendor brings an action to recover the possession, the defendant must file the undertaking to secure rents and damages provided for by this section before he will be allowed to answer. *Allen v. Taylor*, 96 N. C. 37, 1 S. E. 462.

In an action to remove a cloud on the title a defense bond is not required. *Tennessee River Land, etc., Co. v. Butler*, 134 N. C. 50, 45 S. E. 956.

Liability of Surety.—The surety on the bond under this section is liable only for rents and profits pending litigation and subsequent to filing the bond. *Hughes v. Pritchard*, 129 N. C. 42, 43, 39 S. E. 632.

Same—Summary Judgment.—Upon judgment being rendered against defendant in an action to recover land, it is not error to enter a summary judgment against the sureties on his bond. *Rollins v. Henry*, 84 N. C. 570.

Liability for Costs on Appeal.—The defense bond and the sureties thereon, in an action of ejectment under this section are liable to the amount of the bond for the costs in the Supreme Court on appeal as well as those incurred in the superior court. *Grimes v. Andrews*, 171 N. C. 367, 88 S. E. 513. *Kenney v. Seaboard Air Line R. Co.*, 166 N. C. 566, 82 S. E. 49.

Court May Appoint Receiver.—This section, requiring a defendant in ejectment to give bond before putting in a defense to the action, does not abridge the power of the court to appoint a receiver to secure the rents and profits. *Kron v. Dennis*, 90 N. C. 327; *Durant v. Crowell*, 97 N. C. 367, 374, 2 S. E. 541; *Arey v. Williams*, 154 N. C. 610, 70 S. E. 931.

Same—When Unnecessary.—In an action to recover real

property or its possession, upon the approval of the defendant's bond by the clerk of the Superior Court for continued possession, given under this section, when the defendant has given it in compliance with the statute, the plaintiff has an adequate and sufficient remedy at law upon the bond of the principal and surety so given and approved, and the equitable right to the appointment of a receiver, sec. 1-502, par. 1, is not available to the plaintiff, it appearing that a money demand will sufficiently compensate him. *Jones v. Jones*, 187 N. C. 589, 122 S. E. 370.

Ignorance That Bond Required.—Ordinarily excusable neglect cannot arise out of a mistake of law, and where judgment has been rendered by default final for plaintiff for the failure of defendant to file answer as required by the statute, the ignorance of the defendant that he was required to file the bonds, before answer, required by this section, when he is in possession of and claiming title to lands, the subject of the action, is not excusable neglect on his motion to set the judgment aside, and not allowable when it appears that the plaintiff was diligent in insisting upon his rights and has done nothing that could be regarded as a waiver thereof. *Battle v. Mercer*, 187 N. C. 437, 122 S. E. 4.

Mortgage Given for Bond.—A mortgage, given in lieu of the bond required by this section, may be foreclosed by motion, upon notice, in the original action. *Ryan v. Martin*, 103 N. C. 282, 9 S. E. 197.

Applied in *Clegg v. Canady*, 213 N. C. 258, 195 S. E. 770.

§ 1-112. Defense without bond.—The undertaking prescribed in the preceding section is not necessary if an attorney practicing in the court where the action is pending certifies to the court in writing that he has examined the case of the defendant and is of the opinion that the plaintiff is not entitled to recover; and if the defendant also files an affidavit stating that he is unable to give and is not worth the amount of the undertaking in any property whatsoever. (Rev., s. 454; Code, s. 237; 1869-70, c. 193; C. S. 496.)

Editor's Note.—This section appeared formerly as a proviso attached to the preceding section. In regard to this proviso (now this section) the court said in *Wilson v. Fowler*, 104 N. C. 471, 472, 10 S. E. 566: "The terms of the proviso are clear, explicit and exclusive. It declares 'that no such undertaking shall be required' in the case provided for. The words 'no such' are used in the broad sense of not any like that required. There is nothing in the statute that suggests the contrary, or that an undertaking for a less sum than two hundred dollars in amount may be required in any case. The purpose is to allow persons thus poor to make defense in such actions without giving any undertaking, nor does section 350 [now § 109-29] authorize the court to require a party to execute a mortgage of real estate in the cases therein provided for. It simply allows the party, of whom an undertaking may be required in such cases, to give such mortgage instead of it, and the former must be for the same amount as the latter."

It will be observed that when one proposes to sue in forma pauperis, or to appeal (section 1-110 and 1-288) he is only required to swear to his inability to give the undertaking; while in order to defend an attack upon his right of possession of land, he must state not only such inability, but further, that "he is not worth the amount of the said undertaking in any property whatsoever," apparently, if not in fact, denying the privilege to one who has only sufficient exempt property to equal the amount of the bond. *Taylor v. Apple*, 90 N. C. 343, 347.

Notice to Adverse Party Unnecessary.—Nothing in this section requires notice to be given to the adverse party, on an application for permission to defend a suit without giving the required security. *Deal v. Palmer*, 68 N. C. 215.

Upon Compliance No Order Needed.—Notice of the certificate and affidavit under this section is not necessary, and it may be questioned whether it is necessary in any case that the court should make an order allowing the defendant, upon filing such certificate and affidavit, to answer, because he answers as of right under the statute. *Deal v. Palmer*, 68 N. C. 215; *Jones v. Fortune*, 69 N. C. 322; *Taylor v. Apple*, 90 N. C. 343. *Dempsey v. Rhodes*, 93 N. C. 120, 125.

Same—Waiver.—But if such order is necessary the plaintiff is deemed to have waived its absence where the certificate of counsel and the affidavit of the defendant fully meet the requirements of the statute, and they and the answer were on file without objection for two years and until the trial. *Dempsey v. Rhodes*, 93 N. C. 120, 125.

Certificate of Counsel.—Where counsel certifies that he has examined the case of the defendant, and that in his opinion the plaintiff is not entitled to recover; held, a substantial compliance with the statute. It is not intended that the enquiry of counsel should extend beyond the information derived from the defendant. *Taylor v. Apple*, 90 N. C. 343.

Same—Applies Only to Present Action.—The certificate of counsel applies only to the action as then constituted, and not to any other possible action that might be brought by plaintiff for same or similar relief. *Wilson v. Fowler*, 104 N. C. 471, 10 S. E. 566.

Example of Sufficient Compliance.—In an action to recover land, this section was sufficiently complied with when the defendant made affidavit that he was not worth two hundred dollars in any property whatever, and was unable to give the undertaking required, and his counsel certified that they had examined his case and were of opinion he "had a good defense to the action." *Wilson v. Fowler*, 104 N. C. 471, 10 S. E. 566.

Costs.—This section allowing a defendant in an action of ejectment to defend without giving bond, and section 1-288 allowing an appeal without bond, go no further than dispensing with the bond, and neither exempts the party from paying his own costs nor forbids his recovering costs. *Speller v. Speller*, 119 N. C. 356, 357, 26 S. E. 160; *Justice v. Eddings*, 75 N. C. 581; *Lambert v. Kinney*, 74 N. C. 348; *Bailey v. Brown*, 105 N. C. 127, 129, 10 S. E. 1054.

Art. 10. Joint and Several Debtors.

§ 1-113. Defendants jointly or severally liable.—Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

1. If the action is against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise directs, and if he recovers judgment it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served.

2. If the action is against defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants.

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them or any of them alone.

4. If the name of one or more partners has, for any cause, been omitted in an action in which judgment has been rendered against the defendants named in the summons, and the omission was not pleaded in the action, the plaintiff, in case the judgment remains unsatisfied, may by action recover of such partner separately, upon proving his joint liability, notwithstanding he was not named in the original action; but the plaintiff may have satisfaction of only one judgment rendered for the same cause of action. (Rev., s. 455; Code, s. 222; C. C. P., s. 87; C. S. 497.)

Editor's Note.—See 13 N. C. Law Rev. 83, 84, for comment on cases discussed in following note.

Partners—In General.—Members of a partnership are jointly and severally bound for all its debts; and because of the joint liability the creditor and each partner has a right to demand that the joint property shall be applied to the joint debts; and because of the several liability, a creditor may, at will, sue any one or more of the partners. *Hanstein v. Johnson*, 112 N. C. 253, 17 S. E. 155.

Where, in an action against a partnership, service of summons has been made on some of the partners but not

all, upon a verdict in plaintiff's favor, a judgment is properly entered binding upon the partnership's joint property, and upon the individual members served, but not individually upon those not so served with process. *Hancock v. Southgate*, 186 N. C. 278, 119 S. E. 364.

Same—Purpose of Section.—This section was intended to prevent a partner, who was not served with the summons, from defeating an action against him on the ground that judgment had already been taken against his co-partner; and so the cause of action was merged in the judgment, and authorizes an action against him separately, provided the first judgment remains unsatisfied. *Navassa Guano Co. v. Willard*, 73 N. C. 521, 523.

§ 1-114. Summoned after judgment; defense.—

When a judgment is recovered against one or more of several persons jointly indebted upon a contract in accordance with the preceding section, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned. A party so summoned may answer within the time specified denying the judgment, or setting up any defense thereto which has arisen subsequent to such judgment; and may make any defense which he might have made to the action if the summons had been served on him originally. (Rev., ss. 456, 457; Code, ss. 223, 224; C. C. P., ss. 318, 322; C. S. 498.)

Statute of Limitations May Bar Action.—Where an action was begun against certain administrators and the sureties on their bond, and one surety was not served with summons and more than three years thereafter this latter surety was served, it was held that the three year statute of limitations was a bar to the action against the surety. *Koonce v. Pelletier*, 115 N. C. 233, 20 S. E. 391; See *Ruffy v. Claywell, etc., Co.*, 93 N. C. 306.

Where an action was instituted and judgment obtained against A. B. & Co., upon a bill of exchange, and C, who was a secret partner in the firm, was not joined as defendant, and the plaintiff afterwards, and more than three years after the cause of action accrued, discovered that C was a partner and instituted an action against him: Held, that the action was barred by the statute of limitations. *Navassa Guano Co. v. Willard*, 73 N. C. 521.

When Motion in Cause Proper.—Where a judgment is taken against two of three partners who are liable jointly and severally, the proper method to enforce the liability of the third partner is a new action and not a motion in the action in which such judgment was rendered; it is only when the liability is joint and not several that the motion in the cause is proper. *Davis v. Sanderlin*, 119 N. C. 84, 25 S. E. 815.

§ 1-115. Pleadings and proceedings same as in action.—The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply. The answer and reply must be verified in like cases and manner and be subject to the same rules that apply in an action, and the issues may be tried and judgment given in the same manner as in action and enforced by execution if necessary. (Rev., ss. 458, 459; Code, ss. 225, 226; C. C. P., ss. 323, 324; C. S. 499.)

Art. 11. Lis Pendens.

§ 1-116. Filing of notice of suit.—In action affecting the title to real property, the plaintiff, at or any time after the time of filing the complaint or when or any time after a warrant of attachment is issued, or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief, at or any time after the time of filing his answer, if it is intended to affect real estate, may file with the clerk of each county in which the property is situated a notice of the pendency of the action, con-

taining the names of the parties, the object of the action, and the description of the property in that county affected thereby. (Rev., s. 460; Code, s. 229; C. C. P., s. 90; 1917, c. 106; C. S. 500.)

Cross Reference.—As to execution, levy, and lien in attachment, see § 1-449.

In General.—The general doctrine of *lis pendens* is familiar and is firmly established. It may be stated to be thus: When a person buys property pending an action of which he has notice, actual or presumed, in which the title to it is in issue, from one of the parties to the action, he is bound by the judgment in the action, just as the party from whom he bought would have been. The rule is absolutely necessary to give effect to the judgments of courts, because if it were not so held, a party could always defeat the judgment by conveying in anticipation of it to some stranger, and the plaintiff would be compelled to commence a new action against him, and so on indefinitely. *Rollins v. Henry*, 78 N. C. 342, 351.

The principle of *lis pendens* is that the specific property must be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril, and the pendency of such suit duly prosecuted is notice to a purchaser so as to bind his interest. *Todd etc., Co. v. Outlaw*, 79 N. C. 235, 239.

The established rule is that a *lis pendens*, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpoena after the bill is filed. *Lacassagne v. Chapin*, 144 U. S. 119, 125, 12 S. Ct. 659, 36 L. Ed. 368.

A Harsh Rule.—The rule *lis pendens*, while founded upon principles of public policy and absolutely necessary to give effect to the decree of the courts is, never-the-less, in many instances very harsh in its operation; and one who relies upon it to defeat a bona fide purchaser must understand that his case is *strictissimi juris*. *Arrington v. Arrington*, 114 N. C. 151, 159, 19 S. E. 351.

Section Similar to English and New York Statutes.—This section is in substance a copy of 2 Victoria, which has received a construction by the English Courts. It is there held that no *lis pendens*, of which a purchaser has not express notice, will now bind him unless it be duly registered. The provisions of the New York Code for the filing of *lis pendens*, is similar to ours, and has received there the same construction as the English statute. *Todd etc., Co. v. Outlaw*, 79 N. C. 235, 240.

Modifies Common Law Rule.—The common law rule, was that if the real estate to be affected by the judgment or decree were situated in several counties, it would all be bound by the *lis pendens* arising from the pendency of a suit in the county in which only a part of it lies, since, "all persons are supposed to be attentive to what passes in Courts of Justice"; whereas the plain purpose of this section was to modify the rule so as to require notice in all counties where the real estate is situated. *Collingwood v. Brown*, 106 N. C. 362, 368, 10 S. E. 868.

As to real property, there is but one rule of *lis pendens* in North Carolina, and the provisions of this section are a substitute for the common law rule. *Collingwood v. Brown*, 106 N. C. 362, 367, 10 S. E. 868.

Section Adequately Protects Rights of Trustor.—In a suit attacking the validity of a foreclosure sale under a deed of trust, a temporary order enjoining further transfer of the property by the *cestui que trust*, the purchaser at the sale, is properly dissolved, since plaintiff trustor has an adequate remedy at law by filing notice of *lis pendens* in accordance with this and subsequent sections. *Whitford v. North Carolina Joint Stock Land Bank*, 207 N. C. 229, 176 S. E. 740.

This section and § 1-449 are to be construed *in pari materia*, and where notice of levy of attachment on defendant's land in a county has been given under the provisions of § 1-449, by certification of the levy to the clerk of the court for that county and his notation thereof on his judgment docket and indexing in the index to judgments the effect is to take the land in custodia legis, and is not an action affecting the title to lands within the purview of this section, but from the day of such notice, unless the land is released, the attachment constitutes a lien superior to that of a judgment rendered in favor of another, and a later judgment in the attachment proceedings relates back to the filing and indexing of the attachment, and where such notice under § 1-449 has been given, the filing of *lis pendens* in the same county under the provisions of this section is unnecessary. *Pierce v. Mallard*, 197 N. C. 679, 150 S. E. 342.

Jurisdiction of Court.—In order that the right to real

property and personal chattels may be affected by lis pendens, they must be within the jurisdiction of the court and subject to its power. *Enfield v. Jordan*, 119 U. S. 680, 693, 7 S. Ct. 358, 30 L. Ed. 523.

Continuous Litigation.—In order for the doctrine of lis pendens to apply, there must be continuous litigation. *Lee County v. Rogers*, 7 Wall. 181, 19 L. Ed. 160.

An unreasonable delay in prosecution, so far as third persons are concerned, loses its force as a lis pendens. *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174, 176, 3 S. Ct. 570, 28 L. Ed. 109.

Applies to Action in Another County.—Strangers to an action are not affected with constructive notice of an action involving the title to lands situate in a county other than that in which the action is pending, unless the notice, lis pendens, is given under this section. *Spencer v. Credle*, 102 N. C. 68, 8 S. E. 910.

Action Not Affecting Title to Realty.—Where the mortgagee of lands brings an action to recover on the note secured by the mortgage and to set aside a deed of the mortgagor, but not to foreclose the mortgage, the action is not one affecting the title to land within the meaning of this section, and the judgment of the lower court canceling and removing the notice of lis pendens from the records will be affirmed on appeal. *Threlkeld v. Malcragson Land Company*, 198 N. C. 186, 151 S. E. 99.

Breach of Option Contract Not Included.—An action to recover damages for the breach of an option contract is not an action affecting the title to realty, within this section, and the filing of notice in such case will not affect a purchaser pending that action. *Horney v. Price*, 189 N. C. 820, 128 S. E. 321.

When No Notice Required.—No entry of lis pendens, under this section, is required in any case when the action is in the county where the land lies. *Collingwood v. Brown*, 106 N. C. 362, 10 S. E. 868; *Arrington v. Arrington*, 114 N. C. 151, 156, 19 S. E. 351; *Rollins v. Henry*, 78 N. C. 342, 352; *Todd, etc., Co. v. Outlaw*, 79 N. C. 235; *Badger v. Daniel*, 77 N. C. 251; *Spencer v. Credle*, 102 N. C. 68, 8 S. E. 901; *Bird v. Gilliam*, 125 N. C. 76, 79, 34 S. E. 196; *Jarrett v. Holland*, 213 N. C. 428, 196 S. E. 314.

No change in the rule is brought about by this section prescribing how notice of a lis pendens shall be given when the transaction is in one and the same county, and notice is furnished in the record in the pending action. *Morgan v. Bostic*, 132 N. C. 743, 751, 44 S. E. 639.

Where the action is brought in the county where the land is situated, and the pleadings contain "the names of the parties, the object of the action, and the description of the property to be affected in that county," this is a substantial compliance with this section, as to the filing of notice, and puts in operation all of the provisions of the statute. *Collingwood v. Brown*, 106 N. C. 362, 367, 10 S. E. 868.

If this section has no application to an action of foreclosure when brought in the county where the land lies, and it has been so held in a number of cases, it follows as a necessary corollary that the cross-indexing statute (next section) is equally inapplicable. *Massachusetts Bonding, etc., Co. v. Knox*, 220 N. C. 725, 732, 18 S. E. (2d) 436, 138 A. L. R. 1438 (con. op.).

Sufficient Description.—"Although it is necessary in order to constitute lis pendens that the proceedings should, directly or indirectly, designate specific property, yet where the description is so definite that any one reading it can learn thereby, either by the description or reference, what property is intended to be made subject to litigation, it is sufficient." *Benn. Lis Pend.*, sec. 93, 1 *Freem. Judgm.*, sec. 197. *Arrington v. Arrington*, 114 N. C. 151, 156, 19 S. E. 351.

Transfer of Suit.—Where the suit is transferred by consent to another county on the original papers and nothing is left on the files to inform a purchaser of the nature of the action and the property to be affected by it, the lis pendens fails and a bona fide purchaser will be protected. *Arrington v. Arrington*, 114 N. C. 157, 152, 19 S. E. 351.

§ 1-117. Cross-index of lis pendens.—Any party to an action desiring to claim the benefit of a notice of lis pendens, whether given formally under this article or in the pleadings filed in the case, shall cause such notice to be cross-indexed by the clerk of the superior court in a docket to be kept by him, to be called Record of Lis Pendens, which index shall contain the names of the parties to the action, where such notice (whether formal or in the pleadings) is filed, the object of the action, the date of indexing, and sufficient de-

scription of the land to be affected to enable any person to locate said lands. The clerk shall be entitled to a fee of twenty-five cents for indexing said notice, to be paid as are other costs in the pending action. (Rev., s. 464; 1903, c. 472; 1919, c. 31; C. S. 501.)

Construed with Section 47-18.—Lis pendens and registration each have the purpose of giving constructive notice by record, and this section and § 47-13 must be construed in pari materia, and while the lis pendens statutes do not affect the registration laws, the converse is not true. *Massachusetts Bonding, etc., Co. v. Knox*, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438.

Registration as Notice of Pendency of Foreclosure Suit.—An action was instituted to foreclose a duly registered deed of trust in which the trustee and the cestui and the owner of the equity of redemption by mesne conveyances, were made parties, and while the action was pending the owner of the equity sold the property. It was held that the duly registered deed of trust was constructive notice, not only of the lien, but also of the pendency of the foreclosure suit, since it would have been discovered by a prudent examiner, and therefore notice of the suit under this section was not required. *Massachusetts Bonding, etc., Co. v. Knox*, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438.

Cited in *Pierce v. Mallard*, 197 N. C. 679, 682, 150 S. E. 342.

§ 1-118. Effect on subsequent purchasers.—From the cross-indexing of the notice of lis pendens only is the pendency of the action constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently registered is a subsequent purchaser or incumbrancer, and is bound by all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action. For the purposes of this section an action is pending from the time of cross-indexing the notice. (Rev., s. 462; Code, s. 229; C. C. P., s. 90; 1919, c. 31; C. S. 502.)

Editor's Note.—Previous to the adoption of section 1-117, regarding a cross index the filing of notice as provided in section 1-116 was all that was necessary to affect all purchasers with notice. See *Toms v. Warson*, 66 N. C. 417, 419.

Judgment Relates Back to Beginning of Suit.—If a suit was pending against a person for certain property when he parted with it, in which there was afterwards a judgment, that judgment relates to the commencement of the suit and binds subsequent purchasers. *Briley v. Cherry*, 13 N. C. 2; *Cates v. Whitfield*, 53 N. C. 266; *Dancy v. Duncan*, 96 N. C. 111, 116, 1 S. E. 455.

Fraudulent Purchaser of Lands.—Where the president of a corporation, a substantial owner of its shares of stock, has personally bought in the lands which the company is under a binding contract to convey, before suit brought to enforce the contract, and with full knowledge of the plaintiff's right, taken deed for same from his company, before complaint filed, he and his corporation are concluded from setting up the doctrine of lis pendens as a defense, and his purchase will be held ineffective and fraudulent as to the decree rendered and the rights established in the plaintiff's favor, for specific performance. *Morris v. Basnight*, 179 N. C. 298, 102 S. E. 389.

Purchase before Complaint Filed.—A purchaser of land for value after the filing of a lis pendens, but before the filing of the complaint in the action, is not charged with constructive notice of any defects in the title. *Morgan v. Bostic*, 132 N. C. 743, 44 S. E. 639.

Purchase from Litigant with Notice.—The doctrine of lis pendens, as it ordinarily prevails, only affects third persons who may take title to lands after the nature of the claim and the property affected are pointed out with reasonable precision by complaint filed or by notice given pursuant to this section but the principle is not operative where one buys from a litigant with full notice or knowledge of the suit, its nature and purpose and the specific property to be affected. *Morris v. Basnight*, 179 N. C. 298, 102 S. E. 389.

Purchaser from Successful Party.—One who, relying upon the judgment of the superior court, takes a conveyance from the successful party before the expiration of the ten days,

takes it subject to the right of appeal and of the judgment which may be entered therein, and he is conclusively fixed with notice of the litigation. *Rollins v. Henry*, 78 N. C. 342; *Dancy v. Duncan*, 96 N. C. 111, 1 S. E. 455, *Bird v. Gilliam*, 125 N. C. 76, 79, 34 S. E. 196.

Cited in *Brinson v. Lacy*, 195 N. C. 394, 396, 142 S. E. 317; *Pierce v. Mallard*, 197 N. C. 679, 682, 150 S. E. 342.

§ 1-119. Notice void unless action prosecuted.—

The notice of *lis pendens* is of no avail unless it is followed by the first publication of notice of the summons or by an order therefor, or by the personal service on the defendant within sixty days after the cross-indexing. (Rev., s. 461; Code, s. 229; C. C. P., s. 90; 1919, c. 31; C. S. 503.)

Service Within 60 Days Required.—Where a party lives in a different county of the state, and claims as a bona fide purchaser, to affect him with notice of *lis pendens* the requirements of the statute must be strictly followed; among other things, it must be served within sixty days after its filing. *Powell v. Dail*, 172 N. C. 261, 90 S. E. 194.

Cited in *Pierce v. Mallard*, 197 N. C. 679, 682, 150 S. E. 342.

§ 1-120. Cancellation of notice.—

The court in which the said action was commenced may, at any time after it is settled, discontinued or abated, on application of any person aggrieved, on good cause shown, and on such notice as is directed or approved by the court, order the notice authorized by this article to be canceled of record, by the clerk of any county in whose office the same has been filed or recorded; and this cancellation must be made by an endorsement to that effect on the margin of the record, which shall refer to the order. (Rev., s. 463; Code, s. 229; C. C. P., s. 90; C. S. 504.)

Notice Continues Until Canceled.—Where the suit has been prosecuted with proper diligence the *lis pendens* continues until the final judgment, or until it has been canceled under the directions of the court. *Arrington v. Arrington*, 114 N. C. 151, 159, 18 S. E. 351.

Loss or Destruction of Notice.—The mere loss or destruction of the notice will not affect its efficacy, if the statute has been fully complied with. *Arrington v. Arrington*, 114 N. C. 151, 159, 19 S. E. 351.

Same—When by Act of Party.—If the party, by any act of his own has, contrary to the usual course of the court, consented to or been instrumental in the removal from its files of the notice of *lis pendens* (or, as in some cases, its substitute, the complaint), leaving nothing whatever upon the record which could inform a purchaser of the nature of the action and the property sought to be subjected, it must follow, according to every principle of equity and fair dealing, that the purchaser will be protected. *Arrington v. Arrington*, 114 N. C. 151, 159, 19 S. E. 351.

Cited in *Threlkeld v. Malcragson Land Co.*, 198 N. C. 186, 189, 151 S. E. 99.

SUBCHAPTER VI. PLEADINGS.

Art. 12. Complaint.

§ 1-121. First pleading and its filing.—The first pleading on the part of the plaintiff is the complaint. It must be filed in the clerk's office at or before the time of the issuance of summons and a copy thereof delivered to the defendant, or defendants, at the time of the service of summons; provided, that the clerk may at the time of the issuance of summons on application of plaintiff by written order extend the time for filing complaint to a day certain not to exceed twenty (20) days, and a copy of such order shall be delivered to the defendant, or defendants, at the time of the service of summons in lieu of a copy of the complaint: Provided further, said application and order shall state the nature and purpose of the suit. The clerk shall not extend the time for filing complaint beyond the time specified in such

order; except that when application is made to the court, under article forty-six of this chapter, for leave to examine the defendant prior to filing complaint, and it shall be made to appear to the court that such examination of defendant is necessary to enable the plaintiff to file his complaint, and such examination is allowed, the clerk shall extend the time for filing complaint until twenty (20) days after the report of the examination is filed as required by § 1-571. When the complaint is not filed at the time of the issuance of the summons, the plaintiff shall, when he files complaint, likewise file at least one copy thereof for the use of the defendant and his attorney. When there are more than one defendant, the clerk, may, by written notice to the plaintiff, require the filing of additional (not to exceed six) copies of the complaint within the time specified in such notice, not to exceed ten days. Such notice may be served by mailing to the plaintiff or his attorney of record. (Rev., ss. 465, 466; Code, ss. 206, 232, 238; C. C. P., s. 92; 1868-9, c. 76, s. 3; 1870-1, c. 42, s. 3; 1919, c. 304, s. 2; 1927, c. 66, s. 3; C. S. 505.)

Editor's Note.—By the amendment of 1919 a clause "otherwise the suit may, on motion, be dismissed" which originally appeared in the section was omitted, but subsequently was restored by the Consolidated Statutes. In changing other provisions of ch. 156 of the laws of 1919, this section in its original form was reenacted without change by the Extra Session of the Public Laws of 1920 and 1921. See *Campbell v. Asheville*, 184 N. C. 492, 493, 114 S. E. 825.

The act of 1927, ch. 66, not only materially enlarged the provisions of the section but changed the time of the filing of the complaint. Prior to this amendment the complaint was to be filed on or before the return day of the summons, on pain of suit being dismissed at the cost of the plaintiff, and the clerk was authorized to extend, upon motion, the time of filing to a day certain. This was substantially all that this section had formerly provided.

The change in the time of the filing the complaint was effected in view of the changes introduced in section 1-89 with regard to the service and return of the summons. See section 1-89 as amended by the laws of 1927.

The act of 1927, ch. 132, was enacted to amend an act amendatory of four different sections (including this) but did not touch this section.

Prior to the amendment of 1919 the complaint was to be filed on or before the third day of the term to which the action was brought. See *Hill v. Hotel Co.*, 188 N. C. 586, 588, 125 S. E. 266.

Similarity to Former Equity Practice.—The Code and the constitution substantially adopt the practice and procedure of the courts of equity. The only difference between the practice under the Code and the former equity practice is that by the Code the summons does not follow, but precedes the complaint. *Wilson v. Moore*, 72 N. C. 558, 561; *Staton v. Webb*, 137 N. C. 35, 39, 49 S. E. 55. (Decided under the former law.) The summons no more precedes the complaint under the present law, save under the exceptional circumstances designated in the section as amended. Ed. Note.

New Complaint as to New Defendant.—A new or an amended complaint must be filed as against a new defendant brought in subsequent to the filing of the original complaint. And a judgment by default for want of an answer where no such complaint is filed is irregular and capable of being set aside. *Vass v. People's Bldg., etc.*, Ass'n. 91 N. C. 55, 56.

Extension of Time.—Prior to 1921, (the time when the Civil Code of procedure was restored) it was discretionary with the judge of the superior court to allow extension of time for the filing of pleadings; and the motion to extend the time for filing the complaint should be made before the judge, and not before the clerk. *Anderson v. Anderson*, 1 N. C. 20. See also, *Brendle v. Heron*, 68 N. C. 495. But this is no longer the rule. See *Campbell v. Asheville*, 184 N. C. 492, 114 S. E. 825.

Where the clerk of the court has extended the time for filing the complaint in accordance with this section, and the defendant has appealed to the Superior Court, it is within the sound legal discretion of the trial judge, given by § 1-152, to allow the complaint to be filed, and his sustaining

the clerk's order to that effect is an exercise of this discretion. *Hines v. Lucas*, 195 N. C. 376, 142 S. E. 319.

When it appears that the clerk of the court has extended the time to file the complaint by orders regularly entered and in continuous and unbroken sequence for a period of about a year, and the defendant at the end of the full period so extended excepts and appeals to the Superior Court: Held, it is a valid exercise by the clerk of the power conferred by this section. *Hines v. Lucas*, 195 N. C. 376, 142 S. E. 319.

Same — By Consent of Parties. — In *Howard v. Southern R. Co.*, 122 N. C. 944, 29 S. E. 778, neither the complaint nor the answer was filed at the proper time, but there was an entry made on the minutes, which on its face did not purport to be by order of the court, and which was admitted to have been by consent of the parties to the effect that the plaintiff have thirty days to file his complaint and the defendant sixty days thereafter. This procedure seems to be permissible.

Same — Motion to Dismiss Necessary to Prevent Extension. — The fact that this section requires the complaint to be filed at or before the return day of the summons, (before the amendment of 1927) does not prevent the plaintiff from filing it thereafter if the defendant fails to move to dismiss the action for the plaintiff's failure to so file. *Roberts v. Allman*, 106 N. C. 391, 393, 11 S. E. 424.

Judgment of Non Pros. — In the absence of a complaint filed at the proper time the defendant may move for a judgment of non pros. *Vass v. People's Bldg., etc., Ass'n*, 91 N. C. 55, 59.

Cited in *O'Briant v. Bennett*, 213 N. C. 400, 196 S. E. 326.

§ 1-122. Contents.—The complaint must contain—

1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the trial is required to be had, and the names of the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition; and each material allegation must be distinctly numbered.

3. A demand for the relief to which the plaintiff supposes himself entitled. If the recovery of money is demanded, the amount must be stated.

4. In actions for the recovery of a debt contracted for the purchase of land, a statement that the consideration of the debt was the purchase money of certain land, describing the land in an intelligible manner, such as the location, boundaries, and acreage. (Rev., ss. 467-8; Code, ss. 233-4; C. C. P., s. 93; 1879, c. 217; C. S. 506.)

I. In General.

II. Formal Parts of Complaint.

III. Statement of Facts Constituting the Cause of Action.

IV. Demand for Relief.

V. Statement of Consideration for the Purchase of Land.

Cross References.

As to a bill of particulars, see § 1-150. As to amendment to indefinite pleadings, see § 1-153. As to limitation of judgment to demand in complaint, see § 1-226. As to debt for purchase of land, denied by answer, see § 1-136. As to form of execution on judgment for purchase money, see § 1-313, subsection 5.

I. IN GENERAL.

Logic and Precision of Common Law Not Discarded. — The rules of common law as to the pleading which are only the rules of logic, have not been abolished by the Code. *Crump v. Mims*, 64 N. C. 767. The notion that the Code of civil procedure is without order or certainty and that any pleading however loose or irregular, may be upheld, is erroneous; while it is not perfect it has both logical order, precision and certainty, when it is properly observed. *Webb v. Hicks*, 116 N. C. 598, 604, 21 S. E. 672.

Construction of Pleadings. — While the pleadings are to be construed liberally, they are to be so construed as to give the defendant an opportunity to know the grounds upon which he is charged with liability. *Thomason v. Seaboard, etc., R. Co.*, 142 N. C. 318, 325, 55 S. E. 205.

Old and New Procedure Distinguished. — Under the former system the practice was in declaring to proceed on

the special contract and also in other counts, called the common counts, so that, if unable to recover on the special assumpsit, relief might be had on some of the counts in general assumpsit on the implied promise or obligation. If the plaintiff under that system had "counted" only on the special contract, not being able to recover on that, he would have failed in his action. But under the Code all forms of pleading which existed before are abolished, and now we have only the forms of pleading and the rules by which their sufficiency is to be determined, part of which are prescribed in this section. *Jones v. Mial*, 82 N. C. 252, 257.

For an eloquent expression on the abolition of the old system of pleading and the substitution thereof the new system, see, *Pierce v. North Carolina R. Co.*, 124 N. C. 83, 97, 32 S. E. 399.

For a discussion of the similarity between the civil procedure adopted in this state and that which prevailed in the courts of King's Bench, in England, see *Staton v. Webb*, 137 N. C. 35, 36, 49 S. E. 55.

Same Substantial Certainty as at Common Law a Requirement.—The object of the Code was to abolish the different forms of action and the technical and artificial modes of pleading used at common law, but not to dispense with the certainty, regularity and uniformity which are essential in every system adopted for the administration of justice. The plaintiff must state his cause of action with the same substantial certainty as was formerly required in a declaration. *Oates v. Gray*, 66 N. C. 442.

Theory and Form of Action Immaterial.—Where the facts in the complaint in an action for damages caused by an action brought by the defendant to have plaintiff's deed declared void constitute a cause of action, it is immaterial whether the action is for slander of title, malicious prosecution, or for an abuse of legal process, and the complaint is sufficient. *Chatham Estates v. American Nat. Bank*, 171 N. C. 579, 88 S. E. 783.

Cited in *Shemwell v. Lethco*, 198 N. C. 346, 348, 151 S. E. 729; *Tar Heel Hosiery Mill v. Durham Hosiery Mills*, 198 N. C. 596, 152 S. E. 794; *Hinton v. Whitehurst*, 214 N. C. 99, 198 S. E. 579; *Bynum v. Fidelity Bank*, 219 N. C. 109, 12 S. E. (2d) 898; *Herndon v. Massey*, 217 N. C. 610, 8 S. E. (2d) 914.

II. FORMAL PARTS OF COMPLAINT.

Title of Cause. — A paper-writing introduced before a justice of the peace, purporting upon its face only to be a verified account upon which judgment is sought, lacking the requisites of a complaint, under the provisions of this section, in failing to state the title of the cause, the name of the county and parties, will not be considered as a verified complaint on the trial in the superior court, requiring the answer there to be verified; and upon an oral answer denying the liability and raising the issue, the question is for the determination of the jury under proper evidence. *Van Smith Bld. Material Co. v. Tarboro Hardware Co.*, 173 N. C. 55, 91 S. E. 524.

Parties.—A general designation of parties as the "heirs of M. C." is irregular and will not be tolerated. *Kerlee v. Corpening*, 97 N. C. 230, 2 S. E. 664.

It also constitutes a fatal defect on demurrer to designate the plaintiffs in a complaint as "H. M. & Co.," without setting out the individual names of persons composing the firm. *Morrow v. Morgan*, 117 N. C. 504, 23 S. E. 489.

As to parties generally, see sections 1-57 et seq. and the notes thereto.

III. STATEMENT OF FACTS CONSTITUTING THE CAUSE OF ACTION.

Provisions of Section Not Mere Matter of Form.—This section requiring that the plaintiff shall state in a plain, strong, intelligible manner his grounds of action, is not a mere matter of form. It is of the essential substance of the litigation. It is necessary to the end that the contending parties may understand and prepare to meet each the other's contention, and prepare himself for the trial of issues of law or fact presented, that the court may have a proper, just and thorough apprehension of the controversy, and that the same may go into the record and stand as a perpetual memorial of the litigation and all that it embraces. Any other course of procedure would lead to endless confusion and litigation. If this were not done, it would be difficult to show what any litigation embraced or that it had been settled and ended, and when and how. It is not sufficient that the plaintiff had a cause of action and can prove it: he must first plead it, then prove it. *McLaurin v. Cronly*, 90 N. C. 50, 51, 52.

Result of Noncompliance. — Unless the complaint contains a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition pursuant to this section, courts will be hampered in determining

what are the proper issues, both as to form and to number. The principles of good pleading are retained under our present system. *Hunt v. Eure*, 189 N. C. 482, 127 S. E. 593, 596.

Defendant Must Not Be Left in Doubt.—The facts should be so stated as to leave the defendant in no doubt as to alleged cause of action against him, so that he may know how to answer and what defense to make. *Hussey v. Norfolk, etc.*, R. Co., 98 N. C. 34, 3 S. E. 923.

Right to Demand Filing of Amended Complaint.—Several elements of damages may be alleged on one cause of action, and where this has been done, defendant's motion to require plaintiff to file an amended complaint, based on the theory that each element of damage constituted a separate cause of action and should be separately alleged, is properly refused under this section. *Pemberton v. Greensboro*, 205 N. C. 599, 172 S. E. 196.

Matter Should Be Such as Would Be Competent on Hearing.—Nothing ought to be in a complaint, or remain there over objection, which is not competent to be shown on the hearing. *Duke v. Crippled Children's Comm.*, 214 N. C. 570, 571, 199 S. E. 918, citing *Pemberton v. Greensboro*, 203 N. C. 514, 166 S. E. 396.

"A plain and concise statement of facts," within the meaning of this section, means a statement of all the facts necessary to enable the plaintiff to recover. By a "plain" statement is meant a direct and positive averment of fact, which does not leave the existence of the fact to be inferred merely from the existence of some other fact. *Commissioners v. McPherson*, 79 N. C. 524, 525; *Citizens Bank v. Gahagan*, 210 N. C. 464, 187 S. E. 580.

Redundancy in pleading does not present quite the theoretical and technical problems posed by the subject of relevancy, and would seem to include anything which is unnecessary to "a plain and concise statement of the facts constituting a cause of action," such as unnecessary repetition, and the detailed statement of evidential matters, however relevant the latter may be when presented upon the trial. *Parrish v. Atlantic Coast Line R. Co.*, 221 N. C. 292, 298, 20 S. E. (2d) 299.

A party to an action is entitled as a matter of right to put into his pleadings a concise statement of the facts constituting his cause of action or defense, and nothing more. *Patterson v. Southern Ry. Co.*, 214 N. C. 38, 42, 198 S. E. 364; *Wadesboro v. Cox*, 215 N. C. 708, 2 S. E. (2d) 876.

A complaint should state in a plain and concise manner the material and essential facts constituting plaintiff's cause of action, so as to disclose the issuable facts determinative of plaintiff's right to relief, and should not contain collateral, irrelevant, redundant or evidential matter. *Barron v. Cain*, 216 N. C. 282, 4 S. E. (2d) 618.

Facts Must Be Stated, Not Conclusions or Evidence.—The code of civil procedure modifying the method of pleading does not abolish "all forms" of pleading. The fundamental principle of pleading that facts or circumstances constituting the cause of action must be pleaded and not the pleader's conclusions of law drawn from those facts or evidence, holds as true as ever. With respect to the statement of these facts there has been no relaxation from the old, except to require greater particularity of separately numbering every material fact. *Moore v. Hobbs*, 79 N. C. 535, 537; *Lassiter v. Roper*, 114 N. C. 17, 19, 18 S. E. 946; *Gossler v. Wood*, 120 N. C. 69, 73, 27 S. E. 33.

A complaint which merely states a conclusion of law is demurrable both at common law and under the Code. *Rountree v. Brinson*, 98 N. C. 107, 3 S. E. 747.

Matters of Defense Need Not Be Alleged.—If it is alleged that the consideration for the debt or the note sued upon is the purchase money of certain lands, and the lands are specifically described, it is not necessary to allege that the plaintiff has a good title, and that he had tendered a deed to the defendant—these being matters of defense. *Toms v. Fite*, 93 N. C. 274.

Complaint Considered as a Whole.—A complaint will be sustained, as against a demurrer, if any part presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be gathered from it, under a liberal construction of its terms. *Hendrix v. Southern R. Co.*, 162 N. C. 9, 77 S. E. 1001; *New Bern Banking, etc., Co. v. Duffy*, 156 N. C. 83, 72 S. E. 96. See also, *Stokes v. Taylor*, 104 N. C. 394, 10 S. E. 566; *McEachin v. Stewart*, 106 N. C. 336, 11 S. E. 274; *Halstead v. Mullen*, 93 N. C. 252; *Purcell v. Richmond, etc., R. Co.*, 108 N. C. 954, 12 S. E. 954; *Holden v. Warren*, 118 N. C. 327, 24 S. E. 770.

Sufficiency of the Facts.—If the facts stated in the complaint, together with those drawn into issue on the answer of the defendants, constitute a right to any relief whatever,

the plaintiff is entitled to have it on the case as it was, without amendment. *Jones v. Mial*, 82 N. C. 252, 258.

Averment of Willingness in Reciprocal Contract.—Where the plaintiff sues upon a special contract involving the performance of reciprocal acts between himself and the defendant, he must aver and show a readiness and willingness to perform on his part. *Jones v. Mial*, 79 N. C. 165.

Facts Warranting Joinder of Actions.—Where two causes of action are sought to be joined in the same complaint, the complaint must state such facts as would show that the two causes of action can be united under section 1-123. *Allen v. Jackson*, 86 N. C. 321; *Manufacturing Co. v. Barrett*, 95 N. C. 36, 38.

Proof of Foreign Law.—This section requires that the complaint contains a plain and concise "statement of facts constituting the cause of action." Upon those facts, if true, the law gives a "right of action." This right of action is a matter of law of which the court usually takes judicial notice, but if the tort or contract accrued beyond the state-line the law of the foreign state should be pleaded and proved—not because it is in that case a part of the "cause of action" any more than if the transaction had taken place within the state, but because the court is not presumed to know the law of all other states. *Lassiter v. Norfolk, etc., R. Co.*, 136 N. C. 89, 90, 48 S. E. 642.

A complaint for converting a mortgaged crop, which avers title to such crop raised by the mortgagor and by him conveyed to the plaintiff, its delivery to the defendant, its value, and its appropriation by the defendant to his own use, after demand by the plaintiff, is a concise and definite statement of every material fact upon which the right to recover depends, and complies with this section. *Womble v. Leach*, 83 N. C. 84.

Motion to Strike Out Redundant Matter from Complaint.—Where the trial court has allowed the plaintiff to file an amendment to the complaint to be confined to certain phases of the controversy or to allegations as to certain and specific matters, the plaintiff must confine himself to the restrictions under which he is permitted to amend or the trial judge may order stricken therefrom any further matters or any allegations that are irrelevant or redundant and not in conformity with the statute requiring a plain and concise statement of the cause of action without unnecessary repetition, and the granting of the defendant's motion to strike out certain parts of the amended complaint will be sustained on appeal if the complaint is sufficient in its allegations after the portions objected to have been stricken out to present every phase of the controversy. *Ellis v. Ellis*, 198 N. C. 767, 153 S. E. 449.

IV. DEMAND FOR RELIEF.

Relief Prayed and Afforded.—It is the apparent purpose of the new system, while simplifying the method of procedure, to afford any relief to which the plaintiff may be entitled upon the facts set out in his complaint, although misconceived and not specially demanded in his prayer. *Jones v. Mial*, 79 N. C. 165, 168.

Relief Prayed Should Correspond to Proof.—The relief to be granted in an action does not depend upon that asked for in the complaint; but upon whether the matters alleged and proved entitle the complaining party to the relief granted, and this is so in the absence of any prayer for relief. *Bryan v. Canady*, 169 N. C. 579, 86 S. E. 584.

Party Not Limited to Specific Relief Prayed.—Under this section a party is not restricted to the specific relief demanded by him, but may have any additional and different relief which the pleadings and facts proved show to be just and proper. *Knight v. Houghtalling*, 85 N. C. 17; *McNeill v. Hodges*, 105 N. C. 52, 11 S. E. 265; *Hendon v. North Carolina R. Co.*, 127 N. C. 110, 37 S. E. 155.

What Determines the Measure of Relief.—Under the Code system the demand for relief is made wholly immaterial, and that it is the case made by the pleadings and facts proved, and not the prayer of the party, which determines the measure of relief to be administered, the only restriction being that the relief given must not be inconsistent with the pleadings and proofs. In other words, the court has adopted the old equity practice, when granting relief under a general prayer, except that now no general prayer need be expressed, but is always implied. *Knight v. Houghtalling*, 85 N. C. 17; *Staton v. Webb*, 137 N. C. 35, 36, 49 S. E. 55; *Harris v. Sneeden*, 104 N. C. 369, 374, 10 S. E. 477; *Gattis v. Kilgo*, 125 N. C. 133, 135, 34 S. E. 246.

In the absence of any formal demand for judgment the court will grant such judgment as the party may be entitled to have, consistent with the pleadings and proofs. *Demsey v. Rhodes*, 93 N. C. 120; *Staton v. Webb*, 137 N. C. 35, 36, 42, 49 S. E. 55.

Alternative Relief.—The form of the prayer for judgment

is not material, and the plaintiff can unite two causes of action relating to the same transaction and obtain alternative relief. *Herring v. Cumberland Lumber Co.*, 159 N. C. 382, 74 S. E. 1011.

V. STATEMENT OF CONSIDERATION FOR THE PURCHASE OF LAND.

See § 1-136 and clause 5 of § 1-313 and the notes thereto.

§ 1-123. What causes of action may be joined.—

The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of—

1. The same transaction, or transaction connected with the same subject of action.

2. Contract, express or implied.

3. Injuries with or without force to person or property.

4. Injuries to character.

5. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same.

6. Claims to recover personal property, with or without damages for the withholding thereof; or,

7. Claims against a trustee, by virtue of a contract, or by operation of law. But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated.

In actions to foreclose mortgages, the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that remains unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor is personally liable for the debt secured; and if the mortgage debt is secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make that person a party to the action, and the court may adjudge payment of the residue of the debt remaining unsatisfied after a sale of the mortgaged premises, against the other person, and may enforce such judgment as in other cases. (Rev., s. 469; Code, s. 267; C. C. P., s. 126; C. S. 507.)

I. In General.

II. Causes of Action with Reference to Transaction, or Subject of Action.

III. Causes of Action in Contract.

IV. Causes of Action for Tort to Person or Property.

V. Must Affect All Parties and Have Same Venue.

Cross References.

As to parties generally, see § 1-57 et seq. As to who may be defendants, see § 1-69. As to improper joinder of causes of action as ground for demurrer, see § 1-127, subsection 5. As to section prohibiting deficiency judgments in foreclosures of purchase money mortgages, see § 45-36.

I. IN GENERAL.

See notes under §§ 1-69, 1-127.

The common law does not generally allow the joinder of causes of action of different natures because it leads to prolixity, the multiplication of issues and confusion. *Gregory v. Hobbs*, 93 N. C. 1, 4.

The purpose of this section is to extend the right of plaintiffs to join actions, not merely by including equitable as well as legal causes of action, but to make the ground broad enough to cover all causes of action which a plaintiff may have against a defendant, so that the court may not be forced "to take two bites at a cherry," but may dispose of the whole subject of controversy and its incidents and corollaries in one action. *Hamlin v. Tucker*, 72 N. C. 502, 503; *Livingston v. Tanner*, 12 Barb. 486; *Vanderroot v. Gould*, 36 N. Y. 645; *Gregory v. Hobbs*, 93 N. C. 1, 3.

Joinder Not Mandatory but Permissive.—The provisions of this section are permissive. They are not mandatory as to compel the joinder of separate causes of action arising out of the same transaction. *Gregory v. Hobbs*, 93 N. C. 1;

Raper Lumber Co. v. Wallace, 93 N. C. 22, 26; *Tyler v. Capeheart*, 125 N. C. 64, 68, 34 S. E. 108.

Effect of Section upon Existing Law.—This section does not make any substantial change in the rules of practice which obtained before the adoption of the Code in the Courts of Equity with regard to multifariousness. Whatever effect it may have had has been to enlarge the right of uniting in one action different causes of action. The equity rule as existing prior to the Code was thus announced by *Ruffin, C. J.*, in *Bedsole v. Monroe*, 40 N. C. 313: "If the grounds of the bill be not entirely distinct and wholly unconnected; if they arise out of one and the same transaction, or series of transactions, forming one course of dealing, and all tending to one end—if one unconnected story can be told of the whole, the objection of misjoinder of actions cannot apply." And it has been held not to apply, "When there has been a general right in the plaintiff, covering the whole case, although the rights of the defendants may have been distinct." *Heggie v. Hill*, 95 N. C. 304, 305.

Former Equity Practice Followed.—Before this section was adopted, the doctrine of multifariousness was generally understood by the profession, and as the Code has in the main conformed to the equity practice, it may be well to look to those old landmarks for a guide through the mist that envelops the subject. *Barkley v. McClung Realty Co.*, 211 N. C. 540, 543, 191 S. E. 3, citing *Young v. Young*, 81 N. C. 91.

Each Cause Must Belong to Same Class.—No two causes of action which belong to different classes enumerated in this section can be joined in the same cause of action. *Land Co. v. Beaty*, 69 N. C. 329. And this, it is said, even though the different causes of action are connected with the same subject of the action or arise out of the same transaction. *Id.* But this last conclusion has been repeatedly repudiated in the case of joinder of tort and contract actions which are connected with the same subject of the action or arise out of the same transaction. *Ed. Note.* See post, "Causes of Actions with Reference to Transaction and Subject to Action," II.

In order for joinder of causes of actions to be permissible, the causes joined must arise out of any one (and not out of different) of the classes enumerated in this section. In other words, each clause allowing joinder is to be taken independent of the other. See *Sutton v. McMillan*, 72 N. C. 102.

Thus a condemnation proceeding being purely statutory, a cause of action for compensation and one for damages as for a trespass can not be joined. *Abernathy v. South, etc.*, R. Co., 150 N. C. 97, 63 S. E. 180.

Under this section, if the complaint states a connected story, forming a general scheme and tending to a single end, the plaintiff may unite in the same complaint several causes of action. *Shaffer v. Morris Bank*, 201 N. C. 415, 419, 160 S. E. 481.

Inconsistent Causes.—Even if the causes of action were to some extent inconsistent, there is authority to the effect that the complaint is not always on that account demurrable. *Hardin v. Boyd*, 113 U. S. 756, 5 S. Ct. 771, 28 L. Ed. 1141. *Worth v. Knickerbocker Trust Co.*, 152 N. C. 242, 67 S. E. 590, 592.

No Undue Increase of Cost or Inconvenience.—Under the provisions of this section where there is but one subject-matter of the suit or action in which several parties have divergent interests, and they may all be united in one suit without undue increase of cost or inconvenience to the parties, a motion to dismiss for multifariousness and misjoinder of parties is properly denied. *Craven County v. Investment Co.*, 201 N. C. 523, 524, 160 S. E. 753.

Former Equity Practice Followed.—In interpreting this section with regard to multifariousness and misjoinder of parties our courts will take into consideration the principles of the old practice formerly existing exclusively in suits in equity. *Craven County v. Investment Co.*, 201 N. C. 523, 524, 160 S. E. 753.

Judgments.—Causes of action based on several judgments may be joined in one complaint. *Moore v. Nowell*, 94 N. C. 265.

Method of Taking Advantage of Misjoinder.—A misjoinder of causes of action is a ground of demurrer and can be taken advantage of in no other way. *Burks v. Ashworth*, 72 N. C. 496. See sec. 1-127, clause 5, and the notes thereto.

Demurrer for misjoinder of parties and causes of action will be sustained under this section if the several causes of action alleged do not affect all the parties to the action. *Lucas v. North Carolina Bank, etc., Co.*, 206 N. C. 909, 174 S. E. 301.

Execution of Deed and Demand for Land.—The plaintiff can unite, in the same action, a demand for the execution of a deed and for possession of the land, while under the

old system the lost or destroyed deed could only be established in a court of equity, where a decree for title and such other relief as might be proper could be made and enforced according to the practice of that court. *Jennings v. Reeves*, 101 N. C. 447, 450, 7 S. E. 897.

Cited in *Berger v. Stevens*, 197 N. C. 234, 237, 148 S. E. 244; *Pender County v. King*, 197 N. C. 50, 56, 147 S. E. 695; *Andrews Music Store v. Boone*, 197 N. C. 174, 148 S. E. 39; *Berger v. Stevens*, 197 N. C. 234, 237, 148 S. E. 244; *Shuford v. Yarborough*, 197 N. C. 150, 151, 147 S. E. 824; *Shennwell v. Lethco*, 198 N. C. 346, 348, 151 S. E. 729; *Mack Truck Corp. v. Wachovia Bank and Trust Co.*, 199 N. C. 203, 204, 154 S. E. 42; *Taylor v. Taylor*, 197 N. C. 197, 200, 148 S. E. 171; *Daniels v. Duck Island*, 212 N. C. 90, 193 S. E. 7; *Beam v. Wright*, 222 N. C. 174, 22 S. E. (2d) 270; *Bellman v. Bisette*, 222 N. C. 72, 21 S. E. (2d) 896.

II. CAUSES OF ACTION WITH REFERENCE TO TRANSACTION, OR SUBJECT OF ACTION.

The general rule which may be deduced from the decisions is that, if the causes of action be not entirely distinct and unconnected, if they arise out of one and the same transaction, or a series of transactions forming one dealing and all tending to one end, if one connected story can be told of the whole—they may be joined in order to determine the whole controversy in one action. *Young v. Young*, 81 N. C. 92; *Bedsole v. Monroe*, 40 N. C. 313; *Hawk v. Pine Lumber Co.*, 145 N. C. 47, 48, 58 S. E. 603, 604; *Worth v. Knickerbocker Trust Co.*, 152 N. C. 242, 67 S. E. 590, 592; *Howell v. Fuller*, 151 N. C. 315, 66 S. E. 131; *Fisher v. Trust Co.*, 138 N. C. 224, 50 S. E. 659; *King v. Farmer*, 88 N. C. 22; *Balfour Quarry Co. v. West Constr. Co.*, 151 N. C. 345, 66 S. E. 217; *Taylor v. Postal Life Ins. Co.*, 182 N. C. 120, 122, 108 S. E. 502; *Barkley v. McClung Realty Co.*, 211 N. C. 540, 543, 191 S. E. 3; *Griggs v. Griggs*, 218 N. C. 574, 11 S. E. (2d) 878; *Holland v. Whittington*, 215 N. C. 330, 1 S. E. (2d) 813; *Fry v. Pomona Mills*, 206 N. C. 768, 175 S. E. 156; *Peitzman v. Zebulon*, 219 N. C. 473, 14 S. E. (2d) 416.

Source of Litigation.—While it was the object of the legislature to avoid a multiplicity of suits and to prevent protracted and vexatious litigation, this subdivision of this section has given rise to more unprofitable litigation upon its construction than any other section. *Young v. Young*, 81 N. C. 92.

The word "transaction" is used in the statute in reference to the joinder of actions in the sense of the conduct or finishing up of an affair, which constitutes as a whole the "subject of action." *Cheatham v. Bobbitt*, 118 N. C. 343, 346, 24 S. E. 13.

Under this section it is not necessary that the causes of action of several plaintiffs be identical, but only that the causes of action arise out of the same transaction or transactions connected with the same subject of action. *Wilson v. Horton Motor Lines*, 207 N. C. 263, 176 S. E. 750.

Legal and equitable causes of action, arising out of tort and ex contractu, may be united under this section in the same complaint where they arise out of the same transaction or series of transactions forming a connected whole. *Fry v. Pomona Mills*, 206 N. C. 768, 175 S. E. 156.

Series of Transactions Forming One Course of Dealing.—Causes of action which arise from a series of transactions connected together and forming one course of dealing may be joined. *King v. Farmer*, 88 N. C. 22; *Balfour, etc., Co. v. West Constr. Co.*, 151 N. C. 345, 66 S. E. 217, 220; *Barkley v. McClung Realty Co.*, 211 N. C. 540, 543, 191 S. E. 3.

General Right Arising out of Series of Transactions.—*Young v. Young*, 81 N. C. 92.

Tort and Contract May Be Joined.—An action arising upon a contract united in the same complaint with one arising in tort is not a misjoinder, and a demurrer thereto will not be sustained "where they arise out of the same transaction or are connected with the same subject of action." *Hawk v. Pine Lumber Co.*, 145 N. C. 48, 58 S. E. 603; *Cook v. Smith*, 119 N. C. 350, 355, 25 S. E. 958; *Reynolds v. Mt. Airy, etc., R. Co.*, 136 N. C. 345, 346, 48 S. E. 765; *Railroad Co. v. Wakefield Hdw. Co.*, 135 N. C. 73, 75, 47 S. E. 234; *Richmond Cedar Works v. Roper Lumber Co.*, 161 N. C. 603, 77 S. E. 770, 774.

In the earlier cases of *Logan v. Wallis*, 76 N. C. 416, and *Doughty v. Atlantic, etc., R. Co.*, 78 N. C. 22, it was broadly stated that a cause of action founded on a tort could not be joined with one founded on contract; but in *Hodges v. Wilmington, etc., R. Co.*, 105 N. C. 170, 10 S. E. 917, this rule was explained and extended so as to permit such a joinder of action, provided they arose out of the same transaction. *Benton v. Collins*, 118 N. C. 196, 198, 24 S. E. 122; *Daniels v. Baxter*, 120 N. C. 14, 17, 26 S. E. 635; *Hodges v. Wilmington, etc., R. Co.*, 105 N. C. 170, 171, 10 S. E. 917.

For example in *Hamlin v. Tucker*, 72 N. C. 502, it was held that a plaintiff may in the same complaint join as separate causes of action: (1) the harboring and maintaining his wife; (2) the conversion of certain personal property, to which the plaintiff is entitled *jure mariti*; (3) inducing the wife while harbored and maintained to execute to defendant a deed for land, under which he had received the rents, and (4) converting to defendant's own use certain mules, farming utensils, etc., set out in a marriage settlement executed by the plaintiff and his wife. *Hawk v. Pine Lumber Co.*, 145 N. C. 48, 49, 58 S. E. 603.

Likewise in *Young v. Young*, 81 N. C. 92, the court held that a complaint containing several causes of action, viz: (1) to declare one defendant a trustee of land, (2) to recover judgment of other defendants for purchase-money of same, (3) and to recover possession of the land with damages for withholding it, is not demurrable.

Stockholder's Suit against Corporate Officers.—Where the stockholders of a corporation sue its officers for damages for their mismanagement and negligence in accepting worthless paper, and inducing the plaintiffs to become indorsees thereon to their loss and damage, and in failing to indorse these papers themselves under an agreement to do so, the causes of action are properly joined, one sounding in tort and the other being to enforce an equitable right arising out of transactions connected with the same subject-matter. *Ayers v. Bailey*, 162 N. C. 209, 78 S. E. 66.

Suit against Defaulting Corporate Officer and Surety.—A suit by the receiver of a corporation against its defaulting officer and the surety or guarantor for his honesty or fidelity is not objectionable as a misjoinder of parties and causes of action, the alleged default of the principal having occurred that created the surety's liability within the terms and conditions of its bond. *Shuford v. Yarborough*, 197 N. C. 150, 147 S. E. 824, distinguishing *Clark v. Bonsol*, 157 N. C. 270, 72 S. E. 954, and citing *Carswell v. Talley*, 192 N. C. 37, 133 S. E. 181; *Robinson v. Williams*, 189 N. C. 256, 126 S. E. 621; *S. v. Bank*, 193 N. C. 524, 137 S. E. 593; *Shuford v. Yarborough*, 197 N. C. 150, 151, 147 S. E. 824.

Actions on Insurance Policies.—In *McGowan v. Life Insurance Co.*, 141 N. C. 367, 54 S. E. 287, the complaint alleged that the plaintiff had been induced to take out fifteen policies on the lives of herself, her children and grandchildren by means of certain false and fraudulent representations made to her by the defendant's agents that they were ten-year tontine policies; that after paying her weekly assessments for ten years, when she demanded performance it was refused, and she discovered that the policies did not mean what the defendant's agents had represented to her. It was held that the causes of action were properly joined, on the theory that they all arose out of a transaction connected with the same subject of the action. See also, *Pretzfelder & Co. v. Merchants Ins. Co.*, 116 N. C. 491, 21 S. E. 302.

Suit to Engraft Parol Trust on Land.—Where the complaint in a suit to engraft a parol trust upon the title to lands in favor of a husband and wife, alleges that they gave a mortgage on three tracts of land, the husband having title in two of them and his wife in the other, and that the husband for himself and as agent for his wife had agreed with a third person that the latter should bid it in at the sale and hold the title in trust for them upon certain trust relations: Held, in a suit against the administrator of the alleged deceased trustee, the complaint was not demurrable upon the ground of a misjoinder of parties and causes of action. *Cole v. Shelton*, 194 N. C. 741, 140 S. E. 734.

In an action to recover land on the ground that the sale under execution was void, it was held that all matter raised by the pleading could all be settled in one action. *Jeffreys v. Hocutt*, 195 N. C. 339, 142 S. E. 226.

Action to Foreclose Mortgage and Recover Land.—An action brought to foreclose a mortgage upon a tract of land cannot be joined with an action to recover the possession of another tract of land, as these causes do not arise out of the same transaction, nor are the transactions connected with the same subject of action. *Edgerton v. Powell*, 72 N. C. 64.

Actions for Mortgaged Property and Mortgage Debt.—A demand for judgment for the possession of mortgaged property is properly joined with a demand for judgment for the debt secured thereby. *Kiger v. Harmon*, 113 N. C. 406, 18 S. E. 515; *Martin v. McNeely*, 101 N. C. 634, 8 S. E. 231.

Action for Damages by Husband and Wife.—Where a civil action for damages is brought by a husband and wife for an alleged assault against them both, for alleged

false arrest of the male plaintiff and abuse of process in swearing out a peace warrant against him and his false imprisonment, the defendant's demurrer on the ground of misjoinder of parties and causes of action is properly sustained and the case dismissed, the several causes of action not affecting all the parties to the action as required by this section and § 52-10, authorizing a married woman to bring suit for damages for personal injuries without the joinder of her husband. *Sasser v. Bullard*, 199 N. C. 562, 155 S. E. 248.

Scheme and Conspiracy to Defraud.—The complaint alleged fraud and conspiracy on the part of defendants including plaintiffs to sign a deed describing not only the property intended to be conveyed by plaintiffs, but also other valuable property, and that further, pursuant to fraud and conspiracy to deprive plaintiffs of the purchase price of the property intended to be conveyed, which was to be paid in cash or secured by registered lien, defendant grantees executed unsecured notes therefor and defendant attorney wrongfully withheld one of the notes so executed, and prayed for reformation of the deed and for judgment on the notes. Held: Defendants' demurrer on the ground of misjoinder of parties and causes of action was properly overruled, since all the matters alleged arose out of the same transaction or transactions connected with the same subject of action. *Griggs v. Griggs*, 218 N. C. 574, 11 S. E. (2d) 878.

Warranties—Predecessors in Title.—A grantee of lands against whom a recovery has been had for a part thereof may sue his grantor for damages upon the covenants and warranty in his deed, and the successive warrantors in his chain of title, separately or in the same action, the subject-matter being the same, our Code system not favoring a multiplicity of suits. *Winders v. Southerland*, 174 N. C. 235, 93 S. E. 726.

Proceedings under § 50-16.—A complaint in proceedings by the wife under § 50-16, for allowance for subsistence and counsel fees, with allegations that the husband had fraudulently conveyed his lands to his father under a conspiracy to defraud the plaintiff out of her marital rights, and afterwards had grossly abused her and coerced her into accepting a deed of separation is good and a demurrer therefor for misjoinder of parties and causes of action should be overruled, the various causes for which relief is sought being based on a conspiracy or arising out of the same subject-matter or transaction. *Taylor v. Taylor*, 197 N. C. 197, 148 S. E. 171.

III. CAUSES OF ACTION IN CONTRACT.

Contracts and Torts.—See notes under the preceding analysis line.

Implied Contract Arising out of Tort.—Generally a cause of action based on a contract cannot be joined with a cause of action based on tort. But where the tort is of such a nature that the plaintiff may waive it and sue upon an implied contract, the causes of action may be properly joined. *Logan v. Wallis*, 76 N. C. 416.

Specific Performance and Action for Damages.—It is well settled that a cause of action for specific performance may be joined with one for damages resulting from a breach of the contract, or from a delayed performance, or for any other damages growing out of the transaction to which the plaintiff may show himself entitled. *Winders v. Hill*, 141 N. C. 694, 703, 54 S. E. 440.

Action for Statutory Penalties.—An action for a penalty given by a statute to any person injured is an action on a contract. Hence it may not be joined with another cause of action based on tort to person or property. *Doughty v. Atlantic, etc., R. Co.*, 78 N. C. 22, 23; *Hodges v. Wilmington, etc., R. Co.*, 105 N. C. 170, 10 S. E. 917.

A party suing for penalties against the same defendant may unite several such causes of action in the same complaint. *Burrell v. Hughes*, 116 N. C. 430, 437, 21 S. E. 971; *Carter v. Wilmington, etc., R. Co.*, 126 N. C. 437, 36 S. E. 14.

A cause of action for a penalty for unreasonable delay in delivery of goods may be joined with one for recovery of the value of goods not delivered. *Robertson v. Atlantic Coast Line R. Co.*, 148 N. C. 323, 62 S. E. 413; *McCullen v. Seaboard Air Line R. Co.*, 146 N. C. 568, 60 S. E. 506.

Under this section allowing the joinder of several causes of action arising out of contract, express or implied, three causes of action against a register of deeds for statutory penalties for failure to record, and for wrongful issuance of, marriage licenses, may be united in the same complaint. *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890.

Action for Rescission and breach.—Plaintiff may not unite in the same complaint an action for the rescission of a contract and one for its breach. The rights are opposed and

the remedies inconsistent. *Lykes & Co. v. Grove*, 201 N. C. 254, 159 S. E. 360.

IV. CAUSES OF ACTION FOR TORT TO PERSON OR PROPERTY.

Injury to Person and Property May be Joined.—Causes of action for "injuries with or without force to persons and property, or to either," may be joined, and different causes of action for such injuries may be joined against one or more defendants, provided that each of such causes affects all the parties defendant. *Howell v. Fuller*, 151 N. C. 315, 66 S. E. 131.

Trespass and Assault.—A count in trespass for forcibly entering the plaintiff's close may be joined with a count for an assault and battery. *Flinn v. Anders*, 31 N. C. 328.

Destroying Property and Trespass.—An action for willingly destroying a horse may be joined with a count for trespass in entering on the plaintiff's tenement. *Ripsey v. Miller*, 46 N. C. 479.

Trespass Vi Et Armis and on the Case.—In an action for false imprisonment, under the Code, the common-law actions of trespass vi et armis and of trespass on the case may be joined in one complaint. *Bryan v. Stewart*, 123 N. C. 92, 31 S. E. 286. *Hogwood v. Edwards*, 61 N. C. 350, 352.

V. MUST AFFECT ALL PARTIES AND HAVE THE SAME VENUE.

As to general provisions relating to parties, see secs. 1-57 et seq.

General Rule.—As stated in the next to the last paragraph of the section causes of action may not be united under the provisions of this section, except those for the foreclosure of mortgages, unless they affect all the parties thereto. *Roberts v. Utility Mfg. Co.*, 181 N. C. 204, 106 S. E. 664.

Same—Mandatory.—This provision of the statute is mandatory and not merely directory. Thus in *Eller v. Carolina, etc., R. Co.*, 140 N. C. 140, 145, 52 S. E. 305, where no formal objection was taken to the defect, the court said that they would take notice of it so that attention may be called to this important provision of the law which is mandatory and intended to protect a substantial right of the defendant.

Causes Affecting Different Parties.—Comprehensive as are the provisions of this section, allowing several causes of action to be united in the same action, it does not extend to and embrace distinct causes of action against different persons having no substantial connection with each other in respect of such causes of action. It does not provide for the consolidation of all sorts of causes of action in the same action, nor does it allow two or more different persons to be sued in the same action in respect to distinct causes of action where there is no joint or common liability among them. Different causes of action in favor of and against different parties must be litigated in different actions. *Brown v. Coble*, 76 N. C. 391; *Logan v. Wallis*, 76 N. C. 416; *Street v. Tuck*, 84 N. C. 605; *Burns v. Williams*, 88 N. C. 159; *Mitchell v. Mitchell*, 96 N. C. 14, 17, 1 S. E. 648.

When a complete determination of a cause of action joined with others requires parties not necessary to the other causes of action, it is demurrable. *Logan v. Wallis*, 76 N. C. 416.

Thus a plaintiff could not unite in one suit a cause of action for wrongful attachment and one against the surety on the attachment bond for a breach thereof. *Railroad Co. v. Hardware Co.*, 135 N. C. 73, 47 S. E. 234.

An action against insurer to reform plaintiff's fire insurance policy and to upset settlement and recover an additional sum under the policy as reformed, and against plaintiff's mortgagee to restrain foreclosure and recover rents, is defective in that the several causes do not affect all parties to the action, and the action is properly dismissed upon demurrer for misjoinder of parties and causes. *Mills v. North Carolina Joint Stock Land Bank*, 208 N. C. 674, 182 S. E. 336.

Plaintiffs, sureties on the bond of the clerk of the superior court, sought to recover in this action against the county accountant for alleged negligence in failing to properly audit the books of the clerk, against the members of the board of county commissioners for alleged negligence in employing incompetent accountants and in failing to employ competent ones after discovering the neglect of both the county accountant and the clerk, and against the members of the board of county commissioners as statutory bondsmen, in approving the bond of the county accountant in a penal sum less than that required by statute. Defendants' demurrers for misjoinder of parties and causes of action were

properly sustained, since one of the causes sounds in contract while the others sound in tort, and since the causes alleged do not affect all the parties to the action. *Ellis v. Brown*, 217 N. C. 787, 9 S. E. (2d) 467.

Injuries to Father and Son by the Same Negligence. — The joinder of a cause of action brought by a son, an employee, to recover of his employer damages for a personal injury alleged to have been caused by the latter's negligence, with that of the father to recover for the loss of the son's services alleged to have been caused by the same negligent act, is demurrable on the ground of misjoinder of parties and causes of action. *Thigpen v. Cotton Mills*, 151 N. C. 97, 65 S. E. 750.

Causes Affecting Husband and Wife Separately. — A husband and wife can not join their separate actions for damages for mental anguish caused by defendant's negligence, and recover one sum in satisfaction of their several claims. *Eller v. Railroad*, 140 N. C. 140, 52 S. E. 305.

Actions against Different Insurance Companies. — Where a person was insured in several companies, and each policy limited the amount of his recovery thereunder to the proportion of the loss which the policy should bear to the total insurance, it was proper, in an action to recover for a loss, to make each company a party defendant. *Pretzfelder & Co. v. Merchants' Ins. Co.*, 116 N. C. 491, 21 S. E. 302.

Action against Partner. — A cause of action against one on a joint contract as a partner may be joined with a cause of action against such partner individually. *Logan v. Wallis*, 76 N. C. 416.

Actions upon Administrator's and Clerk's Bonds. — A complaint in which are joined two causes of action, the one upon a clerk's and the other upon a bond of an administrator, is demurrable. *Street v. Tuck*, 84 N. C. 605.

Action against Two Carriers. — Where a carrier has accepted a shipment beyond its own line, and upon its not being delivered, agrees by parol to have it reshipped to the starting point, and delivery is made there in bad condition, a joinder of causes of action against the two defendants to recover damages to the shipment while in their possession is proper. *Lyon v. Atlantic, etc., R. Co.*, 165 N. C. 143, 81 S. E. 1.

Joinder of Contract and Tort Actions against Different Defendants. — A contract action against one person may not be joined with a tort action against the same person; much less may a contract action against one person be joined with a tort action against the same and another person. *Land Co. v. Beatty*, 69 N. C. 329. For causes relating to joinder of tort and contract actions generally, see ante, this note, "Causes of Action with Reference to Transaction, or Subject of Action," II.

Different Venue. — Actions requiring different places of trial cannot be joined. *Richmond Cedar Works v. Roper Lumber Co.*, 161 N. C. 603, 613, 77 S. E. 770.

Art. 13. Defendant's Pleadings.

§ 1-124. Demurrer and answer. — The only pleading on the part of the defendant is either a demurrer or an answer. He may demur to one or more of several causes of action stated in the complaint, and answer to the residue. (Rev., ss. 470, 471; Code, ss. 238, 246; C. C. P., ss. 94, 103; C. S. 508.)

Cross Reference. — As to counterclaim in answer, see § 1-140.

Applies to Several Causes of Action Not to Several Allegations. — If a party answer and also demur to the same cause of action, the answer overrules the demurrer; but pleadings, in which a party answers to some and demurs to others of the allegations made in support of any one cause of action, are erroneous. This section applies only where a complaint or answer contains several causes of action. *Ransom v. McClees*, 64 N. C. 17. A party can not answer some of the allegations of a single cause of action, and demur to others. *Speight v. Jenkins*, 99 N. C. 143, 5 S. E. 385; *State v. Young*, 65 N. C. 579; *Von Glahn v. De Rossett*, 76 N. C. 292; *Love v. Commissioners*, 64 N. C. 706.

Cited in *Shemwell v. Lethco*, 198 N. C. 346, 348, 151 S. E. 729.

§ 1-125. When defendant appears and pleads; extension of time; clerk to mail answer to plaintiff. — The defendant must appear and demur or answer within thirty (30) days after the service of summons upon him, or within thirty (30) days

after the final determination of a motion to remove as a matter of right, or after the final determination of a motion to dismiss upon a special appearance, or after the final determination of any other motion required to be made prior to the filing of the answer, or after final judgment overruling demurrer, or after the final determination of a motion to set aside a judgment by default under § 1-220, or to set aside a judgment under § 1-108. If the time is extended for filing complaint, then the defendant shall have thirty (30) days after the final day fixed by such extension in which to plead. The clerk shall not extend the time for filing answer or demurrer more than once nor for a period of time exceeding twenty days except by consent of parties. The defendant shall, when he files answer, likewise file at least one copy thereof for the use of the plaintiff, and his attorney; and the clerk shall not receive and file any answer until and unless such copy is filed therewith. The clerk shall forthwith mail the copy of answer filed to the plaintiff or his attorney of record. This section shall also apply to all courts of record inferior to the superior court, where any defendant resides out of the county from which the summons is issued and no court of record inferior to the superior court shall fix such return date at less than thirty (30) days. (Rev., s. 473; Code, 207; 1870-1, c. 42, s. 4; 1919, c. 304, s. 3; Ex. Sess. 1921, c. 92, s. 1, par. 3; 1927, c. 66, s. 4; 1935, c. 267; C. S. 509.)

Cross References. — As to judgment by default final, see § 1-211. As to judgment by default and inquiry, see § 1-212. As to extension of time for filing of answer or reply by judge in his discretion, see § 1-152.

As to provisions on summons, see sections 1-88 et seq.; 1 N. C. L. Rev. p. 9 et. seq.

For an analysis of summons in inferior courts, see 13 N. C. Law Rev. 372.

Editor's Note. — This section underwent material changes both in its phraseology and substance by every amendment since 1920, cited at the end thereof. As it originally stood in the Consolidated Statutes, it required that the defendant must appear and demur or answer within twenty days after the return day of the summons, and in case of extension of time for the filing of the complaint, twenty days from the filing of such complaint, with an authority in the clerk to extend the time for filing the answer or demurrer for good cause shown; otherwise the plaintiff would have judgment by default.

By the laws of 1921 (Ex. Sess. 1921, ch. 92, sec. 1, par. 3), these provisions were so framed, as to allow the filing of the answer or demurrer twenty days after service of complaint, or within twenty days after the final determination of a motion to remove as a matter of right.

The same amendment inserted a provision to the effect that in case the complaint was not served, for good cause shown, the clerk may extend the time to a day certain; and a limitation upon the power of the clerk not to extend beyond twenty days after service of the complaint upon each of the defendants. (To this latter effect see, *Battle v. Mercer*, 187 N. C. 437, 122 S. E. 4; *Lerch v. McKinne*, 186 N. C. 244, 119 S. E. 193, where it was said that this limitation is a material part of the statute the object of which is to give the defendant twenty days after he is informed of the complaint.)

The amendment of 1927 changed the bases of the time within which the demurrer or the answer was to be filed. While formerly this was dependent upon the return day of the summons, being twenty days from such day, now, under the section as amended, the return day of the summons has no bearing upon the time for filing the answer or the demurrer, the basis of such time now being the service of the summons upon the defendant, irrespective of the time of its return. This change was effected to harmonize the time of filing the answer or demurrer with the new changes wrought into section 1-121 fixing the time of filing the complaint, and section 1-89 relative to the service and return of process.

This amendment also increased (from twenty to thirty days)

the number of days within which the answer may be filed where the time is extended for the filing of the complaint. The limitation against extending the time more than once is also new. So also is the requirement for filing a copy of the answer for the use of the plaintiff.

The Act of 1927, ch. 132, was to amend an amendatory act of four sections (§§ 1-89, 1-121, 1-125, 1-394) but did not affect any part of this section individually.

The amendment of 1935 added the last sentence of the section relating to courts to which it is applicable.

Not Repugnant to § 1-140.—Construing the acts amendatory of this section and section 1-140 together there is no repugnancy between them so as to repeal by implication the provision of the latter, that an answer of defendant setting up a counterclaim will be deemed denied unless a copy thereof is served on the plaintiff or his attorney. *Williams-Fulghun Lumber Co. v. Welch*, 197 N. C. 249, 148 S. E. 250.

A motion to strike out is required to be made before answer or demurrer, and therefore when such motion is made within thirty days from the filing and service of summons and complaint, and notice of the motion is mailed to and received by plaintiff's attorney within that time, plaintiff is not entitled to judgment by default prior to the final determination of the motion, since defendants have thirty days after final determination of the motion in which to answer or demur. *Heffner v. Jefferson Standard Life Ins. Co.*, 214 N. C. 359, 199 S. E. 293.

Motion to Dismiss on Special Appearance.—Defendant making a special appearance and moving to dismiss is entitled to final determination of his motion prior to the hearing of plaintiff's motion for judgment by default. *Bank of Pinehurst v. Derby*, 215 N. C. 669, 2 S. E. (2d) 875.

Extension of Time.—It has been held that the power of court to extend the time of filing the pleadings or doing of any other act is neither affected nor curtailed by the provisions of this section. See *McNair v. Yarboro*, 186 N. C. 111, 118 S. E. 913; *Roberts v. Merritt*, 189 N. C. 194, 126 S. E. 513.

This section does not affect the right of the Superior Court judge to allow an extension of time under section 1-152. *Washington v. Hodges*, 200 N. C. 364, 156 S. E. 912.

Same—Consent of Defendant.—The clerk has authority, upon request of the defendant, to extend the time for filing the answer beyond the twenty days allowed by this section, (prior to amendment of 1927) but he may not, of his own motion, extend the time without the defendant's consent, beyond that requested, and bar him of his right to move the cause to another county when his motion is made before answer filed within the twenty days allowed him from the filing of the complaint, though under a misapprehension as to the statutory time he has requested the clerk to allow him two weeks in which to file his answer, the time to which he is entitled by the statute. *Stevens Lumber Co. v. Arnold*, 179 N. C. 269, 102 S. E. 409.

Same—Beyond Time Requested.—Where a defendant has acted within the time allowed him by law to file his motion to change the venue of the action, and has requested the clerk for an extension of two weeks from the filing of the complaint in which to answer under a misapprehension of the statutory time allowed by this section, the extension of time by the clerk beyond that requested is not upon his application, and the failure of the defendant to specially controvert this upon the argument will not deprive him of his right. *Stevens Lumber Co. v. Arnold*, 179 N. C. 269, 102 S. E. 409.

Same—On Appeal.—The defendant against whom the judgment by default has been rendered, may on appeal apply to the judge for an extension of time. *Brooks v. White*, 187 N. C. 656, 122 S. E. 561.

Same—Modification of Order at Subsequent Term.—An order extending time for defendant to plead, and providing that, in case he did not do so within the time limited, judgment should be entered for plaintiff, is not a judgment conclusively affecting rights and interests of parties, and is not made so by defendant's consent to entry of such order, and hence it may be modified by another judge at a subsequent term. *Woodcock v. Merrimon*, 122 N. C. 731, 30 S. E. 321; *United, etc., Baptist Church N. E. Conference v. United, etc., Baptist Church, N. W. Conference*, 158 N. C. 564, 74 S. E. 14; *Cook v. Bank*, 131 N. C. 96, 42 S. E. 550.

Same—Sufficient with Order.—If defendant prays time to answer and afterwards within the time he answers, denying combination and demurs for the residue, that is sufficient compliance with the order. *Littlejohn v. Burton*, 3 N. C. 127.

Plaintiff May Have Judgment by Default.—If the complaint is filed in compliance with section 1-121, and the defendant fails to appear and answer at the same term, the

plaintiff may have a judgment by default. *Brown v. Rhinehart*, 112 N. C. 772, 775, 16 S. E. 840.

Removal.—The provision relating to the time of filing answer or demurrer after determination of the motion for removal was inserted in this section by the Public Laws of 1921, Ed. Note.

Where an action is removed to the county of defendants' residence upon motion aptly made, defendants have 30 days after final determination of their motion to remove in which to answer or demur. *Monfils v. Hazlewood*, 218 N. C. 215, 10 S. E. (2d) 673.

Same—Time of Removal to Federal Court.—The Federal statute (25 U. S. St. at large, 435) with respect to removal of causes of action from the state to the Federal courts provides that the defendant must file his petition "at or before the time at which he is required to plead."

This requirement is imperative that it shall be filed when the plea is due, and no order of the court or stipulation of the parties allowing an extension of time to plead can extend the time for filing the petition. *Howard v. Southern R. Co.*, 122 N. C. 944, 29 S. E. 778; *Meeke v. Valletown Mineral Co.*, 122 N. C. 790, 796, 29 S. E. 781.

But the holdings of the Federal circuit court are in conflict with the holdings of the Supreme Court of this state. Thus in *Avent v. Deep River Lumber Co.*, 174 Fed. 298, following *Wilcox Co. v. Ins. Co.*, 60 Fed. 929, it was held that under this section requiring the defendant to plead within twenty days after the return day of his summons, unless the time is extended, an order made by the court extending the time to answer, operates to extend the time for filing the petition for removal. Ed. Note.

The filing of an answer in the state court by a defendant after his petition for removal has been denied does not affect his right to file the record in the Federal court and obtain an order of removal therefrom before the time when his answer was due. *Avent v. Deep River Lumber Co.*, 174 Fed. 298.

The time for filing an answer expires when it is actually filed, so far as it affects the defendant's right to apply for a removal of the cause to the Federal court. *Howard v. Southern R. Co.*, 122 N. C. 944, 29 S. E. 778.

Applied in *Harrell v. Welstead*, 206 N. C. 817, 175 S. E. 283.

Cited in *Williams v. Cooper*, 222 N. C. 589, 24 S. E. (2d) 484.

§ 1-126. Sham and irrelevant defenses.—Sham and irrelevant answers and defenses may be stricken out on motion, upon such terms as the court may in its discretion impose. (Rev., s. 472; Code, s. 247; C. C. P., s. 104; C. S. 510.)

What Constitutes Sham Defenses.—A sham answer is false in fact; an irrelevant or frivolous one has no substantial relation to the controversy and presents no defense to the action, though its contents may be true. *Howell v. Ferguson*, 87 N. C. 113.

The answer or defense must be really a sham pleading; that is to say, it must set up matter as a defense which is a mere pretense and has not the color of fact. The design was to prevent vexatious defenses by the plea of matter for delay, false in fact, and so known to be by the pleader. And, while in general such a pleading may be stricken out where the falsehood can be clearly shown, the power ought not to be exercised in any case where the matter, objected to, as presented or in any other form, might constitute a defense. *Boone v. Hardie*, 83 N. C. 471, 473.

An answer which avers that "no allegation of the complaint is true," is a sham plea, and will be stricken on motion as provided by this section. *Flack v. Dawson*, 69 N. C. 42.

So also is a plea that the court had no jurisdiction of the action, or a plea alleging the want of parties. As these are required by the following section to be raised by demurrer. Id.

Conclusions of Law.—An answer stating conclusions of law puts no fact in issue, and for this reason is a sham pleading which may be stricken out. *Deloatch v. Vinson*, 108 N. C. 147, 148, 12 S. E. 895.

Denial of Material Allegations.—Where defendants file answer denying material allegations of the complaint, the court is without authority, on plaintiffs' motion to strike out the answer as sham and irrelevant, to hear evidence, find facts contra the allegations and denials of the answer, and thereupon strike said allegations and denials and grant plaintiffs' motion for judgment on the pleadings. *Brooks v. Muirhead*, 221 N. C. 466, 20 S. E. (2d) 273.

A reference of issues upon sham pleas is erroneous, but

if the reference embrace an issue on a good plea which may be referred, it will be sustained as to that while it is reversed as to the others. *Flack v. Dawson*, 69 N. C. 42.

Answer after Sham Demurrer Overruled.—It is in the discretion of the trial judge to permit the defendant to answer after overruling a demurrer to the complaint, though the demurrer were frivolous. *Parker v. North Carolina R. Co.*, 150 N. C. 433, 64 S. E. 186.

Appeal.—The refusal to hold a demurrer or answer frivolous and to render judgment thereon is not appealable (*Walters v. Starnes*, 118 N. C. 842, 24 S. E. 713; *Abbott v. Hancock*, 123 N. C. 89, 31 S. E. 271), where the reasons are given. *Parker v. North Carolina R. Co.*, 150 N. C. 433, 64 S. E. 186; *Abbott v. Hancock*, 123 N. C. 89, 31 S. E. 271.

The action of the judge of the Superior Court in passing upon the judgment of the clerk of the court in refusing to strike out the defendant's answer as sham and frivolous, under this section, is upon a matter of law requiring exception thereto and an appeal to the Supreme Court. *Wellons v. Lassiter*, 200 N. C. 474, 157 S. E. 434.

The Superior Court has the power and authority to determine on appeal the order of the clerk of the court in refusing a motion under this section to strike out the defendant's answer on the ground that it was sham and frivolous. *Wellons v. Lassiter*, 200 N. C. 474, 157 S. E. 434.

Art. 14. Demurrer.

§ 1-127. Grounds for.—The defendant may demur to the complaint when it appears upon the face thereof, either that:

1. The court has no jurisdiction of the person of the defendant, or of the subject of the action; or,
2. The plaintiff has not legal capacity to sue; or,
3. There is another action pending between the same parties for the same cause; or,
4. There is a defect of parties plaintiff or defendant; or,
5. Several causes of action have been improperly united; or,
6. The complaint does not state facts sufficient to constitute a cause of action. (Rev., s. 474; Code, s. 239; C. C. P., s. 95; C. S. 511.)

- I. In General.
- II. Lack of Jurisdiction.
- III. Lack of Legal Capacity.
- IV. Pendency of Another Action.
- V. Defect of Parties.
- VI. Misjoinder of Several Causes of Action.
- VII. Failure to State Sufficient Facts.

Cross Reference.

As to objection by answer where grounds for demurrer do not appear on face of complaint, see § 1-133.

I. IN GENERAL.

All Demurrers Special.—Under our practice all demurrers are special and may be pleaded only for the causes specified in this section. *Shaffer v. Morris Bank*, 201 N. C. 415, 417, 160 S. E. 481.

Demurrer Does Not Admit Conclusions of Law.—A demurrer challenges the sufficiency of the pleading, taking as true the facts alleged and the relevant inferences of facts deducible therefrom, but the demurrer does not admit inferences or conclusions of law. *Cathey v. South-eastern Const. Co.*, 218 N. C. 525, 11 S. E. (2d) 571.

Defect Must Appear on Face of Complaint.—Demurrer to the jurisdiction on ground that summons was issued out of a recorder's court to another county in an action ex contractu involving less than \$200.00, is bad as a speaking demurrer, since the defect does not appear upon the face of the complaint. *Four County Agricultural Credit Corp. v. Satterfield*, 218 N. C. 298, 10 S. E. (2d) 914.

Enumeration of Grounds Exclusive.—The enumeration in this section of the grounds upon which a demurrer may be based is exclusive. Hence a demurrer does not lie except in the cases specifically mentioned in this section. *Smith v. Summerfield*, 108 N. C. 284, 288, 12 S. E. 997; *Dunn v. Barnes*, 73 N. C. 273.

Thus the statute of limitation which does not appear in the enumeration may not be taken advantage of by demurrer, but must be raised by answer. *Green v. North Carolina R. Co.*, 73 N. C. 524.

Objections Waived—Exceptions.—All objections except those on the ground that the court has no jurisdiction of

the person of the defendant or the subject matter of the action, and that the complaint does not state facts sufficient to constitute a cause of action, are waived unless they are taken by demurrer or answer. But the exceptions referred to may be taken advantage of by demurrer even in the appellate court. *Clements v. Rogers*, 91 N. C. 63, 64; *Raleigh v. Hatcher*, 220 N. C. 613, 18 S. E. (2d) 207. See sec. 1-134, and the note thereto.

Same—No Cause Stated.—The objection that the complaint states no cause of action or that the court has no jurisdiction may be made either by written demurrer or demurrer ore tenus and cannot be waived. *Baker v. Garrison*, 108 N. C. 218, 225, 13 S. E. 2.

Motion to Make More Certain.—Where a pleading is indefinite and uncertain, it is not subject to demurrer, but the proper remedy is by motion to make more definite and certain. *Seaboard Air Line R. Co. v. Main*, 132 N. C. 445, 43 S. E. 930.

The same rule applies where the complaint does not fully state the terms of the contract sued on. *Wood v. Kincaid*, 144 N. C. 393, 57 S. E. 4.

Where a complaint alleging negligence states a cause of action, the remedy of a defendant desiring a more definite statement of the alleged negligence is by motion to make the complaint more definite and certain, and not by demurrer. *Jones v. Henderson*, 147 N. C. 120, 60 S. E. 854; *Allen v. Carolina Cent. R. Co.*, 120 N. C. 548, 27 S. E. 76. See § 1-153, and notes thereto.

Redundancy in pleading must be objected to by motion before answer, and not by demurrer. *Smith v. Summerfield*, 108 N. C. 284, 12 S. E. 997. See § 1-153, and notes.

Alternative, Argumentative, or Hypothetical Allegations.—That a complaint is "argumentative, hypothetical, and, in the alternative," is no ground for demurrer. *Daniels v. Baxter*, 120 N. C. 14, 26 S. E. 635; *Pender v. Mallett*, 123 N. C. 57, 31 S. E. 351; *Smith v. Summerfield*, 108 N. C. 284, 12 S. E. 997.

Inconsistency of Causes.—A complaint is not always demurrable because two alleged causes of action are to some extent inconsistent. *Worth v. Knickerbocker Trust Co.*, 152 N. C. 242, 67 S. E. 590.

Informality in the Demand for Judgment.—Any informality in the demand for judgment in a complaint is not ground for demurrer, and must be disregarded when the sum demanded, and how it is due, sufficiently appear from the summons and complaint. *Dunn v. Barnes*, 73 N. C. 273.

By filing answer defendants waive right to demur except for want of jurisdiction or for failure of the complaint to state a cause of action, and such waiver applies to an amended complaint when the amended complaint is substantially the same as the original complaint to which answer was filed. *Schnibben v. Ballard, etc., Co.*, 210 N. C. 193, 185 S. E. 646.

Applied in *Board of Drainage Com'rs v. Jarvis*, 211 N. C. 690, 191 S. E. 514; *Smith v. Sink*, 211 N. C. 725, 192 S. E. 108; *Beam v. Wright*, 222 N. C. 174, 22 S. E. (2d) 270.

Cited in *Pender County v. King*, 197 N. C. 50, 56, 147 S. E. 695; *Morris v. Cleve*, 197 N. C. 253, 258, 148 S. E. 253; *Shuford v. Yarbrough*, 198 N. C. 5, 150 S. E. 618; *Shemwell v. Lethco*, 198 N. C. 346, 348, 151 S. E. 729; *Oldham v. Ross*, 214 N. C. 696, 200 S. E. 393; *Leach v. Page*, 211 N. C. 622, 191 S. E. 349; *Montgomery v. Blades*, 222 N. C. 463, 23 S. E. (2d) 844.

II. LACK OF JURISDICTION.

Objection to the jurisdiction of the court over the subject matter of the action is presented by demurrer, and a demurrer is a plea to the cause of action set out in the complaint. *Williams v. Cooper*, 222 N. C. 589, 24 S. E. (2d) 484.

Motion Ore Tenus.—A petition which is demurrable on this ground may also be taken advantage of by a motion ore tenus. *Tucker v. Baker*, 86 N. C. 1, 3. See sec. 1-134.

The decision of the question whether a cause of action arose out of tort or contract so as to determine whether the superior court or the justice of the peace has exclusive original jurisdiction, involves only the cause of action as alleged in the complaint, and evidence offered by plaintiff cannot be considered in deciding the question presented by demurrer ore tenus, under subsection 1 of this section and § 1-134. *Roebuck v. Short*, 196 N. C. 61, 144 S. E. 515.

Plea to Jurisdiction Is a Sham Plea.—See note to section immediately preceding.

Plea That Industrial Commission Has Jurisdiction.—In an action by an administrator to recover for the wrongful death of his intestate, a plea to the jurisdiction of the court on the ground that the industrial commission had exclusive jurisdiction of the cause is in effect a demurrer to the complaint, and where it does not appear from the complaint that the defendant regularly employed more than five employees

in this state, the plea to the jurisdiction should be overruled. *Southerland v. Harrell*, 204 N. C. 675, 169 S. E. 423.

Demurrer for Want of Proper Service of Summons.—Where a nonresident defendant wishes to demur to the jurisdiction of the court for the want of proper service of summons on him, he must enter a special appearance for that purpose and confine his demurrer to that objection alone; and where he has entered a general appearance, or demurred on the further ground that the court has no jurisdiction of the subject matter, it is to be taken as a general appearance as to the merits, waiving the objection as to proper service, and he will be bound by the adverse judgments of the court having jurisdiction over the subject-matter of the action. *Dailey Motor Co. v. Reaves*, 184 N. C. 260, 114 S. E. 175.

Under this section the defendant may demur to the complaint when it appears upon its face, the court had no jurisdiction of the person of defendant, and the right to dismiss an action for want of jurisdiction by entering a special appearance for the purpose is imbedded in our procedure. *Smith v. Houghton*, 206 N. C. 587, 588, 174 S. E. 506.

III. LACK OF LEGAL CAPACITY.

In General.—Demurrer lies where a partnership does not show a right to sue, 13 O. S. 210; where it appears upon the face of the pleading that plaintiff suing as a corporation is not such, 26 O. S. 565; 29 Bull 61; 40 N. Y. 410, Affg. 41 Barb. 571; 37 N. Y. 648; where some legal disability of the plaintiff such as infancy, idiocy or coverture, is disclosed, 31 Ind. 355, 11 Kas. 128; 16 Neb. 483; see 6 Ohio Nisi. Prius Reports 60.

It is held that it can only be sustained on these grounds, 67 Ind. 570.

Mr. Bliss says that this is too narrow a view to take of the statute, and that incapacity to sue may arise from want of title to the character in which the plaintiff sues, *Bliss Code pl. § 408*, citing *Mooks Van Stan Voord*, 68; as when an executor does appear to have proved the will of his testator, or appears to have proved it in an improper or insufficient court, as he does not show a complete title to sue as executor, a demurrer will lie, *Bliss Code pl. § 48*; *Mitfords Eq. Pl. 155*; see 47 Hun 281; and when an action is brought by a foreign executor or administrator without showing authority from the State in which the proceeding is had, a demurrer will lie for want of capacity to sue, 26, How. Pr. 15; and when an invalid appointment of a receiver has been made, demurrer should lie for incapacity to sue, 3 Abb Pr. 119.

Must Appear on the Face of Complaint.—Unless the lack of legal capacity appears on the face of the complaint, a demurrer cannot be sustained based on that objection. *Fisher v. Traders' Mut. Life Ins. Co.*, 136 N. C. 217, 219, 48 S. E. 667.

Action for Death by Wrongful Act.—Where an action for wrongful death is instituted in this state by an administratrix appointed by the court of another state, the defect may be taken by demurrer, since such plaintiff does not have legal capacity to sue and the complaint does not state facts sufficient to constitute a cause of action. *Monfils v. Hazlewood*, 218 N. C. 215, 10 S. E. (2d) 673.

IV. PENDENCY OF ANOTHER ACTION.

In General.—The character of the prior action is not material if full relief could have been given therein, 16 Barb. 461; but if it was for relief, which could not be granted in the action demurred to, the demurrer will not be sustained. 5 N. Y. 357.

Pendency in This State Prerequisite.—Upon a demurrer on the ground of pendency of action, it must appear that the other action is pending in courts of this state. *Carpenter, etc., Co. v. Hanes*, 162 N. C. 46, 47, 77 S. E. 1101; *Ridley v. Seaboard, etc., R. Co.*, 118 N. C. 996, 24 S. E. 730; *Sloan & Co. v. McDowell*, 75 N. C. 29.

Pending in Another County.—A demurrer to a complaint, setting up the prior pendency in another county of an action upon the same subject-matter between the same parties, will be sustained, under this section, and, when such allegations do not so appear in the pleading, objection to the pendency of the second action may be taken by answer. *Allen v. Salley*, 179 N. C. 147, 141 S. E. 545.

Availed of by Demurrer or Answer.—If the pendency of the former action appear on the face of the complaint, it may be taken advantage of by demurrer; otherwise by answer. *Allen v. Salley*, 179 N. C. 147, 148, 101 S. E. 545; *Curtis v. Piedmont Lumber, etc., Co.*, 109 N. C. 401, 13 S. E. 944; *Reed v. Carolina Mtg. Co.*, 207 N. C. 27, 175 S. E. 834.

Conclusiveness of Prior Judgment.—Under this section the rights of plaintiff are remitted to a prior judgment, and defendant's demurrer to the complaint in the second action

will be sustained. *Turner v. Turner*, 205 N. C. 198, 200, 170 S. E. 646.

Applied in Fletcher Lbr. Co. v. Wilson, 222 N. C. 87, 21 S. E. (2d) 893.

V. DEFECT OF PARTIES.

As to joinder of parties, see sec. 1-70 and notes.

Lack of Necessary Parties.—Where a substituted trustee brings an equitable action to reform a deed of trust and certain mortgage notes which are negotiable and the holders of these notes are not parties plaintiff a demurrer under this section will be sustained. *First Nat. Bank v. Thomas*, 204 N. C. 599, 169 S. E. 189.

How Taken Advantage of.—If there is a defect of material parties, the defendant must take advantage of the same by demurrer if the defect appears from the complaint, and if not, by answer. Otherwise he will be deemed to have waived such objection. *Kornegay v. Farmer's, etc., Steamboat Co.*, 107 N. C. 115, 117, 12 S. E. 123; *Lanier v. Pullman Co.*, 180 N. C. 406, 409, 105 S. E. 21; *Styers v. Alspaugh*, 118 N. C. 631, 634, 24 S. E. 422. See *Sims v. Dalton*, 202 N. C. 249, 162 S. E. 550, affirming *Lanier v. Pullman Co.*, 180 N. C. 406, 105 S. E. 21; *Yonge v. New York Life Ins. Co.*, 199 N. C. 16, 153 S. E. 630; *Wiggins v. Harrell*, 200 N. C. 336, 155 S. E. 9.

The rule of the common law requiring the non-joinder of defendants in actions ex contractu to be pleaded in abatement, has been changed, and the omission of a necessary party defendant may, under this section be taken advantage of by demurrer when the defect appears upon the face of the complaint. *Merwin v. Ballard*, 65 N. C. 168, 169.

A plea alleging want of parties is a sham plea. The objection must be raised by demurrer. *Flack v. Dawson*, 69 N. C. 42.

The non-joinder of parties plaintiff may not be taken advantage of under a general issue. It must be raised by demurrer. *Lewis v. McNatt*, 65 N. C. 63.

A motion to dismiss the action is an inappropriate method of raising the question of want of proper parties. This must be raised by a demurrer. *Davidson v. Elms*, 67 N. C. 228.

How Defect of Party Cured.—Where there is a defect of parties, the question may be raised by demurrer, and when so raised the defect may be cured by making the lacking party a party to the action. *Graves v. Barrett*, 126 N. C. 267, 270, 35 S. E. 539.

Same—Correction of Misjoinder of Parties.—A misjoinder of parties plaintiff may upon demurrer or motion be corrected by taxing the plaintiff with such costs as are incurred by the misjoinder. *Pritchard v. Mitchell*, 139 N. C. 54, 56, 51 S. E. 783.

Misjoinder of an Unnecessary Party.—While a nonjoinder of one who is a necessary party is fatal, a misjoinder of one who is not a necessary party is a mere surplusage. *Green v. Green*, 69 N. C. 294. Hence the misjoinder of an unnecessary party is not a ground for demurrer. *Sullivan v. Field*, 118 N. C. 358, 24 S. E. 735; *Hargrove v. Hunt*, 73 N. C. 24, 25; *State v. Berryhill*, 84 N. C. 133, 137.

To sustain a demurrer to the complaint there must be a misjoinder of parties and causes of action, and a misjoinder of an unnecessary party is alone insufficient to have the action dismissed. *Shuford v. Yarbrough*, 197 N. C. 150, 147 S. E. 824; *Star Furniture Co. v. Carolina, etc., Ry. Co.*, 195 N. C. 636, 143 S. E. 242, citing *Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 368; *Bank v. Angelo*, 193 N. C. 576, 137 S. E. 705; *Roberts v. Mfg. Co.*, 181 N. C. 204, 106 S. E. 664. See *Winders v. Hill*, 141 N. C. 694, 54 S. E. 440.

Plaintiff Not Real Party in Interest.—Where the plaintiff in the complaint is not the real party in interest under section 1-57, the complaint is subject to demurrer under this section. *Fishell v. Evans*, 193 N. C. 660, 662, 137 S. E. 865.

Averment of Corporate Capacity.—In a suit against a railroad company, it may be designated as a company by its corporate name, without an averment of its corporate capacity, and if this is disputed, it should be by answer and not by demurrer. *Stanly v. Richmond, etc., R. Co.*, 89 N. C. 331.

Cited in Lamson Co. v. Morehead, 199 N. C. 164, 167, 154 S. E. 50.

VI. MISJOINDER OF SEVERAL CAUSES OF ACTION.

As to what causes may be joined, see sec. 1-123, and the notes thereto.

What Constitutes Misjoinder.—A complaint in an action which is not so prolix as to mislead or confuse the defendants or to conceal or obscure, by its elaboration or redundant words, the real cause of action is sufficient; and if the matters alleged arise out of one and the same transaction, or series of transactions, forming one course of dealings, all tending to one end, narrating the transaction as a whole,

the cause stated is not objectionable as multifarious. *Lee v. Thornton*, 171 N. C. 209, 88 S. E. 232.

It does not lie on this ground when causes of action which may have been united in one pleading, had they been separately stated, have been improperly mingled in one count, 64 N. Y. 173; the remedy is by motion, 1d; 29 O. S. 144; 6 Kas. 547; nor where the petition (or complaint) contains a single cause of action, though stated in different counts as separate causes of action, 30 O. S. 308; 13 Kas. 351; nor where the petition (or complaint) states a single cause of action, but asks several distinct forms of relief, all properly obtainable under the facts stated. 41 N. Y. 107.

Defendant's demurrer to the complaint on the ground of misjoinder in that the complaint stated three separate causes of action, was properly overruled, for although the complaint does not allege that the separate deeds were executed by the defendants, respectively, pursuant to a conspiracy to hinder, delay, and defraud creditors, an inference to that effect is not only permissible but inescapable from the facts alleged. *Barkley v. McClung Realty Co.*, 211 N. C. 540, 191 S. E. 3.

Same—Motion to Make More Certain.—Where the several causes of action are of such a nature that they can be properly joined under section 1-123, but they are not put together in a very logical way, the proper method of taking advantage of the defect is not by demurrer but by a motion to make more certain and definite. *State v. McCanless*, 193 N. C. 200, 206, 136 S. E. 371.

The Court May Divide the Several Misjoined Causes.—Even if the several causes have been improperly joined the court may allow the pleadings to conform thereto upon such terms as are just, and order the action to be divided into as many actions as are necessary for the proper determination of the controversy. See post section 1-132. *State v. McCanless*, 193 N. C. 200, 136 S. E. 371.

Applied in *Grady v. Warren*, 201 N. C. 693, 161 S. E. 319.

Cited in *Daniels v. Duck Island*, 212 N. C. 90, 193 S. E. 7; *Bowen v. Mewborn*, 218 N. C. 423, 11 S. E. (2d) 372 (concurring opinion).

VII. FAILURE TO STATE SUFFICIENT FACTS.

See sec. 1-122, clause 2, and note.

Fatal Defect in Complaint.—When it appears upon the face of the complaint that it is fatally defective, a demurrer will be sustained under this section. *Carson v. Jenkins*, 206 N. C. 475, 476, 174 S. E. 271.

Demurrer to Several Causes One of Which is Sufficiently Stated.—Where the petition states several causes of action any one of which is good, a demurrer to the whole petition on the ground that it states no cause of action will be overruled. *State v. McCanless*, 193 N. C. 200, 206, 136 S. E. 371.

Motion to Divide or Make More Certain.—Objection for misjoinder of causes of action should be made upon motion to divide them; objection to the complaint for multifarious, irrelevant, and redundant allegations, upon motion, made before answer or demurrer or time allowed to plead, to make it more definite and certain. *Lee v. Thornton*, 171 N. C. 209, 88 S. E. 232.

Question of Sufficiency Can Be Presented Only by Demurrer.—The sufficiency of the allegations of a complaint is not presented by a motion that certain designated allegations be stricken from the complaint, on the ground that said allegations are improper, irrelevant, and immaterial. That question can be presented only by a demurrer to the complaint, either in writing or ore tenus. *Poovey v. Hickory*, 210 N. C. 630, 631, 188 S. E. 78; *Parrish v. Atlantic Coast Line R. Co.*, 221 N. C. 292, 20 S. E. (2d) 299.

Defective Statement Which Can Be Cured by Amendment.—Where a pleading contains a defective statement, as the omission of a necessary allegation which can be cured by amendment, a demurrer will lie. *New Bern Banking, etc., Co. v. Duffy*, 156 N. C. 83, 72 S. E. 96; *Bowling v. Burton*, 101 N. C. 176, 7 S. E. 701; *Mizzell v. Ruffin*, 118 N. C. 69, 23 S. E. 927; *Ladd v. Ladd*, 121 N. C. 118, 28 S. E. 190; *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874.

But a complaint can not be overthrown by a demurrer unless it be wholly insufficient. *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874.

Complaint Liberally Construed.—Demurrer to a complaint on the ground that it fails to state a cause of action should be overruled if the complaint liberally construed alleges facts sufficient to constitute a cause of action or if facts sufficient for the purpose can be gathered from it. *Sparrow v. Morrell & Co.*, 215 N. C. 452, 2 S. E. (2d) 365.

Complaint Considered as a Whole.—A demurrer can not be sustained to a complaint if in any portion or to any extent it presents a cause of action, or if sufficient facts can

be fairly gathered therefrom. *Hoke v. Glenn*, 167 N. C. 594, 83 S. E. 807; *Jones v. Henderson*, 147 N. C. 120, 60 S. E. 894; *Caho v. Norfolk, etc., R. Co.*, 147 N. C. 20, 60 S. E. 640; *New Bern Banking, etc., Co. v. Duffy*, 156 N. C. 83, 72 S. E. 96; *Womack v. Carter*, 160 N. C. 286, 75 S. E. 1102.

A demurrer to a complaint on the ground that its allegations were insufficient to constitute a cause of action will not be sustained if, taking the pleading in its entirety, it is sufficient in one or more of its parts; and where the demurrer is that the contract sued on was a wagering one and no recovery could be had under § 16-3, and two causes of action are alleged, if only one of them should be good the demurrer should be overruled. *Meyer v. Fenner*, 196 N. C. 476, 146 S. E. 82.

Time of Demurrer.—The demurrer on this ground may be taken at any stage of the case, 32 N. Y. 397, before final judgment in error; but if such objection has not been made prior to filing the petition in error, it should in some form appear in the record of the reviewing court before the case is heard, 30 O. S. 133. Ed. Note.

Defendant may demur ore tenus at any time on the ground that the complaint fails to state a cause of action. *Aldridge Motors v. Alexander*, 217 N. C. 750, 9 S. E. (2d) 469.

Motion Ore Tenus.—A petition which is demurrable on this ground may also be taken advantage of by a motion ore tenus. *Tucker v. Baker*, 86 N. C. 1, 3.

Applied in *Grady v. Warren*, 201 N. C. 693, 161 S. E. 319; *Heater v. Carolina Power, etc., Co.*, 210 N. C. 88, 185 S. E. 447; *Reed v. Farmer*, 211 N. C. 249, 189 S. E. 882; *Swaringen v. Poplin*, 211 N. C. 700, 191 S. E. 746; *Doyle v. Whitley*, 214 N. C. 814, 200 S. E. 888; *Fletcher Lbr. Co. v. Wilson*, 222 N. C. 87, 21 S. E. (2d) 893.

Cited in *Key v. Home Chair Co.*, 199 N. C. 794, 795, 156 S. E. 135; *Lamson Co. v. Morehead*, 199 N. C. 164, 167, 154 S. E. 50; *Redfern v. McGrady*, 199 N. C. 128, 132, 154 S. E. 3; *Begnell v. Safety Coach Line*, 198 N. C. 688, 691, 153 S. E. 264; *Brewer v. Brewer*, 198 N. C. 669, 153 S. E. 163; *Cole v. Wagner*, 197 N. C. 692, 150 S. E. 339; *Gurganus v. McLawhorn*, 212 N. C. 397, 193 S. E. 844; *Kirby v. Reynolds*, 212 N. C. 271, 193 S. E. 412; *Bennett v. Southern Ry. Co.*, 211 N. C. 474, 191 S. E. 240.

§ 1-128. Must specify grounds.—The demurrer must distinctly specify the grounds of objection to the complaint, or it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein. (Rev., s. 475; Code, s. 240; C. C. P., s. 96; C. S. 512.)

The purpose of this section seems to be to give an opportunity to ask for an amendment if the defect admits of cure, or permits further costs to be avoided if the defect is incurable, since the party, upon the particulars being indicated, may become satisfied of the invalidity of his cause of action and discontinue further proceedings. *Thompson v. Johnson Funeral Home*, 205 N. C. 801, 808, 172 S. E. 500.

Comparison of Statute of 4 Anne and This Section.—In regard to demurrers this section improves upon the Statute of 4 Anne, and requires every demurrer, whether for substance or form, to specify distinctly the ground of objection to the complaint. *Garrett v. Trotter*, 65 N. C. 430, 433.

Nature of Demurrer Under the Code.—A demurrer under the Code differs from the former demurrer at law in this: Every demurrer, whether for substance or form, is now special, and must distinctly specify the ground of objection to the complaint, or be disregarded; it differs from the former demurrer in equity, in that the judgment overruling it is final, and decides the case, unless the pleadings are amended by leave to withdraw the demurrer and put in an answer. *Love v. Commissioners*, 64 N. C. 706.

Must Specify for Purposes of Amendment.—A demurrer must specify the ground upon which it is based to the end that the defect may be supplied by amendment. *Garrett v. Trotter*, 65 N. C. 430, 433.

A demurrer to the complaint ore tenus must distinctly specify the grounds of objection or it may be disregarded. *Seawell v. Chas. Cole & Co.*, 194 N. C. 546, 140 S. E. 85.

Otherwise It May Be Disregarded.—Under this section if the demurrer, interposed by the defendants, does not "distinctly specify the grounds of objection to the complaint," it may be disregarded or treated as a motion to dismiss from the refusal of which no appeal lies. *Griffin v. Bank of Coleridge*, 205 N. C. 253, 254, 171 S. E. 71.

A demurrer will not be sustained if the pleadings, liberally construed, are sufficient to sustain the causes therein, to which objection is made. *Enloe v. Ragle*, 195 N. C. 38, 141 S. E. 477.

Upon an appeal from a judgment overruling a demurrer to the complaint the merits of the controversy are not presented, and the court will determine only whether a cause of action has been sufficiently alleged. *Star Furniture Co. v. Carolina, etc., Ry. Co.*, 195 N. C. 636, 143 S. E. 242.

Strictness of the Requirement.—In *Love v. Commissioners*, 64 N. C. 706, the court said: "It is so easy to specify the ground of objection that the court is not disposed to relax the rule. There is no use in having a scribe unless you cut up to it." *Bank v. Bogle*, 85 N. C. 203; *Alford v. McCormac*, 90 N. C. 151.

A demurrer "that the complaint states no cause of action whatever" against the defendant, will be disregarded. It must distinctly specify the grounds of objection to the complaint. *Goss v. Waller*, 90 N. C. 149.

A demurrer is also insufficient which states generally that "there is a defect of parties" or that plaintiff has no legal capacity to sue. 9 Misc. N. Y. 91.

Motion to Dismiss Must Also Specify Grounds.—A motion to dismiss an action because the complaint does not state facts sufficient to constitute a cause of action is a demurrer, and should be disregarded unless it specifies the particulars of the alleged defect. *Elam v. Barnes*, 110 N. C. 73, 14 S. E. 621.

Demurring to Some Allegations and Replying to Others.—The latter sentence of this section clearly refers to a complaint containing several causes of action; or an answer taking two distinct grounds. Hence a party may not demur to some of the allegations supporting the same cause of action or the same defense, and reply to others. *Ransom v. McCles*, 64 N. C. 17, 21.

Cited in *State v. Suncrest Lumber Co.*, 197 N. C. 4, 6, 147 S. E. 682; *Brewer v. Brewer*, 198 N. C. 669, 671, 153 S. E. 163.

§ 1-129. Amendment; hearing.—If a demurrer is filed the plaintiff may be allowed to amend. If plaintiff fail to amend within five days after notice, the parties may agree to a time and place of hearing the same before some judge of the superior court, and upon such agreement it shall be the duty of the clerk of the superior court forthwith to send the complaint and demurrer to the judge holding the courts of the district, or to the resident judge of the district, who shall hear and pass upon the demurrer: Provided, if there be no agreement between the parties as to the time and place of hearing the same before the judge of the superior court, then it shall be the duty of the clerk of the superior court to send the complaint and demurrer to the judge holding the next term of the superior court in the county where the action is pending, who shall hear and pass upon the demurrer at that term of the court. (1919, c. 304, s. 4; Ex. Sess. 1921, c. 92, s. 5; C. S. 513.)

See notes under §§ 1-131, 1-163.

Editor's Note.—Prior to the amendment of 1921 the plaintiff was allowed to amend within three days, and upon failure to amend within such time, and in the absence of agreement between the parties as to the time and place of hearing the demurrer, it was made the duty of the clerk to send the complaint and the demurrer to the judge holding the courts of the district or to the resident judge of the district who was required to fix the time and place of hearing and notify the parties when and where he shall hear and pass upon the demurrer. There was no provision made as to the procedure in case there was no agreement between the parties. Besides these substantial changes, the phraseology of the section was also materially affected.

As to the changes affected upon this and other sections, see article entitled "Changes in North Carolina Procedure," in 1 N. C. L. R. 7-14.

Presumption on Appeal.—Where the plaintiff has not asked to be permitted to file an amendment to his complaint upon a demurrer being interposed thereto on the ground that a cause of action had not been sufficiently alleged, it will be considered on appeal that he has concluded to rely solely on the pleading he has filed. *Ballinger v. Thomas*, 195 N. C. 517, 142 S. E. 761.

Cited in *Gastonia v. Glenn*, 218 N. C. 510, 11 S. E. (2d) 459.

§ 1-130. Appeals.—Upon the rendering of the

decision upon the demurrer, if either party desires to appeal, notice shall be given and the appeal perfected as is now provided in case of appeals from decisions in term time. (1919, c. 304, s. 5; Ex. Sess. 1921, c. 92, s. 6; C. S. 514.)

Cross Reference.—As to appeal from judicial order or determination in superior court, see § 1-277.

Editor's Note.—The word "rendering" was substituted for the word "return" near the beginning of the section, and the words "from decisions" were inserted near the end of the section by the amendment of 1921.

Cited in *Williams v. Cooper*, 222 N. C. 589, 24 S. E. (2d) 484.

§ 1-131. Procedure after return of judgment.—

Within ten days after the return of the judgment upon the demurrer, if there is no appeal, or within ten days after the receipt of the certificate from the supreme court, if there is an appeal, if the demurrer is sustained the plaintiff may move, upon three days notice, for leave to amend the complaint. If this is not granted, judgment shall be entered dismissing the action. If the demurrer is overruled the answer shall be filed within ten days after the receipt of the judgment, if there is no appeal, or within ten days after the receipt of the certificate of the supreme court, if there is an appeal. Otherwise the plaintiff shall be entitled to judgment by default final or by default and inquiry according to the course and practice of the court. (1919, c. 304, ss. 6, 7; Ex. Sess. 1921, c. 92, ss. 7, 8; C. S. 515.)

Cross Reference.—As to pleading over after demurrer interposed in good faith, see § 1-162.

Editor's Note.—By the amendment of 1921 the word "judgment" was substituted for the words "decision overruling the demurrer" in the sentence preceding the last.

Statute Liberally Construed.—This section is in aid of an expeditious administration of justice and should be liberally construed and applied, to the end that actions may be tried on their merits and not dismissed because of defective pleadings. *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253; *Citizens Bank v. Gahagan*, 210 N. C. 464, 187 S. E. 464.

Discretion of Court.—A demurrer to a complaint will be sustained upon the insufficiency of the complaint to state a cause of action, and where a judgment sustaining such demurrer has been appealed from and upheld by the Supreme Court, the trial court has the power under this section, in the exercise of his sound discretion, to allow the plaintiff to amend the original complaint upon motion made within ten days after receipt by the clerk of the Superior Court of the certificate showing that the judgment of the Superior Court has been affirmed. *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253, affirmed in *McKeel v. Latham*, 202 N. C. 318, 162 S. E. 747; *Hood v. Elder Motor Co.*, 209 N. C. 303, 183 S. E. 529.

A motion for leave to amend a complaint under this section is addressed to the sound discretion of the trial court, and his order denying the motion is not subject to review on appeal in the absence of gross abuse of this discretion. *McKeel v. Latham*, 203 N. C. 246, 165 S. E. 694.

Judgment Should Not Be Rendered at Same Time Demurrer Overruled.—The action of the court in overruling defendant's demurrer and at the same time rendering judgment for plaintiff as prayed for in the complaint is error, since defendant has ten days after the demurrer is sustained or, if an appeal is taken, ten days after the certificate of the supreme court is received, in which to file answer. *Rayburn v. Rayburn*, 218 N. C. 514, 11 S. E. (2d) 463.

Dismissal Unless Motion to Amend Is Made.—Where a demurrer ore tenus interposed in the Supreme Court is sustained, questions of law presented by appellant's exception to the overruling of his written demurrers by the lower court need not be considered, and the case will be remanded with direction that it be dismissed, unless in apt time plaintiff moves for leave to amend as provided by this section. *White v. Charlotte*, 207 N. C. 721, 178 S. E. 219.

Amendment after Demurrer Sustained.—Under this section where the supreme court affirms the judgment of the court below sustaining the demurrer of one of defendants, the decision is without prejudice to plaintiff's right to amend the complaint, if so advised. *Byrd v. Waldrop*, 210

N. C. 669, 188 S. E. 101, wherein the court inadvertently referred to § 1-191.

Where the supreme court holds that the demurrer to the complaint should have been sustained, the plaintiff may move for leave to amend in accordance with this section. *Johnston County v. Stewart*, 217 N. C. 334, 7 S. E. (2d) 708.

Where it is determined on appeal that respondent's demurrer to the petition in condemnation proceedings should have been sustained, petitioner may apply to the court below for leave to amend the petition if so advised. *Gastonia v. Glenn*, 218 N. C. 510, 11 S. E. (2d) 459.

Notice of Motion.—After decision of the supreme court sustaining a demurrer to the complaint, but not dismissing the action, plaintiff moved during term to be allowed to file amended complaint. Defendant's objection thereto on the ground that it was entitled to three days written notice of the motion, is untenable, since parties are fixed with notice of all motions or orders made in pending causes during term, and the statutory provisions are not applicable in such instances. *Harris v. Board of Education*, 217 N. C. 281, 7 S. E. (2d) 538.

In reversing the judgment of the lower court overruling defendant's demurrer, the opinion of the supreme court stated that plaintiff will be given reasonable time to amend her complaint, if she so desires. There was no motion by plaintiff in the supreme court to be allowed to amend. The statement merely indicated to plaintiff that the procedure to amend under the provisions of this section, was still open to her, and the opinion of the supreme court does not entitle her to file amended complaint as a matter of right without notice to defendant. *Scott v. Harrison*, 217 N. C. 319, 7 S. E. (2d) 547.

Where plaintiff, after notice of defendant's intention to move to be allowed to amend his answer, requests and obtains a continuance of the motion he thereby waives his right to object that notice of the motion was not given him within the ten-day period prescribed by this section even conceding that the provisions of this section are applicable, the purpose of the requirement of notice being merely to call the matter to the attention of the adverse party and to give him reasonable time for preparation. *Cody v. Hovey*, 217 N. C. 407, 8 S. E. (2d) 479.

Demurrer to Affirmative Defense Set Up in Answer.—Where the supreme court holds that plaintiff's demurrer to an affirmative defense set up in the answer should have been sustained and that defendant might move for leave to amend "in accordance with the provision of C. S. 515," [§ 1-131] the provision for amendment of the answer in accordance with this section is an inadvertence, and cannot be held to confine defendant to the procedure specified in this section, the provisions of this section not being applicable to the amendment of an answer after judgment sustaining a demurrer to an affirmative defense or counterclaim, but only to the amendment of the complaint after judgment sustaining a demurrer thereto, and the supreme court having no right to require defendant to adopt an inappropriate procedure in seeking an amendment to his answer. *Cody v. Hovey*, 217 N. C. 407, 8 S. E. (2d) 479. See also, *Barber v. Edwards*, 218 N. C. 731, 12 S. E. (2d) 234.

Under this section where an action has been dismissed for misjoinder of parties and causes, the action is not pending and the court has no power to allow a motion to amend the pleadings. *Grady v. Warren*, 202 N. C. 638, 163 S. E. 679.

Appeal.—Where the trial judge has allowed the plaintiff's motion to amend his complaint under this section upon due notice, within ten days after the receipt of the certificate by the clerk of the trial court from the Supreme Court on a former appeal, sustaining a demurrer to the complaint, the procedure is, if objected to by the defendants, to note an exception and appeal from the final judgment, and an appeal otherwise will be dismissed as premature. *Morris v. Cleve*, 194 N. C. 202, 139 S. E. 230.

Judgment overruling defendant's demurrer for failure of the complaint to state a cause of action does not preclude defendant from raising the same question by a motion to dismiss or for judgment as of nonsuit. *Law v. Cleveland*, 213 N. C. 289, 195 S. E. 809.

Judgment of Clerk Final and Conclusive.—The judgments of the clerk of the court rendered within the authority given him by this section, are judgments of the Superior Court, and have the same effect as those rendered by the judge, and when not appealed from, are final and conclusive. *Williams v. Williams*, 190 N. C. 478, 130 S. E. 113.

Cited in *Morris v. Cleve*, 197 N. C. 253, 257, 148 S. E. 253; *Shuford v. Yarbrough*, 198 N. C. 5, 150 S. E. 618; *Adams v. Cleve*, 218 N. C. 302, 10 S. E. (2d) 911; *Cody v. Hovey*, 216 N. C. 391, 5 S. E. (2d) 165.

§ 1-132. Division of actions when misjoinder.—

If the demurrer is sustained for the reason that several causes of action have been improperly united, the judge shall, upon such terms as are just, order the action to be divided into as many actions as are necessary for the proper determination of the causes of the action therein mentioned. (Rev., s. 476; Code, s. 272; C. C. P., s. 131; C. S. 516.)

Provisions of Section Mandatory.—It is the duty of the judge, on just terms to divide the action on the docket for separate trials. *Gattis v. Kilgo*, 125 N. C. 133, 136, 34 S. E. 246.

See *Weeks v. McPhail*, 128 N. C. 134, 138, 38 S. E. 292, where the division of the action is spoken of as being within the discretion of the court.

With or Without Terms.—The judge may permit an amendment to divide the action with or without terms. *State v. Roberts*, 108 N. C. 174, 177, 12 S. E. 890.

Different Venues.—Where causes of action have been improperly joined, the court may order the action to be divided upon demurrer, though triable in different counties. *Richmond Cedar Works v. Roper Lumber Co.*, 161 N. C. 603, 604, 77 S. E. 770.

Dismissal of One of Two Causes for Lack of Jurisdiction.—Where two causes of action are improperly joined, but one of them, because of the amount involved, is not within the jurisdiction of the court, it may be dismissable as to the one over which the court has no jurisdiction. *Railroad Co. v. Wakefield Hdw. Co.*, 135 N. C. 73, 47 S. E. 234.

Misjoinder of Causes and Parties.—Where there is not only a misjoinder of distinct causes of action, but also misjoinder of parties having no community of interest, the action cannot be divided under this section. *Mitchell v. Mitchell*, 96 N. C. 14, 1 S. E. 648; *Cromartie v. Parker*, 121 N. C. 198, 204, 28 S. E. 297; *Mortan v. Western Union Tel. Co.*, 130 N. C. 299, 41 S. E. 484; *Jones v. McKinson*, 87 N. C. 294, 298; *Roberts v. Utility Mfg. Co.*, 181 N. C. 204, 106 S. E. 664; *Taylor v. Postal Life Ins. Co.*, 182 N. C. 120, 108 S. E. 502; *Rose v. Freemont Warehouse, etc., Co.*, 182 N. C. 107, 109, 108 S. E. 389; *Citizens Nat. Bank v. Angelo*, 193 N. C. 576, 137 S. E. 705.

For example an action brought by the wife in which her husband has joined, each independently seeking to recover from the defendant the value of their services separately rendered, upon a quantum meruit, is a misjoinder both of parties plaintiff and causes of action, which will ordinarily be dismissed upon demurrer; but the court may sustain the demurrer and permit the defect to be cured by an amendment and the wife's cause proceeded with upon such terms as it considers just. *Shore v. Holt*, 185 N. C. 312, 117 S. E. 165.

Divisible, Even Though Demurrable.—A complaint in which are joined two causes of action, the one upon a clerk's bond and the other upon a bond of an administrator, is demurrable. But in such case the court may order the action to be divided. *Street v. Tuck*, 84 N. C. 605.

Further Service of Summons.—Where a division of the action is ordered under this section, no further service of summons is necessary. *Hodges v. Wilmington, etc., R. Co.*, 105 N. C. 170, 172, 10 S. E. 917.

Motion to Divide.—In *Dunn v. Aid Society*, 151 N. C. 133, 65 S. E. 761, the court held that where there is a misjoinder of actions the remedy is by motion to divide the actions where the defendant was already in court and had received notice by the summons and complaint. To same effect, see *Lee v. Thornton*, 171 N. C. 209, 88 S. E. 232; *Solomon v. Bates*, 118 N. C. 311, 316, 24 S. E. 478.

Principle of the section stated in *State v. McCannless*, 193 N. C. 200, 136 S. E. 371.

Cited in *Pender County v. King*, 197 N. C. 50, 56, 147 S. E. 695; *Shuford v. Yarbrough*, 198 N. C. 5, 150 S. E. 618; *Shemwell v. Lethco*, 198 N. C. 346, 348, 151 S. E. 729.

§ 1-133. Grounds not appearing in complaint.—When any of the matters enumerated as grounds of demurrer do not appear on the face of the complaint, the objection may be taken by answer. (Rev., s. 477; Code, s. 241; C. C. P., s. 98; C. S. 517.)

Cross Reference.—As to grounds for demurrer, see § 1-127.

Controverting Allegations of Complaint.—Where the defendant controverts the truth of the allegations contained in the complaint, this must be done by an answer and not by a demurrer. *Laney v. Hutton*, 149 N. C. 264, 62 S. E. 1082.

Pendency of Another Suit. — Where another action is pending for the same cause and between the same parties, which fact does not appear on the face of the complaint, the objection may be taken by answer. *Cook v. Cook*, 159 N. C. 46, 47, 74 S. E. 639; *Allen v. Salley*, 179 N. C. 147, 101 S. E. 545. It is a ground of demurrer, if it appears on the complaint. See ante, section 1-127, clause 3, and annotations.

This rule was followed in *State v. Gant*, 201 N. C. 211, 229, 159 S. E. 427; *Thompson v. Virginia, etc., So. R. Co.*, 216 N. C. 554, 6 S. E. (2d) 38; *Johnson v. Smith*, 215 N. C. 322, 1 S. E. (2d) 834.

Defect of parties which does not appear on the face of the complaint must be taken advantage of by answer, otherwise it will be deemed as waived. *Lunn v. Shermer*, 93 N. C. 164, 167. See the next section.

But where the defect does appear on the face of the complaint, it is a ground of demurrer and cannot be taken advantage of in any other way. *Burns v. Ashworth*, 72 N. C. 496.

Stated in *Cheshire v. First Presbyterian Church*, 220 N. C. 393, 17 S. E. (2d) 344.

Cited in *Hawkins v. Carter*, 196 N. C. 538, 541, 146 S. E. 231; *Murchison Nat. Bank v. Broadhurst*, 197 N. C. 365, 148 S. E. 452.

§ 1-134. Objection waived.—If objection is not taken either by demurrer or answer, the defendant waives the same, except the objections to the jurisdiction of the court and that the complaint does not state facts sufficient to constitute a cause of action. (Rev., s. 478; Code, s. 242; C. C. P., s. 99; C. S. 518.)

See note under § 1-127.

In General.—The similar section of the N. Y. Code means that when objection is not taken by demurrer, when that mode is proper, or by answer in cases where that is the appropriate method, it is waived. 13 N. Y. 332.

When the objection is one proper to be raised by demurrer, the defendant waives it by raising the objection by answer. 9 How. 246; 37 N. Y. 372; 13 How. 207.

Exceptions Not Waived—Motion to Dismiss at Any Time. — As to the two exceptions mentioned in this section there can be no waiver, and objections may be made at any time. *Johnson v. Finch*, 93 N. C. 205, 208. *Halstead v. Mullen*, 93 N. C. 252, 255; *Gurganus v. McLawhorn*, 212 N. C. 397, 193 S. E. 844; *Raleigh v. Hatcher*, 220 N. C. 613, 18 S. E. (2d) 207.

Same.—In the Supreme Court. — The want of jurisdiction and the failure of the complaint to state facts sufficient to constitute a cause of action cannot be waived and may be taken advantage of at any time even in the Supreme Court. *Hunter v. Yarborough*, 92 N. C. 68, 70; *Tucker v. Baker*, 86 N. C. 1; *Clements v. Rogers*, 91 N. C. 63, 64; *Knowles v. Norfolk, etc., R. Co.*, 102 N. C. 59, 62, 9 S. E. 7; *Raleigh v. Hatcher*, 220 N. C. 613, 18 S. E. (2d) 207.

Defective Statement and Defective Cause Distinguished. —A defective statement of a good cause of action must be taken advantage of by demurrer, and will be deemed to have been waived or cured unless so taken; but a statement of a defective cause may be taken advantage of by a motion to dismiss at any time even in the Supreme Court; or the court may dismiss the action of its own motion. *Cook v. American Exch. Bank*, 129 N. C. 149, 153, 39 S. E. 746; *Baker v. Garriss*, 108 N. C. 218, 219, 230, 13 S. E. 2.

The second exception mentioned in this section applies to complaints that fail "to state facts sufficient to constitute a cause of action," or in other words when it appears therefrom that the action will not lie. The other objections must be raised by demurrer or answer in proper time, or else they will be deemed waived. *Halstead v. Mullen*, 93 N. C. 252, 255.

In *Garrett v. Trotter*, 65 N. C. 430, 435, the court used the following illustrative language which explains the nature of the two exceptions referred to in this section; "The counsel for the defendant, and his Honor, fell into error by not adverting to the distinction above referred to, between a defective statement of a cause of action and a statement of a defective cause of action. There is a like distinction between a defect of jurisdiction in respect to the subject of the action, and a want of jurisdiction in respect to the person; for illustration: Action in a Superior Court upon a note for less than \$200; here, there is a defect of jurisdiction in respect to the subject of the action; it cannot be helped by waiver, consent, amendment or otherwise, and the sooner the proceeding is stopped the better. Action in the county

of Orange, against the Charlotte and Columbia Railroad Company; here is a want of jurisdiction in respect to the person, which may be waived by consent, or by making full defense or pleading by an attorney of the Court."

The failure of a complaint in an action for nondelivery of cotton to allege readiness and ability to pay is a defective statement of a good cause of action. *Blalock v. Clark*, 133 N. C. 306, 45 S. E. 642.

Lack of Jurisdiction.—The defendant by filing an answer to the complaint in the Superior Court did not waive his right to demur ore tenus to the complaint on the ground that the court had no jurisdiction of the action and that the complaint does not state facts sufficient to constitute a cause of action. *Finley v. Finley*, 201 N. C. 1, 3, 158 S. E. 549.

A court has only that jurisdiction granted it by the Constitution and by statute, and it cannot acquire jurisdiction by waiver or consent, and objection to the jurisdiction may be taken at any time during the progress of the action. *McCune v. Rhodes-Rhynne Mig. Co.*, 217 N. C. 351, 8 S. E. (2d) 219.

Defect of Parties.—The defect of nonjoinder of a plaintiff unless availed of by demurrer or by plea shall be deemed to have been waived. *Lewis v. McNatt*, 65 N. C. 63. The general rule is that defects of parties must be raised by demurrer or answer. *Usry v. Suit*, 91 N. C. 406, 414; *Godwin v. Jernigan*, 174 N. C. 76, 93 S. E. 443; *Knowles v. Norfolk, etc., R. Co.*, 102 N. C. 59, 62, 9 S. E. 7; *Mizzell v. Ruffin*, 118 N. C. 69, 71, 23 S. E. 927. See ante, section 1-127, cl. 4, and annotations.

Same—Legal Capacity to Sue. — A demurrer ore tenus to the complaint upon the ground of defect of parties, or that the plaintiff did not have the legal capacity to sue, will not be sustained, as such defense is deemed waived unless taken by a written answer or demurrer. *Kochs Co. v. Jackson*, 156 N. C. 326, 72 S. E. 382. See also, *Fisher v. Traders' Mut. Life Ins. Co.*, 136 N. C. 217, 220, 48 S. E. 667. See also, ante, sec. 1-127, cls. 2 and 4, and annotations thereto.

Arrest of Judgment for Defective Causes. — The provisions of this section as regards complaints which do not contain facts sufficient to constitute a cause of action, are satisfied by arresting the judgment in cases where they apply. *Love v. Commissioners*, 64 N. C. 706.

Premature Institution of Action. — In an action against an executor the objection that the action is prematurely commenced should be set up by the defendant in his answer. *Clements v. Rogers*, 91 N. C. 63, 64.

Demurrer after Answer. — A demurrer to the jurisdiction of the court or that the complaint does not state facts sufficient to constitute a cause of action, may be entered after answer filed, and the principle upon which it is ordinarily required that the answer be first withdrawn with leave of the court before demurring to the complaint, does not apply. *Cherry v. Atlantic Coast Line R. Co.*, 185 N. C. 90, 116 S. E. 192.

Demurrer ore tenus does not lie where answer has been filed and the demurrer does not raise objection to the jurisdiction or that complaint does not state facts sufficient to constitute a cause of action. *Roberts v. Grogan*, 222 N. C. 30, 21 S. E. (2d) 829.

Applied in *Miller v. Roberts*, 212 N. C. 126, 193 S. E. 286; *Hanes Funeral Home v. Spencer*, 214 N. C. 702, 200 S. E. 397; *Jones v. Jones Lewis Furniture Co.*, 222 N. C. 439, 23 S. E. (2d) 309.

Cited in *Morris v. Cleve*, 197 N. C. 253, 258, 148 S. E. 253; *Roebuck v. Short*, 196 N. C. 61, 144 S. E. 515; *Tallassee Power Co. v. Peacock*, 197 N. C. 735, 737, 150 S. E. 510; *Mountain Park Institute v. Lovill*, 198 N. C. 642, 153 S. E. 114; *Begnell v. Safety Coach Line*, 198 N. C. 688, 691, 153 S. E. 264; *Brewer v. Brewer*, 198 N. C. 669, 671, 153 S. E. 163; *Bechtel v. Bohannon*, 198 N. C. 730, 153 S. E. 316; *Carpenter v. Boyler*, 213 N. C. 432, 196 S. E. 850.

Art. 15. Answer.

§ 1-135. Contents.—The answer of the defendant must contain—

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition. (Rev., s. 479; Code, s. 243; C. C. P., s. 100; C. S. 519.)

I. In General.

II. Denials.

A. General and Specific Denials.

B. Denial of Information or Knowledge.

III. New Matter in Defense.

Cross Reference.

As to contents of complaint, see § 1-122.

See note under § 1-137.

I. IN GENERAL.

Any Defense Available under Old System, Available under the New.—Under the Code the defendant may avail himself of any defense that would have been available under the old mode of procedure, either legal or equitable. *Clark v. Clark*, 65 N. C. 655, 660.

Must State Facts.—The answer, like the complaint, must state facts upon which the validity of the defense rests. An averment of a general principle of law will not do. *Knight v. Killebrew*, 86 N. C. 400, 403.

Statement in Plain and Intelligible Manner.—The defendant must state his grounds of defense in a plain, strong and intelligible manner. *McLaurin v. Cronly*, 90 N. C. 50, 52.

Precision and Particularity in Alleging Defenses.—The defendant's defense must be alleged with the same precision and certainty as if alleged in a complaint. *American Nat. Bank v. Hill*, 169 N. C. 235, 85 S. E. 209.

Although an answer to a complaint in an action on a note does not set out the allegations of fraud with that particularity that the rules of pleading ordinarily require, yet, if it seems intended to raise a serious question of fraud, it will not be stricken out as frivolous, for, if filed in good faith, the defendant is entitled to have the facts alleged in it either admitted by demurrer or tried by a jury. *Campbell v. Patton*, 113 N. C. 481, 18 S. E. 687.

Allegata and Probata Must Correspond.—No defense which is not set up in the answer may be introduced at terms and proved. The rule that the allegata and probata must correspond prevails as much under the Code as under the old system. *McLaurin v. Cronly*, 90 N. C. 50.

Stated in Bourne v. Board of Financial Control, 207 N. C. 170, 178, 176 S. E. 306.

C. 170, in *Jeffreys v. Hocutt*, 195 N. C. 339, 344, 142 S. E. 226; *Shemwell v. Lethco*, 198 N. C. 346, 348, 151 S. E. 729; *Hutchins v. Mangum*, 198 N. C. 774, 775, 153 S. E. 409; *Patterson v. Southern Ry. Co.*, 214 N. C. 38, 198 S. E. 364; *Shore v. Shore*, 220 N. C. 802, 18 S. E. (2d) 353; *Sayles v. Loftis*, 217 N. C. 674, 9 S. E. (2d) 393.

II. DENIALS.

A. General and Specific Denials.

Old General Issue and Denials under the Code.—One principal object of the new system was to abolish or restrict the use of the general issue; to require of plaintiffs, as far as it was practicable, a statement of the facts as they were, and not according to their legal effect; and thus both to enable and to require defendants to specify the particular facts which they intended to controvert. To permit a denial of the facts of the complaint en masse, would be to lose this object and to allow and extend, at least where the answer is not under oath, and abuse the general issue, which formerly existed. It would seem also to ignore the requirements that the denial shall be of each material allegation. The requirement seems to demand that the defendant should separately answer each material allegation by a general denial either of the whole allegation (not the whole complaint), or by a specific denial of some selected and specific part of the allegation. *Heyer v. Beatty*, 76 N. C. 28, 30.

Nature of Denials under the Code and Purpose Thereof.—The denials referred to in this section may be a general denial—that is that the allegation is not true, or specific—that is, that it is true in some respects but not true in others. The purpose is to require the defendant frankly to deny the truth of the allegations of the complaint, if he can, or, if he can not, then to admit the truth of them, or to specifically admit the truth of them, so far as they are true within his knowledge and deny the truth of the same in particular respects, so far as he may be warranted in doing so by the facts; and he is further required to state such knowledge and information as he may have as to the allegations sufficient to form a belief. Such denials, admissions and statements of facts should be direct, positive and unequivocal—not argumentative and evasive. *Rumbough v. Southern Improve. Co.*, 106 N. C. 461, 464, 11 S. E. 528.

A plea by denial simply controverts the material allegations of the complaint and puts plaintiff to proof; while a plea in confession and avoidance sets up new matter, which is matter not appearing in the complaint, constituting an

affirmative defense, and such new matter must be properly alleged in order to give notice that it will be used. *Cohoon v. Swain*, 216 N. C. 317, 5 S. E. (2d) 1.

General Denial.—It has been repeatedly held that a general denial, that "no allegation of the complaint is true," is not a sufficient answer under this section, because such a plea may put in one issue several matters of fact, some of which are triable by the court, and others by the jury. *Flack v. Dawson*, 69 N. C. 42; *Brown v. Cooper*, 89 N. C. 237.

Specific Denial.—An answer denying "the truth of the averments contained in the first, second, third, fourth, fifth and sixth paragraphs of the complaint" (being the number contained in the complaint), is a specific denial of each allegation and a sufficient compliance with this section. *Brown v. Cooper*, 89 N. C. 237.

Effect of Failure to Deny.—If an allegation in the complaint is not denied in the answer, it is admitted, and is as effectual as if found by a jury. *Bonham v. Craig*, 80 N. C. 224.

Where the only controverted fact has no bearing on the rights of the parties, judgment may be rendered on the pleadings upon the facts admitted. *Jeffreys v. Boston Ins. Co.*, 202 N. C. 368, 162 S. E. 761.

B. Denial of Information or Knowledge.

Denial of Both Knowledge and Information Necessary.—A denial of knowledge without a denial of information sufficient to form a belief is not sufficient to fulfill the requirement of this section. *Durden v. Simmons*, 84 N. C. 555; *Fagg v. Southern Bldg., etc., Ass'n*, 113 N. C. 364, 368, 18 S. E. 655.

Denial upon Information and Belief.—Where an allegation in a complaint is within the personal knowledge of the defendant, a statement in the answer that he is informed and believes that the allegations of the complaint are not true, and therefore denies the same, is not, under this section, sufficient to raise an issue. The answer may, however, be amended in the discretion of the court. *Avery v. Stewart*, 134 N. C. 287, 299, 46 S. E. 519.

An allegation which does not relate to a personal transaction may be denied on information and belief. *Grimes v. Lexington*, 216 N. C. 735, 6 S. E. (2d) 505.

Allegations that defendant "denies that it has any knowledge or information thereof sufficient to form a belief" is not an admission of the facts alleged in the complaint but is in exact accord with this section and puts plaintiff to proof. *Campbell v. Peoples Sav. Bank, etc., Co.*, 214 N. C. 680, 200 S. E. 392.

An allegation in an answer that defendant has no information of facts alleged in a certain paragraph of the complaint, and demands proof thereof, is not sufficient to put such facts in issue. *Woodcock v. Bostic*, 128 N. C. 243, 38 S. E. 881; *Fagg v. Southern Bldg., etc., Ass'n*, 113 N. C. 364, 18 S. E. 655.

A denial of the allegations of the complaint, made in the form prescribed, i. e., of any knowledge or information thereof, sufficient to form a belief, being allowed by the Code of Civil Procedure, raises, when interposed, a sufficient issue; and such answer is not subject to the objection of being insufficient or frivolous. *Farmers, etc., Bank v. Board*, 75 N. C. 45.

However where a complaint alleges a matter to be within the personal knowledge of defendant an answer "that defendant has no knowledge or information sufficient to form a belief" stated no defense and was an admission of the truth of the allegation of the complaint. *Lay Gas Mach. Co. v. Falls, etc., Mfg. Co.*, 91 N. C. 74.

In an action on notes given for the price of land, denial on information and belief of a count of the complaint alleging that the notes were indorsed for valuable consideration was sufficient. *Willis v. Williams*, 174 N. C. 769, 94 S. E. 513.

In an action for specific performance of a lost bond for title, which denies that the bond embraces the land in controversy according to defendant's best recollection and belief, is sufficient and raises an issue of fact. *Conder v. Stallings*, 161 N. C. 17, 76 S. E. 627.

III. NEW MATTER IN DEFENSE.

New Matter Equitable or Legal.—The answer may contain new matter in defense whether equitable or legal. *Bean v. Western, etc., R. Co.*, 107 N. C. 731, 741, 12 S. E. 600.

Matters in Justification.—Under the old system of pleading, upon the general issue matter in justification could not be proved; it must be pleaded specially. *Barker v. Burham*, 3 Wilson, 368, on pages 370, and 371; *Bush v. Parker*, 1 Bing, N. C. 312; *Brown v. Burnett*, 5 Cowen, 181; 1 Chitty on Pl., 501. Under the Code practice the prin-

ciple is not changed. A defense which can not be maintained by a denial of the allegations in the complaint, must be set up as new matter in the answer. *Raynor v. Wilmington Seacoast R. Co.*, 129 N. C. 195, 198, 39 S. E. 821.

Time of Existence of New Matter in Defense. — This section does not require that new matter constituting a defense must exist at the time of the commencement of the action, and a defense arising thereafter was recognized in *Puffer v. Lucas*, 101 N. C. 281, 285, 7 S. E. 734, and in the later case of *Smith & Co. v. French*, 141 N. C. 1, 2, 53 S. E. 435, it was held that, "A counterclaim connected with the plaintiff's cause of action or with the subject of the same should not necessarily or entirely mature before action commenced, nor even before answer filed." *Williams v. Hutton, etc., Co.*, 164 N. C. 216, 223, 80 S. E. 257. But as to this latter conclusion, see section 1-137, class (2) and annotations thereto.

§ 1-136. Debt for purchase money of land denied. — If the defendant shall deny in his answer that the obligation sued on was for the purchase money of the land described in the complaint, it shall be the duty of the court to submit the issue so joined to the jury. (Rev., s. 480; Code, s. 235; 1879, c. 217; 1921, c. 45; C. S. 520.)

Cross Reference.—See also, § 1-122, paragraph 4.

Editor's Note. — The amendment of 1921, substituted the words "shall deny," near the beginning of this section, for the word "denies."

For a similar provision requiring the plaintiff to state that the consideration of debt was the purchase money of land, see section 1-122, clause 4.

Defendant Entitled to Have Issue Determined by Jury. — In an action on a note alleged to have been given for the purchase money of land, the defendant, if he demands it in apt time and tenders an appropriate issue, has the right to have the question submitted to the jury as to whether or not the note was given for the purchase money of the land. *Davis v. Evans*, 142 N. C. 464, 55 S. E. 344.

Waiver of Right of Jury Trial. — Although the defendant is under this section, entitled to have the issue whether the debt sued on was contracted for the purchase of land, tried by a jury, yet, if after being duly summoned, he fails to appear and answer, he waives that right. *Durham v. Wilson*, 104 N. C. 595, 10 S. E. 683.

§ 1-137. Counterclaim.—The counterclaim mentioned in this article must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. (Rev., s. 481; Code, s. 244; C. C. P., s. 101; C. S. 521.)

- I. In General.
 - A. Editor's Note.
 - B. General Constructions.
- II. Claims Arising out of Plaintiff's Demand.
 - A. General Rules and Instances.
 - B. Time of Existence.
- III. Claims Arising out of Independent Contract.
 - A. General Rules and Instances.
 - B. Time of Existence.
- IV. Pleading and Practice.
 - A. Rules of Pleading.
 - B. Non Suit.
 - C. Jurisdictional Amount.

Cross Reference.

As to duty of jury to render verdict and assess the amount of recovery by defendant in the event of successful counterclaim, see § 1-204.

See 13 N. C. Law Rev., 86, for annotation.

I. IN GENERAL.

A. Editor's Note.

Settlement of two independent disputes between the same parties in the action was beyond the conception of the

common law system of pleading and practice. Claims in favor of defendant arising out of the same transaction as sued upon by the plaintiff, for example a breach of warranty of soundness of personalty sold to the defendants, in an action by the plaintiff upon the purchase price of the property sold, could be set up to defeat plaintiff's claim, and this was known as recoupment. The characteristic features of recoupment were (1) that the defense must arise out of the plaintiff's action on which it is based, (2) it need not be liquidated, (3) could not be used against sealed instruments, (4) and could not be an equitable defense, and (5) no recovery over be had thereon.

While those claims of the defendant which arose out of the same transaction were available in the same action by way of recoupment, subject to the features just enumerated, the defendant could not avail himself of any claim which he might have against the plaintiff and which arose out of a different transaction, and had to bring an independent action therefor. But the inefficiency involved in this method of procedure and the injustices resulting therefrom soon lead to the enactment of the statute of set-off, under which liquidated claims arising out of different transactions could be availed of by the defendant against the plaintiff's demand in the same action. As in the case of recoupment, no recovery over the plaintiff's claim could be had. Another distinction of defenses available by way of counterclaim and those available by way of set-off consisted in the fact that in the former case if the defenses were not pleaded in the same action it was concluded and could not be made the subject of an independent subsequent action; whereas in the latter case it was optional with the defendant to avail himself of his claim, so that in case he did not avail himself in the same action, an independent subsequent action could be maintained thereon.

The effect of the Code is to consolidate the common law recoupment and the statutory set-off, by abolishing all differences that existed between them, by treating the two under the name of counterclaim, with a liberal tendency in favor of the defendant.

The consequence of this consolidation is to enable the defendant to avail himself of his claim in the same action, whether such claim arises out of the same transaction, or different transactions, and whether or not it exceeds the claim of the plaintiff, as recovery for the excess is now permissible.

Cited in *Shemwell v. Lethco*, 198 N. C. 346, 348, 151 S. E. 729; *English Drug Co. v. Helms*, 199 N. C. 755, 757, 155 S. E. 871; *Shore v. Shore*, 220 N. C. 802, 18 S. E. (2d) 353 (dis. op.); *Sineath v. Katzis*, 219 N. C. 434, 14 S. E. (2d) 418 (dis. op.).

B. General Constructions.

Liberal Construction.—This section is very broad in its scope and terms, and should be liberally construed by the court in furtherance of the most desirable and beneficial purpose for which it is enacted. *Smith v. French*, 141 N. C. 1, 6, 53 S. E. 435; *Smith v. Young Bros.*, 109 N. C. 224, 226, 13 S. E. 735; *Garrett v. Love*, 89 N. C. 205, 207.

This section on counterclaim is very broad in its scope and terms, is designed to enable parties litigant to settle well-nigh any and every phase of a given controversy in one and the same action, and should be liberally construed by the court in furtherance of this most desirable and beneficial purpose. *Bourne v. Board of Financial Control*, 207 N. C. 170, 178, 176 S. E. 306.

While this section must be liberally construed, its reasonable restrictions must nevertheless be observed in the interest of orderly judicial investigation. *Manufacturers, etc., Finance Corp. v. Lane*, 221 N. C. 189, 19 S. E. (2d) 849.

More Comprehensive Than the Old Set-Off.—The counterclaim, in an action on contract, embraces not only matter that under the old practice was termed a set-off, but every other cause of action arising out of contract, whether legal or equitable, between the plaintiff and defendant. Where there are more than one plaintiff or defendant it is further extended so that not only mutual debts between the plaintiffs and defendants, but every claim by the defendants, or any one of them, against the plaintiffs, or any of them, between whom a several judgment might be had in the action, is embraced. *Neal v. Lea*, 64 N. C. 678.

Subject to the limitations expressed in this section, a counterclaim includes practically every kind of cross-demand existing in favor of defendant against the plaintiff in the same right, whether said demand be of a legal or an equitable nature. It is said to be broader in meaning than set-off, recoupment, or cross-action, and includes them all, and secures to defendant the full relief which a separate action at law, or a bill in chancery, or a cross-bill would have secured on the same state of facts. *Smith v. French*, 141 N.

C. 1, 7, 53 S. E. 435, followed in *Aetna Life Ins. v. Griffin*, 200 N. C. 251, 253, 156 S. E. 515; *Bourne v. Board of Financial Control*, 207 N. C. 170, 178, 176 S. E. 306.

There is no reason to continue the plea in bar as the limited common-law prototype of modern counterclaim, since this section gives full relief by admitting demands of that character as counterclaims at their full value, which the common law did not. *Manufacturers, etc., Finance Corp. v. Lane*, 221 N. C. 189, 198, 19 S. E. (2d) 849.

Enumeration of Grounds Exclusive.—A defendant cannot set up as a defense or counterclaim any and every cause of action he may have against the plaintiff. He may set up only such causes as counterclaims, that fall within one of the subdivisions of this section. *Byerly v. Humphrey*, 95 N. C. 151.

Criterion to Determine a Valid Counterclaim.—The criterion, for determining whether a defense set up can be maintained as a counterclaim, is whether there is a cause of action upon which the defendant might have sustained a suit against the plaintiff; and if there is, then such cause of action is a counterclaim. *Battle v. Thompson*, 65 N. C. 406, 408.

Payment and Counterclaim Compared.—A payment pro tanto extinguishes the debt eo instanti and is itself thereby extinguished, so that neither remains any longer the subject of an action. On the contrary, a counterclaim which now includes a set-off, is the assertion by the defendant of an independent demand which might be maintained in an independent action. *General Elect. Co. v. Williams*, 123 N. C. 51, 31 S. E. 288.

Cannot Be Set against the State.—A person, indebted to the State and sued on such indebtedness, cannot offer as a set-off or counterclaim the indebtedness of the State to him. The reason being that a counterclaim is allowed to avoid circuity of actions, and as none of its citizens can bring suit against the State, the counterclaim is not permissible. *Battle v. Thompson*, 65 N. C. 406.

With a few exceptions, growing out of public policy, the rules of law which apply to the government and individuals are the same. *McKnight v. United States*, 98 U. S. 179, 186, 25 L. Ed. 115.

Waiver of Exemption by United States.—Although direct suits cannot be maintained against the United States, yet, when the United States institutes a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal or equitable, to the extent of the demand made or property claimed. *The Siren*, 7 Wall. 152, 154, 19 L. Ed. 129; *United States v. Ringgold*, 8 Pet. 150, 8 L. Ed. 899.

Against an Action for Tax.—A set-off is not pleadable to an action for recovery of taxes. *Wilmington v. Bryan*, 141 N. C. 666, 681, 54 S. E. 543.

Equitable Counterclaim.—An equitable cause of action may be set up as a counterclaim against a legal cause of action. *Dempsey v. Rhodes*, 93 N. C. 120, 127.

Counterclaim Where Lien upon Property Involved.—In an action upon a contract, though a lien upon property is involved, it is competent for the defendant to extinguish the debt, due from him, by a proof of counterclaim. *Poston v. Rose*, 87 N. C. 279.

II. CLAIMS ARISING OUT OF PLAINTIFF'S DEMAND.

A. General Rules and Instances.

Counterclaim for Independent Tort Not Allowed.—Under this section a counterclaim is not permissible for a distinct and independent tort, and applying the principle, in an action to recover a tract of land alleged to belong to the plaintiff, a counterclaim for a trespass by the plaintiff on a different tract of land belonging to defendant is not maintainable. *Louisville, etc., R. Co. v. Nichols*, 187 N. C. 153, 155, 20 S. E. 819.

Same—But Permissible if it Grows Out of Same Transaction.—The contention that a tort can not under any circumstances constitute a counterclaim although "connected with the subject of the action" contained in the complaint is unfounded. The contrary is decided in *Walsh v. Hall*, 66 N. C. 233, and *Bitting v. Thaxton*, 72 N. C. 541; *Lee v. Eure*, 93 N. C. 5, 9.

Tort against Contract Claim.—If it arises out of the same transaction or is connected with the subject of the action, a tort claim may be pleaded as a counterclaim against a contract claim. *McKinnon v. Morrison*, 104 N. C. 354, 360, 10 S. E. 513; *Smith v. Old Dominion Bldg., etc., Ass'n*, 119 N. C. 257, 26 S. E. 40; *Branch v. Chappell*, 119 N. C. 81, 23 S. E. 783. The same rule applies to tort claims as against tort actions. *Branch v. Chappell*, supra.

Damages for slander cannot be set up as a counterclaim to an action for debt. *Merritt Milling Co. v. Finlay*, 110

N. C. 411, 15 S. E. 4; *Weiner v. Equel's Style Shop*, 210 N. C. 705, 188 S. E. 331.

A demurrer to a counterclaim sounding in tort not arising out of the contract sued upon, and not connected with the same subject matter, is properly sustained under this section. *Hoyle v. Carter*, 215 N. C. 90, 91, 1 S. E. (2d) 93.

Contract against Tort Claim.—In giving effect to this clause it has been held that not only the defendant could plead a counterclaim grown out of the contract sued on, but that where action is brought for what would have been formerly denominated a tort, the defendant may set up a claim arising out of contract, if it also arises out of the same transaction or vice versa. *Bitting v. Thaxton*, 72 N. C. 541; *Walsh v. Hall*, 66 N. C. 233. *Smith v. Young Bros.*, 109 N. C. 224, 226, 13 S. E. 735.

Contract against Contract Claims Arising Out of Same Transaction.—In an action upon a promissory note given in pursuance of a contract for the sale by payee of a specific article of merchandise, the maker may set up by way of counterclaim that the article furnished was not in compliance with the contract of sale, and that he was thereby damaged. *Patapasco Guano Co. v. Tillery*, 110 N. C. 29, 14 S. E. 639.

Recovery of Excess.—See section 1-204 and the notes thereto; particularly the Editor's note.

Same—In Tort Action.—If a person be sued in tort, he may, under this section, set up a counterclaim for any damages arising out of the same transaction disclosed in the complaint, and if his damages exceed those of the complaint he is entitled to a judgment for the excess. *Bitting v. Thaxton*, 72 N. C. 541; *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513; *Brown v. Brown*, 121 N. C. 8, 10, 27 S. E. 998.

Nature of Transaction Not Determined by What Plaintiff Calls His Action.—When the plaintiff files his complaint, setting forth the "transaction," whether it be a tort or a contract, the defendant may set up any claim which he has against the plaintiff, connected with the transaction set up in the complaint. In this state there being only one form of action, when the plaintiff states the "transaction" in his complaint he cannot by calling it one name or another—as tort or contract—cut off the defendant's counterclaim growing out of the same transaction. It is the transaction that is to be investigated, without regard to its form or name. *Walsh v. Hall*, 66 N. C. 233; *Bitting v. Thaxton*, 72 N. C. 541, 549.

What Constitutes "Subject of the Action"—Example.—In an action for trespass for wrongful entry on land and cutting timber, the defendants filed a counterclaim, alleging that the plaintiffs had wrongfully raised a dam and caused water to back on defendant's land, which was part of the land described in the complaint as that on which the alleged trespass had been committed: Held, that the subject of the action was the trespass committed, and not the land, and hence the counterclaim was not connected with the cause of action, and hence it was not permissible. *Bazemore v. Bridgers*, 105 N. C. 191, 10 S. E. 888.

What Constitutes "Arising Out of Same Transaction" Examples.—Where the cause of action alleged was an obstruction placed by the defendant on the upper edge of his land, and the counterclaim attempted to be set up was that the plaintiff had placed an obstruction on the lower edge of his own land, it was held that these were two separate and distinct torts, and that the latter did not "arise out of the transaction set forth in the complaint," nor was it "connected with the subject of the action." *Street v. Andrews*, 115 N. C. 417, 422, 20 S. E. 450.

An action for damages resulting from an automobile collision does not abate upon the death of the defendant, but may be continued upon the joinder of defendant's personal representative as a party, and the personal representative may set up therein a counterclaim for damages for the death of her intestate arising out of the same accident. *Johnson v. Smith*, 215 N. C. 322, 1 S. E. (2d) 834.

Same—Breach of Warranty of Soundness.—In an action for the specific recovery of a horse, the defendant pleaded as a counterclaim, that the plaintiff sold the horse to the defendant, and, at the time of the sale, warranted that it was sound, which warranty was false, and in consequence of which the defendant had been damaged; Held, that the counterclaim arose out of the transaction set out in the complaint and was properly pleaded as a counterclaim. *Wilson v. Hughes*, 94 N. C. 182.

Same—Action for Libel and Counterclaim for Slander.—Where the plaintiff sued the defendant for libel, and the defendant set out as counterclaim slanderous words uttered by the plaintiff, it was held that the counterclaim did not fall within the first subdivision of this section. *Knott v. Burwell*, 96 N. C. 272, 273, 2 S. E. 588.

Same—Counterclaim for Malicious Prosecution.—Where plaintiff instituted action alleging that defendant had formed a dummy corporation to which he had transferred all his assets, including chattels on which plaintiff had liens, was collecting money on conditional sales contracts which he was wrongfully refusing to pay over to plaintiff, and was dissipating and jeopardizing the assets of the business, and defendant set up a counterclaim alleging want of good faith on the part of plaintiff in maintaining and prosecuting the action and the ancillary remedies and that such wrongful acts had damaged defendant in a large sum, it was held that the counterclaim did not arise out of the transaction set out in the complaint and was not connected with the subject of plaintiff's action within subsection 1, and therefore plaintiff's demurrer to the counterclaim was properly sustained. *Manufacturers, etc., Finance Corp. v. Lane*, 221 N. C. 189, 19 S. E. (2d) 849.

B. Time of Existence.

See post, this note, "Time of Existence" III, B.

The counterclaims referred to in this clause must be existent and continue to exist between the same parties in the same right at the time they are offered and they must be due at the time the answer is filed, that is, not demands to become due in the future, but they need not be due at the time of commencement of the action. And they must arise out of the same contract or transaction which is the foundation of plaintiff's claim, or they must be connected with the subject of the action that is, generally speaking, the interest involved in the litigation, and very frequently this is the property itself. *Smith v. French*, 141 N. C. 1, 8, 53 S. E. 435.

III. CLAIMS ARISING OUT OF INDEPENDENT CONTRACT.

A. General Rules and Instances.

Relation to Original Cause.—This section goes beyond the common-law pleading and practice, and under its provisions a defendant in an action on contract may file a counterclaim arising on a contract unrelated to the cause of action sued on when the required mutuality exists, so that two independent disputes between the parties may be settled in one action. *Bourne v. Board of Financial Control*, 207 N. C. 170, 176 S. E. 306.

Need Not Arise out of Same Transaction.—Under this clause a counterclaim need not arise out of the same transaction if it existed at the commencement of the action. *Brown v. Carter*, 111 N. C. 183, 186, 15 S. E. 934; *Bitting v. Thaxton*, 72 N. C. 541, 549.

Must Be a Debt—Tax Not a Debt.—A counterclaim or set-off is a defense to an action, and exists only in favor of a defendant under this subdivision. It arises when the demand, both of the plaintiff and the defendant, is a debt, arising out of contract and existing at the commencement of the action. A tax is not a debt. *Gatling v. Commissioners*, 92 N. C. 536.

Store Account against Action for Services of Minor.—In an action to recover for services of minor children, a counterclaim of a store account against plaintiff which had been assigned to defendant, is proper under this clause. *Lynn v. Stanley Creek Cotton Mills*, 130 N. C. 621, 41 S. E. 877.

Action on Note by Bank Deposit Counterclaimed.—A depositor in a bank may set off amounts due him as deposits in an action by the bank against him to recover on a promissory note. *Graham v. Proctorville Warehouse*, 139 N. C. 533, 127 S. E. 510.

Share in Stock against Indebtedness upon Note.—Where a bank was in course of liquidation, and a stockholder was indebted to the bank by a note secured by a pledge of stock, his supposed share in the assets was held not to be available as a set-off, legal or equitable, in a suit upon the note. *First Nat. Bank v. Riggins*, 124 N. C. 534, 32 S. E. 801.

Damages for Assault in Action on Note.—Damages for an alleged assault by an officer in taking goods under claim and delivery or false arrest by him, cannot be maintained as a counterclaim in an action upon a note given by the defendant to the plaintiff for fertilizer sold to him, as it does not arise out of, and is not connected with the subject-matter of the action, and does not accrue until after the commencement of the main action. *Godwin v. Kennedy*, 196 N. C. 244, 145 S. E. 229.

Damages for Slander of Title in Action to Establish Title.—Where the plaintiffs' action is to establish their title to and recover possession of mineral interest in a described 5-acre tract of land, and defendants set up as a counterclaim damages alleged to have been caused by the plaintiffs' slander of their title in 500-acre tract: Held, the cross-action alleged is for damages founded upon a

tort, and not on contract, and does not fall within the equitable principle of a suit to quiet title, under the provision of this section and §§ 1-135, 1-138, and a demurrer thereto is good. *Thompson v. Buchanan*, 195 N. C. 155, 141 S. E. 580.

An unpaid judgment in favor of a party to an action rendered previously to the commencement of the present action is in legal effect a contract upon which a counterclaim may be pleaded in an action by the opposing party brought against him to recover on a promissory note. *McClure v. Fulbright*, 196 N. C. 450, 146 S. E. 74.

Liability on County Treasurer's Bond against Past Due County Bonds.—Where defendants were indebted to plaintiff county as principal and sureties on the bond of the county treasurer for funds of the county which the treasurer had not accounted for because of the failure of the bank in which the funds were deposited, it was held that the defendants were entitled to offset their debt to the county with past-due county bonds owned by them, since the respective obligations of the county and defendants arose out of contract, and either party might have recovered judgment against the other on their respective obligations, and the county's obligation to defendants existed prior to the institution of the action. *Swain County v. Welch*, 208 N. C. 439, 181 S. E. 321.

Where a corporation gives its note to its president to secure him against any loss he might sustain by reason of his endorsement of the corporation's notes, and the president transfers the note to a third person, who brings suit, the corporation may not set up as a counterclaim in the action indebtedness due the corporation by the president. *Wellons v. Johnston*, 196 N. C. 94, 144 S. E. 521.

Where the owner of lands living thereon abandons his wife and children, and leaves the state, and his wife and minor children without support, and another took and supported them and has purchased the lands from the purchaser under an execution sale, taking deed with full covenants and warranty of title, upon the return of the execution debtor and his successfully maintaining his suit to have the deeds declared void: Held, the one who took and supported them is entitled in the settlement to the moneys he has reasonably expended for the support and maintenance of the wife and children, and this may be set up as a counterclaim against a recovery for the rents and profits, and judgment may be rendered in the same action. *Jeffreys v. Hocutt*, 195 N. C. 339, 142 S. E. 226.

B. Time of Existence.

See paragraphs under preceding analysis line.

In General.—The requirement restricting a counterclaim to one that exists at the time the action was commenced is only stated in reference to the class of counterclaims described in this clause. Such is the law, for the very just and obvious reason that, when a plaintiff rightfully sues a defendant who owes him at the time the action is commenced, he shall not be put in the wrong and subjected to costs by allowing defendant to buy up claims sufficient or more than sufficient to off-set his debt. But this limitation is not expressed with reference to counterclaim in the first clause of this section. *Smith v. French*, 141 N. C. 1, 7, 53 S. E. 535. See also, *Griffin v. Thomas*, 128 N. C. 310, 38 S. E. 903; *Bank v. Wilson*, 124 N. C. 561, 570, 32 S. E. 882; *Riddick v. Moore*, 65 N. C. 382, 385.

Under this section a counterclaim must exist at the commencement of the action. The defendant "is not obliged to set up such counterclaim. He may omit it and bring another action. He has his election. But when he does set up his counterclaim, it becomes a cross-action, and both opposing claims must be adjudicated. The plaintiff then has the right to the determination of the court of all matters brought in issue, and naturally the defendant has the same right, and neither has the right to go out of court before a complete determination of all the matters in controversy without or against the consent of the other." *McGee v. Frohman*, 207 N. C. 475, 480, 177 S. E. 327.

When the answer sets up as a counterclaim a judgment against plaintiff which had been purchased by defendant, but fails to allege that defendant was the owner of the judgment at the time of the institution of the action, plaintiff's demurrer *ore tenus* to the answer will be sustained, even in the supreme court on appeal, since it is required that a counterclaim not arising out of plaintiff's claim must be one existing at the commencement of the action. *Barber v. Edwards*, 218 N. C. 731, 12 S. E. (2d) 234.

Collateral Demand against Assignee of Note.—The defense of set-off has, by this section, been merged in that of counterclaim, the effect of which, in one respect, is that a defendant is not allowed to off-set the claim of a plaintiff as assignee of a note past due when assigned, by showing that the assignor was indebted to such defendant at the time of

the assignment, unless such counterclaim had attached itself to the note before the assignment. *Haywood v. McNair*, 19 N. C. 283; *Wharton v. Hopkins*, 33 N. C. 505; *McConaughy v. Chambers*, 64 N. C. 284, approved. *Neal v. Lea*, 64 N. C. 678.

In *Neal v. Lea*, 64 N. C. 678, it is held that by the proper construction of this section, no collateral demand against the assignor of a note can be set up against the assignee, and "that to make it available, the demand must have attached itself to the note in the hands of the assignor; for instance, a payment made to him not entered on the note, or a claim, which the assignor had agreed should be taken in satisfaction." The doctrine of *Haywood v. McNair*, 19 N. C. 283, was repudiated and that of *Borough v. Moss*, 10 B. & C. 558 adopted. *Harris v. Burwell*, 65 N. C. 584, 585. A set-off at law must exist when the plaintiff's action is brought; in equity, every set-off or counterclaim must be shown before decree, and this is also the case under the Code. *Hogan v. Kirkland*, 64 N. C. 250, 253.

IV. PLEADING AND PRACTICE.

A. Rules of Pleading.

Allegation of Facts.—The counterclaim must disclose such a state of facts as would entitle the defendant to his action, as if he was plaintiff in the prosecution of his suit, and should contain the substance of a complaint, and contain a plain and concise statement of the facts constituting a cause of action. There is no formula prescribed and in determining its effects, its allegations shall be liberally construed with a view to substantial justice. *Battle v. Thompson*, 65 N. C. 406, 408. It is held in the United States Supreme Court that a counterclaim is unavailable unless set up by defendant in his pleading. *McGowan v. American Pressed Tan Bark Co.*, 121 U. S. 575, 7 S. Ct. 1315, 30 L. Ed. 1027.

Same—Demand of Relief.—Strictly, a counterclaim is a cross-action against the plaintiff in which the defendant may have affirmative relief; but it must, like a complaint, state the cause of action and demand the relief to which the defendant alleges he is entitled. *Hurst, etc., Co. v. Everett*, 91 N. C. 399, 400.

Particularity in Alleging.—A counterclaim is in substance a cross-action and it should be set out with the same particularity and accuracy required in stating a cause of action in the complaint. *State v. Scott*, 84 N. C. 184, 187.

For instance a counterclaim which only alleges that the plaintiff is indebted to the defendant, without alleging further the nature, extent, and kind of indebtedness, and how it arose, is imperfectly pleaded, and should be disregarded. *American Nat. Bank v. Northcutt*, 169 N. C. 219, 85 S. E. 210.

Allegation as to Time of Existence.—An answer setting up a counterclaim, but which fails to show that the same subsisted between the parties when the action was begun, or that it arose out of, or was connected with the subject of the plaintiff's action, is demurrable. *Reynolds v. Smathers*, 87 N. C. 24, 25.

Replication to Counterclaim.—Whenever a counterclaim is pleaded the plaintiff must make a replication, or else it will be treated as admitted. *Davison v. West Oxford Land Co.*, 121 N. C. 146, 28 S. E. 266.

B. Nonsuit.

When Counterclaim Is Pleaded, a Nonsuit Cannot Be Taken.—*McGee v. Frohman*, 207 N. C. 475, 480, 177 S. E. 327.

Nonsuit by Plaintiff.—Where a defendant sets up a counterclaim which does not arise out of the same transaction as the cause of action of the plaintiff, the plaintiff may submit to a nonsuit. *Olmsted v. Smith*, 133 N. C. 584, 45 S. E. 953.

Same—Nonsuit in United States Courts.—It has been repeatedly decided that the courts of the United States have no power to order a peremptory nonsuit, against the will of the plaintiff, unless the right is given by a state statute in which case it will be followed in that state, or unless it is given by a federal statute, or by agreement of parties. *Meehan v. Valentine*, 145 U. S. 611, 618, 12 S. Ct. 972, 36 L. Ed. 835; *Thompson v. Selden*, 20 How. 194, 15 L. Ed. 1001; *Elmore v. Grymes*, 1 Pet. 469, 7 L. Ed. 224.

Same—Where Counterclaim Arises out of Same Transaction.—When the defendant pleads, as a counterclaim, a cause of action arising out of a contract or transaction set forth in the complaint as a foundation of the plaintiff's cause of action, the plaintiff cannot be permitted to take a nonsuit, without the consent of the defendant, for the reason that, as it is a connected transaction and cause of action, the whole matter in controversy between the parties should be determined by the one action. But when the counterclaim

does not arise out of the same transaction as the plaintiff's cause of action but falls under subdivision 2 of this section, the plaintiff may submit to a nonsuit. In such case the defendant may either withdraw his counterclaim, when the action will be at an end, or he may proceed to try it, at his election. *Whedbee v. Leggett*, 92 N. C. 465, 469. Nor can he take a nonsuit where the defendant has acquired in an equitable action any other right or advantage which he is entitled to have tried and settled in the action. *Bynum v. Powe*, 97 N. C. 374, 2 S. E. 170.

Same—As to Parties Not Necessary.—As to persons who are not necessary or proper parties, and who have been joined as defendants, the plaintiff may be permitted at any time to enter a nonsuit, or nol. pros. notwithstanding the fact that they have filed answers asserting counterclaims and asking for affirmative relief. *Lee v. Eure*, 93 N. C. 5.

Same—Against One of Several Defendants.—And where there are several defendants against whom the charge is joint and several, there cannot be, at common law, a nonsuit as to one and verdict against the others, although the verdict may be against one and in favor of the others. *Castle v. Bullard*, 23 How. 172, 183, 184, 16 L. Ed. 424.

Nonsuit by Defendant.—Where the defendant has set up a counterclaim as allowed by this section, as to the cause of action arising on contract, existing at the commencement of the action, and not embraced within the first subdivision of this section, he may, as a matter of right, take a nonsuit thereon at any stage of the trial before verdict. *Cahoon v. Cooper*, 186 N. C. 26, 118 S. E. 834.

But where the defendant's answer sets up a counterclaim arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of his action, existing at the commencement thereof, it becomes a cross-action, and both opposing claims must be adjusted in the action, and he may not take a nonsuit thereon as a matter of right, without the plaintiff's consent. *Cahoon v. Cooper*, supra.

Same—After Verdict.—Where the jury have returned their verdict into court upon the issue as to defendant's counterclaim, and as to the others except one to which the judge has held no response was required, the defendant may not take a voluntary nonsuit as to the counterclaim he has set up in his answer. *Cahoon v. Cooper*, 186 N. C. 26, 118 S. E. 834.

C. Jurisdictional Amount.

Jurisdictional Amount for Counterclaims.—As to the power of court to render judgment in favor of the defendant upon a counterclaim involving an amount exceeding the jurisdictional amount of the court, see 1 N. C. Law Rev. 224; and annotations to section 1-204.

Same—In Several Counterclaims.—Where several counterclaims are pleaded in the same action, their aggregate sum will be taken as the jurisdictional amount. *General Elect. Co. v. Williams*, 123 N. C. 51, 31 S. E. 288.

Jurisdictional Amount in Justice's Court.—The counterclaim must be one on which judgment might be had in action, and must therefore come within the jurisdiction of the court. It cannot exceed \$200 in a justice's court. *General Elect. Co. v. Williams*, 123 N. C. 51, 31 S. E. 288.

§ 1-138. Several defenses.—The defendant may set forth by answer as many defenses and counterclaims as he has, whether they are of a legal or equitable nature, or both. They must be separately stated and numbered, and refer to the cause of action which they are intended to answer in such manner that they may be intelligibly distinguished. (Rev., s. 482; Code, s. 245; C. C. P., s. 102; C. S. 522.)

Same Certainty as Complaint Required.—The defenses in the answer must be as certain as the allegations of the complaint, so that the jury may separately determine the merits of each issue. See *Gossler v. Wood*, 120 N. C. 69, 73, 27 S. E. 33.

All matters equitable in their nature should be alleged in the pleadings with such reasonable fullness, and particularly as to the constituent facts which will enable the court to see clearly the character of the equity alleged, the purpose of the pleading and the issues raised. *Bean v. Western, etc., R. Co.*, 107 N. C. 731, 741, 12 S. E. 600.

Contradictory Defenses.—Under this section even contradictory defenses are permissible to be pleaded. *Upton v. R. R.*, 128 N. C. 173, 178, 38 S. E. 736; *Bean v. Western, etc., R. Co.*, 107 N. C. 731, 12 S. E. 600; *Reed v. Reed*, 93 N. C. 462, 465; *Williams v. Hutton, etc., Co.*, 164 N. C. 216, 80 S. E. 257; *McLamb v. McPhail*, 126 N. C. 218, 35 S. E. 426. But

see, *Fayetteville Waterworks Co. v. Tillinghast*, 119 N. C. 343, 25 S. E. 960; *Freeman v. Thompson*, 216 N. C. 484, 5 S. E. (2d) 434.

Hence, where the answer denies the allegations of the complaint and for further defense to the action pleads matters in avoidance, it is error for the court below to disregard the denials and adjudge that the answer admits the instrument sued upon. *Reed v. Reed*, 93 N. C. 462.

Upon the same principle where the answer sets up defenses in bar, and also asks an account between plaintiff and defendant, the demand for an account can not be construed as a waiver of such defenses, but is merely contingent on their failure. *Mull v. Walker*, 100 N. C. 46, 6 S. E. 685.

The inconsistent defenses, however, must be separately stated. *McLamb v. McPhail*, 126 N. C. 218, 35 S. E. 426.

Both Equitable or Legal Defenses—Affirmative Relief.—The defendant may set up as many defenses as he might have, whether denominated legal or equitable, or both, and to have such relief, affirmative or negative, as may be legally authorized on the facts constituting his defense. *Covington v. Ingram*, 64 N. C. 123; *Melvin v. Stephens*, 82 N. C. 284, 288.

An equitable counterclaim may be asserted in an answer to a complaint containing a purely legal cause of action. *Dempsey v. Rhodes*, 93 N. C. 120.

No Leave of Court Necessary.—The defendant may plead several defenses without asking the leave of the court. *Whitaker v. Freeman*, 12 N. C. 271, 279.

Cited in *Jeffreys v. Hocutt*, 195 N. C. 339, 344, 142 S. E. 226; *Shenwell v. Lethco*, 198 N. C. 346, 348, 151 S. E. 729; *Shore v. Shore*, 220 N. C. 802, 18 S. E. (2d) 353; *Sayles v. Loftis*, 217 N. C. 674, 9 S. E. (2d) 393.

§ 1-139. Contributory negligence pleaded and proved.—In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial. (Rev., s. 483; 1887, c. 33; C. S. 523.)

See 13 N. C. Law Rev., 256, for comment on Contributory Negligence as evidence relevant to damages.

Editor's Note.—Prior to the enactment of this section there was some doubt as to whether the fact of contributory negligence was in the first instance to be negatived by the plaintiff, or to be pleaded by the defendant in bar. But the cases are now uniform in holding that whatever doubt that may have existed upon the question, is removed by the enactment of this section, which imposes the burden of both pleading and proving it upon the defendant.

Constitutionality — Impairs No Vested Right.—This section placing the burden of proving contributory negligence upon the defendant affects only the remedy and impairs no vested right. It was competent for the Legislature to enact it. *Wallace v. Western etc.*, R. Co., 104 N. C. 442, 450, 10 S. E. 552.

The general rule inculcated by this section is that the defendant must properly plead the negligence of the plaintiff as a defense, and he must also assume the burden of proving his allegation of contributory negligence. *Moore v. Chicago Bridge, etc., Works*, 183 N. C. 438, 440, 111 S. E. 776.

Same — Where Complaint Negatives Contributory Negligence.—The defendant can avail himself of anything appearing in plaintiff's evidence which tends to disprove contributory negligence, but this does not change the burden of proof as fixed by this section. *Wallace v. Western, etc.*, R. Co., 104 N. C. 442, 450, 10 S. E. 552.

Applies to Actions of Employee against Employer.—This section applies to actions brought by an employee against his employer. *Hudson v. Charleston, etc.*, R. Co., 104 N. C. 491, 10 S. E. 669.

In an action for wrongful death, where defendant fails to plead contributory negligence it is not entitled to have the issue submitted to jury under this section. *Murphy v. Power Co.*, 196 N. C. 484, 146 S. E. 204, citing *Fleming v. Norfolk, etc.*, R. Co., 160 N. C. 196, 76 S. E. 212.

Presumption against Contributory Negligence.—Where there is no evidence of the fact, the presumption is against contributory negligence, even in the absence of a statute making it a matter of affirmative defense. *Norton v. North Carolina R. Co.*, 122 N. C. 910, 29 S. E. 886, cited in note in 33 L. R. A., N. S., 1116.

Same — Burden of Proof in Supreme Court.—The Federal Supreme Court has held repeatedly that the burden of proving contributory negligence rests on the defendant; hence, it is not to be negatived or disproved by the plaintiff. *Union Pacific R. Co. v. O'Brien*, 161 U. S. 451, 456, 16 S.

Ct. 618, 40 L. Ed. 766; *Texas, etc.*, R. Co. v. Volk, 151 U. S. 73, 77, 14 S. Ct. 239, 38 L. Ed. 78.

The law presumes that a person found dead and killed by the alleged negligence of another has exercised due care himself. *Cogdell v. Wilmington, etc.*, R. Co., 132 N. C. 852, 44 S. E. 618.

How the Burden of Negligence Shifts.—The burden of proof is on the plaintiff to show that his injury was caused by the negligence of the defendant. After the plaintiff has shown such negligence if the defendant wishes to plead contributory negligence as a defense, the burden is on him to show that the plaintiff was guilty of contributory negligence. After the defendant has shown this, if the plaintiff wishes to take advantage of the doctrine of last clear chance, the burden is on him. 5 N. C. L. R. 63. *Cox v. Norfolk, etc.*, Railroad, 123 N. C. 604, 31 S. E. 848.

A plaintiff in the first instance must show negligence on the part of the defendant. Having done this he need not go further in those jurisdictions where the burden of proof is on the defendant to show contributory negligence. *Baltimore, etc.*, R. Co. v. Landrigan, 191 U. S. 461, 24 S. Ct. 137, 48 L. Ed. 262; *Looney v. Metropolitan R. Co.*, 200 U. S. 480, 487, 26 S. Ct. 303, 50 L. Ed. 564.

Assumption of Risk.—While there is a marked distinction between the doctrines of assumption of risks and contributory negligence, it is proper, in pertinent cases, to consider the application of the law relating to an assumption of risk under the issue of contributory negligence, with the burden of proof on the defendant pleading it. *Pigford v. Norfolk, etc.*, R. Co., 160 N. C. 94, 75 S. E. 860.

Motion to Nonsuit — Scintilla of Evidence.—This section imposes the burden of proving contributory negligence upon the defendant. It therefore follows, that on a motion to nonsuit, the court can only consider the evidence relating to the negligence of the defendant, and if there is more than a mere scintilla of evidence tending to prove such negligence, the motion must be denied and the case submitted to the jury. *Cox v. Norfolk & etc.*, Railroad, 123 N. C. 604, 31 S. E. 848.

Where there is evidence at the trial tending to sustain the allegations of the complaint, the defendant is not entitled to a judgment as of nonsuit, unless all the evidence, considered in the light most favorable to the plaintiff, sustains the defenses, e. g., contributory negligence, relied upon by the defendant in bar of plaintiff's recovery. *Pittman v. Downing*, 209 N. C. 219, 222, 183 S. E. 362.

Question for Jury.—The question whether the plaintiff was guilty of contributory negligence is to be determined by the jury upon proof offered at the trial pursuant to this section. *Miller v. Scott*, 185 N. C. 93, 116 S. E. 86.

Hence the trial judge cannot submit a verdict on a plea of contributory negligence, but must submit the issue to the jury. *United States Leather Co. v. Howell*, 151 Fed. 445.

It is not error, even when contributory negligence is pleaded, since the enactment of this section, to submit only the question whether the injury was caused by the defendant's negligence, and instruct the jury to respond in the negative if they find that the plaintiff, by concurrent carelessness, contributed to cause the injury. *McAdoo v. Richmond & etc.*, R. Co., 105 N. C. 140, 11 S. E. 316.

Same—Where Court Explains to the Jury the Testimony.—While it is better practice to submit an issue in regard to contributory negligence, when pleaded, and there is evidence to sustain the plea, the omission to submit the issue is not reversible error, where the court fully explained to the jury the several phases of the testimony relied upon to show contributory negligence and it was apparent that defendant had been given the benefit of such testimony with its application. *Ruffin v. R.*, 142 N. C. 120, 55 S. E. 86.

A Specific Application.—The plea that an employee of the plaintiff had negligently failed to see that he had entirely extinguished a fire started by the locomotive of the defendant railroad company, and that the fire rekindled and caused the plaintiff the damages complained of in his action, is one of contributory negligence which is required by this section to be pleaded. *Kearney v. Seaboard Air Line R. Co.*, 177 N. C. 251, 98 S. E. 710.

What Law Governs — Federal or State.—The procedure for the establishment of contributory negligence has been defined and approved under numerous decisions construing the State statutes which control contributory negligence, as referred to in the Federal Statutes, and it has been declared that it should be considered and treated as a partial defense, coming within the terms of the local law, and to make the same available it must be set up in the answer and proved as required by this section. *Fleming v. Norfolk etc.*, R. Co., 160 N. C. 197, 76 S. E. 212.

As the Federal act makes no specific regulations as to

the methods by which the fact of contributory negligence should be established, when the action is brought in the State court, the procedure should conform as near as may be to that of the State law applicable, including the "character of action, the order and manner of trial, the rules of pleading and evidence, etc." *Fleming v. Norfolk*, etc., R. Co., 160 N. C. 197, 76 S. E. 212.

The Rule the Same in Federal Courts.—The same rule as to the burden of proof of contributory negligence which prevails in the courts of this state, also prevails in Federal Courts, *Cox v. Norfolk* etc., Railroad, 123 N. C. 613, 31 S. E. 848; *Inland*, etc., Coasting Co. v. Tolson, 139 U. S. 551, 11 S. Ct. 653, 35 L. Ed. 270.

Contributory negligence must be pleaded in the answer and proved on the trial, the burden on the issue being upon defendant under this section. *Ramsey v. Nash Furniture Co.*, 209 N. C. 165, 183 S. L. 536.

Defendant must plead contributory negligence in order to be entitled to the submission of the issue to the jury. *Bevan v. Carter*, 210 N. C. 291, 186 S. E. 321.

A demurrer to the complaint on the ground of contributory negligence will not be sustained unless upon the face of the complaint itself contributory negligence is patent and unquestionable. *Ramsey v. Nash Furniture Co.*, 209 N. C. 165, 183 S. E. 536.

A four-year-old child is incapable of negligence, primary or contributory. *Bevan v. Carter*, 210 N. C. 291, 186 S. E. 321.

Applied in *Stovall v. Ragland*, 211 N. C. 536, 190 S. E. 899; *Butner v. Atlantic*, etc., Ry. Co., 199 N. C. 695, 696, 155 S. E. 601; *Farrell v. Thomas*, etc., Co., 204 N. C. 631, 169 S. E. 224.

Art. 16. Reply.

§ 1-140. Demurrer or reply to answer; where answer contains a counterclaim.—If the answer contains a counterclaim against the plaintiff or plaintiffs, or any of them, such answer shall be served upon the plaintiff or plaintiffs against whom such counterclaim is plead, or against the attorney or attorneys of record of such plaintiff or plaintiffs; the plaintiff or plaintiffs against whom such counterclaim shall be plead shall have twenty (20) days after the service thereof within which to answer or reply to such counterclaim: Provided, for good cause shown, the clerk may extend the time of filing such answer or reply to a day certain. If a counterclaim is plead against any of the plaintiffs and no copy of the answer containing such counterclaim shall be served upon the plaintiff or plaintiffs or his or their attorneys of record, such counterclaim shall be deemed to be denied as fully as if the plaintiff or plaintiffs had filed an answer or reply denying the same. All other replies, if any, shall be filed within twenty (20) days from the filing of the answer: Provided, for good cause shown, the clerk or judge, in the event the cause shall have been transferred to the civil issue docket, may extend the time to a day certain. (Rev., s. 484; Code, s. 208; 1870-71, c. 42, s. 5; 1919, c. 304; Ex. Sess. 1921, c. 92, s. 1; Ex. Sess. 1924, c. 18; C. S. 524.)

Editor's Note.—The acts of 1919, ch. 304, which effected certain changes in the time of filing the complaint, the demurrer and the answer, contained no provision with respect to the time of filing the reply; but the Consolidated Statutes carried out the general meaning of the plan by requiring the reply, when necessary, to be filed within twenty days after the answer. But this time was subsequently changed to ten days by the acts of 1920 and 1921. See 1 N. C. Law Rev. 12. The same acts inserted a proviso to the effect that the clerk for good cause shown may extend the time to a day certain, which proviso was subsequently modified by acts 1924, c. 18, to provide that the extension by the clerk for good cause could be effected in the event the cause shall have been transferred to the civil issue docket. The acts of 1924, c. 18, extended the time of filing the reply to twenty days beginning from the filing of the answer, as the section had provided before the amendment of 1921.

But the most radical effect of the amendment of 1924 was to enlarge the provisions of the section. Thus the provision

at the beginning of the section, requiring service of the counterclaim upon the plaintiff, etc., with the proviso annexed thereto; and the provision prescribing the effect of failure to serve the counterclaim as required, was introduced by the amendment of 1924, see 3 N. C. Law Rev. 24.

Powers of Court under Section 1-152 Not Affected.—The restriction put upon the power of the clerk to extend the time of filing, does not affect the broad powers conferred upon the court by section 1-152. *Roberts v. Merritt*, 189 N. C. 194, 126 S. E. 513.

Failure to Serve Copy of Answer Setting up Counterclaim.—It is proper for the judge of the Superior Court to set aside a judgment by default on defendant's counterclaim under this section when the plaintiff, or his attorney, is not served with a copy thereof, since the law denies the allegations of the counterclaim when such service is not made. *Williams-Fulghun Lumber Co. v. Welch*, 197 N. C. 249, 148 S. E. 250.

Where no service of answer is made upon plaintiffs they are under no compulsion to file a reply even though the answer sets up a counterclaim, since the law denies the counterclaim for them. *Miller v. Grimsley*, 220 N. C. 514, 17 S. E. (2d) 642.

Applied in *Kassler v. Tinsley*, 198 N. C. 781, 153 S. E. 411.

§ 1-141. Content; demurrer to answer.—When the answer contains new matter constituting a counterclaim, the plaintiff may reply to the new matter, denying generally or specifically each allegation controverted by him or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defense to the new matter in the answer. The plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a counterclaim or defense; and he may demur to one or more of such defenses or counterclaims, and reply to the residue. Such demurrer shall be heard and determined as provided for demurrers to the complaint. In other cases, when an answer contains new matter constituting a defense by way of avoidance, the court may in its discretion, on the defendant's motion, require a reply to such new matter, and such reply shall be subject to the same rules as a reply to a counterclaim. (Rev., s. 485; Code, s. 248; C. C. P., s. 105; 1919, c. 304; C. S. 525.)

Cross Reference.—As to demurrer, see § 1-127 et seq. **Matter in Defense Deemed as Denial without Replication.**—If the new matter in the answer does not constitute a counterclaim, even in the absence of a replication such new matter is to be deemed controverted by the plaintiff as upon a direct denial. *Wilson v. Brown*, 134 N. C. 400, 407, 46 S. E. 762; *Fitzgerald v. Shelton*, 95 N. C. 519; *Williams v. Hutton*, etc., Co., 164 N. C. 216, 80 S. E. 257; *Smith v. Bruton*, 137 N. C. 79, 49 S. E. 64.

For in such a case no replication is necessary, unless required by the court. *Simon v. Masters*, 192 N. C. 731, 135 S. E. 861; *Fishplate v. Fidelity Co.*, 140 N. C. 589, 594, 53 S. E. 354; *Jones v. Cohen*, 82 N. C. 75, 80. It is only when a counterclaim is relied on that the plaintiff's failure to reply may afford ground for a judgment for want of a replication, but not when the matter constitutes a defense to the action merely. *Barnhardt v. Smith*, 86 N. C. 473, 483.

The Court May Require Reply.—Though no counterclaim is pleaded the court can order a reply to be filed to any defence set up in the answer or may allow it to be filed as a matter of discretion. *James v. Western*, etc., R. Co., 121 N. C. 530, 28 S. E. 537.

May Contain New Matter.—The plaintiff may not only reply to a counterclaim, but may allege "new matter" which has no connection with the matter alleged in the complaint or the new matter alleged in the counterclaim, the requirement being that it shall not be inconsistent with the complaint. *Boyett v. Vaughan*, 79 N. C. 528, s. c. 85 N. C. 364.

Reply Only to New Matter in Answer.—A reply can be made only to new matter brought out in the answer. *Olmstead v. Raleigh*, 130 N. C. 243, 41 S. E. 292.

Must Not be Radically Inconsistent.—A party will not be

allowed to maintain radically inconsistent positions, or to state one cause of action in the complaint and in the replication state another which is entirely inconsistent. *Berry v. Hyde County Land, etc., Co.*, 183 N. C. 384, 386, 111 S. E. 707.

Plaintiffs may file a reply to new matter appearing in the answer by way of counterclaim, but by express provision of this section the allegations of the reply must not be inconsistent with the complaint. *Miller v. Grimsley*, 220 N. C. 514, 17 S. E. (2d) 642.

Waiver by Failure to Demur.—Where an answer is defective in failing to allege that the plaintiff had knowledge of the fraud, a failure to deny thereto will have the effect of waiving such defect. *Prinour Co. v. McAden*, 131 N. C. 178, 184, 42 S. E. 575.

Sufficient Denial in Replication.—An answer having alleged a set-off, the replication thereto alleged that such answer is "untrue and denied" and reiterated the cause of action stated in the complaint: Held, sufficient to put the plea of set-off in issue and require evidence in its support. *Gregg v. Mallett*, 111 N. C. 74, 15 S. E. 936.

Statute of Limitations.—Formerly a replication was required to be filed whenever the statute of limitation was pleaded; but now a replication is necessary, only in the event the plaintiff has some matter in avoidance, such as a new promise, etc. *Stubbs v. Motz*, 113 N. C. 458, 18 S. E. 387.

An appeal will lie from an order overruling a demurrer to the answer which admits the cause alleged and sets up an affirmative defense. *Cody v. Hovey*, 216 N. C. 391, 5 S. E. (2d) 165.

Amendment of Answer upon Demurrer Sustained.—The provisions of § 1-131, that plaintiff, after judgment sustaining a demurrer to the complaint must move to be allowed to amend within ten days after the return of the judgment or within ten days after receipt of the certificate from the supreme court, apply solely to amendment of the complaint after demurrer thereto is sustained, and the ten-day period prescribed by that section does not apply to an amendment of an answer after judgment sustaining a demurrer to an affirmative defense set up therein, the procedure regulating demurrer to an answer being provided by this section which contains no reference to § 1-131, and this conclusion is in accord with the history of the various amendments relating to civil procedure and with the principles that the adjective law will be liberally construed to promote justice and not to defeat or delay it by technical construction. *Cody v. Hovey*, 217 N. C. 407, 8 S. E. (2d) 479.

When a demurrer to the answer is sustained, defendant has the right to amend, if he so elects. *Barber v. Edwards*, 218 N. C. 731, 12 S. E. (2d) 234.

Applied in *Bryan v. Acme Mfg. Co.*, 209 N. C. 720, 184 S. E. 471.

Cited in *Herndon v. Massey*, 217 N. C. 610, 8 S. E. (2d) 914.

§ 1-142. Demurrer to reply.—If a reply of the plaintiff to a defense set up by the answer of the defendant is insufficient, the defendant may demur thereto, and must state the grounds thereof. (Rev., s. 486; Code, s. 250; C. C. P., s. 107; C. S. 526.)

Amended Reply.—A judgment will not be reversed for error in sustaining a demurrer to the reply when the plaintiff, on leave, files an amended reply, presenting, in addition to others, the same issues, and the same proceeds to trial and final judgment upon the issues thus presented. 22 Ohio St. Reports, construing a similar section of the Ohio Code.

Reply Set up New Matter.—In construing the Ohio statute it was held that where a reply, which sets up new matter sufficient in law to avoid the defense, is, on demurrer, erroneously held insufficient, and the case is finally disposed of by a finding against the plaintiff on issues of fact, under which the special matter in the reply is not available to the plaintiff, the error of the court in sustaining the demurrer constitutes a good ground for reversing the final judgment, and awarding a new trial, unless the record shows such error to have been otherwise waived. 18 Ohio State Reports 353.

If Reply Is a Departure.—If reply is a departure, demurrer should be sustained. 1 Cincinnati Superior Court Reporter 12. It was so held in construing the Ohio Code.

Failure to Demur to Reply.—A failure to demur to a reply that does not contain matter sufficient to avoid a defense set up in the answer, is not a waiver of the right to object to the sufficiency of the reply, and will not affect

the judgment to be rendered. 31 Ohio State Reporter 492, so held in construing the Ohio Code.

Art. 17. Pleadings, General Provisions.

§ 1-143. Forms of pleading.—The forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this chapter. (Rev., s. 487; Code, s. 231; C. C. P., s. 91; C. S. 527.)

Cross References.—As to abolition of differences between actions at law and suits in equity, see § 1-9. As to requirement that all inferior courts be subject to rules applicable in the superior courts where summons to run outside of county and filing of pleadings therein, see § 1-92.

General Effect of New Form of Procedure.—The subtle science of pleading heretofore in use is not merely relaxed but abolished by the Code, so that the forms of pleading in civil actions, and the rules by which their sufficiency is to be determined, are those prescribed in this chapter. The new system inaugurated thereby is such that few, if any, of the ancient rules are now applicable. *Moore v. Edmiston*, 70 N. C. 510, 518.

In construing the Ohio Code, it was held that when the facts set out in the petition entitled the plaintiff to judgment, it is immaterial what the form of action would have been at law. 21 Ohio State Reporter 596, 603.

Same—Rules for Certainty Not Abolished.—While the distinction between actions at law and suits in equity and all feigned issues have been abolished, and there is now but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which is denominated a civil action, and while new rules have been prescribed by the chapter for determining the sufficiency of a pleading, it was not intended to repeal those rules of pleading which are essential to produce certainty of statement and issue between the parties. *Turner v. McKee*, 137 N. C. 251, 259, 49 S. E. 330.

Forms of Actions Abolished.—All the forms of pleading heretofore existing are abolished, and under the present system there is but one form of action. *Bitting v. Thaxton*, 72 N. C. 541, 548.

Thus the forms of action trespass vi et armis or trespass on the case have been abolished and a civil action for all cases has been substituted therefor. *Sneed v. Harris*, 109 N. C. 349, 357, 13 S. E. 920.

Pleading Should Be in Writing.—In the United States Courts it is held that pleadings should be in writing, at law as in equity. *McFaul v. Ramsey*, 20 How. 523, 15 L. Ed. 1010.

What They Must Contain in General.—Pleadings should clearly, distinctly and succinctly state the nature of the wrong complained of, the remedy sought, and the defense set up. *Bradford v. Southern R. Co.*, 195 U. S. 243, 25 S. Ct. 55, 49 L. Ed. 178; *Chesapeake, etc., R. Co. v. Dixon*, 179 U. S. 131, 21 S. Ct. 67, 45 L. Ed. 121.

Meaning of the Pleader.—In construing the Ohio Code it was held that the meaning of the pleader must be fairly ascertained from the whole instrument without regard to technical rules. If legal or technical words are used they are to be taken in their recognized sense, unless the context shows another sense was intended. 42 Ohio State Reporter 625, 9 Circuit Court Reports 421.

§ 1-144. Subscription and verification of pleading.—Every pleading in a court of record must be subscribed by the party or his attorney, and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also. (Rev., s. 488; Code, s. 257; C. C. P., s. 116; C. S. 528.)

When Verification Necessary.—The provisions of this section which are applicable also to special proceedings, do not require that the petition (or any other pleading) be, at all events, verified. It simply requires that when one pleading is verified every subsequent one, except a demurrer, be verified. *Lindsay v. Beaman*, 128 N. C. 189, 190, 38 S. E. 811.

Requirement One of Substance.—The requirement as to the verification of pleadings is one of substance, and not of form, and a defect therein is jurisdictional. *Martin v. Martin*, 130 N. C. 27, 40 S. E. 822; *Holloman v. Holloman*, 127 N. C. 15, 37 S. E. 68; *Nichols v. Nichols*, 128 N. C. 108, 38 S. E. 296.

The object of the verification is, that if the defendant does

not deny the allegations, the cause shall stand as if the jury had been empaneled, and the allegations put in proof without denial, the purpose being to avoid the delay of trial upon uncontroverted points. *Griffin v. Asheville Light Co.*, 111 N. C. 434, 16 S. E. 423.

It is to give the pleader a convenient substitute for the old bill of discovery in equity, and to eliminate all issues of fact that the parties are not willing to raise under oath. *Miller v. Curl*, 162 N. C. 1, 77 S. E. 952.

Want of Verification Fatal Defect.—Where a statute directs that the complaint of the petitioner "shall be sworn to as in other actions," the want of a proper verification is a fatal defect for which judgment will be arrested. *Cowles v. Hardin*, 79 N. C. 577.

Effect of Non-Verification.—Where a pleading is not verified in compliance with this and the two succeeding sections, the other party has a right to file an unverified pleading, and it is error to deny him such right. See *Reynolds v. Smathers*, 87 N. C. 24.

In construing this section the court has repeatedly held that if a pleading be verified and the subsequent pleading be not, the latter may be set aside and disregarded. *Harkey v. Houston*, 65 N. C. 137; *Alspaugh v. Winstead*, 79 N. C. 526; *Wynne v. Prairie*, 86 N. C. 73; *Rogers v. Moore*, 86 N. C. 86; *Alford v. McCormac*, 90 N. C. 151, 152.

Upon this principle if the plaintiff verify his complaint and the defendant fail to verify his answer, the plaintiff is entitled to judgment. *Alford v. McCormac*, supra; *Griffin v. Asheville Light Co.*, 111 N. C. 434, 438, 16 S. E. 423.

Substantial Compliance.—The requirements of this section must be substantially complied with. *Miller v. Curl*, 162 N. C. 1, 77 S. E. 952.

Applicable to Courts of Record Only.—The requirements of this section with regard to verification applies only to courts of record, and have no application to pleading in a justice's court, which is not a court of record. *Van Smith Building, etc., Co. v. Pender*, 173 N. C. 55, 91 S. E. 524.

Amended Complaint.—A complaint amended in a material part after being verified is, in effect, unverified; and the answer to it is not required to be verified. *Rankin v. Allison*, 64 N. C. 673.

§ 1-145. Form of verification.—The verification must be in substance that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true; and must be by affidavit of the party, or if there are several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, if the party is in the county where the attorney resides and is capable of making the affidavit. (Rev., s. 489; Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7; C. S. 529.)

Cross Reference.—As to requirements of plaintiff's affidavit to be filed with complaint in divorce action, see § 50-8.

Amendment to Insufficient Verification.—Where the verification of an answer was insufficient, it is not error for the trial court to allow an amended verification, where such allowance tends to a fair trial of the case on the merits, and the adverse party is given a reasonable time to meet the amended pleadings. *Best v. Dunn*, 126 N. C. 560, 36 S. E. 126.

No Literal Formula Required.—This section provides that the verification must be in "substance" as therein prescribed. Hence a verbal and literal following of the formula prescribed is not necessary. *McLamb v. McPhail*, 126 N. C. 218, 220, 35 S. E. 426.

Same—But Following the Terms of Section Recommended.—With reference to the contents and forms of verification, the court in *Cole v. Boyd*, 125 N. C. 496, 498, 34 S. E. 557, said: "We do not wish to be understood as insisting upon a literal compliance. Such a requirement would be contrary to the spirit of our present system. Any form of words that is equivalent thereto will be sufficient. We may even go further and say that we should permit any form of verification that, taken in connection with the form of statement in the pleading, clearly distinguishes between personal knowledge and information so as to render the affiant legally responsible for the truth of every material allegation. But the object of verification is to verify. If it fails to do this, it is worse than useless. If a party wishes to bind his opponent with the obligations of a verified pleading, he must bind himself, and must so state every material allegation that it will not only rest under the moral sanctity

of an oath, but that its falsity will fasten upon him the penalties of perjury. This is the object of a verification and the true test of its sufficiency. While it is not necessary to follow the exact words of the statute, it is always safe to do so, and we would strongly advise such course in preference to mere experimental practice, which is always dangerous."

Instances of Sufficient Verification.—An allegation that plaintiff has "reason to believe," and therefore "alleges," etc., is sufficient under this section, requiring matter to be alleged as of plaintiff's knowledge or upon "information and belief." *Ware-Kramer Tobacco Co. v. American Tobacco Co.*, 180 Fed. 160.

So, where an instrument in writing is charged to have been executed by a person other than the deceased, the affidavit will be sufficient if it states that the affiant has reason to believe that such instrument was not executed by the decedent or by his authority. *Apache County v. Barth*, 177 U. S. 538, 20 S. Ct. 718, 44 L. Ed. 878, construing an Arizona statute of similar import.

The verification of the answer in the words following, "The foregoing answer of the defendants is true of his own knowledge, except those matters stated on information and belief, and he believes those to be true," is a substantial compliance with this section. *McLamb v. McPhail*, 126 N. C. 218, 220, 35 S. E. 426.

Same—Insufficient Verifications.—A verification in the words following: "he has read the foregoing answer and knows the contents thereof; that the facts set forth therein of his own knowledge are true, and that those stated on information and belief he believes to be true," is held insufficient. *Carroll v. McMillan*, 133 N. C. 141, 45 S. E. 530.

A verification in the words "sworn and subscribed to" is not sufficient in an ordinary action, and a fortiori in a divorce action which the law does not favor. *Martin v. Martin*, 130 N. C. 27, 40 S. E. 822; see section 50-8.

Subscribing the Verification by Affiant.—This section does not in terms or specifically require that the verification of the pleading shall be subscribed by the affiant, and it need not be so signed unless an affidavit is incomplete and inoperative without it. *Alford v. McCormac*, 90 N. C. 151, 152. Though the signing by him is commendable. *Cahoon v. Everton*, 187 N. C. 369, 121 S. E. 612.

Oath—By Whom Administered.—It is sufficient if the oath is administered by one authorized to administer oaths. *Alford v. McCormac*, 90 N. C. 151.

Cited in *Ragan v. Ragan*, 212 N. C. 753, 194 S. E. 458; *Silver v. Silver*, 220 N. C. 191, 16 S. E. (2d) 834.

§ 1-146. Verification by agent or attorney.—The affidavit may also be made by the agent or attorney, if the action or defense is founded upon a written instrument for the payment of money only and the instrument is in the possession of the agent or attorney, or if all the material allegations of the pleadings are within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge or the grounds of his belief on the subject, and the reasons why it is not made by the party. (Rev., s. 490; Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7; C. S. 530.)

Editor's Note.—This section contemplates only two cases where the affidavit may be made by the attorney. The one, when the action is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the attorney; and the other, when the material allegations are within the personal knowledge of the attorney. The one or the other of these facts is essential to the validity of a verification by an agent or attorney. See *Hammerslaugh v. Farrior*, 95 N. C. 135, 136.

Not Applicable to Ancillary Remedies.—The provisions of this section, requiring that verifications made by agents shall state why they are not made by the principals, and that the material facts are personally known to the agent, apply only to actions in which the responsive pleadings must also be under oath, and not to those ancillary remedies intended merely to secure the fruits of an ultimate recovery, in seeking which greater latitude is allowed. *Bruff v. Stern*, 81 N. C. 183.

The pleadings of a non-resident may be verified by an agent or attorney, if either one of the two requirements of this section be present. *Griffin v. Asheville Light Co.*, 111 N. C. 434, 436, 16 S. E. 423.

Verification by Corporate Officer Need Not State Knowl-

edge, etc.—A verification to a complaint made by an officer of a corporation need not set forth “his knowledge or the grounds of his belief on the subject and the reason why it was made by the party.” A corporation acts only through its officers and agents, and such verification is the verification of the corporation itself. *Bank v. Hutchison*, 87 N. C. 22. See generally the annotations to the succeeding section.

Instances of Good and Defective Verifications by Agents.—A verification to a complaint, made by an agent or attorney of a non-resident, to the effect that the claim sued on is in writing and in his possession for collection, giving facts in his personal knowledge and sources of other information, meets the substantial requirements of this section. *Clark & Co. v. Maxwell*, 87 N. C. 18.

A verification of a complaint made by an attorney of the plaintiff, setting forth in the affidavit “that the facts set forth * * * as of his own knowledge are true, and those stated on information and belief he believes to be true * * * ; that the action is based on a written instrument for the payment of money, and that said instrument is in his possession, and he therefore makes this verification pursuant to the provisions of this section,” does not comply with the requisites of the statute, and is defective in not stating the grounds of his belief and the reason why the party himself did not make the verification. *Miller v. Curl*, 162 N. C. 1, 77 S. E. 952.

In a proceeding to restore certain records destroyed by fire, an affidavit by the agent of the petitioner that the facts set forth in the complaint “are true to the best of his knowledge, information and belief,” is an insufficient verification. *Cowles v. Hardin*, 79 N. C. 577.

Cited in *Nevins v. Lexington*, 212 N. C. 616, 194 S. E. 293.

§ 1-147. Verification by corporation or the state.

—When a corporation is a party the verification may be made by any officer, or managing or local agent thereof upon whom summons might be served; and when the state or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts. (Rev., s. 491; Code, s. 258; 1901, c. 610; C. C. P., s. 117; 1868-9, c. 159, s. 7; C. S. 531.)

Cross Reference.—As to service of summons against corporation, see § 1-97, paragraph 1.

Editor's Note.—Formerly it was held that a verification by an “agent” of a corporation was inoperative, and that it must be made by a corporate officer. *Banks v. Gay Mfg. Co.*, 108 N. C. 282, 12 S. E. 741; *Phifer v. Traveler's Ins. Co.*, 123 N. C. 405, 406, 31 S. E. 715. But now, this section in terms provides for verification by “managing or local agent.” To this latter effect, see *Godwin v. Carolina Tel., etc., Co.*, 136 N. C. 258, 48 S. E. 636. And see § 1-97 and notes thereto.

The managing director of a foreign corporation may verify its pleadings. *Best v. British, etc., Mortg. Co.*, 131 N. C. 70, 42 S. E. 456.

Knowledge or Ground of Belief of Corporate Agent.—See *Bank v. Hutchison*, 87 N. C. 22, in the annotations to the preceding section.

The city manager of a municipal corporation is its “managing or local agent” and is authorized to verify the municipality's answer in an action instituted against it. *Grimes v. Lexington*, 216 N. C. 735, 6 S. E. (2d) 505.

§ 1-148. Verification before what officer.—Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the superior court, notary public, in or out of the state, or justice of the peace, is competent to take affidavits for the verification of pleadings, in any court or county in the state, and for general purposes. (Rev., s. 492; Code, s. 258; 1891, c. 140; C. C. P., s. 117; 1868-9, c. 159, s. 7; C. S. 532.)

Editor's Note.—Many decisions of the supreme court had formerly declared that the notaries public authorized to take affidavits for the verification of the pleadings were those of this, and not of some other state. *Benedict, etc., Co. v. Hall*, 76 N. C. 113; *Hinton v. Life Ins. Co.*, 116 N. C. 22, 24, 21 S. E. 201. But this has now been changed by the express terms of this section which permit verification to be taken by notaries in as well as out of the state. See *Hinton v. Life Ins. Co.*, supra.

And it seems that the phrase “in or out of the state”

immediately succeeding the words “notary public,” has reference not only to notaries, but to the other officers designated in the section. Thus in *Hinton v. Life Ins. Co.*, 116 N. C. 22, 21 S. E. 201, the verification was made before the clerk of the Hustings Court of Richmond, Va., and it was held valid, the court announcing the general rule that courts take judicial notice of the seal of the courts of other states just as they do of the seals of foreign courts of admiralty and notaries public.

§ 1-149. When verification omitted; use in criminal prosecutions.—The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. No pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it. (Rev., s. 493; Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7; C. S. 533.)

In a prosecution for embezzlement the admission in evidence over defendant's objection of pleadings in civil actions against defendant, involving the funds he is alleged to have embezzled, is erroneous in view of this section. *State v. Ray*, 206 N. C. 736, 175 S. E. 109.

No Pleading Can Be Used in Criminal Prosecution.—It is error to permit the solicitor, while cross-examining defendant in a criminal prosecution to read certain allegations of fact in a complaint in a civil action relating to the same subject matter and to ask defendant if he had failed to deny them by answer. *State v. Wilson*, 217 N. C. 123, 7 S. E. (2d) 11.

Where defendant moved to set aside the verdict on ground that the jury, without defendant's consent, took into its room the complaint in a civil action relating to the subject matter of the prosecution, which had been admitted in evidence without objection, and typed notes of the argument of counsel for the prosecution containing reference to defendant's failure to testify, it was error to permit the jury to take such papers into the jury room and retain same while in its deliberations, and defendant's motion to set aside the verdict should have been allowed. *State v. Stephenson*, 218 N. C. 258, 10 S. E. (2d) 819.

Applied in *State v. Dula*, 204 N. C. 535, 168 S. E. 836.

§ 1-150. Items of account; bill of particulars.—It is not necessary for a party to set forth in a pleading the items of an account alleged in it; but he must deliver to the adverse party, within ten days after a demand therefor in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath or that of his agent or attorney if within the personal knowledge of the agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court or judge may order a further account when the one delivered is defective, and may, in all cases, order a bill of particulars of the claim of either party to be furnished. (Rev., s. 494; Code, s. 259; C. C. P., s. 118; C. S. 534.)

Cross References.—For similar provision applicable to proceeding in court of justices of the peace, see § 7-149, rule 10. For provisions for proof of book account of less than sixty dollars, see § 8-42 et seq. See also, §§ 1-153, 15-143.

Purpose and Effect of Section.—This section, which, in case of a disregard of the demand, shuts out all proof of the items of the claim coming from any witness (and does not close the mouth of the party making it), is intended to meet the case of a complaint that does not set out the particulars, and confines the evidence at the trial to such as are set forth. Its aim is to supply an omission to give them in the pleadings, and hence, when furnished, they become substantially and in legal effect a part of the complaint itself. *Wiggins v. Guthrie*, 101 N. C. 661, 675, 7 S. E. 761.

Indefiniteness as to Dates, Locality, etc.—For indefiniteness of the complaint as to dates, etc., the defendant may ask for a bill of particulars. *Lumber Co. v. Atlantic, etc., R. Co.*, 141 N. C. 171, 179, 53 S. E. 823. The same rule applies to indefiniteness of locality. *Lucas v. Carolina Cent. R. Co.*, 121 N. C. 506, 509, 28 S. E. 265; *Bryan v. Spivey*, 106 N. C. 95, 11 S. E. 510; *Fulps v. Mock*, 108 N. C. 601, 13 S. E. 92.

Indefinite Statement of Cause.—An uncertain or an indefinite statement of a cause of action may be corrected by an

application for a bill of particulars under this section. *Bristol v. Carolina, etc., R. Co.*, 175 N. C. 509, 95 S. E. 850.

Time of Application for Bill of Particulars.—The application for a bill of particulars should always be made in time to avoid any delay being caused in the trial. If too long delayed, the court will refuse the application. *State v. Brady*, 107 N. C. 822, 827, 12 S. E. 325; *Wiggins v. Guthrie*, 101 N. C. 661, 7 S. E. 761.

Same—Before Trial.—The better practice, for a party who intends to preclude his adversary from proving an account on the ground that he has not complied with a demand or an order for the particulars of such account, is to apply for an order to that effect before the trial, so as to have the question settled before the trial. *Wiggins v. Guthrie*, 101 N. C. 661, 675, 7 S. E. 761.

Discretion of Court as to Bill of Particulars.—A motion for a bill of particulars under this section rests in the discretion of the presiding judge, and its grant or refusal is not reviewable. *State v. Bryant*, 111 N. C. 693, 16 S. E. 326. While this is true, yet such motions should be liberally allowed by trial courts when made in time to avoid any delay in the trial, unless clearly useless or merely for the purpose of annoyance. *Townsend v. Williams*, 117 N. C. 330, 337, 23 S. E. 461. See also *Savage v. Currin*, 207 N. C. 222, 176 S. E. 569; *Tickle v. Hobgood*, 212 N. C. 762, 194 S. E. 461; *Ogburn v. Sterchi Bros. Stores*, 218 N. C. 507, 11 S. E. (2d) 460.

The court has the discretionary power to allow an application for a bill of particulars, under this section, or to grant a motion to require a pleading to be made more definite and certain under section 1-153, or to strike out in its discretion orders previously made under the statutes, and no appeal will lie from such discretionary orders. *Temple v. Western Union Tel. Co.*, 205 N. C. 441, 171 S. E. 630.

Defective Bill of Particulars—How Taken Advantage.—If the bill of particulars be defective the remedy is not by a demurrer thereto, for its sufficiency or insufficiency rests with the presiding judge, but by an application to the court to order a more definite bill. *Townsend v. Williams*, 117 N. C. 330, 337, 23 S. E. 461.

Demand for Account Where Bill of Particulars Filed.—A demand for a copy of the account is not warranted where the plaintiff attaches a bill of particulars to his complaint, and has made it a part thereof by reference. *Wiggins v. Guthrie*, 101 N. C. 661, 7 S. E. 761.

Motion to Make Complaint More Definite.—Under the provision of this section and section 1-153, the Superior Court judge may, in his sound discretion, allow defendant's motion, after answer filed, to make the complaint more definite and certain as to the grounds upon which the relief is sought, especially when it affects book records and other written data easily accessible to the plaintiff. *Elizabeth City Water, etc., Co. v. Elizabeth City*, 188 N. C. 278, 124 S. E. 611.

Evidence Must Relate to Items in Bill.—When a bill of particulars is required or allowed the evidence at the trial must be confined to the specific items set forth in such bill. *Savage v. Currin*, 207 N. C. 222, 225, 176 S. E. 569; *Beck v. Lexington Coca-Cola Bottling Co.*, 214 N. C. 566, 568, 199 S. E. 924.

Effect of Destruction of Records by Fire.—Where plaintiff's failure to comply with an order of the court, as provided by this section, to file an itemized statement of the account sued on is due to the fact that his records had been destroyed by fire, plaintiff is not precluded by his failure to comply with the order from establishing the debt by competent evidence. *Savage v. Currin*, 207 N. C. 222, 176 S. E. 569.

In Criminal Proceedings.—For the procedure in obtaining a bill of particulars in criminal proceedings, and its similarity to that in civil actions, see *State v. Brady*, 107 N. C. 822, 827, 12 S. E. 325. See also, section 15-143.

Cited in Sentelle v. Board of Education, 198 N. C. 389, 391, 151 S. E. 877; *State v. Suncrest Lumber Co.*, 199 N. C. 199, 201, 154 S. E. 72; *Gruber v. Ewbanks*, 199 N. C. 335, 338, 154 S. E. 318; *Hood v. Love*, 203 N. C. 583, 166 S. E. 743; *Pemberton v. Greensboro*, 205 N. C. 599, 172 S. E. 196.

§ 1-151. Pleadings construed liberally.—In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties. (Rev., s. 495; Code, s. 260; C. C. P., s. 119; C. S. 535.)

Editor's Note.—Under the common-law rules of pleading, the requirement of accuracy and precision was often

pushed to the extreme, and the rights of litigants were determined not on the merits of the controversy but on sheer technicalities such as using the verb "to have" in the past tense, instead of in the present. These ideas were entirely abrogated in this country by the Codes of Civil Procedure wherever adopted. In England, after a series of improvements, beginning in 1834, when the celebrated "Rules of Hilary Term" were adopted, the British Parliament has swept them out of the English law also and has introduced the substance of the American Reformed Civil Procedure.

The object of the procedure under the Code is to try cases on their merits and not on technicalities and refined distinctions of the old system of pleading, under which the victory depended too much upon the skill of the pleader, rather than upon the merits of the successful party's case. The present system is far more liberal, and seeks first of all things, to try each case upon its facts and without so much regard to form. Its main purpose is to avoid miscarriages of justice by mere slips in pleadings, and, therefore, it requires that pleadings be construed sensibly, "with a view to substantial justice between the parties," as prescribed in this section.

Common Law Rule of Construction Modified—Reasonable Construction.—The common law rule requiring every pleading to be construed against the pleader has been materially modified by this section. *Sexton v. Farrington*, 185 N. C. 339, 117 S. E. 172. Hence a pleading will be upheld if any part presents sufficient facts; or if such facts may be gathered from the whole pleading by a liberal and reasonable construction, the pleading will be sustained. *Pridgen v. Pridgen*, 190 N. C. 102, 105, 129 S. E. 419.

Allegations of complaint, when given liberal construction required by this section, held to allege facts sufficient to constitute actionable negligence on the part of demurring defendants. *Cunningham v. Haynes*, 214 N. C. 456, 458, 199 S. E. 627.

In Favor of Pleader.—The court is required on demurrer to construe the complaint liberally "with a view to substantial justice between the parties," under this section, and, contrary to the common-law rule, every reasonable intentment is to be made in favor of the pleader. *Joyner v. Woodard*, 201 N. C. 315, 317, 160 S. E. 288; *Bailey v. Roberts*, 208 N. C. 532, 181 S. E. 754; *Leach v. Page*, 211 N. C. 622, 191 S. E. 349; *Anthony v. Knight*, 211 N. C. 637, 191 S. E. 323; *Anderson Cotton Mills v. Royal Mfg. Co.*, 218 N. C. 560, 11 S. E. (2d) 550.

Construction in View of Merits.—The pleadings must be liberally construed, with a view to present the case upon its real merits. *Lyon v. Atlantic, etc., R. Co.*, 165 N. C. 143, 81 S. E. 1.

Statement of Cause of Action.—If the facts alleged are sufficient for a cause of action when liberally construed, however inartificially the complaint may have been drawn, it will be sustained. *Renn v. Seaboard Air Line R. Co.*, 170 N. C. 128, 86 S. E. 964; *Conrad v. Board*, 190 N. C. 389, 130 S. E. 53. Same rule applies to an answer. *Pridgen v. Pridgen*, 190 N. C. 102, 129 S. E. 419; *Dixon v. Green*, 178 N. C. 205, 100 S. E. 262. See also *Farrell v. Thomas, etc., Co.*, 204 N. C. 631, 633, 169 S. E. 224.

But there should be at least a substantial accuracy in the averments of pleadings, and a compliance therein with the essential rules of pleading so that the real issues may be evolved from the controversy. *New Bern Banking, etc., Co. v. Duffy*, 156 N. C. 83, 72 S. E. 96.

Upon the inquiry as to whether the complaint states a cause of action, it will be liberally construed with every reasonable intentment therefrom in the plaintiff's favor, however uncertain, defective and redundant its allegations may be drawn. *Enloe v. Ragle*, 195 N. C. 38, 141 S. E. 477; *Sewell v. Chas. Cole & Co.*, 194 N. C. 546, 140 S. E. 85, citing *S. v. Bank*, 193 N. C. 513, 527, 137 S. E. 587; *Foy v. Stephens*, 168 N. C. 438, 84 S. E. 758; *S. v. Trust Co.*, 192 N. C. 246, 134 S. E. 656; *Elam v. Barnes*, 110 N. C. 73, 14 S. E. 621.

A complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements, for, contrary to the common-law rule, every reasonable intentment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient. *Fairbanks, etc., Co. v. Murdock Co.*, 207 N. C. 348, 351, 177 S. E. 122; *Ramsey v. Nash Furniture Co.*, 209 N. C. 165, 168, 183 S. E. 536; *Cummings v. Dunning*, 210 N. C. 156, 185 S. E. 653; *Avery County v. Braswell*, 215 N. C. 270, 1 S. E. (2d) 864; *Vincent v. Powell*, 215 N. C. 336, 1 S. E. (2d) 826.

Although under this section allegations of pleadings are to be construed liberally "with a view to substantial justice between the parties," § 1-122 makes it a necessary requirement that the complaint shall contain "a plain and concise statement of the facts constituting a cause of action," which means that it shall contain a plain and concise statement of all the facts necessary to enable the plaintiff to recover. *Citizens Bank v. Gahagan*, 210 N. C. 464, 466, 187 S. E. 580.

The material allegations of the complaint are that at the foreclosure sale the land was bought by the secretary and treasurer of the corporate mortgagee, and that this official was "acting in said capacity at the time he purchased said land at the foreclosure sale, and was acting as the agent of said bank," and that this official shortly thereafter conveyed the land to the mortgagee, which thus indirectly purchased at its own sale. Held that the complaint is not so wholly insufficient that it can be overthrown by a demurrer. *Council v. Greensboro Joint Stock Land Bank*, 211 N. C. 262, 265, 189 S. E. 777.

In spite of this section, a complaint must allege a cause of action, and the court will not, under this rule, construe into a pleading that which it does not contain. *Jones v. Jones Lewis Furniture Co.*, 222 N. C. 439, 23 S. E. (2d) 309.

Same—Judged from Whole Pleading. — When it is apparent from the whole pleading that the complaint alleges a good cause of action, it will be sustained under the rule of liberal construction. *Muse v. Ford Motor Co.*, 175 N. C. 466, 95 S. E. 900; *Dixon v. Green*, 178 N. C. 205, 100 S. E. 262.

Extent of Liberal Construction Rule. — The rule of liberal construction does not mean that a pleading shall be construed to say what it does not say, but that if it can be seen from its general scope that a party has a cause of action or defense he will not be deprived thereof merely because he has not stated it with technical accuracy. *Cheson v. Lynch*, 186 N. C. 625, 626, 120 S. E. 198. Nor does it mean that the court shall supply the necessary allegations; nor is it intended thereby to repeal those rules of pleading which are essential to produce certainty of issues. *Turner v. McKee*, 137 N. C. 251, 259, 49 S. E. 330. See also *Fairbanks, etc., Co. v. Murdock Co.*, 207 N. C. 348, 351, 177 S. E. 122.

Errors in Language and Use of Words. — A plea that a cause of action did not "arise" within the time prescribed by the statute for the commencement of an action, while not strictly accurate, will be construed under the liberal system of pleading in force under this section, to mean that it did not "accrue" within that time. *Stubbs v. Motz*, 113 N. C. 458, 18 S. E. 387.

Answer Not Rejected Unless Fatally Defective. — Under the liberal construction provided by this section, an answer must be fatally defective before it will be rejected as insufficient and every reasonable intendment and presumption must be in favor of the pleader. *Commerce Ins. Co. v. McCraw*, 215 N. C. 105, 108, 1 S. E. (2d) 369.

And an Amended Answer May Sufficiently State Cause of Action. — Where an amendment eliminated the ground upon which the demurrer was interposed, overruling of the demurrer was proper, the amended answer being sufficient to state a cause of action under the liberal construction provided by this section. *Solmer v. Felton Beauty Supply Co.*, 214 N. C. 522, 199 S. E. 711.

Conflicts of Laws. — The rules of construction of the pleadings are governed by the *lex fori*, i. e. by the law of the state in which the cause is being litigated. *McNinch v. American Trust Co.*, 183 N. C. 33, 110 S. E. 663.

Variations. — Under the liberal principle which this section inculcates, a variance between the pleadings and proof will not be regarded as material unless it misleads the complaining party to his prejudice in maintaining his action upon its merits. *Renn v. Seaboard Air Line R. Co.*, 170 N. C. 128, 86 S. E. 964; *Muse v. Ford Motor Co.*, 175 N. C. 466, 95 S. E. 900. And where the variance is not material the judge may direct the fact to be found according to the evidence. *Dorsey v. Corbett*, 190 N. C. 783, 130 S. E. 842.

A demurrer to the evidence will not be sustained if it is sufficient under a liberal construction to sustain the plaintiff's action. *State v. National Bank*, 193 N. C. 524, 137 S. E. 593.

Applied in *Toler v. French*, 213 N. C. 360, 196 S. E. 312. **Cited in** *Jeffreys v. Hocutt*, 195 N. C. 339, 344, 142 S. E. 226; *Virginia-Carolina, etc., Bank v. First, etc., Bank*, 197 N. C. 526, 531, 150 S. E. 34; *Lee v. Caveness Produce Co.*, 197 N. C. 714, 150 S. E. 363; *Shemwell v. Lethco*, 198 N. C. 346, 348, 151 S. E. 729; *Brewer v. Brewer*, 198 N. C. 669, 153 S. E. 163; *Mack Truck Corp. v. Wachovia Bank & Trust Co.*, 199 N. C. 203, 204, 154 S. E. 42; *Smithwick*

v. Colonial Pine Co., 199 N. C. 431, 154 S. E. 917; *Cole v. Wagner*, 197 N. C. 692, 150 S. E. 339; *Nall v. McConnell*, 211 N. C. 258, 190 S. E. 210; *Kirby v. Reynolds*, 212 N. C. 271, 193 S. E. 412; *Pearce v. Privette*, 213 N. C. 501, 196 S. E. 843; *Bynum v. Fidelity Bank*, 219 N. C. 109, 12 S. E. (2d) 898; *Adams v. Cleve*, 218 N. C. 302, 10 S. E. (2d) 911; *Sayles v. Loftis*, 217 N. C. 674, 9 S. E. (2d) 393; *Hill v. Stansbury*, 221 N. C. 339, 20 S. E. (2d) 308; *Hallow v. Atlantic Coast Line R. Co.*, 222 N. C. 740, 24 S. E. (2d) 633; *Belk's Department Store v. Guilford County*, 222 N. C. 441, 23 S. E. (2d) 897 (dis. op.).

§ 1-152. Time for pleading enlarged. — The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order may enlarge the time. (Rev., s. 512; Code, s. 274; C. C. P., s. 133; C. S. 536.)

Cross References. — As to amendments to pleadings, see § 1-161 et seq. As to power of judge to set aside judgment for mistake, surprise, or excusable neglect, see § 1-220. As to power of judge to enlarge time in case on appeal, see § 1-282.

Editor's Note. — It will be noticed that this section confers upon the judge two supplementary powers: (a) To allow an answer to be filed after the time limited for its filing, which presupposes that the power is to be exercised after the expiration of such time; (b) a power to extend the time of filing the answer or reply, which presupposes that the power is to be exercised before the expiration of the time limited for the filing of the answer or reply.

While it is true the line of cases cited under this section, refer more particularly to filing answer, no sound reason occurs why the same power does not exist for enlarging the time for filing complaint. *Smith v. New York Life Ins. Co.*, 208 N. C. 99, 102, 179 S. E. 457.

Inherent Power to Extend Time. — Even independent of this section, and a fortiori under this section, the superior court possesses an inherent discretionary power to amend pleadings or allow them to be filed at any time, unless prohibited by some statute, or unless vested rights are interfered with. *Gilchrist v. Kitchen*, 86 N. C. 20.

Review of Discretion. — It is generally held that whenever the judge is vested with a discretion, his doing or refusal to do the act in question is not reviewable upon appeal. *United Am., etc., Baptist Church v. United Am., etc., Baptist Church*, 158 N. C. 564, 74 S. E. 14; *Wilmington v. McDonald*, 133 N. C. 548, 45 S. E. 864; *Beck v. Bellamy*, 93 N. C. 129; *Best v. British, etc., Mortg. Co.*, 131 N. C. 70, 42 S. E. 456. This discretion however is not an arbitrary but a legal discretion. *Hudgins v. White*, 65 N. C. 393.

Ample Power in Questions of Pleading and Practice. — In *Austin v. Clarke*, 70 N. C. 458, 459, the court said that this section invests the Court with ample powers, in all questions of practice and procedure, to be exercised at the discretion of the judge presiding who is presumed to know best what orders and what indulgence will promote the ends of justice in each particular case. With the exercise of discretion we cannot interfere, and it is not the subject of appeal.

Extension Not to Be Encouraged. — After the defendant has failed to file a verified answer, the court may in its discretion extend the time for filing it, though such extension of time is a practice not to be encouraged. *Griffin v. Asheville Light Co.*, 111 N. C. 434, 438, 16 S. E. 423.

Extension beyond Next Term. — The trial court cannot extend the time for pleading beyond the next term of court, unless by consent of the parties. *Sheek v. Sain*, 127 N. C. 266, 37 S. E. 334.

Extension after Supreme Court's Decision. — The trial court cannot permit an answer to be filed after the Supreme Court has decided that judgment should have been entered by default for the plaintiff. *Cook v. American Exch. Bank*, 130 N. C. 183, 41 S. E. 67.

Enlarging Time for Filing Answer. — The judge of the Superior Court where a civil action has been brought has the discretionary power to enlarge the time in which an answer may be filed to the complaint beyond that limited before the clerk, upon such terms as may be just, by an order to that effect. *Aldridge v. Greensboro Fire Ins. Co.*, 194 N. C. 683, 140 S. E. 706. See also *Vann v. Coleman*, 206 N. C. 451, 174 S. E. 301.

Same—Setting Aside Default. — On an appeal from an order of the clerk of the superior court denying motion to set aside a default judgment the judge of such court has jurisdiction under this and § 1-276 to set aside the judgment

and enlarge the time for filing the defendant's answer. *Acme Mfg. Co. v. Kornegay*, 195 N. C. 373, 142 S. E. 224, citing *Caldwell v. Caldwell*, 189 N. C. 805, 128 S. E. 329.

Upon a proper finding of a meritorious defense and excusable neglect, the judge of the Superior Court, on appeal from the clerk, has authority under § 1-220 to set aside a judgment rendered by the clerk, against the defendant by default of an answer, to which exception has been duly entered before the clerk, and to permit an answer to be filed under this section. *Dunn v. Jones*, 195 N. C. 354, 142 S. E. 320.

At the Time of Trial. — It is in the discretion of the court to allow filing of the answer or demurrer even where the case is reached for trial. *Morgan v. Harris*, 141 N. C. 358, 360, 54 S. E. 381.

Allowance to File Answer after Five Years. — In *Mallard v. Patterson*, 103 N. C. 255, 13 S. E. 93, the defendant filed an unverified answer, the complaint in the action having been verified, and the defendant, after a lapse of five years, asked to be allowed to file a new answer, properly verified, and the court allowed him the leave, though he was not entitled to it as a matter of right. The Supreme Court approved of the order, and declared that the exercise of the discretion by the judge was not reviewable. *Best v. British, etc., Mortg. Co.*, 131 N. C. 70, 42 S. E. 456.

Irrespective of Laches. — Even if the delay in filing the pleading is due to the pleader's laches, it is in the discretion of the presiding judge to permit it to be filed. *McMillan v. Baxley*, 112 N. C. 578, 583, 16 S. E. 845.

Filing Defense Bond. — A trial judge may at any time extend the time for filing a defense bond. *Timber Co. v. Butler*, 134 N. C. 50, 45 S. E. 956; *Dunn v. Marks*, 141 N. C. 232, 53 S. E. 845.

Delay in Motion for Judgment May Be Considered. — In passing on a motion to file or verify an answer after the time limit, the court may in its discretion consider the delay of the plaintiff in moving for judgment. *Horney v. Mills*, 189 N. C. 724, 128 S. E. 324.

Answer to Amended Complaint. — The trial judge has the discretionary power conferred on him by this section to allow the defendant to file an answer to the amended complaint during the term, and his action will not be reviewed on appeal when an abuse of this discretion has not been shown. *Brown v. Hillsboro*, 185 N. C. 368, 117 S. E. 41.

Effect of Section 1-125. — Section 1-125 prohibits the clerk of the court only from extending the time for defendant to answer, and does not impair the broad powers conferred by this section upon the judge. *McNair v. Yarboro*, 186 N. C. 111, 118 S. E. 913.

Effect of Section 1-140 on Power of Court. — The restrictions in section 1-140 do not impair the discretion of the court in allowing an answer to be filed after the time limited. *Roberts v. Merritt*, 189 N. C. 194, 126 S. E. 513; *Aldridge v. Greensboro Fire Ins. Co.*, 194 N. C. 683, 140 S. E. 706.

Applied in *Bailey v. Commissioners*, 120 N. C. 388, 27 S. E. 28.

Cited in *Carolina Power & Light Co. v. Reeves*, 198 N. C. 404, 410, 151 S. E. 871; *O'Briant v. Bennett*, 213 N. C. 400, 196 S. E. 336.

§ 1-153. Irrelevant, redundant, indefinite pleadings. — If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment. (Rev., s. 496; Code, s. 261; C. C. P., s. 120; C. S. 537.)

Cross References. — As to bill of particulars in certain cases, see § 1-150. As to sham and irrelevant defenses, motion to strike, see § 1-126.

For note on use of the motion to strike, see 19 N. C. Law Rev. 25.

Editor's Note. — The true doctrine to be gathered from all the cases is that, if the substantial facts which constitute a cause of action are stated in the complaint or can be inferred therefrom by reasonable intendment, though the allegations are imperfect, incomplete and defective, and such insufficiency pertains rather to the form than to the substance, the proper mode of correction is not by demurrer nor by excluding evidence at the trial but by a motion, before the

trial, to make the averments more definite by amendment. To this effect see, *Moore v. Edmiston*, 70 N. C. 510; *Stokes v. Taylor*, 104 N. C. 394, 397, 10 S. E. 566; *Nye v. Williams*, 190 N. C. 129, 129 S. E. 193; *Fulps v. Mock*, 108 N. C. 601, 605, 13 S. E. 92. *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874; *Bristol v. Carolina, etc., R. Co.*, 175 N. C. 509, 95 S. E. 850; *Leach v. Page*, 211 N. C. 622, 191 S. E. 349.

Power to Strike. — Under this section or under section 1-272, the superior court has power to strike out an answer whenever it appears to the satisfaction of the court that it is irrelevant or frivolous. *Commissioners v. Piercy*, 72 N. C. 181; *Dail & Bro. v. Harper*, 83 N. C. 5, 7.

The Test of Right to Have Allegation Stricken. — Whether evidence in support of an allegation would be competent upon the trial does not determine plaintiff's right to have it stricken out upon motion under this section, the test being whether the allegation is of a probative or of an ultimate fact. *Revis v. Asheville*, 207 N. C. 237, 176 S. E. 738.

The allegation as to a city carrying accident and liability insurance was an allegation of an evidential and probative fact and not of a material, essential, or ultimate fact, and there was no error in the trial court's ordering it stricken out under this section. *Id.*

Equitable matters in defense relevant only upon the motion to confirm a foreclosure sale are properly stricken from the answer upon motion, under this section, since plaintiff seeks a legal remedy only and invokes no equitable jurisdiction of the court, and the foreclosure sale cannot be collaterally attacked in plaintiff's action to recover the deficiency after foreclosure. *First Carolina's Joint-Stock Land Bank v. Stewart*, 208 N. C. 139, 179 S. E. 463.

Power to Make Explicit Ex Mero Motu. — The court has a right ex mero motu to direct that the pleadings shall be more explicit. *Martin v. Goode*, 111 N. C. 288, 16 S. E. 232; *Allen v. Carolina Cent. R. Co.*, 120 N. C. 548, 550, 27 S. E. 76. Or it may direct the same upon the application of a party interested. *Buie v. Brown*, 104 N. C. 335, 336, 337, 10 S. E. 465; *Bowling v. Fidelity Bank*, 209 N. C. 463, 184 S. E. 13.

If defendant desires a more certain and definite statement of the cause of action alleged, the proper remedy is a motion under this section. *Cox v. Jenkins*, 212 N. C. 667, 194 S. E. 119.

Manner of Correction May Not Be Directed. — While the trial judge is authorized in the exercise of his discretion to order that a pleading be made more definite under the provisions of this section, he may not direct the manner in which this may be done. *Hensley v. McDowell Furniture Co.*, 164 N. C. 148, 80 S. E. 154.

Argumentative, Hypothetical or Alternative Pleading. — The proper method of taking advantage of an argumentative, hypothetical or an alternative pleading is not by demurrer but by a motion under this section to make more explicit. *Daniels v. Baxter*, 120 N. C. 14, 18, 26 S. E. 635.

Discretion of Court. — A motion to make a pleading more definite and certain is addressed to the discretion of the court. *Womack v. Carter*, 160 N. C. 286, 75 S. E. 1102. See also, *Allen v. Carolina Cent. R. Co.*, 120 N. C. 548, 27 S. E. 76; *Smith v. Summerfield*, 108 N. C. 284, 12 S. E. 997; *Conley v. Richmond, etc., R. Co.*, 109 N. C. 692, 14 S. E. 303. See also *Temple v. Western Union Tel. Co.*, 205 N. C. 441, 171 S. E. 630; *Tickle v. Hobgood*, 212 N. C. 762, 194 S. E. 461.

If the pleader thinks that it is impossible to make the allegations of his pleading more definite, this fact must be addressed to the judge who has a large discretion in such matters, and if it appears to him that such was the case, he will disallow a motion to make such pleading more definite and certain. *Bristol v. Carolina, etc., R. Co.*, 175 N. C. 509, 95 S. E. 850.

Under this section the Superior Court is authorized in the exercise of its discretion to strike from a pleading any allegations of purely evidential and probative facts. *Life Ins. Co. v. Smathers*, 211 N. C. 373, 190 S. E. 484.

If irrelevant or redundant matter is inserted in a pleading it may be stricken out on motion of the aggrieved party, and if made in apt time "it is not addressed to the discretion of the court, but is made as a matter of right." *Herndon v. Massey*, 217 N. C. 610, 8 S. E. (2d) 914. See also, *Tar Heel Hosiery Mill v. Durham Hosiery Mills*, 198 N. C. 596, 152 S. E. 794; *Federal Reserve Bank v. Atmore*, 200 N. C. 437, 157 S. E. 129; *Patterson v. Southern R. Co.*, 214 N. C. 38, 198 S. E. 364; *Parrish v. Atlantic Coast Line R. Co.*, 221 N. C. 292, 20 S. E. (2d) 299; *Hill v. Stansbury*, 221 N. C. 339, 20 S. E. (2d) 308.

Motion to Make Pleading More Definite and Certain. — The refusal of the court to grant plaintiff's motion to strike the parts of the reply artificially setting up a defense, is not reversible error, plaintiff's more appropriate remedy being a motion to make defendant's pleading more definite

and certain. *Sayles v. Loftis*, 217 N. C. 674, 9 S. E. (2d) 393.

If defendant, in a negligent injury action, desires more specific and detailed allegations in the complaint as to the charge of negligence, he must aptly request that the court require the pleading to be made more definite and certain or request a bill of particulars. *Livingston v. Essex Inv. Co.*, 219 N. C. 416, 14 S. E. (2d) 489.

Action to Establish Donatio Mortis Causa.—In an action to establish a donatio mortis causa, allegations setting forth facts tending to show motive, the setting, the relationship between the parties, the intention of the donor, and the state of his health and the circumstances surrounding his death, are proper, and defendant administrator's motion to strike such allegations from the complaint is properly denied. *Bynum v. Fidelity Bank*, 219 N. C. 109, 12 S. E. (2d) 898.

Waiver or Cure of Defects in Absence of Motion.—If the defect of uncertainty or indefiniteness is not raised by a motion to make more certain, and an answer is filed, such defect will be deemed as waived or cured. *Ricks v. Brooks*, 179 N. C. 204, 102 S. E. 207.

The defect in the statement of locality may be raised either by a motion for a bill of particulars or a motion under this section to make the pleading more specific. *Lucas v. Carolina Cent. R. Co.*, 121 N. C. 506, 509, 28 S. E. 265.

Scandalous and Impertinent Matter.—Where "impertinent" matter is introduced into the pleadings, it may be stricken out at the expense of the party introducing it. *Powell v. Cobb*, 56 N. C. 1.

A party is entitled, as a matter of right, to have irrelevant or redundant matter which is prejudicial to him, or scandalous, stricken from his opponent's pleading upon motion aptly made. *Patterson v. Southern Ry. Co.*, 214 N. C. 38, 198 S. E. 364.

Application to Justice's Court.—The provision of this section, as to motions to make pleadings more certain, applies to justices' courts as well as to the superior courts. *Wilson v. Batchelor*, 182 N. C. 92, 108 S. E. 355.

Time of Motion.—Under this section the motion must be made in apt time before answer or demurrer, and if not made within time the granting of the motion rests within the discretion of the judge. *Hensley v. McDowell Furniture Co.*, 164 N. C. 148, 80 S. E. 154; *Bowling v. Fidelity Bank*, 209 N. C. 463, 184 S. E. 13.

Thus, a motion to strike out as a matter of right made after answer and on the day the case is calendared for trial, is properly denied for the reason that it is not made in apt time. But even though a motion to strike out is not made in apt time, the court has discretionary power to allow the motion during the term at which the case is calendared for trial. *Warren v. Virginia-Carolina Joint Stock Land Bank*, 214 N. C. 206, 198 S. E. 624.

Motion to strike matter from an answer comes too late, when filed after the jury is impaneled. *Roller v. McKinney*, 159 N. C. 319, 74 S. E. 966.

A motion to strike out alleged improper matter from a complaint will not be considered after an answer to demurrer is filed, or after an order for time to plead. *Lee v. Thornton*, 171 N. C. 209, 88 S. E. 232.

It was held not an abuse of discretion for the trial court to order the complaint made more definite and certain, although the complaint was filed at October term, 1916, and the motion was made at the December term, 1917, immediately before trial. *Bristol v. Carolina, etc., R. Co.*, 175 N. C. 509, 95 S. E. 850.

Where a motion is made on the eve of the trial, it should be granted with great caution, if the moving party has been very dilatory. *Bristol v. Carolina, etc., R. Co.*, 175 N. C. 509, 95 S. E. 850.

A motion to strike out does not challenge sufficiency of the complaint to state a cause of action, but concedes that sufficient facts are alleged, and presents only the propriety, relevancy, or materiality of the allegations sought to be stricken out. *Poovey v. Hickory*, 210 N. C. 630, 188 S. E. 78.

A motion to strike under this section does not raise the question of the sufficiency of the complaint as a whole to state a cause of action, but such question can be raised only by demurrer. *Parrish v. Atlantic Coast Line R. Co.*, 221 N. C. 292, 20 S. E. (2d) 299.

"Oratorical" Allegations Are Not Improper.—Although the allegations are made in language which the defendant thinks is somewhat oratorical, this does not make them improper, irrelevant, or immaterial, nor can it be held that as a matter of law the reading of such allegations to the court, in the presence of the jury, will be prejudicial to the rights of the defendant. *Poovey v. Hickory*, 210 N. C. 630, 188 S. E. 78.

Allowance of Amendments.—Under this section and § 1-150

when there is a defective cause of action, although in due form, the plaintiff cannot recover unless the court in its discretion, on reasonable terms, allows an amendment. When a good cause of action is set out, but defective in form, the court may require the pleadings to be made definite and certain by amendment. *Bowling v. Fidelity Bank*, 209 N. C. 463, 184 S. E. 13, citing *Allen v. Carolina Cent. Ry. Co.*, 120 N. C. 548, 27 S. E. 76.

Review of Refusal of Motion to Strike.—The refusal of a motion to strike out certain portions of a bill of particulars as irrelevant and immaterial, under this section, will be affirmed where it appears that defendant was not prejudiced thereby, the matter lending itself to an easier determination by correct rulings on the admissibility of evidence offered in support of such allegations. *Pemberton v. Greensboro*, 205 N. C. 599, 172 S. E. 196; *Scott v. Bryan*, 210 N. C. 478, 187 S. E. 756.

An appeal will lie immediately from the denial of a motion made as a matter of right under this section, to strike certain paragraphs from the complaint on the ground of irrelevancy and redundancy, but not where motion is addressed to court's discretion. *Parrish v. Atlantic Coast Line R. Co.*, 221 N. C. 292, 20 S. E. (2d) 299.

On appeal from the denial of a motion to strike made under this section, the duty rests upon the supreme court to sustain the objections which relate to any allegation which is clearly irrelevant or redundant within the meaning of this section and to strike same from the pleading, but caution will be exercised not to put the lower court in trammels upon a doubtful matter when the competency of the allegations objected to may more clearly appear when the case is factually developed on the trial. *Hill v. Stansbury*, 221 N. C. 339, 20 S. E. (2d) 308.

Applied in *McCarley v. Council*, 205 N. C. 370, 375, 171 S. E. 323; *In re West*, 212 N. C. 189, 193 S. E. 134; *Batton v. Atlantic Coast Line R. Co.*, 212 N. C. 256, 193 S. E. 674; *Heffner v. Jefferson Standard Life Ins. Co.*, 214 N. C. 359, 199 S. E. 293, treated under § 1-125.

Cited in *Cole v. Wagner*, 197 N. C. 692, 150 S. E. 339; *Tar Heel Hosiery Mill v. Durham Hosiery Mills*, 198 N. C. 596, 152 S. E. 794; *Ellis v. Ellis*, 198 N. C. 767, 153 S. E. 449; *Hutchins v. Mangum*, 198 N. C. 774, 153 S. E. 409; *Yonge v. New York Life Ins. Co.*, 199 N. C. 16, 18, 153 S. E. 630; *Hood v. Love*, 203 N. C. 583, 166 S. E. 743; *Duke v. Crippled Children's Comm.*, 214 N. C. 571, 199 S. E. 918.

§ 1-154. Pleading judgments.—In pleading a judgment or other determination of a court or of an officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but the judgment or determination may be stated to have been duly given or made. If this allegation is controverted, the party pleading must establish, on the trial, the facts conferring jurisdiction. (Rev., s. 497; Code, s. 262; C. C. P., s. 121; C. S. 538.)

§ 1-155. How conditions precedent pleaded.—In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing performance, but it may be stated generally that the party duly performed all the conditions on his part. If this allegation is controverted, the party pleading must establish, on the trial, the facts showing performance. (Rev., s. 498; Code, s. 263; C. C. P., s. 122; C. S. 539.)

In Actions upon Insurance Policy.—In *Britt v. Mutual Ben. Life Ins. Co.*, 105 N. C. 175, 178, 10 S. E. 896, it was held under this section that, in an action upon an insurance policy, the truth of the representations in the application as conditions precedent may be averred generally by stating that the party duly performed all the conditions on his part.

§ 1-156. How instrument for payment of money pleaded.—In an action or defense founded upon an instrument for the payment of money only, it is sufficient for the party pleading to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum which he claims. (Rev., s. 499; Code, s. 263; C. C. P., s. 122; C. S. 540.)

This section does not require that the entire writing be

made a part of the complaint, and, a demurrer ore tenus does not lie where answer has been filed and no objection taken by demurrer to the jurisdiction of the court or that the complaint did not state facts sufficient to constitute a cause of action. *Roberts v. Grogan*, 222 N. C. 30, 32, 21 S. E. (2d) 829.

Applied in *Sossamon v. Oaklawn Cemetery*, 212 N. C. 535, 193 S. E. 720.

§ 1-157. How private statutes pleaded.—In pleading a private statute or right derived therefrom it is sufficient to refer to the statute by its title or the day of its ratification, and the court shall thereupon take judicial notice of it. (Rev., s. 500; Code, s. 264; C. C. P., s. 123; C. S. 541.)

Public Law Published in Private Laws, and Vice Versa.—Notwithstanding the fact that a public statute is erroneously published in the private laws, the court will take judicial notice thereof without the necessity of its being pleaded. *Hancock v. Norfolk, etc.*, R. Co., 124 N. C. 222, 32 S. E. 679. And conversely, the fact that a private statute is published among the public statutes will not make it a public statute so as to do away with the necessity of pleading and proving it. *Durham v. Richmond, etc.*, R. Co., 108 N. C. 399, 402, 12 S. E. 1040, 13 S. E. 1.

Private Statute with Public Provisions.—A private statute does not assume the character of a public statute because of the fact that it contains public statutory provisions. Upon this principle the charter of a corporation which contains public statutory provisions is not a public statute. *Carrow v. Washington Toll-Bridge Co.*, 61 N. C. 118; *Durham v. Richmond, etc.*, R. Co., 108 N. C. 399, 402, 12 S. E. 1040, 13 S. E. 1. A fortiori where it does not contain such provisions it must be specifically pleaded. *Corporation Comm. v. Seaboard Air Line System*, 127 N. C. 283, 37 S. E. 266.

Nature of Statute is a Question of Law.—Whether a statute is public or private is a question of law which the courts must determine in the absence of a statutory enactment declaring and settling its nature. *Humphries v. Baxter*, 28 N. C. 437; *State v. Wallace*, 94 N. C. 827.

Qualification of the Rule in Supreme Court.—While the courts will not as a general rule, take judicial notice of a private statute or its terms and will require that it shall be specially pleaded in the manner required by this section, this rule will not be allowed to prevail when a private statute relating to and effectually settling the matter in controversy has, after due notice, been formally brought to the attention of the Supreme Court; for then only an abstract proposition would be left for the Court's determination, which will not be entertained. *Reid v. Norfolk Southern R. Co.*, 162 N. C. 355, 78 S. E. 306.

Proof of Private Statutes.—Private statutes must not only be pleaded as provided by this section, but also proved when they become necessary as evidence. *Durham v. Richmond, etc.*, R. Co., 108 N. C. 399, 402, 12 S. E. 1040, 13 S. E. 1.

§ 1-158. Pleadings in libel and slander.—In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it is sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation is controverted, the plaintiff is bound to establish on trial that it was so published or spoken.

The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances. (Rev., ss. 501, 502; Code, ss. 265, 266; C. C. P., ss. 124, 125; C. S. 542.)

Cross Reference.—As to libel and slander generally, see § 99-1 et seq.

For an article entitled "Restrictions on a Free Press," wherein various phases of rights arising out of libel are discussed, see 4 N. C. Law Rev. 24.

Plea Prerequisite to Evidence of Truth.—A plea of justification or of mitigation is a prerequisite to the allowance of

evidence of the truth of the charge. Without it such evidence is incompetent. *Burris v. Bush*, 170 N. C. 394, 87 S. E. 97; *Upchurch v. Robertson*, 127 N. C. 127, 128, 37 S. E. 157; *Dickerson v. Dail*, 159 N. C. 541, 75 S. E. 803; *Bryant v. Reedy*, 214 N. C. 748, 753, 200 S. E. 896.

Where the truth of words alleged to be slanderous is not specifically pleaded, evidence thereof was held properly rejected. *Elmore v. Atlantic Coast Line R. Co.*, 189 N. C. 658, 127 S. E. 710.

Thus, when the defendant pleads the general issue, he may not introduce evidence in justification or mitigation. *Bryant v. Reedy*, 214 N. C. 748, 753, 200 S. E. 896.

When the defendant in an action for slander denies the allegations of plaintiff as to the slander charges in toto, and tenders no issue as to justification or mitigation as provided in this section, the exclusion of evidence of justification and mitigation is not error, it being required that such evidence be supported by proper plea. Id.

Sufficient Averment.—It is material only to aver in the complaint that the slanderous words were spoken of the plaintiff, the facts which point to them and convey to the hearer the sense in which they are used, are matters of proof before the jury. *Wozelka v. Hettrick*, 93 N. C. 10.

Sufficient Publication.—Under this section where the complaint in an action for libel alleges that the defendant sent the plaintiff an open post card through the mails containing libelous matter, without an allegation that such matter was read by some third person, the allegation of publication is insufficient. *McKeel v. Latham*, 202 N. C. 318, 162 S. E. 747.

Evidence of Justification under General Issue.—When the defendant pleads the general issue, he may not introduce evidence in justification or mitigation. *Upchurch v. Robertson*, 127 N. C. 127, 37 S. E. 157.

Where defendants had not pleaded privilege, justification, etc., it was error to withhold case from the jury. *Harrell v. Goerch*, 209 N. C. 741, 742, 184 S. E. 489.

In the absence of a plea of privilege, justification, or mitigating circumstances, the evidence was sufficient to be submitted to the jury on the question of whether the general manager was acting within the scope of his authority in uttering certain slanderous words in an action therefor against the corporation. *Alley v. Long*, 209 N. C. 245, 183 S. E. 294.

§ 1-159. Allegations not denied, deemed true.—Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer, constituting a counterclaim, not controverted by the reply is, for the purposes of the action, taken as true. But the allegation of new matter in the answer, not relating to a counterclaim, or of new matter in reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case requires. (Rev., s. 503; Code, s. 268; C. C. P., s. 127; C. S. 543.)

Editor's Note.—The rule established by this section disposed of the necessity of submitting to the jury matters which the law deems as admitted in the absence of denial.

New Matter Not Amounting to Counterclaim.—If the new matter in the answer does not amount to a counterclaim such matter will be deemed as denied by the operation of law. *Wagon Co. v. Byrd*, 119 N. C. 460, 26 S. E. 144; *McQueen v. People's Nat. Bank*, 111 N. C. 509, 513, 16 S. E. 270. Thus in an action for the purchase price of land sold, the allegation of defective title is a matter of defense, and not a counterclaim, and hence the burden is on defendant, even though not specifically denied by the operation of law. *Bank v. Loughran*, 122 N. C. 668, 674, 30 S. E. 17.

When such new matter does not raise issues of fact but presents only questions of law, the court may render judgment on the pleadings, there being no controverted issues of fact for the determination of the jury. *Dunn v. Tew*, 219 N. C. 286, 13 S. E. (2d) 536.

The allegations of the complaint, and every material allegation of new matter constituting a counterclaim in an answer, directly admitted or not denied, have the effect of a finding by a jury. *Bonham v. Craig*, 80 N. C. 224; *Helms v. Green*, 105 N. C. 251, 262, 11 S. E. 470.

As a corollary to this general principle it follows that new matter in the answer not amounting to counterclaim disposes of the necessity of a replication. *McLamb v. McPhail*, 126 N. C. 218, 221, 35 S. E. 426; *Wilson v. Brown*, 134 N. C. 400, 408, 46 S. E. 762; *Smith v. Bruton*, 137 N. C. 79, 80, 49 S. E. 64; *Askew v. Koonce*, 118 N. C. 526, 24 S. E. 218.

Admission as Basis for Referee's Finding.—Allegations in

a complaint, not denied in the answer, are a sufficient basis for the referee's findings of fact; but allegations not so admitted and not sustained by proof, are not evidence, unless put in evidence. *Stephenson v. Felton*, 106 N. C. 114, 11 S. E. 255.

Application in Divorce Actions.—Divorces are granted only when the facts constituting a sufficient cause, under a proper construction of the law, are pleaded, proved and found by the jury. *McQueen v. McQueen*, 82 N. C. 471. The admissions of the parties are not competent evidence, as in other actions, of the truth of the material allegations of the pleadings. *Perkins v. Perkins*, 88 N. C. 41. But when a defendant demurs to a petition for divorce the court here must consider the demurrer as a concession, not only that the facts alleged are true, but that they can and will be proved, so as to secure the verdict of the jury. *Steele v. Steele*, 104 N. C. 631, 634, 10 S. E. 707.

Admissions as Evidence in Other Actions.—Admissions implied under this section by failure to controvert allegations of the opposite pleading constitute evidence against the party making them in all actions and proceedings against him, wherein they may be pertinent and competent, just as are admissions and declarations of a party made adverse to his right on any occasion. Their weight depends always upon whether or not they were made with deliberation or incautiously, and they are subject to proper explanation. *Mason v. McCormick*, 85 N. C. 226; *Adams v. Utley*, 87 N. C. 356; *Guy v. Manuel*, 89 N. C. 83; *Brooks v. Brooks*, 90 N. C. 142; *White v. Beaman*, 96 N. C. 122, 1 S. E. 789; *Smith v. Nimocks*, 94 N. C. 243. And the fact that the former action was decided in favor of the party admitting can not affect his admissions as evidence in the subsequent action. *Grant v. Gooch*, 105 N. C. 278, 282, 11 S. E. 571. See also *Lowder v. Smith*, 201 N. C. 642, 648, 161 S. E. 223.

Applied in *Little v. Rhyne*, 211 N. C. 431, 190 S. E. 725. Cited in *Brewer v. Brewer*, 198 N. C. 669, 671, 153 S. E. 163.

§ 1-160. Pleading lost, copy used.—If an original pleading or paper is lost or withheld by any person, the court may authorize a copy to be filed and used instead of the original. (Rev., s. 504; Code, s. 600; C. C. P., s. 357; C. S. 541.)

Before Cause Argued in Supreme Court.—The lost pleading or paper should always be supplied by a copy, before the cause is argued in the supreme court. *Blackmore v. Winders*, 144 N. C. 212, 219, 56 S. E. 874.

Order of Substitution Not Reviewable.—Judgments of trial courts permitting lost pleadings to be substituted, are not reviewable. *Bray v. Creekmore*, 109 N. C. 49, 13 S. E. 723.

Art. 18. Amendments.

§ 1-161. Amendment as of course.—Any pleading may be once amended of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering it expires; or it can be so amended at any time, unless it is made to appear to the court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a term for which the cause is, or may be, docketed for trial; and if it appears to the court or judge that the amendment was made for that purpose, it may be stricken out, and such terms imposed as seem just to the court or judge. (Rev., s. 505; Code, s. 272; C. C. P., s. 131; C. S. 545.)

Cross References.—As to enlargement of time in discretion of judge, see § 1-152. As to amendment to make pleading more definite and certain, see § 1-153. As to amendment of pleadings, etc., to correct mistake, to insert material allegations, etc., in discretion of court, see § 1-163.

Editor's Note.—The resultant frustration of justice from the absurd technicalities of the common law system of pleading and practice aroused from the very early days of its history a liberal movement towards the emancipation of the rules of procedure from needless and cumbersome formalities. The movement originated with the gradual development in England of courts of equity which "delight to disregard form and look into the substance," and was supplemented by the statute of Jeoffails which provided for the cure and disregard of formal defects.

In this country this liberal tendency expressed itself in the

form of express enactments towards the adaptation of the rules of pleading and procedure, for the protection of substantive rights and for a speedy and effective administration of justice.

In accord with what one may justly call the "renaissance" of the procedural law, the legislative policy of this state has been so prone to respond to the calls of a more rational administration of justice independent of technicalities and form, that in this state it may now be well said that "anything may be amended at any time," with the qualifications to be hereafter noted.

These statutory provisions authorizing amendments may generally be classified under two principal categories: (A) Provisions authorizing amendments as a matter of right, and (B) Provisions authorizing amendments within the discretion of the court to subserve the ends of justice.

The former category (A) may be further analyzed by dividing it into (a) amendments made before the time for answering the pleading has expired, and (b) amendments after such time has expired. In the former case there is no limitation or condition upon the right to amend, except the condition that it must be exercised without prejudice to the proceedings already had; in the latter case the right to amend as a matter of course does not exist. See *Goodwin v. Caraleigh, etc., Fertilizer Works*, 121 N. C. 91, 28 S. E. 192; *Kron v. Smith*, 96 N. C. 389, 2 S. E. 532; *Commissioners v. Blair*, 76 N. C. 136. From the doctrine of these cases the inference is deduced that the phrase "or it can be so amended at any time" appearing in the first part of the section, has no reference to the right to amend as a matter of course, and that it simply means that the pleading may be amended after the period for answering it has expired, "without costs and without prejudice to the proceedings already had."

The scope and the extent of the latter category (B) is entirely dependent upon the discretion of the court, which is subject only to the usual limitation upon the exercise of discretionary powers, viz., that it must not be abused.

Time of Amendment as a Matter of Right.—Where the motion to amend is made after the time for answering has expired, and after an answer has been filed, it will be too late to amend as a matter of course; after such time the privilege of amending the pleadings is at the discretion of the court which is not reviewable. *Commissioners v. Blair*, 76 N. C. 136; *Kron v. Smith*, 96 N. C. 389; 2 S. E. 532; *Goodwin v. Caraleigh, etc., Fertilizer Works*, 121 N. C. 91, 28 S. E. 192; *Biggs v. Moffitt*, 218 N. C. 601, 11 S. E. (2d) 870.

Practice of Allowing Amendments at All Times Is Becoming Liberal.—Under this and subsequent sections, and under the liberal practice as set out in § 1-151, the court below, in its sound discretion, in furtherance of justice, can amend the pleading, before and after judgment, to conform to the facts proved, keeping in mind always that an amendment cannot change substantially the nature of the action or defense, without consent. The system is broadening and expanding more and more, with the view at all times that a trial should be had on the merits and to prevent injustice. *Lipe v. Citizens' Bank, etc., Co.*, 206 N. C. 24, 29, 173 S. E. 316.

Form and Notice of Motion to Amend.—After the time for answering has expired it has been the uniform practice to apply to the court for permission to amend. This application may be oral or written, but notice of such motion is required unless made during a term of court at which the action stands for trial. *Carolina Discount Corp. v. Butler*, 200 N. C. 709, 712, 158 S. E. 249.

Cited in *Whichard v. Lipe*, 221 N. C. 53, 19 S. E. (2d) 14, 139 A. L. R. 1147.

§ 1-162. Pleading over after demurrer.—After the decision on a demurrer, the judge shall, if it appear that the demurrer was interposed in good faith, allow the party to plead over upon such terms as may be just. (Rev., s. 506; Code, s. 272; C. C. P., s. 131; 1871-2, c. 173; C. S. 546.)

Cross References.—As to procedure after return of judgment upon demurrer, see § 1-131. As to motion for judgment on frivolous demurrer, see § 1-219. See also, § 1-129.

Formerly Section Discretionary—Now Mandatory.—Prior to the act of 1872, it was discretionary with the judge to permit any amendment the provision being: the judge "may in his discretion" etc. *Matthews v. Copeland*, 80 N. C. 30, 33. But now the requirement is mandatory under proper circumstances. See *Moore v. Hobbs*, 77 N. C. 65, 66.

Application to Contracts Prior to C. C. P.—This section, which provides that after the decision of a demurrer interposed in good faith the judge shall allow the party to plead over, has no application to actions on contracts entered into

prior to the ratification of the *C. C. P. Matthews v. Cope-land*, 80 N. C. 30.

Not Applicable to Plaintiff.—This section has been often construed to give to the defendant, after a demurrer interposed by him in good faith has been overruled, the right to answer over, but it has never been extended to the plaintiff as a right to amend his complaint. *Barnes v. Crawford*, 115 N. C. 76, 79, 20 S. E. 386.

Request at the Same Term.—Where a demurrer, being interposed in good faith, is overruled, the defendant is entitled to plead over, if the request to do so is made at that term, and he may also appeal from the overruling of the demurrer. *Perry v. Board*, 130 N. C. 558, 41 S. E. 787; *Gore v. Davis*, 124 N. C. 234, 32 S. E. 554.

Demurrer Must Have Been Interposed in Good Faith.—The right to put in an answer after the overruling of a demurrer, as created by this section, is subject to the qualification that it shall appear that the demurrer was interposed in good faith. *Bronson v. Wilmington N. C. Life Ins. Co.*, 85 N. C. 411, 415.

Hence where the demurrer is frivolous, the plaintiff is entitled to judgment, unless the court in the exercise of a sound discretion permits the defendant to answer over. *Morgan v. Harris*, 141 N. C. 358, 360, 54 S. E. 381.

Time of Answering.—Upon the overruling of the demurrer the defendant is entitled under this section to answer, but he must answer at that term, and the allowance of further time is in the discretion of the court. *Gore v. Davis*, 124 N. C. 234, 32 S. E. 554.

Leave to Amend Must Be Obtained.—Where a demurrer is overruled the party may not as a matter of course answer or reply; but the case is open for judgment, as if the party had made no defense, unless he obtains leave to amend his pleadings by putting in an answer or reply as authorized by this section. *Ranson v. McClees*, 64 N. C. 17, 21.

Cited in *Morris v. Cleve*, 194 N. C. 202, 139 S. E. 290.

§ 1-163. Amendments in discretion of court.—

The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; by correcting a mistake in the name of a party, or a mistake in any other respect; by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved. When a proceeding taken by a party fails to conform to law in any respect, the trial judge may permit an amendment of the proceeding so as to make it conformable thereto. (Rev., ss. 507, 512; Code, ss. 273, 274; C. C. P., ss. 132, 133; C. S. 547.)

- I. In General.
- II. Discretionary Powers of the Court.
- III. Introducing New Cause of Action, Defense or Relief.
- IV. Conforming Pleadings to Facts Found.
- V. Amendments of Process.
- VI. Amendments as to Parties.
- VII. Amendments Before Justices of the Peace.
- VIII. Specific Instances.

I. IN GENERAL.

See notes under §§ 1-129, 1-131.

Amplest Powers of Amendment.—In civil actions, the amplest powers of amendment are given to the courts to amend any process, pleading or proceeding in such actions either in form or substance for the furtherance of justice, on such terms as shall be just, at any time before or after judgment rendered therein. *State v. Vaughan*, 91 N. C. 532, 535.

Power to Amend Independent of Statute.—Even independently of the Code, the superior courts possess an inherent discretionary power to amend pleadings or allow them to be filed at any time unless prohibited by some statute, or unless vested rights are interfered with, and a fortiori under the liberal provisions of the Code which have uniformly been beneficially construed by the Supreme Court. *Gilchrist v. Kitchen*, 86 N. C. 20; *Cantwell v. Herring*, 127 N. C. 81, 82, 37 S. E. 140.

Inherent Power of Amendment.—The superior courts possess an inherent discretionary power to amend pleadings or allow them to be filed at any time, unless prohibited by some statute, or unless vested rights are interfered with. *Gilchrist v. Kitchen*, 86 N. C. 20.

To the same effect in *Gilchrist v. Kitchen*, 86 N. C. 20, the Court says: "But, independent of the Code, we hold that the right to amend pleadings in the cause and allow answers or other pleadings to be filed at any time, is an inherent power of the superior courts which they may exercise at their discretion. The judge presiding is presumed to know best what orders and what indulgence as to filing of pleadings will promote the ends of justice as they arise in each particular case, and with the exercise of this discretion this Court cannot interfere because it is not the subject of appeal." *Austin v. Clarke*, 70 N. C. 458; *Woodcock v. Merrimon*, 122 N. C. 731, 735, 30 S. E. 321.

It has been held that the allowance of amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice. *Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866.

Liberal Allowance on Proper Terms—Exception.—Amendments to pleadings which further justice, speed the trial of controversies or prevent unnecessary circuitry of action and unnecessary expense, should be liberally allowed on proper terms, *Commissioners v. Blair*, 76 N. C. 136, except when the effect of the amendment is to allege substantially a new cause of action. *Dosenbacher v. Martin*, 170 N. C. 236, 86 S. E. 785. See post, this note, "Introducing New Cause of Action or Defense", III.

While amendments to process and pleading, under our procedure, in both civil and criminal causes, are liberally allowed by this section, this does not imply that the court has power to change the nature of the offense intended to be charged so as to charge a different offense in substance from that at first intended. *State v. Clegg*, 214 N. C. 675, 677, 200 S. E. 371. See also, *Clenenger v. Grover*, 212 N. C. 13, 193 S. E. 12.

Allowance in the Liberal Spirit of the Code.—The whole scope and design of the new Code is to discountenance all dilatory pleas, and to afford the parties a cheap and speedy trial upon the merits of their matter in controversy. To effect this end it is the duty of all the courts to allow amendments in the liberal spirit clearly indicated in the Code. *Wilson v. Moore*, 72 N. C. 558, 562.

"Anything May Be Amended at Any Time."—The scale of amendments is so liberal that it may well be said that "anything may be amended at any time." *Garrett v. Trotter*, 65 N. C. 430.

Power to Make Any Conceivable Amendment.—In *Moore v. Edmiston*, 70 N. C. 510, 619, the court speaking of this section says: "By a sweeping curative supplement to this most curative system of pleading, this section confers upon the court the power, both before and after judgment, to make almost any conceivable amendment so as to conform the pleadings to the facts proved."

Powers to be Exercised Freely.—While the court cannot, without the consent of the parties, so amend, change or modify the pleadings in a pending action so as to make it substantially a new one, *Merrill v. Merrill*, 92 N. C. 657; *McNair v. Board*, 93 N. C. 364, (see post "Introducing new cause of action") its general powers, and especially those expressly conferred by this and the following sections, to allow amendments of the pleadings "in furtherance of justice," are broad and comprehensive, and in all proper cases should be exercised freely by the court, having due regard to fairness and the rights of the parties. *Ely v. Early*, 94 N. C. 1, 4.

Object to Try Cases upon Their Merits.—It is the policy of our Code system to be liberal in allowing amendments of process, pleadings, and proceedings, so that causes may be tried upon their merits, and to prevent a failure of justice for reasons which may be technical or frivolous, not affecting the substantial rights of the parties. *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642.

This provision and numerous others of the C. C. P. show that its purpose is to prevent actions from being defeated on grounds that do not affect the merits of the controversy, whenever it can be done by amending such actions. The pervading idea being to settle controversies by one action, and thereby prevent the loss of the labor and money expended in that action, and the necessity for incurring like labor and expense in a second. *Bullard v. Johnson*, 65 N. C. 436, 438.

The purpose and scope of the new system is to facilitate the trial and disposition of causes upon their merits; and to this end, when necessary, the process and pleadings are liberally reformed by amendments which do not substantially change the claim or defense. *Cheatham v. Crews*, 81 N. C. 343, 345.

Time of Amendment.—Formerly this section applied only to amendments made before or at the trial, and not at a time subsequent. *Askew v. Capehart*, 79 N. C. 17, 19. But now it in terms provides for amendments after judgment as well as before. Ed. Note.

There is no force in the argument, that an amendment which removes the objections must be made before they are taken, and cannot be made afterwards, since it is precisely for such a purpose the power is conferred to be exercised in furthering the ends of justice, at the discretion of the judge, in order that such as are trivial, and do not affect the substantial and understood matters in controversy, may be removed. *State v. Giles*, 103 N. C. 391, 393, 9 S. E. 433.

Amendment after Judgment.—If necessary, the pleadings may be reformed even after judgment to conform to the facts proved. *Hendon v. North Carolina R. Co.*, 127 N. C. 110, 113, 37 S. E. 155.

Same—The Answer.—The court may in its discretion even after judgment allow an answer to be amended to conform to the proof. *Waters v. Waters*, 125 N. C. 590, 593, 34 S. E. 548.

Amendment after Demurrer.—The trial court has the discretionary power to allow plaintiff to amend his complaint, upon the hearing of defendants' demurrer thereto, so as to allege that the negligence complained of was the proximate cause of the injury. *Bailey v. Roberts*, 208 N. C. 532, 181 S. E. 754.

Amendment after Verdict.—The court has power to allow an amendment after verdict, so as to supply the omission of an averment in the pleading. *Pearce v. Mason*, 78 N. C. 37; *Penny v. Smith*, 61 N. C. 35; *Roberson v. Hodges*, 105 N. C. 49, 11 S. E. 263.

After Reversal.—Under this section upon the receipt of a certificate of reversal of judgment overruling a demurrer, the lower court may allow an amendment of the summons and complaint in accordance with the opinion. *Commissioner of Banks v. Harvey*, 202 N. C. 380, 162 S. E. 894.

Amendment after Order and Confirmation of Sale.—In *Stafford v. Harris*, 72 N. C. 198, the court held that the Probate Court (now the clerk of the superior court) had no authority, after order of sale and confirmation of sale and order to make title, to entertain a motion in the cause on the part of the purchaser to so amend the pleadings as to include another tract of land not mentioned, and that the judge would have no power to amend the petition upon parol evidence that a tract of land had been omitted therefrom through mistake.

Presumption of Facts Supporting Amendment.—The trial judge will be presumed to have found the facts necessary to support his order allowing an amendment to the pleading, when no facts are stated in the record. *Patterson v. Champion Lumber Co.*, 175 N. C. 90, 94 S. E. 692.

Relation Back Doctrine.—An amendment when properly allowed will date back to the time of the institution of the suit. *Lefler v. Lane & Co.*, 170 N. C. 181, 86 S. E. 1022.

An amended summons, under this section, relates back to the commencement of the action unless the amendment changes the cause of action or brings in new parties, in which event the amendment is effective only from the date it was granted. *Lee v. Hoff*, 221 N. C. 233, 237, 19 S. E. (2d) 858.

Jurisdiction.—In order to allow an amendment, the court must have jurisdiction of the cause. An amendment presupposes jurisdiction of the case. *Hodge v. Williams*, 22 How. 87, 88, 16 L. Ed. 237.

Power of Clerk of Court.—The clerk of the court acting as and for the court has authority, out of term time, to allow all proper amendments. *Cushing v. Styron*, 104 N. C. 338, 340, 10 S. E. 258.

Verification of Answer by Amendment.—An unverified answer may be allowed to be verified by amendment in the discretion of the court. *Banks v. Gay Mfg. Co.*, 108 N. C. 282, 283, 12 S. E. 741.

Void Proceedings not Curable by Amendment.—If the proceedings are so defective in form and substance that they are void upon their faces, no amendment can cure them. *Merchants Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507, 524, 20 S. E. 765.

In the Supreme Court.—In proper cases the Supreme Court will allow an amendment to the complaint for the furtherance of justice. *Deligny v. Tate Furniture Co.*, 170 N. C. 189, 190, 86 S. E. 980. See section 7-13.

On appeal from a motion to dismiss, on the ground of the insufficiency of the complaint to allege a cause of action, where merely a good cause has been defectively stated, the action will not be dismissed in the Supreme Court on motion made there, but if necessary, an amendment will be allowed to conform the pleadings to the facts proved. *Ricks v. Brooks*, 179 N. C. 204, 250, 102 S. E. 207.

Applied in *Henley v. Holt*, 214 N. C. 384, 199 S. E. 383.

Cited in *Bridgeman v. Pilot Life Ins. Co.*, 197 N. C. 599, 150 S. E. 15; *Pierce v. Mallard*, 197 N. C. 679, 181, 150 S. E. 342; *Hargett v. Lee*, 206 N. C. 536, 539, 174 S. E. 498; *Choate Rental Co. v. Justice*, 212 N. C. 523, 193 S.

E. 817; *Silver v. Silver*, 220 N. C. 191, 16 S. E. (2d) 834; *Whitehurst v. Hinton*, 222 N. C. 85, 21 S. E. (2d) 874.

II. DISCRETIONARY POWERS OF THE COURT.

Powers Discretionary—When Reviewable.—It has been well settled in this State that no appeal lies to the supreme court from the exercise of a discretionary power of the superior court. But if the exercise of a discretion by that court is refused upon the ground that it has no power to grant a motion addressed to its discretion, the ruling of that court is reviewable. *Gilchrist v. Kitchen*, 86 N. C. 20, 21. See *Life Ins. Co. v. Edgerton*, 206 N. C. 402, 174 S. E. 96; *Smith v. New York Life Ins. Co.*, 208 N. C. 99, 101, 179 S. E. 457.

Discretionary, with or without Terms.—The judge can, in his discretion, refuse the motion to amend or grant it with or without terms. *Maggett v. Roberts*, 108 N. C. 174, 177, 12 S. E. 890.

Not Reviewable Except for Palpable Abuse.—The discretion is not reviewable in the absence of palpable abuse. *Gordon v. Pintsch Gas Co.*, 178 N. C. 435, 436, 100 S. E. 878; *Hogsd v. Pearlman*, 213 N. C. 240, 195 S. E. 789; *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265.

Discretion Not Arbitrary but Legal.—This discretion however is not arbitrary, but implies a legal discretion. *Hudgins v. White*, 65 N. C. 393.

Changing Affidavit into Complaint.—While the action of the trial judge in refusing to permit an amendment to the pleadings is usually a matter within his discretion and not reviewable, it was held error, under the circumstances of the case, for the judge to refuse an amendment in effect to change the affidavit into the form of a complaint. *Mason v. Stephens*, 168 N. C. 369, 84 S. E. 528.

Verification to an Answer.—It is discretionary with the trial court to allow an amendment of a verification to an answer. *Cantwell v. Herring*, 127 N. C. 81, 37 S. E. 140.

Amendment Setting Up Statute of Limitation.—It is discretionary with the court whether or not to allow an amendment setting up the statute of limitations. *Smith v. Smith*, 123 N. C. 229, 31 S. E. 471; *Balk v. Harris*, 130 N. C. 381, 383, 41 S. E. 940.

Reinstatement of Nonsuited Causes.—Where plaintiff voluntarily amends his complaint by entering a nol pros as to certain causes of action, it is a matter of discretion in the court, whether he shall reinstate them. *Grant v. Burgwyn*, 88 N. C. 95.

Costs.—When the superior court has power to amend, the question of costs is entirely in its discretion. *Robinson v. Willoughby*, 67 N. C. 84.

III. INTRODUCING NEW CAUSE OF ACTION, DEFENSE OR RELIEF.

Permissible When It Introduces No New Cause.—Unless its effect is to add a new cause of action or change the subject-matter of the original action, no objection can successfully be urged where the amendment is germane to the original action, involving substantially the same transaction and presenting no real departure from the demand as originally stated. *Lefler v. Lane & Co.*, 170 N. C. 181, 86 S. E. 1022; *Wilmington v. Board of Education*, 210 N. C. 197, 185 S. E. 767.

The judge of the Superior Court has within his sound discretion the statutory authority to permit the plaintiff to amend his complaint when thereby the ground of the alleged cause is not so substantially changed as to become a new or different cause of action. *Goins v. Sargent*, 196 N. C. 478, 146 S. E. 131.

Amendment by Referee.—It would seem that this section is broad enough to warrant the action of the referee in allowing partner to come in as party plaintiff and adopt complaint previously filed by copartner. *Sheffield v. Alexander*, 194 N. C. 744, 745, 140 S. E. 726. See note under § 1-192.

Instances of New Cause Not Introduced.—In an action to recover damages for a conspiracy to prevent the employment by others of a discharged employee, under §§ 14-355, 14-356, the cause of action alleged was not substantially changed by allowing an amendment to the effect that the plaintiff had been employed by the defendant prior to the time of the alleged conspiracy. *Goins v. Sargent*, 196 N. C. 478, 146 S. E. 131.

An amendment to a complaint in an action to set aside a conveyance of land for fraud is not substantially changed by an amendment allowed the plaintiff in the discretion of the trial court, to allege damages sustained and provable as directly resulting therefrom. *Parker v. Mecklenburg Realty, etc., Co.*, 195 N. C. 644, 143 S. E. 254.

Where the complaint in an action for nonpayment of draft alleged that defendant failed to pay when it was received, it was held not error to allow an amendment alleging that defendant had in fact accepted the draft by

entering it on its books and had held it for more than 24 hours thereafter during which time it failed and refused to return it accepted or nonaccepted. *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253.

Same—Amendatory Summons.—Where one administratrix has renounced her right, and a second has been appointed, and the second administratrix has brought action and made her mark to the complaint, the action of the trial judge in correcting a mistake in the summons and complaint by changing the name of the first administratrix to that of the second does not change the cause of action, and does not constitute error. *Hill v. Norfolk So. Ry. Co.*, 195 N. C. 605, 143 S. E. 129.

Consent Necessary when New Cause Introduced.—The court cannot, except by consent, allow an amendment which changes the pleadings so as to make it substantially a new action, but an amendment which only adds to the original cause of action is not of this nature, and may be allowed. *Ely v. Early*, 94 N. C. 1.

Tests as to When New Cause Introduced.—In construing the similar statute in other code states, two tests are given by which it may be determined whether a second petition (or complaint) is an amendment or a substitution of a new cause of action: (1) that the same evidence will support both petitions (or complaints); (2) that the same measure of damages will apply to both. If both these tests fail the new pleading is not an amendment. *Lumpkin v. Collier*, 69 Mo. 170; *Scoville v. Glasner*, 79 Mo. 449.

Defective Statement of a Good Cause.—A defective statement of a good cause of action, as distinguished from a failure to state a good cause of action, is a defect which is curable by amendment, even after verdict. *Blalock v. Clark*, 133 N. C. 306, 308, 45 S. E. 642. To the same effect see also, *Fidelity, etc., Co. v. Jordan*, 134 N. C. 236, 244, 46 S. E. 496.

Adding New Plea after Appeal Reached Supreme Court.—The power and duty of the judge in respect to amendments after the appeal has reached this court depend on these sections, and there is nothing in these sections requiring the judge to allow a new plea to be put in, though he may do so on payment of all costs up to that time. The Code is liberal in allowing amendments, but the adding of a new plea stands on different grounds from the amending of a formal or even a substantial defect in a plea which does not introduce a substantially new defence. *Hinton v. Deans*, 75 N. C. 18, 20.

Changing the Form of Action.—In *Oates, etc., Co. v. Kendall*, 67 N. C. 241, 243, the main objection to the recovery was that the plaintiff, in his complaint, had alleged and set out a case in trover, when the case, as proved on the trial, showed that it should have been in the nature of an assumpsit for money had and received, the court said: "It would be in violation of one of the most important provisions of the New Code to permit a party to defeat a recovery, upon the sole ground that the form of the complaint is not just as it should have been, from the facts established by the proofs in the case. To allow such an objection now to avail a party would be to defeat that great and vital principle of the Code and Constitution which declares that there shall be but one form of action, and it would incorporate into our new system all the mischief and intricacies touching the form of action intended to be obviated by that provision. No such objection can be permitted to defeat a recovery."

Same—Changing the Cause from Contract to Tort.—It is not error to allow a plaintiff to amend his complaint, assumed to state a cause of action on contract, so as to declare on a tort arising out of the same transaction. *Reynolds v. Mt. Airy, etc., R. Co.*, 136 N. C. 345, 48 S. E. 765.

Amendment Changing the Relief Sought.—A complaint in an action for the possession of the land under a deed absolute which has been declared to be a mortgage may be so amended as to allow a demand for a judgment of foreclosure of the mortgage. *Robinson v. Willoughby*, 67 N. C. 84.

Defense May Not Be Substantially Changed.—See *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265.

Statute of Limitation.—Where a distinct cause of action is allowed to be inserted in a complaint, by amendment, it is tantamount to bringing a new action, and the statute of limitation runs to the time when the amendment is allowed; but this rule does not apply when the new matter allowed by the amendment constitutes a part of the original cause of action. *Ely v. Early*, 94 N. C. 1.

So where, in an action to recover land, the Court allowed the plaintiff to amend, so as to set up a mutual mistake in a deed, the statute only runs against the relief demanded by the amended complaint to the time when the action was commenced. *Ely v. Early*, 94 N. C. 1.

Amendment of Insufficient Affidavit.—The Court has the power to allow the amendment of an affidavit upon which a warrant of attachment had issued, although the former affidavit is wholly insufficient. *Brown, etc., Co. v. Hawkins*, 65 N. C. 645.

IV. CONFORMING PLEADINGS TO FACTS FOUND.

See sections 1-165, 1-168.

Leave to Amend to Conform Pleadings to Facts.—Under this section and section 1-168, a plaintiff may sue for a horse and recover a cow; but in order to do this, when the variance appears, the plaintiff must obtain leave to amend by striking out "horse" and inserting "cow", or else the jury must find the facts specially or the case must be submitted to the jury "on issues," so that the pleading may be amended and be made to conform to the facts proved on such terms as the judge may deem proper, "unless the amendment affects the merits and substantially changes the claim or defense." *Shelton v. Davis*, 69 N. C. 324, 328.

The court has discretionary power to allow a pleading to be amended after the introduction of evidence so as to make the pleading conform to the evidence. *Hicks v. Nivens*, 210 N. C. 44, 185 S. E. 469.

Evidence Cannot Be Considered Without Amendment.—Where, in an action for the alleged conversion of money, the complaint did not state that funds were received by the person charged with the conversion as trustee or agent, evidence tending to show that they were so received cannot be considered in the absence of an amendment, under this section, conforming the complaint to the evidence. *Parker v. Harden*, 121 N. C. 57, 28 S. E. 20.

In *Dickens v. Perkins*, 134 N. C. 220, 223, 46 S. E. 490, the court said: "If the plaintiffs were unable to show by their proof that the contract was made as alleged, and by the evidence established a different agreement, they could have availed themselves of the latter and have enforced the same only by an amendment, provided the cause of action was not thereby substantially changed."

Conforming Complaint to Facts Found by Referee.—Under this section the trial court may, upon the coming in of a referee's report, permit an amendment to the complaint to conform to the facts found if the amendment does not change substantially the cause of action. *Nims Mfg. Co. v. Blythe*, 127 N. C. 325, 37 S. E. 455.

V. AMENDMENTS OF PROCESS.

Generally.—If the paper bear internal evidence of its official origin, and of the purpose for which it was issued, it comes within the definition of original process, and the broad discretion with which judges are clothed by this section may be freely exercised, subject only to the restriction that the alteration shall not disturb or impair any intervening rights of third parties. *Cheatham v. Crews*, 81 N. C. 343; *Thomas v. Womack*, 64 N. C. 657; *Redmond v. Mullenax*, 113 N. C. 505, 510, 18 S. E. 708.

For an elaborate review of the authorities upon amendments of the process, particularly as to the signature and seal thereof, see *Henderson v. Graham*, 84 N. C. 496.

Not Permissible as to Prejudice Acquired Interest.—Amendments of process are not admissible when the effect will be to prejudice acquired interests or take away any defense which could be made to an action begun at the time of the amendments. *Phillips v. Holland*, 78 N. C. 31. *Henderson v. Graham*, 84 N. C. 496, 498.

Defects Curable by General Appearance Amendable.—With reference to the amendment of a process, it is held that whether a summons should be amended is a discretionary matter and not reviewable (*Henderson v. Graham*, 84 N. C. 496). From this is to be deduced the rule, in regard to the amendment of process, that any defect or omission of a formal character, which would be waived or remedied by a general appearance or answer upon the merits, may be treated as a matter which can be remedied by amendment at the discretion of the court, when the rights of other persons are not affected and no protection withdrawn from the officer. *Jackson v. McLean*, 90 N. C. 64, 65.

Absence of Clerk's Signature.—Under this section the absence of the clerk's signature on a summons is a defect of a formal character which may be waived by general appearance and is therefore remediable by amendment. *Hooker v. Forbes*, 202 N. C. 364, 368, 162 S. E. 903.

The Seal.—But, unless there is something upon the face of the paper which stamps upon it unmistakably an official character, it is not a defective summons, but no summons at all—no more than one of the usual printed blanks kept by the clerks of the courts. The seal of the court is evidence throughout the state of the fact that a paper to which it is attached emanates from the tribunal to which it belongs, and though the clerk's signature is the prescribed

evidence of genuineness as to all process to be served in the county in which his court is held, yet, if he issue to such county a summons in the usual form, attested by his official seal, but not subscribed, and containing his name only as printed in the body of the paper, the court has the power, after the defendant has entered an appearance, to amend by allowing the clerk to sign his name. *Henderson v. Graham*, 84 N. C. 496; *Redmond v. Mullenax*, 113 N. C. 505, 510, 18 S. E. 708.

On the other hand, where a summons is issued to an adjacent county, signed by the clerk of the superior court, but not attested by the seal, and served upon the defendant, it was held that, after an appearance by virtue of such service, the court might, in its discretion, allow the seal to be attached, as it could also to final process upon which property had been sold in another county, and after it had been returned by the officer who sold. *Clark v. Hellen*, 23 N. C. 421; *Seawell v. Bank*, 14 N. C. 279; *Purcell v. McFarland*, 23 N. C. 34. *Redmond v. Mullenax*, 113 N. C. 505, 512, 18 S. E. 708.

The seal, though not required, or the signature, though not imparting authenticity in the county to which the summons issues, is evidence of the fact that the clerk has approved the prosecution bond or permitted the issuance on a proper affidavit; and when the defendant waives the informality or irregularity by appearing, the curative power of amendment may be invoked, but not when there is nothing upon the face of the paper to give assurance that it received the sanction of the clerk before it was delivered to the sheriff to be served. *Redmond v. Mullenax*, 113 N. C. 505, 512, 18 S. E. 708.

Same—Process Issued Out of County.—By amendment a seal may be affixed to a process issued out of the county after its return. *McArter v. Rhea*, 122 N. C. 614, 30 S. E. 128.

Informalities Cured.—Informalities in the process may be cured by amendment, if allowed by the court. *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642.

Middle Initial Incorrect.—In an action instituted against husband and wife on a note signed by them as makers, the names of defendants in the summons and return were correct except for the middle initial. It was held that upon the hearing of defendants' motion to dismiss for want of jurisdiction, the court had discretionary power to permit the officer to testify that in fact the summons was served on defendants, and to permit plaintiff's motion to amend the summons and to correct the officer's return to show the correct names of defendants. *Lee v. Hoff*, 221 N. C. 233, 19 S. E. (2d) 858.

Amendment to Give Effectual Jurisdiction.—Where process is erroneously made returnable before the clerk, instead of to the term of the court, the court at term, having acquired jurisdiction, may make all necessary amendments of the process and proceedings in order to give it effectual jurisdiction, if no intervening and vested right is injuriously affected, and when the process is thus amended, it justifies the original service of any official action previously taken under it. *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642.

Amendment in Attachment Proceedings.—Amendment under this section may not be permitted where the rights of third persons are injuriously affected. And where the surety on defendant's undertaking has executed a bond in a substantial sum, in accordance with § 1-457, to discharge the lien on property which has been attached by virtue of a warrant based solely on an unfounded allegation in the affidavit, the allowance of an amendment thereafter to set up a new ground of attachment would have the effect of imposing on the surety an obligation which he did not assume. *Rushing v. Ashcraft*, 211 N. C. 627, 629, 191 S. E. 332.

Allegations as to Value Supplied.—Where in an action of claim and delivery of personal property, the allegation as to the value was omitted in the summons, the justice of the peace properly allowed a motion to amend by filling in the blank left for such allegation. *Cox v. Grisham*, 113 N. C. 279, 18 S. E. 212.

VI. AMENDMENTS AS TO PARTIES.

Generally.—The power of the judge to make additional parties to an action is settled, especially when the amendment did not change the cause of action, nor work any injustice to the opposing party. *Mills v. Callahan*, 126 N. C. 756, 36 S. E. 164; *North Carolina Bank, etc., Co. v. Williams*, 209 N. C. 806, 185 S. E. 18.

Limitation on Operation of Rule.—The court has the power to make additional parties plaintiff or defendant. However, when the court makes a new party plaintiff it constitutes a new action against the defendant as to the new party and the action as to him does not relate back to the date of the institution of the original cause so as to

deprive the defendants of the right to plead the statute of limitations in bar of recovery in such action. *Home Real Estate, etc., Co. v. Locker*, 214 N. C. 1, 2, 197 S. E. 555.

Discretionary and Not Reviewable.—It very rarely happens that the making of additional parties prove prejudicial, and hence orders making such parties are discretionary with the trial court, and are not reviewable upon appeal. *Tillery v. Candler*, 118 N. C. 888, 889, 24 S. E. 709; *Bernard v. Shemwell*, 139 N. C. 446, 447, 52 S. E. 64. *Burrell v. Hughes*, 116 N. C. 430, 21 S. E. 971; *State v. Arrington*, 101 N. C. 109, 7 S. E. 652; *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890; *Wilmington v. Board of Education*, 210 N. C. 197, 185 S. E. 767.

New Parties to a Pending Action.—By amendment proper new parties may be brought into a pending action. *Dobson v. Southern Ry. Co.*, 129 N. C. 289, 40 S. E. 42.

Making Parties after Judgment.—In a proper case additional parties can be made even after judgment. *Bird v. Gilliam*, 125 N. C. 76, 78, 34 S. E. 196.

Joint Payees—Statute of Limitation.—Where a note is made to the husband and his wife as joint payees, and the action thereon is brought by the husband alone, an amendment joining the wife as a party to the action, after the running of the statute of limitations is in effect the bringing of a new action, which also will be barred. *Fishell v. Evans*, 193 N. C. 660, 137 S. E. 865.

Correction of Mistake as to Parties Defendant.—Where a mistake has been made in designating the parties defendant to the action it is within the discretionary power of the superior court to allow the plaintiff to correct the mistake, both in the process and pleadings. *Rosenbacher & Bro. v. Martin*, 170 N. C. 236, 86 S. E. 785.

Disintegrating Misjoined Parties.—Where there has been a misjoinder of parties as well as causes of action, it is within the discretion of the trial judge at any time before verdict or adverse decision, to permit the withdrawal of one of the parties, leaving the action to proceed singly as to the other, and to allow a proper amendment of the pleadings as to the remaining cause, where the defendant has asked no affirmative relief and his defense cannot be prejudiced; but the defendant is entitled to recover his cost against the party retiring from the case. *Campbell v. Washington Light, etc., Co.*, 166 N. C. 488, 82 S. E. 842.

Withdrawal of One of Joint Plaintiffs—Statute of Limitation.—Where damages are sought by joint plaintiffs upon the alleged negligence of the defendant, the cause of action is such negligence; and where one of them is permitted to withdraw and the other to amend, owing to a mistaken construction of a contract as to the joint ownership of the property damaged, the amendment referring to the same alleged negligent act does not create a new cause of action, but, being upon the same cause, relates back to the issuance of the summons, and when that was done in time the statute of limitations will not have run against it. *McLaughlin v. Raleigh, etc., R. Co.*, 174 N. C. 182, 93 S. E. 748. See "Introducing New Cause of Action, Defense or Relief." III.

Striking One of Several Plaintiffs.—Under this section the court, in its discretion, may allow the motion of one of the several plaintiffs to strike out his name, and the exercise of such discretion, whether by refusing or granting the motion, is not reviewable. *Jarrett v. Gibbs*, 107 N. C. 303, 12 S. E. 272.

Refusal to Strike Discretionary.—The refusal or granting of a motion to strike out the name of a party is a matter of discretion and not reviewable, unless the refusal is placed on the want of power, in which case an appeal lies. *Henderson v. Graham*, 84 N. C. 496; *Jarrett v. Gibbs*, 107 N. C. 303, 304, 12 S. E. 272.

Substituting a Stranger for a Party.—In *Bullard v. Johnson*, 65 N. C. 436, 438, the question whether, under the broad power of amending, the superior court in an action by A could strike out the name of A and insert that of B, a stranger to the controversy, either directly or indirectly, as by first adding the name of B as co-plaintiff, and then striking out the name of A, was raised but was not decided.

Substitution of Corporation for President Thereof.—The trial judge has the power to allow the substitution of the company as the party plaintiff for the president of the company, the character or nature of the action not being substantially changed thereby. *Street v. McCabe*, 203 N. C. 80, 164 S. E. 329.

Administrator Made Party in Individual Capacity.—Where, in proceedings to sell lands to make assets, defendants pleaded the statute of limitations as to certain indebtedness alleged in petitioner's bill of particulars and asked for an accounting, and the parties thereupon agreed that the matters in controversy should be heard by the judge without a jury upon an agreed statement of facts, and that the judge might find such additional facts as he may consider neces-

sary to complete determination of the matters in controversy, the proceeding is converted by consent into an administration suit, and petitioner is precluded by the agreement from objecting to an order requiring her to be made a party in her individual capacity, and to account for certain money paid to her either individually or as the widow of the deceased, the agreement not constituting the proceeding a controversy without action in which the authority of the court is limited to the matters submitted. *Edney v. Mathews*, 218 N. C. 171, 10 S. E. (2d) 619.

Making Trustee Party.—Where money is borrowed to pay off a prior mortgage and the lender takes another mortgage to secure the money so borrowed which is later declared invalid for improper acknowledgment, and the lender brings action to foreclose under the first mortgage under the doctrine of equitable subrogation: Held, the trustee can be made a party by amendment if it should be necessary. *Investment Securities Co. v. Gash*, 203 N. C. 126, 164 S. E. 628.

Making New Parties upon Appeal to Superior Court.—A connecting line of carriers had been sued in a justice's court for the statutory penalty in failing to transport the shipment within a reasonable time, and appealed to the superior court from an adverse judgment. It was held proper for the court, in its discretion to order the other carrier to be made a party therein, though the amount involved was less than \$200, without the necessity of remanding the case to the justice's court for that purpose. *Sellers Hosiery Mills v. Southern R. Co.*, 174 N. C. 449, 93 S. E. 952.

Substitution of Plaintiff upon Appeal to Superior Court.—In *Bullard v. Johnson*, 65 N. C. 436, and *State v. Cauble*, 70 N. C. 62, a new plaintiff was allowed to be substituted in a warrant issued by a magistrate after it reached the superior court by appeal. *Cheatham v. Crews*, 81 N. C. 343, 364.

Mistake in Designating Parties Defendant.—Where a mistake has been made in designating the parties defendant to the action it is within the discretionary power of the superior court to allow the plaintiff to correct the mistake, both in the process and pleadings. *Rosenbacher & Bro. v. Martin*, 170 N. C. 236, 86 S. E. 785.

Correction of Mistake in Name Authorized.—The correction of a mistake in the name of a party after judgment is expressly authorized by this section and does not come within the limitation of "one year after notice thereof" prescribed by section 1-220. *Rosenthal v. Roberson*, 114 N. C. 594, 597, 19 S. E. 667.

Descriptio Personae.—In a summons against A. H. B., the words "President of Southern Improvement Company," are mere descriptio personae and do not make the company a party to the proceeding, but the court can allow an amendment making the company a party either with its consent or by service of such amended summons upon the corporation. *Plemmons v. Southern Improve. Co.*, 108 N. C. 614, 13 S. E. 188.

To Show Real Parties.—Upon the facts in this case, it is held, on appeal, that the trial court properly allowed the plaintiffs to amend their complaint to allege that some of the plaintiffs had acquired the interests of the others in a policy of insurance against loss by fire, in furtherance of justice, under the provisions of this section. *Redmon v. Netherlands Fire, etc., Ins. Co.*, 184 N. C. 481, 114 S. E. 758.

VII. AMENDMENTS BEFORE JUSTICES OF THE PEACE.

Generally.—A justice of the peace has power to amend any warrant, process, pleading or proceeding in any action pending before him, either civil or criminal, either in form or substance. *Cox v. Grisham*, 113 N. C. 279, 18 S. E. 212.

Before the adoption of the Code there was no statute investing the court with the power of amending a process, proceedings, &c., had before justice of the peace. The only legislation on that subject was that "no process issued by a justice of the peace shall be set aside for the want of form if the essential matters are set forth therein." This embraced civil as well as criminal process, but gave no power to amend in matters of substance. *State v. Vaughn*, 91 N. C. 532, 534.

Nature of Pleadings—Ample Power to Amend.—The pleadings in a justice's court need not be in any particular form or drawn with technical accuracy, but are sufficient if they "enable a person of common understanding to know what is meant," and they may not "be quashed or set aside for want of form, if the essential matters are set forth therein," and ample powers are given the court to amend either in substance or form, at any time before or after judgment in furtherance of justice. *Aman v. Dover, etc., R. Co.*, 179 N. C. 310, 102 S. E. 392.

Amendment to Show Jurisdiction.—In a proceeding before a justice's court, if the averment of value is omitted from the summons by mistake or inadvertence, an amendment

may be allowed even on the trial in the superior court, to make it appear that the justice's jurisdiction was not improperly exercised. *Cox v. Grisham*, 113 N. C. 279, 18 S. E. 212.

VIII. SPECIFIC INSTANCES.

Setting up Mistake in Deed.—In an action to recover land, the Court may allow an amendment so as to set up a mistake in a deed. *Ely v. Early*, 94 N. C. 1.

A petition to lay out roads is within the meaning of this section authorizing the court to amend pleadings in any action, etc. *Pridgen v. Anders*, 52 N. C. 257.

Express Contract of Complaint on Quantum Meruit.—Upon a complaint broad enough to set out an action on the quantum meruit, the plaintiff will not be confined to the express contract, and if not broad enough, the court may allow an amendment after a verdict making it so. *Roberts v. Deming Woodworking Co.*, 111 N. C. 432, 16 S. E. 415.

Increasing Amount of Demand.—In an action by the mortgagee to recover the value of a crop, subject to the lien of his chattel mortgage against the defendant, who is alleged to have received it to his own use, it is discretionary with the trial judge to allow the plaintiff to amend his complaint, either before or after verdict, so as to increase the amount of his demand in conformity with the facts he has proved upon the trial. *Warrington v. Hardison*, 185 N. C. 76, 116 S. E. 166.

To Allege Warranty.—Where the plaintiff seeks to recover damages upon the allegation that the defendant falsely and knowingly induced him to purchase an automobile upon false representations, it is within the sound discretion of the trial judge to permit an amendment alleging a warranty, in addition to the allegations in the original complaint; and where the statute of limitations has not run as to the latter, the amendment cannot be construed to have a different result. *Wiggins v. Landis*, 188 N. C. 316, 124 S. E. 621.

After Plea of Contributory Negligence.—Where, in an action involving the issue of negligence, contributory negligence is pleaded in substance by defendant, an amendment allowed defendant to make his allegation more specific is not held reversible error. *Gholson v. Scott*, 200 N. C. 429, 157 S. E. 64.

§ 1-164. Amendment changing nature of action or relief; effect.—When the complaint is so amended as to change the nature of the action and the character of the relief demanded, the judgment rendered does not operate as an estoppel upon any person acquiring an interest in the property in controversy prior to the allowance of the amendment. (Rev., s. 508; 1901, c. 486; C. S. 548.)

Cited in *Pierce v. Mallard*, 197 N. C. 679, 681, 150 S. E. 342.

§ 1-165. Unsubstantial defects disregarded.—The court or judge shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which do not affect the substantial rights of the adverse party; and no judgment may be reversed or affected by reason of such error or defect. (Rev., s. 509; Code, s. 276; R. C., c. 3, ss. 5, 6; C. C. P., s. 135; C. S. 549.)

Cross Reference.—As to variance, material and immaterial, between pleading and proof, see § 1-168.

Under this section the form of the prayer for judgment is not material. It is the facts alleged that determine the nature of the relief to be granted. *Bolich v. Prudential Ins. Co.*, 206 N. C. 144, 150, 173 S. E. 320.

Trial of Causes upon Their Merits.—It is manifest from this and other sections of the Code that the new system, in its whole structure and scope, looks to a trial of a cause upon its merits, and discountenances objections for defects which may be corrected and removed when made in apt time, and will not entertain them after trial and verdict. *Halstead v. Mullen*, 93 N. C. 252, 255.

In construing the identical section of the Ohio Code it is said: "Slight mistakes or omissions in pleading, will be cured by judgment; but where the pleading is totally defective, showing on its face that the party can claim no right under it, the judgment will be held erroneous." See 2 Ohio State Reports 21.

Clerical errors shall be disregarded under the provisions of this section. See *Patterson v. Walton*, 119 N. C. 500, 26 S. E. 43; *Clawson v. Wolfe*, 77 N. C. 100, 102.

A warrant in attachment, in substantial conformity with sec. 1-447, and, in fact, executed by the deputy sheriff of the proper county, is valid, and will not be held otherwise when

verified by a proper agent, though by apparent clerical error it was stated in its beginning to have been made by a member of the firm, the power of the trial judge to allow amendments being plenary under the provisions of this section. *May Co. v. Menzies Shoe Co.*, 186 N. C. 144, 119 S. E. 227.

Defective Return of Process—Defect in Name.—A defective or informal return of process will be cured after judgment. *Crawford v. Bank*, 61 N. C. 136; so will also a defect in the name of a defendant in the summons. *Clawson v. Wolfe*, 77 N. C. 100.

Mistake in Name.—Names are used to designate persons, and where the identity is certain a variance in the name is immaterial, and hence will be disregarded. *Patterson v. Walton*, 119 N. C. 500, 26 S. E. 43.

By the Supreme Court.—The Supreme Court will disregard errors or defects in the pleadings or proceedings in the Superior Court, which are immaterial and where no substantial rights of the appellant will be injuriously affected thereby. *Ricks v. Brooks*, 179 N. C. 204, 102 S. E. 207.

The interpretation put upon a similar section in the courts of New York is that such defects as would be remediable by amendment that does not change substantially the claim or defense, will not sustain an application to dismiss the action. *Leoundsbury v. Purdy*, 18 N. Y. 515. *Halstead v. Mullen*, 93 N. C. 252, 255.

Cited in *Bridgeman v. Pilot Life Ins. Co.*, 197 N. C. 599, 150 S. E. 15; *Brewer v. Brewer*, 198 N. C. 669, 153 S. E. 163; *Pierce v. Mallard*, 197 N. C. 679, 681, 150 S. E. 342.

§ 1-166. Defendant sued in fictitious name; amendment.—When the plaintiff is ignorant of the name of a defendant the latter may be designated in a pleading or proceeding by any name; and when his true name is discovered, the pleading or proceeding may be amended accordingly. (Rev., s. 510; Code, s. 275; C. C. P., s. 134; C. S. 550.)

Cross Reference.—As to amendment in the discretion of the court for correcting a mistake in the name of any party, etc., see § 1-163.

Editor's Note.—A defendant ought to be sued in the surname of his ancestors and the christian name given to him in baptism. If he is known by two names, he may be sued by either, or if the real name is unknown he may be sued, under this section, by a fictitious one.

Discretion of Court.—Where a mistake has been made in designating the parties defendant to the action it is within the discretionary power of the superior court to allow the plaintiff to correct the mistake, both in the process and pleadings. *Rosenbacher & Bro. v. Martin*, 170 N. C. 236, 86 S. E. 785.

Two Names Designated.—In construing the similar section of the Ohio Code it is said: "The law supposes every one to have a family name and a given name, and allows two fictitious names to be inserted when either of the real ones are unknown." 5 Rob. 599.

Middle Name.—The law recognizes but one middle name. The omission of a middle name is unimportant, and if a wrong middle name is inserted, it may be struck out as surplusage. 39 Barb. 479; 5 Johns 84. See also, *Evans v. Brendle*, 173 N. C. 149, 91 S. E. 723.

§ 1-167. Supplemental pleadings.—The plaintiff or defendant respectively may be allowed on motion to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after, or of which the party was ignorant when his former pleading was filed. Either party may set up by a supplemental pleading, the judgment or decree of any court of competent jurisdiction, rendered since the commencement of an action, determining all or any part of the matter in controversy in said action, and if the judgment is set up by the plaintiff, it shall be without prejudice to any provisional remedy theretofore issued or other proceedings had in the action on his behalf. Such motions may be made before the clerk of the superior court of the county in which the action is pending, by filing with the clerk the original and one copy of the proposed amended pleading and motion, which copy shall be forwarded to the opposing party or counsel

and in which motion the clerk shall name a day and time of not less than ten days, unless by consent, to hear any objection to same; from the determination of the clerk, either party may have the matter sent to the judge of, or holding courts in the judicial district in which the matter is pending, by giving notice thereof to the clerk and opposing party or counsel within ten days from such date of hearing by the clerk: Provided, such motion shall be made at least thirty days before the convening of a term of court at which the cause may be calendared for trial. (Rev., s. 511; Code, s. 277; C. C. P., s. 136; 1929, c. 95; C. S. 551.)

Editor's Note.—At common law defendant could take advantage of a defense arising after the commencement of the action by a plea puis darrein continuance if it occurred after the plea was filed. *Williams v. Hutton*, etc., Co., 164 N. C. 216, 80 S. E. 257. The supplemental answer prescribed by this section takes the place of the former plea puis darrein continuance.

The Act of 1929 added the third sentence and proviso to this section.

The office of a supplemental pleading is to bring into the record new facts, so that the court may render its final judgment upon the facts existing at the time of its rendition. See 90 Indiana Reports 585. And it has been held that the analogous section of the Ohio Code affords the only proper method of presenting facts occurring during the pendency of an action. See 37 O. S. 291; 10 O. S. 372.

It is within the discretionary power of the trial court to allow the filing of a supplemental complaint. *Speas v. Greensboro*, 204 N. C. 239, 167 S. E. 807.

Plea of Puis Darrein Waived Previous Pleas.—At common law such a plea confesses the matter which was before in dispute between the parties, and is therefore a waiver of all the pleas previously pleaded. But in this state a plea of puis darrein continuance is in no case construed as a relinquishment of any plea or pleas previously entered. *Morgan v. Cone*, 18 N. C. 234, 235.

Truth of Plea of Puis Darrein.—A plea of puis darrein continuance will be refused unless the court is satisfied of its truth. *McNaughton & Co. v. Naylor*, 2 N. C. 180.

Same—When Allowance Discretionary.—Where a petition to be allowed to file a plea puis darrein continuance does not set forth facts which, if true, would be a bar to a recovery; its allowance is discretionary with the court. *Balk v. Harris*, 130 N. C. 381, 41 S. E. 940.

Release Puis Darrein.—A release to party to a suit, made during its pendency and after the issues are joined, cannot operate as a defense, unless it be pleaded specially since the last continuance. *Smithwick v. Ward*, 52 N. C. 64, 75 Am. Dec. 453.

Defect of Title Raised by Plea Puis Darrein.—While a plaintiff cannot recover upon the title accruing after the commencement of an action to recover land, a defendant will be permitted by an amendment to his answer in the nature of a plea since last continuance to plead defects in the plaintiff's title, or matter validating his own, which accrued since the action began. *Taylor v. Gooch*, 110 N. C. 387, 15 S. E. 2.

When Supplemental Complaint or Answer Required of New Parties.—A supplemental complaint or answer is required from new parties only when the previous record of the cause does not show how they are connected with the controversy or interested in its result; but where the death of the original party and the relationship of the new parties to him are ascertained, there seems to be no necessity for supplemental pleading. *Hughes v. Hodges*, 94 N. C. 56.

When a nonsuit has been entered, it is too late to file a supplemental answer containing a counterclaim. *Sydor Pump etc., Co. v. Rocky Mount Ice Co.*, 125 N. C. 80, 34 S. E. 198.

Laches is, in the discretion of the court, ground for refusing consent to file supplemental pleadings. 16 Abb. 269; 6 Duer 661, affirming 19 N. Y. 207.

§ 1-168. Variance, material and immaterial.—1. No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits. Whenever it is alleged that a party has been so misled, that fact and in what respect he has been

misled must be proved to the satisfaction of the court; and thereupon the judge may order the pleading to be amended upon such terms as shall be just.

2. Where the variance is not material as herein provided, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. (Rev., ss. 515, 516; Code, ss. 269, 270; C. C. P., ss. 128, 129; C. S. 552.)

Cross Reference.—As to error or defect in pleadings or proceedings which does not affect substantial rights, see § 1-165.

Editor's Note.—Under this section two situations may present themselves: (1) If the variance is not material, the court may direct the facts to be found according to the evidence; (2) if the variance is material and the adverse party has been taken by surprise or been misled, the court may allow an amendment upon such terms as may be just. *Deligny v. Tate Furniture Co.*, 170 N. C. 189, 86 S. E. 980; *Brown v. Morris*, 83 N. C. 252, 256; *Wills v. Branch*, 94 N. C. 142, 148.

Hence, when the proof materially departs from the allegation, there can be no recovery without an amendment. *McKee v. Lineberger*, 69 N. C. 217; *Brittain v. Daniels*, 94 N. C. 781; *Faulk v. Thornton*, 108 N. C. 314, 12 S. E. 998; *Pendleton v. Dalton*, 96 N. C. 507, 2 S. E. 759; *Hunt v. Vanderbilt*, 115 N. C. 559, 20 S. E. 168; *Green v. Biggs*, 167 N. C. 417, 83 S. E. 553; *Talley v. Harriss Granite Quarries Co.*, 174 N. C. 445, 447, 93 S. E. 995.

In construing the same provision of the Ohio Code it is said: To constitute a variance between the allegations and the proofs, the difference must be as to the substantial elements of the case, and not as to the legal conclusions from the facts drawn by the pleader. 27 O. S. 159.

Difference of the Old and New Rule on Variances.—The only observable difference between the old and the new rule is that a variance, so slight and unimportant that the adverse party cannot have been misled by it is deemed immaterial and the court will either order an amendment without terms, or will consider the pleading as if amended, and permit evidence to be given under it. And even in the case of a material variance, so substantial that the adverse party may have been misled by the averments, still, if the proofs have an apparent relation to and connection with the allegations, the court will allow an amendment, though, upon terms. But where the proof establishes a case wholly different from the one alleged and inconsistent therewith, then no amendment is permitted, but the cause of action must fail. *Carpenter v. Huffsteller*, 87 N. C. 273, 278.

Uniformity of Allegata et Probata Not Wholly Dispersed.—The liberal construction given to pleadings under the Code system does not avoid the necessity that the proof must correspond with the allegation, for proof without allegation is as unavailing as allegation without proof; and where the difference between the allegation of the pleading and the proof is substantial, so as to grossly mislead the other party, amounting to alleging one cause of action and proving another, it is not allowed. *Talley v. Harriss Granite Quarries Co.*, 174 N. C. 445, 93 S. E. 995; *Willis v. Branch*, 94 N. C. 142, 148.

The chief purpose of pleading is to enable the parties to litigate their rights intelligently and fairly and prevent shifts and undue advantage. It is a well-settled rule that there must be allegata et probata. It follows that the court should not receive evidence that is not pertinent in some aspect of material allegations in the complaint, nor should it receive evidence to prove a cause of action not alleged. *McKee v. Lineberger*, 69 N. C. 217; *McLaurin v. Cronly*, 90 N. C. 50; *Brittain v. Daniels*, 94 N. C. 781; *Greer v. Herren*, 99 N. C. 492, 6 S. E. 257; *Faulk v. Thornton*, 108 N. C. 314, 320, 12 S. E. 998.

Evidence Not Rejected unless Party Misled.—Even though there be a variance between the allegations of the complaint and the evidence adduced, the evidence should not be rejected unless the variance will mislead the other party to his prejudice. *Mode v. Penland*, 93 N. C. 292, 293, 295; *Morgan v. First Nat. Bank*, 93 N. C. 352, 357.

Accordingly it is held that where a railroad company is sued by a passenger for a wrongful ejection from its train alleged to have been at a certain one of its stations, and upon the trial the evidence of both parties relates with unanimity to a certain other of its stations, the variation will not be deemed as material. *Edwards v. Southern R. Co.*, 162 N. C. 278, 78 S. E. 219.

Leave to Amend in Case of Substantial Variance.—Where

there is a substantial variance between the allegations of the pleading and the proof, the proper procedure is to ask leave to amend the pleading to conform to the proof, (which will be allowed without cost) and it cannot be maintained that the judge should disregard the variance and give judgment according to the proof irrespective of the allegations of the pleading. *Haughton v. Newberry*, 69 N. C. 456, 459.

Objection to Be Taken in Apt Time.—An objection to a variance between the allegations of the pleadings and the proof, when prejudicial and misleading, etc., should be taken in apt time. *Patterson v. Champion Lumber Co.*, 175 N. C. 90, 94 S. E. 692.

Defendant Must Pursue Remedy Prescribed.—In the case of a variance between the allegations of the complaint and the proof upon the trial, the defendant must pursue the remedy prescribed in this section or the variance, under our liberal practice of construction, will be deemed immaterial. *Simmons v. Roper Lumber Co.*, 174 N. C. 220, 221, 93 S. E. 736. See also, *Whitchard v. Lipe*, 221 N. C. 53, 19 S. E. (2d) 14, 139 A. L. R. 1147 (dis. op.).

The adverse party must allege that he was misled, and must prove that fact "to the satisfaction of the court," and show wherein he was misled, and the only penalty and remedy prescribed is an amendment upon such terms as the court may deem just. There is no penalty allowed of dismissal of the action or loss of substantial rights by either party. The sole object is that the case shall be tried and decided upon its merits. *Wright v. Teutonia Ins. Co.*, 138 N. C. 488, 496, 51 S. E. 55.

Allegations of time and place are not in general material, and hence a variance between them and the proof shall be disregarded. *Pegram v. Stoltz*, 67 N. C. 144, 147.

Examples of Immaterial Variances.—In an action against a street car company for injuries sustained, the plaintiff alleges that at the time of his injury he was using an iron rod to replace the derailed car on the track, and that he first connected the rod with the car and then with the rail, and he was permitted to prove that he first connected the rod with the rail and then with the car. This was held to be a variance but not such as to mislead the defendant, and therefore immaterial. *Dellinger v. Charlotte Elect. R. Co.*, 160 N. C. 532, 539, 76 S. E. 494.

Where the complaint against a telegraph company for damages for delay in the delivery of a message alleges that the defendant received the telegram sued on at its office at A., and the evidence tends to show that it was received at B., a near-by point, and telephoned to A., by the defendant's agent there, and there is nothing to indicate that the defendant was misled or was unprepared to meet the evidence introduced, or was thereby prejudiced. Held, the variance between the allegation and the proof was neither material nor fatal. *Brown v. Western Union Tel. Co.*, 169 N. C. 509, 86 S. E. 290.

Where the answer averred a mutual understanding between the intestate and feme defendant, that an adequate compensation should be provided in the former's will, "to the extent of \$2,000 at least," while the verdict establishes a fixed and definite sum, it was held that this did not constitute a material variance. *Lawrence v. Hester*, 93 N. C. 79, 81.

Where the allegations of the complaint set forth a promissory note, and the evidence introduced proved the instrument to be a bond, the variance was, in view of the circumstances of the case, held to be an immaterial one which should be disregarded. *Lilly v. Baker*, 88 N. C. 151, 152.

Where a plaintiff, in his complaint, alleged and set out a case in trover, and the proof showed that it should have been in the nature of an assumpsit for money had and received, it was held, that the plaintiff was entitled to recover, notwithstanding the variance. *Oates, etc., Co. v. Kendall*, 67 N. C. 241.

In an action for the recovery of the possession of personal property where the proof revealed that the defendant did not have the possession of such property, though he had converted it, the complaint may be so amended as to change the relief sought from that for the possession of the property to that for the recovery of the value thereof, since the defendant will not be misled thereby. *Haughton v. Newberry*, 69 N. C. 456; *Webb v. Taylor*, 80 N. C. 305.

§ 1-169. Total failure of proof.—Where the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not deemed a case of variance, but a failure of proof. (Rev., s. 517; Code, s. 397; C. C. P., s. 223; C. S. 553.)

Editor's Note.—A failure of proof is where no cause of action or defense whatever has been proved. 9 Daley 391. If there is a failure to prove a cause of action or ground of defense in some particular, it is a variance only, but if there is total want of any allegation in the pleading of the subject matter as a cause of action or ground of defense, it is a failure of proof. 10 Barb. 321; 2 N. Y. 500.

No Amendment Where Proof Wholly Different from Allegations.—No amendment of pleadings will be allowed where the cause of action proved is wholly different from that alleged. *Grant v. Burgwyn*, 88 N. C. 95.

Same—Relief.—A plaintiff cannot sue upon one contract and prove another essentially different contract. This is more than a mere variance; it is a failure of proof. But if he sues for specific relief, to which he is not entitled, upon facts which show him entitled to other and different relief, he may be adjudged to have that relief to which he is in law entitled. *Wright v. Teutonia Ins. Co.*, 138 N. C. 488, 492, 51 S. E. 55.

Cited in *Whichard v. Lipe*, 221 N. C. 53, 57, 19 S. E. (2d) 14, 139 A. L. R. 1147 (dis. op.).

SUBCHAPTER VII. TRIAL AND ITS INCIDENTS.

Art. 19. Trial.

§ 1-170. **Defined.**—A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact. (Rev., s. 526; Code, s. 397; C. C. P., s. 223; C. S. 554.)

Summary Proceedings.—In construing the section of the Ohio Code which is identical with this section, the court, in *Railway v. Thurstin*, 44 O. S. 523, 528 says: "It seems clear that the issues here referred to are those which arise upon the pleadings and do not relate to controversies involved in summary proceedings like the one now under consideration, although the pendency of the action in which it is involved depends upon the disposition of it by the court."

Impaneling a jury is embraced in a "trial" 42 Ohio State Reports, 596, 602.

Quoted in *Dunn v. Tew*, 219 N. C. 286, 13 S. E. (2d) 536.

§ 1-171. **Joinder of issue and trial.**—Pleadings shall be made up and issues joined before the clerk. After pleadings have been so made up and issues joined, the clerk shall forthwith transmit the original papers in the cause to the court at term for trial upon the issues, when the case shall be proceeded with according to the course and practice of the court, and on appeal with the same procedure as is now in force. (1919, c. 304, s. 8; Ex. Sess. 1921, c. 92, s. 13; C. S. 555.)

Editor's Note.—This section was re-enacted without change by the Public Laws of 1921, Extra Session.

Trial Procedure Before Passage of This Section.—Prior to this act the practice, concisely stated, was as follows: the summons was returnable to a regular term of the superior court to be held in the county from which it was issued; the complaint was to be filed in the clerk's office on or before the third day of the term to which the action was brought, and at the same term the defendant was to appear and demur or answer; if the defendant failed to appear the plaintiff, if not entitled to a judgment by default final, was authorized to take a judgment by default and inquiry. The inquiry was to be executed at a succeeding term for the obvious reason, if for no other, that the defendant's right to answer precluded such inquiry at the return term. *Hill v. Huffines Hotel Company*, 188 N. C. 586, 588, 125 S. E. 266.

This section has reference to the clerk and was not intended to impair the broad powers conferred on the judge, who "may in his discretion and upon such terms as may be just allow an answer or reply to be made, or other act done, after the time limited or by an order to enlarge the time," under section 1-152. *Smith v. New York Life Ins. Co.*, 208 N. C. 99, 101, 179 S. E. 457.

Transferring Papers Where No Answer Filed.—If this section were interpreted as providing that original papers can be transferred to the docket for trial in term only after an answer is filed, some difficulty might be encountered in assessing damages in cases where no answer is filed. *Hill v. Huffines Hotel Company*, 188 N. C. 586, 589, 125 S. E. 266.

§ 1-172. **How issue tried.**—An issue of law must

be tried by the judge or court, unless it is referred. An issue of fact must be tried by a jury, unless a trial by jury is waived or a reference ordered. Every other issue is triable by the court, or judge, who, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it. (Rev., s. 527; Code, ss. 398, 399; C. C. P., ss. 224, 225; C. S. 556.)

Cross References.—As to reference: by consent of parties, see § 1-188; by direction of the court, see § 1-189. As to waiver of jury trial, see § 1-184 and the North Carolina Constitution, Article IV, section 13.

Plaintiff Entitled to Jury Trial.—In all actions under the C. C. P., where legal rights are involved and issues of fact are joined by the pleadings, the plaintiff is entitled to a trial by jury, and cannot be deprived of this right except by his consent. *Andrews v. Pritchett*, 66 N. C. 387; approving *Hatchell v. Odum*, 19 N. C. 302.

Methods of Waiving Jury Trial.—There are three modes of waiving a jury trial: 1, by default; 2, by written consent; and 3, by oral consent, entered on the minutes of the Court. *Armfield v. Brown*, 70 N. C. 27, 29.

When Issues of Fact Tried by Judge.—The duty of trying issues of fact cannot be imposed on the judge except when, by consent of the parties, the judge is substituted for the jury. *Lee v. Pearce*, 68 N. C. 76, 89, overruling *Goldsbrough v. Turner*, 67 N. C. 403.

What the evidence would have been had a jury been impaneled could not be anticipated by the court, and the court was without jurisdiction under this section to try the issues of fact which arose upon the pleadings. *Hershey Corp. v. Atlantic Coast Line R. Co.*, 207 N. C. 122, 124, 176 S. E. 265.

Judge May Disregard Agreement to Waive Jury Trial.—The trial judge, in the exercise of a sound discretion, may disregard the agreement of the parties that a jury trial shall be waived or that a reference shall be made of issues other than those of fact in an action upon contract. *Lumber Company v. Lumber Company*, 137 N. C. 431, 49 S. E. 946. As to waiver, see § 1-184 and notes thereto.

Right to Jury Trial When Case Referred.—Where a reference is by consent, the parties waive the right to have any of the issues of fact passed on by a jury. Where the reference is compulsory, the excepting party has the right to have all issues of fact which arise on the pleadings, submitted to a jury, but not the questions of fact which arise on exceptions to the findings of fact by the referee. *State v. Askew*, 94 N. C. 194; *Armfield v. Brown*, 70 N. C. 27.

Equitable Element Cannot Defeat Right to Jury Trial.—A party has a right to a jury trial of an issue of fact, as well when it involves an equitable as a legal element entering into the merits of the controversy. *Worthy v. Shields*, 90 N. C. 192.

Submission of Evidential Issues Error.—The only issues proper to be submitted to the jury are those raised by the constitutive facts alleged on the one side and denied on the other; and those issues which are merely evidential, and when found by the jury, only furnish facts which would be evidence to prove the main issue, should never be submitted. *Patton v. Western, etc., R. Co.*, 96 N. C. 455, 456, 1 S. E. 863.

Jury Impaneled but No Evidence Adduced.—On the trial of a civil action when the jury were sworn and impaneled and issues framed, but no evidence adduced on either side, and the jury were discharged without verdict it was Held,

(1) That the parties stood at issue on the pleadings just as they were before the jury were sworn.

(2) That in such case the judge has no right to pass upon the issues, except upon a waiver of jury trial in accordance with section 1-184. *Chasteen v. Martin*, 81 N. C. 51.

Appeal.—Where the parties waive a jury trial and agree to trial by the court, the court's findings of fact from the evidence are binding and conclusive upon appeal. *Berry v. Payne*, 219 N. C. 171, 13 S. E. (2d) 217.

Quoted in *Berry v. Payne*, 219 N. C. 171, 13 S. E. (2d) 217.

Cited in *Piedmont Wagon Co. v. Byrd*, 119 N. C. 460, 26 S. E. 144; *Grimes v. Home Ins. Co.*, 217 N. C. 259, 7 S. E. (2d) 557.

§ 1-173. **Issues of fact.**—Every issue of fact joined on the pleadings, and inquiry of damages ordered to be tried by a jury, must be tried at the term of the court next ensuing the joinder of issue or order for inquiry, if the issue was joined or

order made more than ten days before such term, but if not, they may be tried at the second term after the joinder or order. (Rev., s. 528; Code, s. 400; C. C. P., s. 226; 1923, c. 54; 1925, c. 5; C. S. 557.)

Editor's Note.—Prior to the passage of the Act of 1923 the time specified by this section was thirty days before the term. The same act substituted the word "may" for "must" in the next to the last line of the section.

Acts 1925, c. 5 did not affect the wording of the section but corrected an error in the amending act of 1923.

Power of Judge to Compel Party to Proceed.—The judge is without authority to compel a party to an action to proceed with the trial of a cause transferred to the civil issue docket when the issue has been joined within ten days from the commencement of the term. *Cahoon v. Everton*, 187 N. C. 369, 121 S. E. 612.

Amended Answer Raising Additional Issue.—Where, at trial term, an amended answer to an amended complaint raises additional issues of fact, the defendant is entitled to a continuance. *Dobson v. Southern Ry. Co.*, 129 N. C. 289, 40 S. E. 42.

Issue of Insanity.—In an indictment for murder, there being no allegation that the prisoner was insane at the time of the trial, no issue as to insanity need be submitted. *State v. Spivey*, 132 N. C. 989, 43 S. E. 475.

Cited in *Denmark v. Atlantic, etc., R. Co.*, 107 N. C. 185, 12 S. E. 54; *Simms v. Sampson*, 221 N. C. 379, 389, 20 S. E. (2d) 554.

§ 1-174. Issues of fact before the clerk.—All issues of fact joined before the clerk shall be transferred to the superior court for trial at the next succeeding term, and in case of such transfer neither party is required to give an undertaking for costs. (Rev., s. 529; C. S. 558.)

Denial of Good Faith in Condemnation Proceedings.—When in proceedings by a railroad company to condemn lands, the answer denies the intention of the petitioner in good faith to construct the proposed railroad, the pleadings, in this respect, do not raise an issue of fact to be transferred to and tried by the Superior Court in term, under the provisions of this section. *Madison County R. Co. v. Gahagan*, 161 N. C. 190, 76 S. E. 696.

Review of Clerk's Decisions.—The rulings or decisions of the clerks of the court must, as stated in this section, be transferred for trial to the next succeeding term of the Superior Court, if determinative issues arise on the pleadings in a procedure where the adversary rights of litigants are presented; and if there be issues of law or material questions of fact decided by the clerk, they may be reviewed by the judge at term or in chambers, on appeal properly taken; and in passing upon these questions of fact, the court may act on the evidence already received, or if this is not satisfactory, it may ordinarily require the production of other evidence as an aid in the proper disposition of the question presented. *Mills v. McDaniel*, 161 N. C. 112, 76 S. E. 551.

§ 1-175. Continuance before term; affidavit.—A party to an action may apply to the court in which it is pending, or to the judge thereof, by affidavit, thirty days before the trial term, and after three days notice in writing to the adverse party, to have the trial continued to a term subsequent to that in which it is regularly triable. The court or judge may continue the trial as asked for, on such terms as may be just, if satisfied—

1. That the applicant has used due diligence to have his case ready for trial.

2. That by reason of circumstances beyond his control, which he must set forth, he cannot have a fair trial at the regular trial term. If the application is made by reason of the expected absence of a witness, it must state the name and residence of the witness, the facts expected to be proved by him, the grounds for the expectation of his nonattendance, and that the applicant expects to procure his evidence at or before some named subsequent term. The applicant must in all cases pay the costs

of the application. (Rev., s. 530; Code, 401; C. C. P., s. 227; C. S. 559.)

Continuance Lies in Discretion of Judge.—The matter of granting or refusing a continuance of a cause for trial rests in the discretion of the trial judge, and the exercise of such discretion is not reviewable on appeal, in the absence of gross abuse. *Piedmont Wagon Company v. Bostic*, 118 N. C. 758, 24 S. E. 525.

Continuances Not Favored by Law.—Continuances are not favored by the law. One of the immortal provisions of the Magna Charta is that justice shall neither be delayed nor denied, and these are coupled together, for a delay of justice is often a denial of justice. *Piedmont Wagon Company v. Bostic*, 118 N. C. 758, 759, 24 S. E. 525.

Who May Make Affidavit.—In the United States Supreme Court it has been held that an affidavit for a continuance must be made by some one interested in the suit or action. See *Hunter v. Kennedy*, 1 Dall. 81, 1 L. Ed. 46.

§ 1-176. Continuance during term.—The judge at any time during the term at which an action is triable may continue the trial on the application of either party, and on such terms as shall be just, if satisfied—

1. That the applicant has used due diligence to be ready for trial.

2. That he cannot have a fair trial at that term, by reason of circumstances stated, and if the ground of application is the nonattendance of a witness, the affidavit must contain the particulars required by subdivision two of § 1-175. Unless the applicant also sets forth in his affidavit that the facts upon which his application is grounded occurred or came to his knowledge too late to allow him to apply as prescribed in § 1-175, and that his application is made as soon as it reasonably could be after the knowledge of those facts, the continuance shall not be granted, except on the payment of the costs in the action for the term. (Rev., s. 531; Code, s. 402; C. C. P., s. 228; R. C., c. 31, s. 57; C. S. 560.)

Continuance Discretionary with Judge.—The granting or refusing a continuance is entirely discretionary with the presiding judge, and cannot be assigned for error on appeal, in the absence of gross abuse. *Dupree v. Va. Home Ins. Co.*, 92 N. C. 418; *Piedmont Wagon Co. v. Bostic*, 118 N. C. 758, 24 S. E. 525; *Slocumb v. Construction Co.*, 142 N. C. 349, 55 S. E. 196; *Watson v. Black Mountain R. Co.*, 164 N. C. 176, 80 S. E. 175. See *In re Bank*, 202 N. C. 251, 162 S. E. 568, affirming the rule announced in the *Dupree* case.

A court cannot lay down a general rule for the continuance of causes; but must, under the circumstances of each case, take care that injustice is not done, either by precipitate trials or wanton delays, and where there appears to be a fair ground for the postponement, the case will be continued. *Symes v. Irvine*, 2 Dall. 383, 384, 1 L. Ed. 425.

The absence of a party or witness must be accounted for before a cause will be continued on these grounds. *Crites v. Lanier*, 1 N. C. 110.

Attorney Son of Trial Judge.—The fact that an attorney in an action is the son of the trial judge is not a ground for continuance. *Allison v. So. R. Co.*, 129 N. C. 336, 40 S. E. 91.

Sickness of members of a defendant's family may be a ground on which the judge, in his discretion, may grant a continuance. *Skinner v. Bryce*, 75 N. C. 287.

Insanity of Defendant.—Where defendant becomes insane pending an action against her for divorce, the action should be continued if there is any hope of recovery. *Stratford v. Stratford*, 92 N. C. 297.

To Prove Bad Character of Witnesses.—Where defendant has asked for a continuance under this section without complying with the requirements and the purpose given for seeking the continuance is to secure depositions as to the bad character of the State's witnesses when defendant has already been permitted to cross-examine the witnesses and they admitted being prosecuted for criminal offenses, refusal of the trial judge to grant the continuance is not an abuse of discretion. *State v. Banks*, 204 N. C. 233, 167 S. E. 851.

Amendment of Pleadings.—Refusal of a continuance on a defendant filing on the day of trial, an answer substantially

like that of the other defendants, and raising no additional issue, is not an abuse of discretion. *Slingluff v. Hall*, 124 N. C. 397, 32 S. E. 739.

But where an amendment is such as to cause surprise, it is cause for continuance, *Martin v. Bank*, 131 N. C. 121, 42 S. E. 558; *Sams v. Price, etc., Co.*, 119 N. C. 572, 26 S. E. 170; and ordinarily an amendment which changes the issues or the parties causes such surprise as will authorize the continuance. *Watson v. Black Mountain R. Co.*, 164 N. C. 176, 80 S. E. 175; and it has been held that the allowance of an amendment alleging fraud, if such as to take defendant by surprise, entitles him to a continuance. *Dockery v. Fairbanks Morse Co.*, 172 N. C. 529, 90 S. E. 501. See also note of *Dobson v. Southern Railway Co.*, 129 N. C. 289, 40 S. E. 42, under § 1-173. Likewise if an allegation of time and place is made, and a party has prepared his evidence, based wholly upon such allegation, and is surprised at the trial by the evidence of another time or place, he should be given another opportunity to meet such evidence. *Brown v. Western Union Tel. Co.*, 169 N. C. 509, 86 S. E. 290.

§ 1-177. Counter affidavits as to continuance.—It is competent in all civil cases only for the opposing side to controvert the allegations of fact in applications for continuance, and to offer counter affidavits to that end. The judge shall not allow the continuance unless satisfied, after thorough examination of the evidence aforesaid, that the ends of justice demand it. (Rev., s. 532; 1885, c. 394; C. S. 561.)

In General.—As the two preceding sections, in the judgment of the legislature, were not sufficient to protect against the "laws delay," this section was passed. *Piedmont Wagon Co. v. Bostic*, 118 N. C. 758, 759, 24 S. E. 525.

Judge Must Be Satisfied.—If the judge is left in doubt he must refuse the continuance. *Piedmont Wagon Co. v. Bostic*, 118 N. C. 758, 759, 24 S. E. 525.

§ 1-178. Order of business.—The criminal calendar must be first disposed of, unless, by consent of counsel, or for reasons satisfactory to the judge, particular criminal actions may be deferred. The issue on the civil calendar must be disposed of in the following order, unless, for the convenience of parties or the dispatch of business, the court otherwise directs:

1. Issues of fact to be tried by a jury.
2. Issues of fact to be tried by the court.
3. Issues of law.

(Rev., s. 533; Code, s. 403; C. C. P., s. 229; C. S. 562.)

Cross Reference.—As to civil cases at criminal terms, see § 7-72.

Generally.—While placing a case on the civil issue docket usually indicates a trial by jury of issues of fact, this does not necessarily follow, nor compel the conclusion that the legislature so intended, as there may be, and frequently are, issues of law and questions of fact, triable by the judge, which properly find their way to this docket. *State v. Willis Barber, etc., Shop*, 219 N. C. 709, 712, 15 S. E. (2d) 4.

§ 1-179. Separate trials.—A separate trial between a plaintiff and any of several defendants may be allowed by the court when, in its opinion, justice will thereby be promoted. (Rev., s. 534; Code, s. 407; C. C. P., s. 230; C. S. 563.)

Severance Not a Matter of Right.—It is within the sound discretion of the court, on motion of the defendants, or any of them, to allow severance and a separate trial as to each defendant if thereby justice will be promoted. However it was error for the court to hold that the defendants had a right to demand it, and a judgment rendered upon such holding will be reversed. *Bryan v. Spivey*, 106 N. C. 95, 11 S. E. 510.

Division Allowed in Case of Misjoinder.—Where there is a misjoinder of causes of action, the court may allow the action to be divided; or, where there is a misjoinder of parties, the court in its discretion can do the same. *Pretzfelder, etc. v. Merchants' Ins. Co.*, 116 N. C. 491, 496, 21 S. E. 302.

Result of Order of Severance.—An order of severance is equivalent to dividing the action into several suits, with all

the usual provisions for costs, etc., incident thereto. *Bryan v. Spivey*, 106 N. C. 95, 11 S. E. 510.

§ 1-180. Judge to explain law, but give no opinion on facts.—No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon. (Rev., s. 535; Code, s. 413; C. C. P., s. 237; R. C., c. 31, s. 130; 1796, c. 452; C. S. 564.)

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I. EDITOR'S NOTE.

Editor's Note.—This section has been the subject of some criticism.

It should, in the opinion of most legal writers on the subject, not only be the right but the duty of the court to aid the jury by recalling the testimony to their recollection, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by stating the true point of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripping off every consideration which otherwise might mislead or confuse them. At common law the judge was not forbidden to express an opinion upon the facts in the case, for it was deemed that the judge could be of aid to the jury in expressing an opinion upon the reasonable inference to be drawn from the evidence, though of course he could not direct the verdict when there was conflicting evidence. The same rule still obtains in England, in all the federal courts, and the courts of nearly every state of the union.

"The policy of the state differs from the federal rule and the rule in most states, and the section has been the subject of much criticism." *Caldwell v. Southern Ry. Co.*, 218 N. C. 63, 82, 10 S. E. (2d) 680 (concurring opinion).

II. OPINION OF JUDGE.

A. General Considerations.

Purposes and Effect of Section.—The necessity of judges, in obedience to the statute, avoiding any expression, however inadvertent or well intentioned, which may be reasonably construed by a jury, quick to perceive the judge's point of view, as more favorable to one side than the other, has never been better expressed than by Mr. Justice Walker in *Withers v. Lane*, 144 N. C. 184, 187, 56 S. E. 855. He quotes, from Chief Justice Taylor in *Reel v. Reel*, 9 N. C. 63, as follows: "Upon considering the whole of the charge, it appears to us that its general tendency is to preclude that full and free inquiry into the truth of the facts which is contemplated by the law, with the purest intentions, however, on the part of the worthy judge, who, receiving a strong impression from the testimony adduced, was willing that what he believed to be the very justice of the case should be administered. We are not unaware of the difficulty of concealing all indications of the conviction wrought on the mind by evidence throughout a long and complicated cause; but the law has spoken, and we have only to obey."

Mr. Justice Walker, continues in his own language as follows: "What these eminent jurists have so well said

about the duty of the trial judge under our statute, and the consequence of a violation of it, will, if it is properly heeded, conduce to the more perfect and satisfactory trial of causes. The judge should be the embodiment of even and exact justice. He should at all times be on the alert lest in an unguarded moment something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the 'cold neutralit, of the impartial judge,' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged." *Starling v. Selma Cotton Mills*, 171 N. C. 222, 228, 88 S. E. 242.

In *State v. Jones*, 181 N. C. 546, 106 S. E. 817, the court said: "This Court has always been very careful to enforce the provision of the statute which prohibits a judge from expression of opinion in the trial of causes before the jury, this section, extending the inhibition to such expression in the hearing of the jury at any time during the trial, and whether the objectionable comments may be towards the testimony offered, the witness testifying, or the litigant and the cause he is endeavoring to maintain."

An expression of an opinion by the judge as to an essential fact involved in an issue is condemned by this section. *Abernethy v. State Planters' Bank, etc., Co.*, 202 N. C. 46, 49, 161 S. E. 705.

The provisions of this section are mandatory. *State v. Evans*, 211 N. C. 458, 459, 190 S. E. 724.

Two Provisions Are of Equal Dignity.—This section proscribes the judge in charging the jury from expressing an opinion as to the weight and credibility of the evidence, and prescribes that he declare and explain the law arising upon the evidence, and the two provisions are linked together and are of equal dignity, and the failure to observe either is error. *Ryals v. Carolina Contracting Co.*, 219 N. C. 479, 14 S. E. (2d) 531.

A Substantial Right of Litigants. — This section gives the parties to the action a substantial right. The jury has the sole and exclusive function of finding the facts from the evidence under the law thus given them, and it is not their duty, in any event, to determine what is the law. *Wilson v. Wilson*, 190 N. C. 819, 130 S. E. 834; *Ryals v. Carolina Contracting Co.*, 219 N. C. 479, 14 S. E. (2d) 531.

Cannot be Extended. — The North Carolina statute being a restriction upon the almost universal rule, cannot be extended beyond its terms. *State v. Baldwin*, 178 N. C. 687, 689, 100 S. E. 348; *State v. Pugh*, 183 N. C. 800, 111 S. E. 849.

Evidence Must Be Stated Impartially. — It has been accepted as the proper construction and meaning of the act of this section, though it goes beyond the words: that a judge in charging a jury shall state the evidence fairly and impartially, and that he shall express no opinion on the weight of evidence. *State v. Jones*, 67 N. C. 285.

Where Law Gives Testimony Artificial Weight. — It is only where the law gives to testimony an artificial weight that the judge is at liberty to express an opinion upon its weight. *Bonner v. Hodges*, 111 N. C. 66, 15 S. E. 881.

Section Not Confined to Charge. — In terms, this statute refers to the charge, but it has always been construed as including the expression of any opinion, or even an intimation by the judge, at any time during the trial which is calculated to prejudice either of the parties. And when once expressed such opinion or intimation cannot be recalled. *State v. Bryant*, 189 N. C. 112, 126 S. E. 107, 108; *State v. Oakley*, 210 N. C. 206, 186 S. E. 244.

Section Applies Throughout Trial. — This section applies to any expression of opinion by the judge in the hearing of the jury at any time during the trial. *State v. Cook*, 162 N. C. 586, 77 S. E. 759; *Thompson v. Angel*, 214 N. C. 3, 197 S. E. 618.

It was considered so essential to protect the right of trial by jury that this section was broadly worded and was among the earliest of our remedial enactments, and, while it refers in terms to the charge, it has always been construed as including the expression of any opinion, or even an intimation of the judge, at any time during the trial, calculated to prejudice either of the parties. *Morris v. Kramer Bros. Co.*, 182 N. C. 87, 90, 108 S. E. 381.

This section proscribes the court from expressing an opinion upon the weight or credibility of the evidence in any manner either in the course and conduct of the trial or in its instructions to the jury. *Bailey v. Hayman*, 220 N. C. 402, 17 S. E. (2d) 520.

Motive of Judge Immaterial. — The probable effect or influence upon the jury, and not the motive of the judge, determines whether the party whose right to a fair trial has been impaired is entitled to a new trial. *State v. Bryant*, 189 N. C. 112, 126 S. E. 107, 108; *State v. Oakley*, 210 N. C. 206, 186 S. E. 244.

What Remarks Presumed Correct. — The remarks of

the trial judge in discharging a jury after verdict, or in impressing upon jurors and the public the duty of jurors in their conduct, are prima facie presumed on appeal to be correct. *State v. Pugh*, 183 N. C. 800, 111 S. E. 849.

Province of Court and Jury. — It is not for the judge to pass upon the intensity of the proof. That is a matter which lies solely within the province of the jury. The verdict may be set aside by the court, if found to be against the weight of the evidence, but the right of the plaintiff to have it submitted to the jury can not be denied provided there is some evidence tending to establish the plaintiff's contention. The jury should be instructed that the evidence must be clear and satisfactory in cases to which that principle applies, but it is for them to say whether the evidence is of that convincing character. *Avery v. Stewart*, 136 N. C. 426, 430, 48 S. E. 775.

Weight and Sufficiency of Evidence Question for Jury. — Whether there be any evidence is a question for the judge. Whether it is sufficient evidence is a question for the jury. *Wittkowsky v. Wasson*, 71 N. C. 451; *State v. Hardee*, 83 N. C. 619; *State v. Moses*, 13 N. C. 452; *Withers v. Lane*, 144 N. C. 184, 56 S. E. 855.

A judge is prohibited by this section from expressing an opinion upon the weight of the evidence, and could not instruct the jury that this was or was not clear, strong, and convincing. *Earnhardt v. Clement*, 137 N. C. 91, 95, 49 S. E. 49.

It is the province of the jury to ascertain the facts from the evidence, the weight and credibility thereof being exclusively for its determination. In re *Will of Bergeron*, 196 N. C. 649, 146 S. E. 571.

And Final Decision of Facts Rests with Jury.—The jury must not only unanimously concur in the verdict, but must be left free to act according to the dictates of their own judgment. The final decision upon the facts rests with them, and any inference by the court tending to influence them into a verdict against their convictions is irregular and without the warrant of law. The judge is not justified in expressing to the jury his opinion that the defendant is guilty upon the evidence adduced. *State v. Maxwell*, 215 N. C. 32, 33, 1 S. E. (2d) 125.

Judge Cannot Withdraw Case. — A judge cannot pass upon the weight of evidence and withdraw a case from the jury when it appears to him that the evidence is not clear, strong, and convincing. *Lehew v. Hewett*, 138 N. C. 6, 9, 50 S. E. 459.

May Explain Law of Concurrent Negligence as Applied to Evidence.—In *Harvell v. Wilmington*, 214 N. C. 608, 200 S. E. 367, it was held that, the law of concurrent negligence being applicable to the conflicting evidence in the case, the plaintiff had a right to rely thereon, and it was the duty of the court to apply such law to the evidence and to declare and explain, in the manner contemplated by this section, the law of concurrent negligence as it applied to the evidence.

Nonsuit. — It is the duty of the judge to nonsuit, when the evidence is not legally sufficient to justify a verdict for the plaintiff. *Kearns v. R. Co.*, 139 N. C. 470, 52 S. E. 131.

But he cannot enter a judgment of nonsuit on the grounds of plaintiff's contributory negligence without deciding an issue of fact. *Osborne v. Southern R. Co.*, 160 N. C. 309, 311, 76 S. E. 16.

Directing a Verdict. — Where the evidence upon the trial is permissible of more than one construction or different inferences may be drawn therefrom, peremptory instructions directing a verdict thereon in favor of either party to the controversy is an expression of an opinion thereon by the trial judge, forbidden by this section. *United States Railroad Administration v. Hilton Lumber Co.*, 185 N. C. 227, 117 S. E. 50.

Court Cannot Direct Affirmative Finding. — Where the party upon whom the burden of proof rests offers no evidence to prove the issue the trial judge should direct a negative finding; but in no case, however strong and uncontradictory the evidence is in support of this issue, should the court withdraw the issue from the jury and direct an affirmative finding. *Anniston Nat. Bank v. School Committee*, 121 N. C. 107, 28 S. E. 134; *Cable v. Southern R. Co.*, 122 N. C. 892, 29 S. E. 377.

Examination of Witnesses Discretionary. — The manner of conducting the examination of witnesses is left largely to the discretion of the judge and can but seldom be the subject of review, even when not entirely approved by this court. *State v. Brown*, 100 N. C. 519, 6 S. E. 563.

Dissertation upon Moral Questions.—This section does not prohibit a judge, in his charge to the jury, from pronouncing a dissertation upon such moral questions as are suggested by the incidents of the trial, provided the language used is without prejudice to either party. *Stilley v. McCox*, 88 N. C. 18.

A Venire de Novo for Violation. — Under this section the trial judge is restricted to stating plainly and correctly the evidence and declaring and explaining the law arising thereon; and when his peculiar emphasis, or language, or manner in presenting or arraying the evidence indicates his opinion upon the facts, or conclusion of facts, a venire de novo will be ordered. *Withers v. Lane*, 144 N. C. 184, 56 S. E. 855.

Exceptions after Verdict. — The fact that exception was not entered at the time a remark was uttered is immaterial. The statute is mandatory, and all expressions of opinion by the judge during the trial, in like manner, with the admission of evidence made incompetent by statute, may be excepted to after the verdict. *State v. Bryant*, 189 N. C. 112, 126 S. E. 107, 109.

This case apparently overrules, without so stating, *State v. Brown*, 100 N. C. 519, 6 S. E. 568. In that case it was held that an objection made after verdict was too late.

Record on Appeal Must Show Error. — If an appeal is taken on the ground that the judge, by his manner or emphasis intimated an opinion upon the facts, the record must allege the tone, emphasis or manner. *Davis v. Blevins*, 125 N. C. 433, 34 S. E. 541. Citing *State v. Wilson*, 76 N. C. 120; *State v. Jones*, 67 N. C. 285.

An assignment of error to a charge should state wherein the charge fails to comply with this section. *Switzerland Co. v. North Carolina State Highway, etc.*, Comm., 216 N. C. 450, 5 S. E. (2d) 327.

Applied in *Misskelley v. Home Life Ins. Co.*, 205 N. C. 496, 508, 171 S. E. 862; *Rand v. Home Ins. Co.*, 206 N. C. 760, 768, 174 S. E. 749; *Lamm v. Lamm*, 206 N. C. 905, 173 S. E. 309; *Wilson v. Inter-Ocean Cas. Co.*, 210 N. C. 585, 188 S. E. 102; *State v. Batts*, 210 N. C. 659, 188 S. E. 99.

Cited in *Hunsinger v. Carolina, etc., Ry.*, 194 N. C. 679, 681, 140 S. E. 608; *State v. Newsome*, 195 N. C. 552, 143 S. E. 187; *Bridgeman v. Pilot Life Ins. Co.*, 197 N. C. 599, 150 S. E. 15; *Bostwick v. Jackson*, 197 N. C. 785, 148 S. E. 925; *State v. Sawyer*, 198 N. C. 459, 152 S. E. 153; *American Exch. Nat. Bank v. Winder*, 198 N. C. 18, 22, 150 S. E. 489; *Brown v. Postal Telegraph-Cable Co.*, 198 N. C. 771, 153 S. E. 457; *Moss v. Brown*, 199 N. C. 189, 154 S. E. 48; *Pyatt v. Southern R. Co.*, 199 N. C. 397, 407, 154 S. E. 847; *Nelson v. Jefferson Standard Life Ins. Co.*, 199 N. C. 443, 450, 154 S. E. 752; *Rogers v. Ray*, 199 N. C. 577, 155 S. E. 253; *State v. Johnson*, 205 N. C. 839, 171 S. E. 926; *Jones v. Metropolitan Life Ins. Co.*, 206 N. C. 916, 918, 175 S. E. 162; *State v. Hall*, 214 N. C. 639, 200 S. E. 375; *Owens v. Blackwood Lbr. Co.*, 212 N. C. 133, 193 S. E. 219; *Leonard v. Pacific Mut. Life Ins. Co.*, 212 N. C. 151, 193 S. E. 166; *In re Worsley*, 212 N. C. 320, 193 S. E. 666; *Farrow v. White*, 212 N. C. 376, 193 S. E. 386; *Lewis v. Hunter*, 212 N. C. 504, 193 S. E. 814; *Rooks v. Bruce*, 213 N. C. 58, 195 S. E. 26; *State v. Robinson*, 213 N. C. 273, 195 S. E. 824; *State v. Epps*, 213 N. C. 709, 197 S. E. 580; *Hancock v. Wilson*, 211 N. C. 129, 189 S. E. 631; *Noland Co. v. Jones*, 211 N. C. 462, 190 S. E. 720; *State v. Johnson*, 218 N. C. 604, 12 S. E. (2d) 278; *Nichols v. York*, 219 N. C. 262, 13 S. E. (2d) 565; *Moyle v. Hopkins*, 222 N. C. 33, 21 S. E. (2d) 826; *State v. Shine*, 222 N. C. 237, 22 S. E. (2d) 447; *Sample v. Spencer*, 222 N. C. 580, 24 S. E. (2d) 241; *State v. Wells*, 221 N. C. 144, 19 S. E. (2d) 243.

B. What Constitutes an Opinion.

In General. — This section has been interpreted to mean that no judge, in giving a charge to the jury or at any time during the trial, shall intimate whether a fact is fully or sufficiently proved. *State v. Mitchell*, 193 N. C. 796, 798, 138 S. E. 166, citing *State v. Kline*, 190 N. C. 177, 129 S. E. 417; *State v. Hart*, 186 N. C. 582, 120 S. E. 345. See *Speed v. Perry*, 167 N. C. 122, 83 S. E. 176, where this section, in all of its phases, is discussed at considerable length, with full citation of authorities.

The judge who tries a cause has no right to intimate in any manner his opinion as to the weight of the evidence, nor to express an opinion on the facts. *Powell v. Wilmington, etc., R. Co.*, 68 N. C. 395.

A correct charge of the court upon the evidence in a case will not be held for error as containing an expression of opinion prohibited by this section, when nothing of this character appears from a careful perusal of the charge on appeal that could bias a mind of ordinary firmness and intelligence. *Keller v. Caldwell Furniture Co.*, 199 N. C. 413, 414, 154 S. E. 674.

Test of Violation. — It is a violation of this section for a judge at any time in the progress of a trial (as well as during his charge to the jury) to express an opinion as to the weight of evidence or to use language which, fairly interpreted, would make it reasonably certain that it would influence the minds of the jury in determining a fact. *State v. Browning*, 78 N. C. 555.

Direct Language Not Necessary to Constitute Error. — Where an intimation as to whether any fact is sufficiently proved is reasonably inferred from the manner of the judge or his peculiar emphasis of the evidence, or in his presentation thereof or his form of expression, or by the tone or general tenor of the trial, giving advantage to the appellee thereby, such as to impair the credit which might otherwise, under normal conditions be given by the jury to the testimony, it comes within the prohibition of this section. *State v. Hart*, 186 N. C. 582, 120 S. E. 345; *State v. Rhinehart*, 209 N. C. 150, 153, 183 S. E. 388.

Possibility of Unfair Inference Insufficient. — It is not sufficient to show, that what the judge did or said might have had an unfair influence, or that his words, critically examined and detached from the context and the incidents of the trial, were capable of a construction from which his opinion on the weight of testimony might be inferred; but it must appear, with ordinary certainty, that his manner of arraying and presenting the evidence was unfair, and likely to be prejudicial, or that his language, when fairly interpreted, was likely to convey to the jury his opinion on the weight of the testimony. *State v. Jones*, 67 N. C. 285.

Section Applies to Issues. — The facts on which this section restrains the judge from expressing an opinion to the jury are those respecting which the parties take issue or dispute and on which, as having occurred or not occurred, the imputed liability of the defendant depends. *Long v. Byrd*, 169 N. C. 659, 86 S. E. 574, citing *State v. Angel*, 29 N. C. 27.

Language Subject to Misapprehension. — When there is a conflict of testimony which leaves a case in doubt before the jury, and the judge uses language which may be subject to misapprehension and is calculated to mislead, the Supreme Court will order a venire de novo. *State v. Rogers*, 93 N. C. 523, 524.

Remarks Made in Mere Plesantry. — Remarks made in mere pleasantry by the trial judge in the presence of the jury, in relation to irrelevant testimony of a witness he had theretofore been patiently endeavoring to properly confine, will not be held for reversible error as an expression of his opinion forbidden by statute, when it could not reasonably have had any appreciable effect upon the jury, and could only have been regarded by them in the manner in which it was uttered. *State v. Jones*, 181 N. C. 546, 106 S. E. 817.

Remarks That Fact Is "Sufficiently Proved." — The mortuary tables (see § 8-46), are but evidence of life expectancy, to be taken in connection with other evidence of health, constitution, and habits, and an instruction that testator's life expectancy was so many years, based upon the tables, violates this rule and the rule against an expression of opinion by the court as to whether a fact is sufficiently proven. *Wachovia Bank, etc., Co. v. Atlantic Greyhound Lines*, 210 N. C. 293, 186 S. E. 320.

Charge Predicated on Jury Findings. — Where the trial judge predicates his statements in his charge upon what the jury may find the facts to be, it is not an expression of opinion forbidden by this section. *Ivie v. King*, 167 N. C. 174, 83 S. E. 339.

Positive and Negative Testimony. — It is not error, as a general proposition, for a judge to say that positive testimony is entitled to more weight than negative. *Henderson v. Crouse*, 52 N. C. 623.

Assumption of Truth of Fact. — An instruction which assumes the truth of controverted facts is erroneous, as invading the province of the jury. *Bradley v. Ohio River, etc., R. Co.*, 126 N. C. 735, 36 S. E. 181; *Pigford v. Norfolk, etc., R. Co.*, 160 N. C. 93, 75 S. E. 860.

Assumption of Non-Existence of Facts. — A new trial will be awarded, where the charge of the court assumed that certain facts had not been proved, thus taking the questions from the jury. *Powell v. Wilmington, etc., R. Co.*, 68 N. C. 395.

Uncontroverted Facts. — An instruction is not erroneous in assuming an admitted fact. *Crampton v. Ivie*, 124 N. C. 591, 32 S. E. 968.

Uncontroverted Evidence. — Where the defense is based on the uncontradicted testimony of a witness, it is proper for the court to instruct the jury to find for defendant if they believe such witness. *Love v. Gregg*, 117 N. C. 467, 23 S. E. 332; *Purifoy v. Richmond, etc., R. Co.*, 108 N. C. 100, 12 S. E. 741; *Chemical Co. v. Johnson*, 101 N. C. 223, 7 S. E. 770, 775.

However, this principle does not apply where the evidence, if true, is susceptible of more than one deduction. *Armour Fertilizer Works v. Cox*, 187 N. C. 654, 122 S. E. 479.

Submission to Jury. — Where issues are submitted to the jury, an instruction that plaintiff can not recover can not be granted. *Bradley v. Ohio River, etc., R. Co.*, 126 N. C.

735, 36 S. E. 181; *Witsell v. West Asheville, etc., R. Co.*, 120 N. C. 557, 27 S. E. 125.

Instruction That There Is No Evidence. — If any testimony, however slight or insufficient, is given, which tends to establish the issue, it is error to instruct the jury that there is none. *State v. Allen*, 48 N. C. 257.

Failure of Proof. — Where there is no evidence to prove the affirmative of an issue, the jury may be instructed to answer it in the negative if they believe the evidence. *Woodbury v. Evans*, 122 N. C. 779, 30 S. E. 2; *Newsome v. Western Union Tel. Co.*, 144 N. C. 178, 56 S. E. 863.

Remark That Fact is "Sufficiently Proved." — The judge is not permitted to express an opinion as to whether a fact, is sufficiently proved, in his charge to the jury. *Williams v. Crosby Lumber Co.*, 118 N. C. 928, 934, 24 S. E. 800.

In an action for wrongful death, an instruction that, according to the mortuary table, testate's age being a stated number of years, his life expectancy was a certain number of years, is error as being an expression of opinion by the court as to the sufficiency of the proof of the fact of age and the life expectancy, contrary to this section. *Sebastian v. Horton Motor Lines*, 213 N. C. 770, 197 S. E. 539.

Hypothetical Statements by Judge. — Merely hypothetical instructions are erroneous, and should not be indulged in, as they proceed on an assumption of facts. *State v. Collins*, 30 N. C. 407; *State v. Benton*, 19 N. C. 196; *Johnson v. Bell*, 74 N. C. 355; *State v. Murph.*, 60 N. C. 129.

It is not error to refuse any instruction asked on a hypothetical state of facts. *Wilson v. Holley*, 66 N. C. 408.

Applies to Inferences of Fact. — Whether a fact is sufficiently proved is within the province of the jury to determine, upon which the court may not intimate an opinion, and this inhibition extends not only to the ultimate facts, but to all the essential inferences of fact arising from the testimony upon which the ultimate facts necessarily depend. *Phillips v. Giles*, 175 N. C. 409, 410, 95 S. E. 772.

Remarks Must Be Prejudicial. — Unless it appears with ordinary certainty that the rights of either party have been in some way prejudiced by the remarks or conduct of the court, it cannot be treated as error. *State v. Browning*, 78 N. C. 555.

To constitute reversible error, an expression of opinion on the part of the court must be prejudicial to the interest of the appellant. *State v. Puett*, 210 N. C. 633, 635, 188 S. E. 75.

Appellant may not maintain an exception to the charge on the ground that it contained an expression of opinion by the court in violation of this section when the alleged error is in favor of appellant and is therefore harmless as to him. *Vaughn v. Booker*, 217 N. C. 479, 8 S. E. (2d) 603.

Evidence Tends to Show. — It is not error, as commenting on the weight of evidence, to use in instructions the phrases, "the evidence tends to show," and "evidence tending to show." *Lewis v. Norfolk, etc., R. Co.*, 132 N. C. 382, 43 S. E. 919; *State v. Harris*, 213 N. C. 648, 197 S. E. 142.

The use of the words "the evidence tends to show" by the trial court in his charge to the jury, applied both to the evidence for the State and for the defendant, is not an expression by him upon the weight and credibility of the evidence forbidden by this section. *State v. Jackson*, 199 N. C. 321, 154 S. E. 402.

Remarks to Counsel. — Remarks of the judge, made, not in his charge but to counsel during the introduction of the evidence, are not a ground for a new trial, unless it reasonably appears that a party is prejudiced in the minds of the jury by such remarks. *Williams v. Crosby Lumber Co.*, 118 N. C. 928, 24 S. E. 800.

Reprimand of Spectators. — A reprimand of spectators is not a violation of this section. *State v. Robertson*, 121 N. C. 551, 28 S. E. 59.

Credibility of Witnesses. — Where there is a disputed fact depending for its proof upon the testimony of witnesses, the credibility of the witnesses is always a question for the jury, and this is so though the testimony may be all on one side. In this case, the judge may charge the jury, if they find the facts to be as testified by the witnesses, to answer the issue in a certain way; but not upon the evidence, so to answer it. *Dobbins v. Dobbins*, 141 N. C. 210, 53 S. E. 870; *Smith v. Cashie, etc., Lumber Co.*, 140 N. C. 375, 53 S. E. 233.

Appearance and Manner of Witness. — The presiding judge should not state to the jury his estimate of the appearance and manner of a witness. *Crutchfield v. Richmond, etc., R. Co.*, 76 N. C. 320.

Time Spent in Outlining Evidence of One Party. — Where the state has a number of witnesses and only defendant testifies for the defense, the fact that the court necessarily consumes more time in outlining the evidence for the

state than that of defendant does not support defendant's contention that the court expressed an opinion upon the facts by laying undue emphasis on the contentions of the state. *State v. Cureton*, 218 N. C. 491, 11 S. E. (2d) 469.

Instructing Plaintiff to Reopen Case and Supply Deficiency in Record. — Where the record disclosed that at the conclusion of all the evidence the court ruled favorably on defendant's motion to nonsuit and stated that there was a serious defect in the record and that if plaintiff wished to reopen the case and supply the deficiency the court would permit him to do so, that there followed a 10-minute recess after which the court told plaintiff he had not introduced the summons which was very material, and that upon plaintiff's request the deficiency in the record was supplied, it was held that the remarks of the court did not constitute an expression of opinion upon the evidence inhibited by this section, but were within the court's sound discretion in discharging its duty to see to it that each side has a fair and impartial trial. *Miller v. Greenwood*, 218 N. C. 146, 10 S. E. (2d) 708.

Remark Complimentary to Witness. — A remark of the trial judge complimentary to the character of one who was a witness in the cause, made before the jury is empanelled, is not forbidden by this section. *State v. Howard*, 129 N. C. 584, 40 S. E. 71.

Amount of Recovery. — Mathematical computations in a charge on the measure of damages is not a usurpation of the powers of the jury, where the court charges they are used merely as an example. *Speight v. Seaboard, etc., Railway*, 161 N. C. 80, 76 S. E. 684.

Remarks Made in Directing Nonsuit of One of Several Defendants. — It is error for the judge in the presence of the jury, to nonsuit one of several defendants upon the evidence he did not participate in the offense charged against them all in the indictment, when the judge's remarks intimated that the appealing defendants had committed the offense. *State v. Sullivan*, 193 N. C. 754, 138 S. E. 156.

C. Illustrative Cases.

1. Remarks Held Not Erroneous.

a. Remarks Concerning a Party to the Trial.

Parties as Witnesses. — Where plaintiff and defendant are the principal witnesses, and the former testifies distinctly to one contract and its breach by defendant, who testifies as distinctly to another and a different contract, it is not error to charge that, if the jury find that plaintiff has stated the contract correctly, they will find for him, but, if defendant stated it correctly, then the verdict should be for him. *Barringer v. Burns*, 108 N. C. 606, 13 S. E. 142.

Remarks During Former Trial. — The remarks of the judge in sentencing a prisoner during the previous week cannot be held as improper for the trial of another defendant for participating in the same offense tried during the next week. *State v. Baldwin*, 178 N. C. 687, 688, 100 S. E. 348.

Remark That Prisoner Would Escape. — A remark of the judge before trial began, that the jailer had informed him the prisoner "would escape if he had the opportunity" is not an expression of opinion upon the facts. *State v. Jacobs*, 106 N. C. 695, 10 S. E. 1031.

Statement That Judge Did Not Understand Claim. — Where the judge in charging the jury said, "I am not sure, and I frankly confess that I am not sure, that I understand fully the claim upon which the plaintiff based the eleven thousand and some odd dollars," it was held that this was not an expression of opinion prohibited by this section. *McDonald v. MacArthur Bros. Co.*, 154 N. C. 11, 69 S. E. 684.

b. Remarks Concerning Witnesses.

Defendant Not Prejudiced by Remarks During Cross-Examination of State's Witness. — Remarks of the court in the presence of the jury which tend to discredit a witness will be held for reversible error upon appeal of the injured party, but when such remarks are made during defendant's cross-examination of a state's witness, defendant cannot be prejudiced thereby and his exception thereto cannot be sustained. *State v. Puett*, 210 N. C. 633, 188 S. E. 75.

Remark Concerning Emotion of Witness. — On a trial for rape a remark by the judge concerning the mother of the prosecutrix, that "some allowance must be made for the woman, as she is overcome with emotion", was held not to be error. *State v. Laxton*, 78 N. C. 564.

Statement That Witness Corroborates Another. — A recitation that the testimony of a witness corroborated the testimony of another witness is not an expression of opinion. *State v. Mitchell*, 193 N. C. 796, 138 S. E. 166.

Remark That Witness Has Fully Answered Question. — Where the same witness has several times fully answered

a question it is within the discretion of the trial judge to relieve the witness from answering substantially the same question; and his statement before the jury that the witness had already fully answered, is not an expression of his opinion upon the credibility of the witness. *State v. Mansell*, 192 N. C. 20, 133 S. E. 190.

Referring to Eyewitnesses.—Upon the trial under an indictment for assault and larceny, where some of the State's witnesses were eye-witnesses and some were not, and the defendant had admitted he was present at the time, an instruction as to the first class "now that is the testimony of eye-witnesses," followed by correct instructions as to the second class, is not objectionable as an expression of opinion by the trial judge forbidden by this section. *State v. Boswell*, 195 N. C. 496, 142 S. E. 583.

Statement that court would strike evidence unless it corroborated witness, and failure to strike it out, was not expression of opinion on weight of evidence. *State v. Starnes*, 218 N. C. 539, 11 S. E. (2d) 553.

c. Remarks Concerning Weight and Credibility of Testimony.

Instruction Based on Law.—Where there is evidence of fraud and undue influence in the making of a will, and it appears that it was by a woman who derived the property from her first husband, of which marriage there was one child, and she had given this property to the children of her second marriage, an instruction to the jury that, in the absence of some reasonable ground for such preference, this would constitute what the law calls an unreasonable will, which may be considered with the other evidence in the case as evidence upon the question of mental capacity and of undue influence, is not objectionable as an expression of opinion by the judge. *In re Will of Hardee*, 187 N. C. 381, 121 S. E. 667.

Statement That Phases of Case Were Admitted.—A trial judge in an action for damages who stated to the jury that there were phases of the case apparently admitted by the defendant's counsel and if not, to be passed upon by the jury, did not violate this section. *Means v. Carolina Cent. R. Co.*, 126 N. C. 424, 35 S. E. 813.

Statement Concerning Admission.—It is not a violation of this section for the judge to tell the jury that the evidence that the defendant had admitted execution of a bond, if believed by the jury to be true, is entitled to more weight than the opinion of experts to the genuineness of the signature, and that such opinions should be received with caution. *Buxly v. Buxton*, 92 N. C. 479.

Reference to Testimony of One Witness.—Where the court was evidently stating the contentions of the parties as to the force of the evidence taken as a whole, his reference to the testimony of one witness is not improper as tending to restrict the consideration of the jury to it alone. *Wheeler v. Cole*, 164 N. C. 378, 80 S. E. 241.

Charge Based on Uncontradicted Testimony.—A charge by the court for the jury to return a verdict of guilty if they believed or found as true the testimony of an uncontradicted witness (capable of only one meaning), is not an expression of the court's opinion upon the weight and credibility of the evidence. *State v. Moore*, 192 N. C. 209, 134 S. E. 456.

Remark on Evidence of Character of Defendant.—An instruction that "there was evidence tending to show that he (the defendant) is a man of bad character," said while stating the contentions of the state, cannot be held for error as an expression of opinion by the court on the weight or credibility of the testimony in violation of this section. *State v. Sims*, 213 N. C. 590, 197 S. E. 176.

Statement That Evidence Satisfies "Beyond Reasonable Doubt."—Where the trial court instructed the jury "all the evidence tends to show a homicide committed in the perpetration of a robbery," and that the State has offered evidence, "which, it contends, tends to show, and which should satisfy you, gentlemen, beyond a reasonable doubt," etc.: Held, the charge will not be held for error on defendant's exception on the ground that it contained an expression of opinion by the court in violation of this section. *State v. Johnson*, 207 N. C. 273, 176 S. E. 581.

Statement as to Evidence on Handwriting.—An instruction of the court in stating the evidence that the propounder had offered three witnesses, beside herself, who had testified that they were familiar with the handwriting of deceased, and had compared the handwriting of the purported will, and had given it as their opinion that the paper writing and every part thereof is in the handwriting of the deceased, is not erroneous as an expression of the opinion by the court on the weight of the evidence, it appearing that the court, prior to this instruction, went into detail in citing caveators' testimony. *In re Williams' Will*, 215 N. C. 259, 1 S. E. (2d) 857.

d. Miscellaneous Remarks.

Where Defense Not Applicable to Issue.—Where the testimony of all the officers of a bank conversant with the facts that the bank was an indorsee for value and a holder in due course of the note sued on was not contradicted, and the maker relied solely on the fraud of the payee in procuring the note, the court properly charged that if the jury believed the evidence, the verdict should be for the bank. *First Nat. Bank v. Griffin*, 153 N. C. 72, 68 S. E. 919.

Gambling Nature of Device.—A charge that a punchboard and a tip book are the same under the statute and "that if you find this defendant guilty" will not be held for error as an expression of opinion on the evidence when the phrase is immediately followed by an instruction that in order to convict, the jury must find beyond a reasonable doubt that the tip boards were gambling devices and were in defendant's possession. *State v. Webster*, 218 N. C. 692, 12 S. E. (2d) 272.

A reference in the charge to "these gambling devices" will not be held prejudicial as an expression of opinion on the evidence when it is apparent that the charge referred to the devices mentioned in the warrant and not to those about which evidence had been taken. *Id.*

Comment upon Admission of Confession in Evidence.—The comment of the trial court upon the admission of defendant's confession in evidence that the court had held the confession competent because it appeared that it was taken without hope of reward or without extortion or fear, after defendant had been duly warned of his rights, amounts to no more than stating that the confession had been admitted in evidence and the reasons for admitting it, and will not be held for error as an expression of opinion by the court prohibited by this section. *State v. Fain*, 216 N. C. 157, 4 S. E. (2d) 319.

Statement to Jury.—Where the jury has returned for further instructions which the court fairly and impartially gives, his statement to them that they should reconcile the evidence if they could and that if they could not, the court would "have to do something else," is not an intimation as to whether "any fact has been fully and sufficiently proved." *Nixon v. Buckeye Cotton Oil Mill*, 174 N. C. 730, 94 S. E. 410.

Comment on Jury's Duty.—Where the jury has failed up to that time to agree upon a verdict in a criminal action, an instruction by the judge that in effect it was a matter of indifference to him, but it was their duty to agree if they could do so without violence to their consciences; that they must find for conviction beyond a reasonable doubt, uninfluenced by prejudices, etc., was held, not to be an expression of opinion by the judge upon the evidence. *State v. Pugh*, 183 N. C. 800, 111 S. E. 849.

Question as to Verdict.—The question of the court as to whether the verdict of guilty referred to first degree burglary held to be an inquiry and not an expression of opinion. *State v. Walls*, 211 N. C. 487, 497, 191 S. E. 232.

Statement after Verdict Excusing Jurors for Term.—When the trial judge has stated to a jury after rendering a verdict in a criminal action, that from their verdict their attention was evidently attracted by important business matters at home, and therefore he would excuse them for the term, it cannot be construed as an expression of opinion forbidden by this section though one of the same jurors sat upon this case. *State v. Pugh*, 182 N. C. 800, 111 S. E. 849.

Remark Concerning Recall of Witness.—A remark by a judge, when he permitted a witness to be recalled, and asked a question to impeach his credibility, that if he had known the counsel intended to ask that question he would not have allowed the witness to be recalled, is not an expression of opinion about the facts. *DeBerry v. Carolina Cent. R. Co.*, 100 N. C. 310, 6 S. E. 723.

Question to Counsel.—Where the judge asked defendant's counsel in the hearing of the jury, if he thought that an objection to certain proof in the case "would be fair," it was held that the remark of the judge was no violation of this section. *State v. Brown*, 100 N. C. 519, 6 S. E. 563.

Response to Request of Counsel.—Where the prisoner's counsel called attention to the judge's failure to state in his summary that the prosecutrix had said that she did not know a certain woman, to which the judge said, "Yes, I believe that she did say that," it was held, that such remarks were a sufficient response to the request of the prisoner's counsel, and did not convey an opinion of the judge in violation of this section. *State v. Freeman*, 100 N. C. 429, 5 S. E. 921.

Suggestion of Method of Settlement.—In an action for the purchase price of a horse, defended upon the ground of a breach of warranty, a suggestion by the judge, that a good test would be for each party to select a man and

drive the horse sufficiently to see what his condition was, is not an expression of opinion. *Long v. Byrd*, 169 N. C. 658, 86 S. E. 574.

Matters Subject to Mathematical Calculation.—Where the answers to the issues as to the amounts recoverable, in case the defendants were found liable to the plaintiffs, is merely a matter of mathematical calculation, peremptory instructions in regard thereto do not constitute prejudicial or reversible error under this section. *State v. Gant*, 201 N. C. 211, 212, 159 S. E. 427.

Opinion on One Count Applies to Others. — Where the verdict of the jury has acquitted the defendant under a count charging an unlawful sale of intoxicating liquors, but has convicted him of having the unlawful possession of the liquor for the purpose of sale, an expression of his opinion by the trial judge upon the evidence that the defendant had made the unlawful sale, applies also to the count charging that he had the unlawful possession for the purposes of sale, and constitutes error. *State v. Sparks*, 184 N. C. 745, 114 S. E. 755.

2. Remarks Held Error.

a. Remarks Concerning a Party to the Trial.

Character of Accused. — It was held to be error for a judge to tell the jury that, "in a plain case, a good character would not help the prisoner; but in a doubtful case, he had a right to have it cast into the scales and weighed in his behalf"; the true rule being that in all cases a good character is to be considered. *State v. Henry*, 50 N. C. 66.

Motive. — A charge, "While it is permissible to show a motive as a circumstance to be considered by the jury, it is not necessary. All the State has to do is to satisfy the jury beyond a reasonable doubt that the defendants did the acts charged in the indictment," was held to be error under this section. *State v. Morgan*, 136 N. C. 628, 629, 48 S. E. 670.

Comment on Absence of Defendants. — Where the trial judge has questioned a witness as to the absence of the defendants from court, where their deed was being attacked for fraud, his remark that their absence was a circumstance that a fraud had been committed is an expression of opinion forbidden by this section. *Greene v. Newsome*, 184 N. C. 77, 113 S. E. 569.

Ordinary Care. — An instruction, that if a porter, injured in getting on a train, could have got on in safety by using both hands, his failure to do so was not the exercise of ordinary care, was erroneous. *Sanders v. Atlantic, etc., R. Co.*, 160 N. C. 526, 76 S. E. 553.

"Proverbial Slowness of Messenger Boy." — In an action against a telegraph company it is error for the court to refer in its charge to the "proverbial slowness of the messenger boy." *Meadows v. Western Union Tel. Co.*, 131 N. C. 73, 42 S. E. 534.

Corporation Benefits. — In an action against a corporation the judge recited the benefits conferred by corporations upon the citizens, without mentioning the benefits they received in return, and intimated that he would not permit a verdict rendered upon "guesswork, sympathy, pity, or prejudice," etc., the charge was held to be an expression of opinion. *Starling v. Selma Cotton Mills*, 171 N. C. 222, 223, 88 S. E. 242.

Identification of Defendant. — Where the only evidence connecting the defendant with operating a still was a coat found there with a receipt with defendant's name on it in one of the pockets, an instruction that the name on the receipt was sufficient evidence that it was the property of defendant, is an expression of an opinion. *State v. Allen*, 190 N. C. 498, 130 S. E. 163.

Where the state relied upon testimony that tracks had been followed from the scene of the crime to the defendant's room, but did not prove them to be the defendant's, the expression of the court, "You tracked the defendant to whose house?" was held prejudicial, and especially so as the evidence of the state was circumstantial. *State v. Oakley*, 210 N. C. 206, 211, 186 S. E. 244.

Remark Concerning Plaintiff as Witness. — In an action of claim and delivery for a horse, an instruction by the trial judge, that in passing upon the credibility of the plaintiff as a witness the jury should consider the fact that he had \$50 of the defendant's money in his pocket and refused to give it to him, amounts to an expression of an opinion upon the facts. *Faulkner v. King*, 130 N. C. 494, 41 S. E. 885.

Time Plaintiff Would Live.—In an action to recover damages for a permanent injury alleged to have been negligently inflicted, an expression in the charge as to the presumed time the plaintiff would live, and the consequent diminution of his earning capacity, falls within

the inhibition of our statute. *Cogdill v. Boice Hardwood Co.*, 194 N. C. 745, 140 S. E. 732.

b. Remarks Concerning Witnesses.

Remarks Having Effect of Impeaching Witnesses.—Where questions propounded by the court have the effect of impeaching witnesses they are in violation of this section and defendants' exceptive assignments of error thereto must be sustained. *State v. Winckler*, 210 N. C. 556, 187 S. E. 792.

Remark That Witness was "Admirably Lucid." — The expression of the opinion of the court as to the "admirably lucid" testimony of a medical expert witness constituted reversible error. *State v. Horne*, 171 N. C. 787, 88 S. E. 433.

Comments upon Witnesses. — "The expression, 'This witness has the weakest voice or the shortest memory of any witness I ever saw'—is clearly susceptible of the construction that the testimony of the witness was at least questioned by the court, if not unworthy of credit." *State v. Bryant*, 189 N. C. 112, 126 S. E. 107, 109.

Questioning Non-Resident As to Professional Ethics. — In an action to recover damages for personal injury, where a release from liability is set up, it is an ineradicable error for the judge, during the trial and in the presence and hearing of the jury, to stop the testimony of the defendant's witness, a nonresident attorney who had procured the release, and question him upon the professional ethics involved and the standard in his own State, of such conduct; which reflected on the witness. *Morris v. Kramer Bros. Co.*, 182 N. C. 87, 108 S. E. 381.

Witness Included in Same Indictment. — Where there is a severance on the trial of defendants, and another party charged in the bill testifies in behalf of the accused, it is error, as indicating the opinion of the court on the facts, to charge that the very fact that the witness is included in the same indictment will impair his testimony, and that the same should not be placed on the same plane or footing with that of a witness of undoubted character who is disinterested. *State v. Jenkins*, 85 N. C. 544.

Interest of Witness.—It is error to charge the jury that they are bound to believe a witness who is unimpeached and uncontradicted. Though he tells a credible story, his connection with the parties may shake the jury's confidence. *Noland v. McCracken*, 18 N. C. 594.

Minister As Witness. — Where a judge charged that, because a witness was clergyman, his testimony was therefore entitled to more weight, it is sufficient ground for a new trial. *Sneed v. Creath*, 8 N. C. 309.

Statement That "Both Witnesses Are Gentlemen." — For the judge, where the testimony of two witnesses conflicted, to tell the jury: "Both witnesses are gentlemen. It is a matter of memory"—was erroneous, as interfering with the province of the jury to determine the credibility. *McRae v. Lawrence*, 75 N. C. 289, cited in notes in 61 L. R. A. 514, 515.

c. Remarks Concerning Weight and Credibility of Testimony.

Remark That Circumstance Was a "Strong Badge of Fraud." — Where a creditor postponed taking judgment because the debtor alleged that he was making arrangements to borrow the money, but before the expiration of the extended time the debtor made an assignment, preferring other creditors, an instruction that the circumstance was a strong badge of fraud was held to be error. *Bonner v. Hodges*, 111 N. C. 66, 15 S. E. 881.

Instruction As to Former Marriage. — In an indictment for bigamy an instruction that the weight of the evidence was that there had been no first marriage, is a violation of this section. *State v. Parker*, 106 N. C. 711, 11 S. E. 517.

Determination of Preponderance. — A request in a civil action that, "when the minds of the jury are in doubt, they must find for the defendant," is error. *Willis v. Atlantic, etc., R. Co.*, 122 N. C. 905, 29 S. E. 941.

Instruction That Evidence Rebuts a Prima Facie Case.—When the plaintiff makes out a prima facie case, then to instruct the jury that the evidence rebuts it and overcomes it, is to invade the province of the jury and violates this section. *Sherrill v. Western Union Tel. Co.*, 116 N. C. 655, 657, 21 S. E. 429.

Instruction That Guilt Is Established.—This section prohibits the court in its charge to the jury from expressing any opinion as to the weight and credibility of the evidence, and, defendant having pleaded not guilty, it is error for the court to charge the jury in effect that the fact of guilt is established by the evidence, even though the evidence be uncontradicted and even though the fact of guilt may be inferred from defendant's own testimony, since the credibility of the evidence is in the exclusive prov-

ince of the jury. *State v. Blue*, 219 N. C. 612, 14 S. E. (2d) 635.

Statement That Evidence Left Matter Unproved. — Where the judge presiding at a trial said that, while there was some evidence to go to the jury, it was a bare scintilla, leaving the matter not proved, it was held error. The evidence was competent or it was not, and should have been withdrawn from the jury or submitted without expression of opinion. *Boing v. Raleigh, etc., R. Co.*, 87 N. C. 360.

Concerning Corroboration of Defendant's Testimony. — Where the defendant, charged with homicide, testified as to his version of the fatal killing upon his contention of self-defense, and narrated the actions of himself, his oldest son, and the deceased, and where upon the conclusion of his testimony the court by interrogation objected to by defendant's counsel, brought out the fact that the son was seventeen years old, and was present in the courtroom, the charge of the court which set forth as the contention of the state that defendant's testimony could not be relied upon because uncorroborated, notwithstanding the fact that defendant's oldest son, who saw what happened, was present in the court room was held to constitute reversible error. *State v. Bean*, 211 N. C. 59, 188 S. E. 610.

Concerning Value of Book As Testimony. — For the judge to say that a book on farriery, which had been read by counsel, was entitled to as much authority as a witness who had been examined as an expert in the science of diseases of horses, is a clear violation of this section. *Melvin v. Easley*, 46 N. C. 386, 62 Am. Dec. 171.

Concerning Map. — Where a certain location is material and a surveyor had testified and his map was put in evidence, it is reversible error for the trial judge to instruct the jury that they must be guided in their judgment, not from the map, but from the testimony of the surveyor and other witnesses. *Swain v. Clemons*, 172 N. C. 277, 90 S. E. 193.

Concerning Location and Acreage. — The weight of the circumstance that one claimed location would give the acreage called for by the deed, while the other would give a greater acreage, being for the jury, it was error to charge that the acreage was not of great value to aid the jury in determining the location. *May v. Manufacturing, etc., Co.*, 164 N. C. 262, 80 S. E. 380.

Instruction as to Value of Deed. — In an action for ejectment it was error to instruct the jury that the deed was sufficient to vest the title in the grantees, where plaintiff's right to recover was dependent upon evidence that the defendant's grantor was estopped to claim the land, as the credibility of the witnesses was a matter for the jury. *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201.

Instruction as to Age of Prosecutrix. — Where in prosecution under § 14-26, the court, in summarizing the contentions of defendant, charged that defendant insisted that the jury should not find beyond a reasonable doubt that the prosecutrix was under sixteen years of age, "whereas the Biblical records and the testimony of her father and mother should satisfy you beyond a reasonable doubt that she is under sixteen years of age," the instruction constitutes an expression of opinion on an essential element of the crime charged, prohibited by this section, and the error is not mitigated by construing the charge as a whole, nor may it be upheld as charging that the jury should find that the prosecutrix was under sixteen years of age, if they believed the uncontradicted testimony. *State v. Wyont*, 218 N. C. 505, 11 S. E. (2d) 473.

Where the charge on the issue of testamentary capacity, read from the text-book, is that where the testator's sickness is wholly physical, proof of his condition as to lethargy, unconsciousness, etc., "is entitled to little consideration," and that the courts will "scrutinize efforts by witnesses to infer mental weakness or insanity from mere physical decrepitude," and that "the will of an aged person should be regarded with great tenderness" when not procured by fraud, etc., is held as reversible error under this section. *In re Will of Bergeron*, 196 N. C. 649, 146 S. E. 571.

d. Miscellaneous Remarks.

Instruction Not Barred on All Elements — An instruction which states that, if the jury find certain facts grouped in the instruction, there was no negligence, is objectionable, unless all the material elements of the case are included. *Ruffin v. Atlantic, etc., R. Co.*, 142 N. C. 120, 55 S. E. 86.

Inference from Evidence. — An instruction charging the jury that, if they believed the evidence, they should find certain evidential facts to be true and that thereupon, certain other facts must be true, is error. *Kinney v. North Carolina R. Co.*, 122 N. C. 961, 30 S. E. 313.

Charge Based on Contradicted Witness. — It is error

in the judge to designate a single witness who is contradicted by other witnesses, and to instruct the jury that if they believe the testimony of such witness, then the prisoner is guilty. *State v. Rogers*, 93 N. C. 523.

On Contradictory Evidence. — Where the evidence was conflicting, an instruction, "if the jury believe the evidence, the answer to the first issue should be no," is a violation of this section. *Rickert v. Southern R. Co.*, 123 N. C. 255, 31 S. E. 497; *Leak v. Covington*, 99 N. C. 559, 6 S. E. 241.

Where the case is tried upon special issues, an instruction that plaintiffs are not entitled to recover if the jury believe the evidence is improper. *Jones v. Balsley*, 154 N. C. 61, 69 S. E. 827; *Baker v. Brem*, 103 N. C. 72, 9 S. E. 629. See *Cauley v. Dunn*, 167 N. C. 32, 83 S. E. 16.

Assumption of Conflicting Fact. — Where defendant railway claimed that decedent found on its tracks was already dead when struck by the train, and the evidence on this point was in sharp conflict, an instruction which assumed that decedent was killed by the train was erroneous under this section. *Hunsinger v. Carolina, etc., Ry.*, 194 N. C. 679, 140 S. E. 608.

Remark That "We Are Not Informed." — Where there is any evidence to the contrary, it is erroneous in the judge to say, "We are not informed" of the fact upon which it is for the jury to pass. *Powell v. Wilmington, etc., R. Co.*, 68 N. C. 395.

Degree of Crime. — Although the defendant in a trial for murder introduced no evidence, and all the evidence for the State tended to show only murder in the first degree, it was error to instruct the jury that if they believed the evidence they should find the defendant guilty of murder in the first degree. *State v. Gadberry*, 117 N. C. 811, 23 S. E. 477.

When No Presumption at Law. — A trial judge cannot say to the jury that any fact proved or admitted, that does not in law raise a presumption of the truth of the allegation of fraud, is a strong circumstance tending to establish it. *National Bank v. Gilmer*, 116 N. C. 684, 703, 22 S. E. 2.

Arguing Law to Jury. — For the judge to charge that a case cited by counsel for plaintiff, and relied on to establish his position, was an authority directly against that position, and that counsel knew or ought to have known it, was held to be error. *Perry v. Perry*, 144 N. C. 328, 57 S. E. 1.

Trial for Attempted Rape. — On a trial of an indictment for an assault with intent to commit rape, where there was evidence that the defendant had been found on the six year old child, while on her back with her clothes up, it was held to be error for the court in its charge to the jury to remark with emphasis, "Why was she on her back, and why was he on her?" *State v. Dancy*, 78 N. C. 437.

Insurance. — A requested charge that, if insured was more than 55 years of age when he applied for membership, the association was not liable on the policy, "as the same was procured under a misrepresentation of the age" of insured, was properly refused as an expression of opinion upon the facts. *Tillery v. Royal Ben. Soc.*, 165 N. C. 262, 30 S. E. 1068.

Regarding Duty of Railroad to Build Culvert. — It was held error in a trial judge to instruct the jury that it was the duty of a railroad company to build a culvert over a certain ravine, and it was also held error to express the opinion that the said branch, regarding which there was conflicting evidence, was not a natural water-course. *Fleming v. Wilmington, etc., R. Co.*, 115 N. C. 676, 20 S. E. 714.

Effect of Easement on Adjoining Land. — In a proceeding to assess compensation for the taking of an easement over respondent's land for a high voltage transmission line, where the court in ruling upon the admissibility of evidence stated that the steel towers on the land and the power lines running over the land did not affect the value of the land outside the easement, it was held that the remarks of the court constituted a determination, as a matter of law, of an issue of fact within the province of the jury in violation of this section. *Nantahala Power, etc., Co. v. Carringer*, 220 N. C. 57, 16 S. E. (2d) 453.

Validity of Lien. — In an action involving the validity of a lien on certain crops, an instruction that the lien is void, because it was recorded in one county, while the debtor resided in another, involves an expression of opinion as to the facts of the case. *Weisenfield v. McLean*, 96 N. C. 248, 2 S. E. 56.

Bills and Notes. — In an action on a note, where defendant testified that he signed as surety, with the knowledge of the payee, and the payee testified to the contrary, it was error to instruct the jury that if they believed the

evidence they should find that the payee knew that defendant signed as a surety. *Harris v. Carrington*, 115 N. C. 187, 20 S. E. 452.

Value of Property. — In an action for damages plaintiff testified that the property destroyed was worth a specified sum, and defendant introduced as a witness the tax lister who testified that plaintiff stated that a much lower valuation was too high for purposes of taxation, it was held, that instructions that the jury had the uncontradicted evidence of plaintiff as to the value of the property destroyed was erroneous, as withdrawing from the consideration of the jury the testimony of the tax lister. *Dobson v. Southern R. Co.*, 132 N. C. 900, 44 S. E. 593.

III. EXPLANATION OF LAW AND EVIDENCE.

A. General Considerations of the Charge.

Editor's Note. — When the Supreme Court in *Hinshaw v. Raleigh*, etc., R. Co., 118 N. C. 1047, 24 S. E. 426, overruled *Emry v. Raleigh*, etc., R. Co., 109 N. C. 589, 14 S. E. 352, and modified the broad rule laid down in *State v. Boyle*, 104 N. C. 800, 10 S. E. 696, in a series of adjudications that followed it, it was not intended that the jury should be left to grope in utter darkness, unless counsel were sufficiently diligent to draw fire from the court by prayers for instruction. *McCracken v. Smathers*, 119 N. C. 617, 620, 26 S. E. 157.

The Object of Instructions. — The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. *Bird v. United States*, 180 U. S. 356, 361, 21 S. Ct. 403, 45 L. Ed. 570.

Benefits to be Derived from Charge. — The principal benefit to be derived from a charge to the jury is not a statement of law but the elimination of irrelevant matters. *Irvin v. Southern R. Co.*, 164 N. C. 5, 80 S. E. 78.

Theory as to Evidence. — Much confusion as to proceeding with evidence, when a prima facie showing has been made, is eliminated by a proper application of this section. Under our system the trial court, during the production of the evidence, must necessarily proceed upon the theory that the jury has a right to find as true all the evidence submitted by either party. *Hunt v. Eure*, 189 N. C. 482, 127 S. E. 593, 595.

Charge Must Be Considered as a Whole. — The charge to a jury must be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so considered, it presents the law fairly and clearly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous. *Gilliland v. Board*, 141 N. C. 482, 54 S. E. 413. *In re Will of Hardee*, 187 N. C. 381, 121 S. E. 667.

"The charge must be considered contextually and not disjointly. *Riverview Milling Co. v. State Highway Comm.*, 190 N. C. 692, 697, 130 S. E. 724, and cases cited therein.

In determining whether a charge comes up to the requirements of this section it (charge) must be considered as a whole. *Gore v. Wilmington*, 194 N. C. 450, 457, 140 S. E. 71. See *State v. Moore*, 197 N. C. 196, 197, 148 S. E. 29.

The charge of the trial court will be construed as a whole, and if, upon such construction, it fully charges the law applicable to the facts and does not impinge this section, it will not be held for error on appeal. *Harrison v. Metropolitan Life Ins. Co.*, 207 N. C. 488, 177 S. E. 423.

Where it appears that the charge, when read contextually as a whole, was not prejudicial in its manner of stating the evidence and contentions of the parties, an exception, based upon detached portions thereof, will not be sustained. *Braddy v. Pfaff*, 210 N. C. 248, 186 S. E. 340.

Charges Held Not to Impinge on This Section. — See *State v. Hester*, 209 N. C. 99, 182 S. E. 738; *State v. Hodgins*, 210 N. C. 371, 186 S. E. 495; *State v. Atlantic Ice, etc., Co.*, 210 N. C. 742, 188 S. E. 412.

Matters Stricken from Complaint. — Requested instructions as to matters stricken from the complaint as to which the evidence had been withdrawn from the jury should be refused. *Tilghman v. Seaboard, etc., R. Co.*, 167 N. C. 163, 83 S. E. 315.

Applications of Instructions to Case. — It is not error for the court to refuse to give instructions which, though correct in the abstract, are not applicable to the case. *McMillan v. Baxley*, 112 N. C. 578, 16 S. E. 845.

The refusal to instruct as to a point not material to the verdict is not prejudicial error. *Mendenhall v. North Carolina R. Co.*, 123 N. C. 275, 31 S. E. 480.

However, the giving of an instruction not strictly applicable to the material questions to be determined is not

ground for reversal, where no prejudice is shown and it appears the jury could not have been misled thereby. *Evans v. Howell*, 84 N. C. 461.

Arguments of Counsel. — It was not error in the court to recapitulate fairly such contentions of counsel as illustrated the bearing of the evidence on the issues. *Clark v. Wilmington, etc., R. Co.*, 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749.

Unauthorized Charge. — A judge cannot make a charge not authorized by the pleadings. Thus in an action for a debt barred by the statute of limitation, where the statute is not pleaded, the judge cannot charge that the debt is barred although requested to make such a charge. *Albertson v. Terry*, 109 N. C. 8, 13 S. E. 713.

Inconsistent or Contradictory Instructions. — An inconsistent charge by the court which leaves the jury in doubt as to the law applicable to their findings upon an issue is error. *Patterson v. Nichols*, 157 N. C. 406, 73 S. E. 202; *Blanton Grocery Co. v. Taylor*, 162 N. C. 307, 78 S. E. 276. See also, *Oakley v. National Cas. Co.*, 217 N. C. 150, 7 S. E. (2d) 495.

Erroneous Instruction Not Cured by Correct Instruction. — An error in giving an erroneous instruction is not cured by subsequently correctly stating the law. *State v. Morgan*, 136 N. C. 628, 48 S. E. 670.

When Charge Contains a "Powerful Summing up." — Where the trial judge in his general charge gives "every reasonable contention of the state," it is erroneous to give an entirely new charge, containing "a powerful summing up" for the state. *State v. McDowell*, 129 N. C. 523, 39 S. E. 840.

The use of the words "you want to find" in charging the jury as to the elements of the offense charged, construing the charge as a whole, merely placed the burden on the state to prove the crime charged and not to constitute an expression of opinion or a direction or intimation that the jury should so find. *State v. Smith*, 221 N. C. 400, 20 S. E. (2d) 360.

The use of the words "the state has offered evidence which tends to show" in a charge to the jury does not constitute an expression of opinion in violation of this section. *State v. Howard*, 222 N. C. 291, 22 S. E. (2d) 917.

Contentions Not Necessarily a Part of Instructions. — The contentions of the parties to an action are not a necessary part of the instruction of the trial judge to the jury upon the law of the case. *State v. Whaley*, 191 N. C. 387, 132 S. E. 6.

Requiring Jury to Be Satisfied. — An instruction requiring the jury to be "satisfied" as to the facts of justification relied on to defeat an action for false arrest and imprisonment does not require too great a degree of proof to establish justification. *Sigmon v. Shell*, 165 N. C. 582, 81 S. E. 739.

Weight of Defendant's Testimony. — The testimony of defendant if accepted as true by the jury, is given the same credibility as that of a disinterested witness, and a charge to that effect, after a proper instruction as to interest, is not error. *State v. Beavers*, 188 N. C. 595, 125 S. E. 258.

Instructions Should Be Restricted to Answers Expected. — Where the case is submitted for a special verdict, the jury should only be instructed on questions which they are to answer, and it is error to inform them as to the effect their answers will have on the ultimate rights of the parties, or to authorize them to answer in the form of a legal conclusion. *Earnhardt v. Clement*, 137 N. C. 91, 49 S. E. 49; *Bottoms v. Seaboard, etc., R. Co.*, 109 N. C. 72, 13 S. E. 738.

Defendants can not complain that the court embodied in the charge, as an abstract proposition, what is known as the "rule of the prudent man" in response to its requests, where, in specific instructions, the court correctly applies the law of negligence and contributory negligence to the facts of the case. *Blackwell v. Lynchburg, etc., Railroad*, 111 N. C. 151, 16 S. E. 12, 17 L. R. A. 729, 32 Am. St. Rep. 786.

Where Charge Favorable to Appellant. — The failure of the court to comply with this section will not be sufficient ground for a new trial, where the case on appeal shows that the charge of the court presented the case in the most favorable light for the defendant. *State v. Pritchett*, 106 N. C. 667, 668, 11 S. E. 357.

Requests for Instructions Must Be Timely. — A party desiring more specific instructions than those given in the general charge must ask for them in apt time. A complaint of the charge, made after verdict, is too late. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225. See also *State v. Brady*, 107 N. C. 822, 12 S. E. 325.

Exception Must Be Specific. — An exception to the charge on the ground that it failed to explain and apply the law to the evidence as required by this section may be disregarded

as a broadside exception. *State v. Webster*, 218 N. C. 692, 12 S. E. (2d) 272.

An exception to the charge on the ground that it did not explain the evidence and did not declare and explain the law arising thereon as required by this section is ineffective as a "broadside" exception, it being necessary that an exception to the charge specifically refer to the particular point claimed to be erroneous. *Arnold v. State Bank, etc., Co.*, 218 N. C. 433, 11 S. E. (2d) 307.

An exception that the trial judge "failed to state in a plain and correct manner the evidence, and declare and explain the law arising thereon as required in this section," is too general and cannot be sustained. *Jackson v. Ayden Lumber Co.*, 158 N. C. 317, 74 S. E. 350.

Error Cured by Verdict. — Where there are several counts of an indictment, and the charge was correct upon those on which a conviction has been had, the verdict cures the error committed in not giving the principles of law arising from the evidence upon the count which the appealing defendant was acquitted. *State v. Church*, 192 N. C. 658, 135 S. E. 769.

Same—Failure to Call Judge's Attention to Error. — The appellant must at the time call the attention of the trial judge to errors he is alleged to have committed in stating the contentions of the parties to the jury, when he has not done so, as an exception after verdict comes too late to be considered on appeal. *State v. Beavers*, 188 N. C. 595, 125 S. E. 258; *State v. Harvey*, 214 N. C. 9, 197 S. E. 620; *State v. Bowser*, 214 N. C. 249, 199 S. E. 31.

B. Explanation Required.

1. In General.

Rule Stated. — It is held under the requirements of this section, to be the duty of the judge in charging the jury, to segregate the material facts of the case, array the facts on both sides, and apply the principles of law to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence. *State v. Rogers*, 93 N. C. 523, 531. Citing *State v. Dunlop*, 65 N. C. 288; *State v. Jones*, 87 N. C. 547; *Guyes v. Council*, 213 N. C. 654, 197 S. E. 121.

He is required to state clearly and distinctly the particular issues arising on the evidence, and on which the jury are to pass, and to instruct them as to the law applicable to every state of the facts which upon the evidence they may reasonably find to be a true one. *State v. Matthews*, 78 N. C. 523, 537.

And in criminal cases this section requires the court to give to the jury such instructions as will enable them to understand the nature of the crime and properly determine each material fact upon which may depend the guilt or innocence of the accused. *State v. Fulford*, 124 N. C. 798, 801, 32 S. E. 377.

An instruction meets the requirements of this section when it clearly applies the law to the evidence introduced upon the trial and gives the position taken by the respective parties as to the prominent and controlling features which make for the ascertainment of the facts. *State v. Graham*, 194 N. C. 459, 140 S. E. 26.

Where the trial court in his charge to the jury explains the law applicable and gives the contention of the parties, but fails to instruct the jury as to the application of the law to the substantive features of the case, the charge is insufficient to meet the requirements of this section and a new trial will be awarded. *Com'r of Banks v. Florence Mills*, 202 N. C. 509, 163 S. E. 598.

In both criminal and civil causes under this section, a judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect. He should state in a plain and correct manner the evidence in the case and explain the law arising thereon, and a failure to do so, when properly presented, shall be held for error. *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 213, 226, 189 S. E. 873, citing *State v. Merrick*, 171 N. C. 788, 88 S. E. 501.

Where evidence is in the record defendant is entitled to have the law arising thereon explained and applied by the judge. *State v. Anderson*, 222 N. C. 148, 151, 22 S. E. (2d) 271.

Where the charge of the court fails to point out the distinction between the counts in the indictment, and leaves the jury with the impression that both counts are valid when there is only one question to be answered constitutes reversible error, under this section. *State v. Ray*, 207 N. C. 642, 178 S. E. 224.

Scope of Instruction. — The court should instruct the jury on all the issues presented by the pleadings and the

evidence. *Patterson v. North Carolina Lumber Co.*, 145 N. C. 42, 58 S. E. 437.

Where the effect of a charge of the court to the jury is to eliminate from the case an instruction upon a principle of law arising from the evidence, so necessary that its omission would necessarily and substantially prejudice one of the parties, in the consideration of the evidence by the jury, it is error, notwithstanding the party so prejudiced has not tendered a prayer for instruction covering the omission of which he complains. *Bowen v. Schnibben*, 184 N. C. 248, 114 S. E. 170.

Where Facts Are Simple. — The section does not require the judge to "charge the jury where the facts at issue are few and simple, and no principle of law is involved, unless he is requested to do so; but in cases where the witnesses are numerous, or the testimony conflicting or complicated, and different principles of law are applicable to different aspects of the case, it is his duty to conform to the requirement of the statute." *Duckworth v. Orr*, 126 N. C. 674, 677, 36 S. E. 150, citing *Holly v. Holly*, 94 N. C. 96; *State v. Reynolds*, 87 N. C. 544; *State v. Grady*, 83 N. C. 643.

Instructions to the jury should be addressed to specific issues, but, where the issues are simple, and they do not appear to have misled the jury, the error in this respect will not be held as reversible. *Craig v. Stewart*, 163 N. C. 531, 79 S. E. 1100.

Mere Statement of Contentions. — It is error simply to state the contentions of the parties, both as to the facts and as to the law and not declare and explain the law applicable to the facts as the jury might find them from the evidence. *Nichols v. Champion Fibre Co.*, 190 N. C. 1, 6, 128 S. E. 471; *Parker v. Thomas*, 192 N. C. 798, 803, 136 S. E. 118. See *Fowler v. Champion Fibre Co.*, 191 N. C. 42, 131 S. E. 380.

Contentions of Parties.—Although it is not required by this section that the trial judge should state the contentions of the parties to the jury, the practice has grown up in our courts as a helpful and accepted procedure, and a fair statement of the contentions of a party will not be held for error upon exception. *Rocky Mount Sav., etc., Co. v. Aetna Life Ins. Co.*, 204 N. C. 282, 167 S. E. 854.

Objection to the charge on the ground that the court unduly emphasized the contentions of the state, amounting to an expression of opinion on the facts, held untenable, since the charge construed as a whole stated only contentions legitimately arising on the evidence and inferences properly deducible therefrom. *State v. Wilcox*, 213 N. C. 665, 197 S. E. 156.

Explanation of Subordinate Features of Case.—The charge of the court did not fail to comply with the provisions of this section if it sufficiently pointed out and explained the substantive features of the case, and as to subordinate features the prisoner should have aptly tendered prayers for special instructions. *State v. Ellis*, 203 N. C. 836, 167 S. E. 67.

In the absence of a special request for instructions, the failure of the charge to define certain terms constituting a subordinate feature of the charge will not be held for error. *State v. Puckett*, 211 N. C. 66, 189 S. E. 183.

Duty Cannot Be Omitted. — The duty of the court to explain technical words used in instructions cannot be omitted because some of the jury may be able to explain them. *State v. Clark*, 134 N. C. 698, 47 S. E. 36.

Failure to Instruct as to Corporate Liability.—The liability of a corporate defendant arising through the agency of a servant is a substantive feature of law arising on the evidence, and is not a simple or self-explanatory principle of law, and the failure of the court to instruct the jury, as required by this section, constitutes reversible error. *Robinson v. Standard Transp. Co.*, 214 N. C. 489, 199 S. E. 725.

Where in an action against a corporate and an individual defendant the trial court charged the jury as though the corporate defendant was the sole party sued, it was held that the individual defendant is entitled to a new trial for failure of the charge to declare and explain the law arising upon the evidence as it related individually to him and involving his contentions. *Id.*

Salutation of Instruction. — The trial judge should instruct "that if the jury find from the evidence" and not "if they believe the evidence." *State v. Green*, 134 N. C. 658, 46 S. E. 761; *State v. Seaboard Airline R.*, 145 N. C. 570, 59 S. E. 1048.

But where instructions consisting of several clauses contain at the beginning the words, "If the jury find from the evidence," it is not necessary to repeat such words in each clause. *Wilkie v. Raleigh, etc., R. Co.*, 127 N. C. 203, 37 S. E. 204. Rehearing in 128 N. C. 113, 38 S. E. 289.

2. Statement of Evidence.

In General.—All that is required of a charge by this sec-

tion is that the essential evidence offered at the trial be stated in a plain and correct manner, together with an explanation of the law arising thereon. *State v. Fleming*, 202 N. C. 512, 514, 163 S. E. 453; *In re Beale*, 202 N. C. 618, 163 S. E. 684.

By virtue of this section where the charge of a trial court fails to state the evidence of a party relative to a material point and which directly bears on the amount recoverable, a new trial will be awarded. *Myers v. Foreman*, 202 N. C. 246, 162 S. E. 549.

Slight inaccuracies in the statement of the evidence in the instructions of the court to the jury will not be held for reversible error when not called to the attention of the judge at the time and the charge substantially complies with this section. *State v. Sterling*, 200 N. C. 18, 19, 156 S. E. 96.

Repetition of Testimony Insufficient.—This duty is not performed by simply repeating the testimony in the order in which it was delivered, or in a general statement of the principles of law applicable to the case; but it requires the judge to state clearly and distinctly the particular issues arising in the controversy; to eliminate the controverted facts; to arrange the testimony in its bearing on their different aspects, and to instruct the jury as to the law applicable thereto in such manner as will enable them to see and comprehend the matters which are essential to an intelligent and impartial verdict. *State v. Boyle*, 104 N. C. 800, 10 S. E. 696.

This section is not complied with where the court reads to the jury full notes of all the testimony in the cause, and tells them that he does this to refresh, and not to control, their recollection of the testimony, that it is their duty to remember the testimony, and that they ought to rely in the last resort on their own recollection. *State v. Boyle*, 104 N. C. 800, 10 S. E. 696.

Possibilities of Fact.—Where there are several possibilities of fact, different from the inference tended to be drawn from the evidence offered, a judge is not required to note one such possibility, and specifically bring it to the attention of the jury. *State v. Clara*, 53 N. C. 25.

Restricting Evidence to Purpose for Which Admissible.—It is error to admit evidence, competent for one purpose only, to be considered and acted on generally by the jury, without instructions restricting it to the special purpose for which it is admissible. *Burton v. Wilmington, etc., R. Co.*, 84 N. C. 193. See also, *State v. Ballard*, 79 N. C. 627.

Recapitulation Unnecessary.—The judge is not bound to recapitulate all the evidence in his charge to the jury; it is sufficient for him to direct the attention of the jury to the principal questions they have to try, and explain the law applicable thereto. *Boon v. Murphy*, 108 N. C. 187, 12 S. E. 1032; *State v. Gould*, 90 N. C. 658.

Nor is the judge required to recite the testimony of each witness in the order in which he was examined, but need only give a clear and intelligent statement of the evidence, with its legal bearing upon the issue. *State v. Jones*, 97 N. C. 469, 1 S. E. 680.

Second Recapitulation Not Required.—The trial judge is not required to recapitulate the testimony a second time, although one of the parties may request it to be done. *Aston v. Craigmiles*, 70 N. C. 316.

Judge May Omit Testimony.—Unless there be some reason why the judge should remark particularly on the testimony of a witness, he may with propriety, decline to comply with a request to do so. *Findly v. Ray*, 50 N. C. 125.

Agreement of Counsel.—The failure of a judge to recite the testimony in his charge to the jury is not error, where it was agreed by the counsel on both sides that the testimony need not be recapitulated. *Wiseman v. Penland*, 79 N. C. 197.

Effect of a "Slip of the Tongue."—A mere inadvertent "slip of the tongue" in stating the evidence, will not be held as prejudicial error when counsel for defendant might easily have called attention thereto and had it corrected then and there. *State v. Sinodis*, 189 N. C. 565, 127 S. E. 601.

Weight and Credibility.—Where the trial judge gives the contentions of the State and of the defendant, clearly stating that they are but contentions in a trial for unintentional manslaughter, and correctly charges the law arising upon the evidence, objection that he has therein impinged upon the provisions of this section, in expressing his opinion upon the weight and credibility of the evidence, is untenable. *State v. Durham*, 201 N. C. 724, 726, 161 S. E. 398.

The portion of the charge devoted to reviewing the evidence for the state cannot be held for error as an expression of opinion that certain facts were fully proven when it appears that the court categorically indicated to the jury that it was then engaged in reviewing the state's evidence. *State v. Jessup*, 219 N. C. 620, 14 S. E. (2d) 668. See also, *State v. Johnson*, 219 N. C. 757, 14 S. E. (2d) 792.

3. Explanation of Law.

In General.—This section confers upon litigants a substantial legal right and calls for instructions as to the law upon all substantial features of the case. *Williams v. Eastern Carolina Coach Co.*, 197 N. C. 12, 15, 147 S. E. 435, citing *Wilson v. Wilson*, 190 N. C. 819, 130 S. E. 834; *State v. O'Neal*, 187 N. C. 22, 24, 120 S. E. 817; *Blake v. Smith*, 163 N. C. 274, 79 S. E. 596; *Bowen v. Schnibben*, 184 N. C. 248, 249, 114 S. E. 170.

As was said in *State v. Matthews*, 78 N. C. 523, 537, the requirements of this section are not met by a general statement of legal principles which bear more or less directly, but not with absolute directness upon the issues made by the evidence. *Williams v. Eastern Carolina Coach Co.*, 197 N. C. 12, 15, 147 S. E. 435.

The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial, even in the absence of a request for special instructions. *Spencer v. Brown*, 214 N. C. 114, 198 S. E. 630.

It is the duty of the trial court without request for special instructions to declare and explain the law arising upon the evidence in the case, which duty is not discharged by general definitions or abstract discussions of the law, but requires that the court apply the law to the evidence in the case and instruct the jury as to the circumstances presented by the evidence under which the issue should be answered in the affirmative and under which it should be answered in the negative, and the failure of the court to comply substantially with the mandate of this section impinges a substantial legal right of the party aggrieved entitling him to a new trial. *Smith v. Kappas*, 219 N. C. 850, 15 S. E. (2d) 375.

Trial by jury vouchsafed in the constitution contemplates a verdict of the jury rendered upon the evidence guided by correct instructions as to the law applicable thereto in conformity with this section. *Smith v. Kappas*, 219 N. C. 850, 15 S. E. (2d) 375.

Party Must Request.—Where the judge has sufficiently charged the jury as to the law arising under the evidence in the case in compliance with this section, such further matters of instruction as the appellant may desire should be offered by special request of instruction. *Gore v. Wilmington*, 194 N. C. 450, 140 S. E. 71; *Murphy v. Power Co.*, 196 N. C. 484, 146 S. E. 204. See *Graham v. State*, 194 N. C. 459, 140 S. E. 26.

But the rule stated in *Bank v. Rochamora*, 193 N. C. 1, at p. 8, 136 S. E. 259, that "where the instruction is proper so far as it goes, a party desiring a more specific instruction must request it," applies to subordinate elaboration, but not substantive, material and essential features of the charge. *McCall v. Lumber Co.*, 196 N. C. 597, 602, 146 S. E. 579.

It is the duty of the court in charging the jury to do so without request for special instructions, and the failure of the judge to explain the law arising upon the evidence constitutes reversible error. *Ryals v. Carolina Contracting Co.*, 219 N. C. 479, 14 S. E. (2d) 531.

When a judge has charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it. *Acme Mfg. Co. v. McPhail*, 179 N. C. 383, 388, 102 S. E. 611; *Riverview Milling Co. v. State Highway Comm.*, 190 N. C. 692, 130 S. E. 724; *State v. Johnson*, 193 N. C. 701, 133 S. E. 19; *State v. Jordan*, 216 N. C. 356, 5 S. E. (2d) 156.

Where the charge of the court is sufficiently full to meet the requirements of this section, it will not be held for reversible error on defendant's exceptions, it being incumbent on defendant, if he desires more specific instructions on any point, or a more detailed and complete statement of his contentions to aptly make request therefor. *State v. Caudle*, 208 N. C. 249, 180 S. E. 91.

If the indictment fully describes the offense, and this was read to the jury by the court, then the charge is in compliance with this section, it being the duty of the defendant, if he desires more elaborate instruction, to aptly tender a request therefor. *State v. Gore*, 207 N. C. 618, 178 S. E. 209.

Defendant desiring more full or detailed instructions as to any particular phase of evidence or law should request special instructions. *State v. Hendricks*, 207 N. C. 873, 178 S. E. 557.

The failure of the court to charge the jury as to the credibility to be given the testimony of an accomplice, corroborated in every respect by other evidence, will not be held for error in the absence of a special request, whether such charge should be given being in the sound discretion of the trial court. *State v. Kelly*, 216 N. C. 627, 6 S. E. (2d) 533.

The failure of the court to instruct the jury that the fact that a defendant did not testify in his own behalf raises no presumption against him, will not be held for error in the absence of a request for instructions, the matter being in the sound discretion of the trial court. *Id.*

Explanation Must Cover any Authorized Finding.—It is the duty of the judge to explain and adapt the law to any authorized findings which the jury may make upon the evidence. *Lawton v. Giles*, 90 N. C. 374, 375, 379; *State v. Jones*, 87 N. C. 547.

Law on Facts and Inferences.—It is necessary to state the law arising on the various phases of the evidence, and on all facts which the jury should find from the evidence, when such facts constitute a part of the basis for the answers to the issues. *Wilson v. Wilson*, 190 N. C. 819, 821, 130 S. E. 834, and cases therein cited.

Instructions Based on Assumption.—When instructions are asked for upon an assumed state of facts, which there is evidence tending to prove, and thus questions of law are raised which are pertinent to the case, it is the duty of the judge to answer the question so presented, and to instruct the jury distinctly what the law is, if they shall find the assumed state of facts to be true, and so in respect to every state of facts which may be reasonably assumed upon the evidence. *State v. Dunlop*, 65 N. C. 288.

But where a prayer for instructions assumes certain facts to be in proof, and in the opinion of the judge there is no evidence tending to prove them, he ought to say so, and thus not embarrass the jury by the consideration both of the assumed facts and of the questions of law predicated on their assumption. *State v. Dunlop*, 65 N. C. 288.

Instruction Necessary to Reach Verdict.—Where an instruction upon the law is necessary for the jury to arrive at a verdict upon a material issue, it is the duty of the trial judge to charge the law thus arising without a request for special instruction. *Jacob Stove Works v. Boyd*, 191 N. C. 523, 132 S. E. 273.

Substantial Compliance with Request Sufficient.—The trial judge is not required to give special instructions in the precise words asked, even when unobjectionable. A substantial compliance is sufficient. *State v. Booker*, 123 N. C. 713, 31 S. E. 376.

The trial court is not required to give instructions in the language of the prayers, provided the instructions given are correct and cover the various phases of the testimony. *State v. Wilcox*, 132 N. C. 1120, 44 S. E. 625.

Instruction as to Statutory Provisions.—In automobile accident cases it is the duty of the court to charge the jury upon the provisions of the Motor Vehicle Law arising upon the evidence and a charge embracing only general provisions of the common law is not sufficient. *Barnes v. Teer*, 219 N. C. 823, 15 S. E. (2d) 379.

Charge Covering Subordinate Features.—When a judge has followed this section and charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it by prayers for instructions or other proper procedure; but on the substantive features of the case arising on the evidence, the judge is required to give a correct charge concerning it. *Acme Mfg. Co. v. McPhail*, 179 N. C. 383, 388, 102 S. E. 611; *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 213, 189 S. E. 873; *Headen v. Bluebird Transp. Corp.*, 211 N. C. 639, 191 S. E. 331.

Request for Special Instructions.—Where the trial judge has instructed the jury correctly but generally on the essential features of the cases, the charge will not be held for error upon appellant's exception that he had not explained to the jury the legal principles in conformity with the provisions of this section when he has not submitted in apt time correct special prayers for instruction to such effect. *Planters Bank, etc., Co. v. Yelverton*, 185 N. C. 314, 117 S. E. 249.

Refusal to Correct Special Request for Instructions.—Where the general charge of the court to the jury covers every correct principle applying under the evidence in the case and all of the special prayers, it is not objectionable that the court refused to correct special requests for instructions in the language offered by the appellant. *Williams v. Hedgepeth*, 184 N. C. 114, 113 S. E. 602.

Waiver of Error.—A failure to comply with this section is error which is not waived by failure to request special instructions, where there is no charge applicable to the facts given in evidence. *Nichols v. Champion Fibre Co.*, 190 N. C. 1, 128 S. E. 471.

Objection as to Fullness of Statement.—An instruction which gives to the jury a clear and comprehensive charge on the law applicable to the evidence in the case, stating the position of the respective parties as to every feature thereof,

is not erroneous as failing to explain and declare the law arising from the evidence, as required by this section and an objection that a fuller statement of the evidence was required cannot be considered on appeal when exception thereto has not been brought to the attention of the trial court at the time of the alleged omission. *Tatham v. Andrews Mfg. Co.*, 180 N. C. 627, 105 S. E. 423.

Failure to Charge on Defense Not Presented.—Defendants denied the contract declared on, offered evidence that they did not enter into the contract, but did not object to plaintiff's parol evidence in support of the contract alleged. In making up the case on appeal, defendants excepted to the charge for that the court failed to charge the law relative to the statute of frauds and contended on appeal that plaintiff's evidence disclosed a contract to answer for the debt or default of another. It was held that defendants' exception to the charge could not be sustained, the court having had no notice that defendants would rely upon the statute, and that defendants had waived the defense of the statute by failing to properly present such defense. *Allison v. Steele*, 220 N. C. 318, 17 S. E. (2d) 339.

Charge on Degrees of Crime.—Where a person indicted for a crime may be convicted of a lesser degree of the same crime and there is evidence tending to support the milder verdict, he is entitled to have the law with respect to the lesser offense submitted to the jury under a correct charge. A statement of the contentions or of certain phases of the evidence accompanied with a mere enunciation of a legal principle is not a compliance with this section. *State v. Hardee*, 192 N. C. 533, 535, 135 S. E. 345, citing *State v. Lee*, 192 N. C. 225, 134 S. E. 458; *Watson v. Sylva Tanning Co.*, 190 N. C. 840, 130 S. E. 833; *Wilson v. Wilson*, 190 N. C. 819, 130 S. E. 834; *State v. Williams*, 185 N. C. 683, 116 S. E. 736.

Where the defendant admits his guilt of murder in the second degree, it is not error for the trial court to act upon the admission, and after fully charging the elements of murder in the first degree, and defining murder in the second degree, to instruct the jury to return a verdict of murder in the second degree if they should fail to find any one of the elements of first degree murder, as defined, beyond a reasonable doubt. *State v. Grier*, 209 N. C. 298, 183 S. E. 272.

Instruction Should Apply Law to Facts Adduced.—An instruction which correctly defines and explains negligence and proximate cause in abstract terms but fails to apply the law to the facts adduced by the evidence fails to meet the requirements of this section, and a new trial will be awarded on appellant's exception. *Smith v. Safe Bus Co.*, 216 N. C. 22, 3 S. E. (2d) 362.

A charge defining negligence and proximate cause and stating the contentions of the parties and properly placing the burden of proof, but which fails to apply the law to the evidence, will be held for error as failing to comply with this section since the application of the law to the facts as the jury may find them to be from the evidence, is a substantive feature of the charge which must be given even in the absence of a prayer for instruction. *Mack v. Marshall Field & Co.*, 218 N. C. 697, 12 S. E. (2d) 235.

Waiver of Error.—The failure of the court to explain the law arising on the evidence favorable to defendant is error, and mere silence of counsel upon the statement of the court after charging the law arising upon plaintiff's evidence that it would not recapitulate the evidence is not a waiver of the substantial rights conferred by this section. *Carruthers v. Atlantic, etc., R. Co.*, 215 N. C. 675, 2 S. E. (2d) 878.

Any Substantial Error Is Material.—Any substantial error in the portion of the charge applying the law to the facts of the case is perforce material. *Templeton v. Kelley*, 216 N. C. 487, 5 S. E. (2d) 555.

Failure to Instruct as to Law of Self Defense.—See *State v. Thornton*, 211 N. C. 413, 190 S. E. 758; *State v. Godwin*, 211 N. C. 419, 190 S. E. 761; *State v. Greer*, 218 N. C. 660, 12 S. E. (2d) 238.

Failure to Charge on Second Degree Murder.—See note under § 15-172.

Cited in *State v. Weston*, 197 N. C. 25, 26, 147 S. E. 618.

C. Illustrative Cases.

Instructions on Interest of Counsel.—An instruction that "it is the business of counsel to make their side appear the best side, their reasons the best of reasons; but you and I are under different obligations" is erroneous. *State v. Hardy*, 189 N. C. 799, 128 S. E. 152.

Failure to Define "Conspiracy."—Where the court charged the jury that defendant would be guilty of first degree murder even if one of the others fired the fatal shot, if it was fired in the execution of their unlawful conspiracy and agreement and the defendant excepted on the ground that

the court could not define "conspiracy," it was held that the exception could not be sustained, in the absence of a special request for instructions, the term "conspiracy" being used synonymously with "agreement," and the charge being clear and easily understood, and defendant being guilty of murder in the first degree under the evidence regardless of the existence of a technical conspiracy. *State v. Puckett*, 211 N. C. 66, 189 S. E. 183.

Instruction as to Presumption of Character.—Where the character of a witness had not been impeached either by contradictory evidence or the manner of his cross-examination, it is presumed to be good, and the testimony of other witnesses thereto will be excluded; and where in a criminal action the case has been given to the jury, who return to court with a request for a further instruction as to whether a witness's character is considered good until proven bad in court, the judge's reply that it is presumed to be good until the contrary is shown, is free from error. *State v. Pugh*, 183 N. C. 800, 111 S. E. 849.

Omission of Necessary Instruction.—Where the defendant, charged with murder, introduced evidence of an alibi which was material to his defense, but the judge in his charge to the jury did not refer to this evidence, it was held to be error. *State v. Melton*, 187 N. C. 481, 122 S. E. 17.

Instruction to "Settle Case as Between Man and Man."—Where there is much conflicting evidence, it is error for the judge to instruct the jury to "take the case and settle it as between man and man," without charging on the different aspects of the case. *Blake v. Smith*, 163 N. C. 274, 79 S. E. 596.

Charge as Essay.—Though the charge of a judge presiding over a trial for murder is correct as a general essay on homicide, and his propositions taken generally are supported by the authorities, still it is not a full compliance with this section. *State v. Dunlop*, 65 N. C. 288.

Omission in Charge.—Where a charge excluded from consideration important evidence in the case bearing upon the essential inquiry whether defendant had waived, or surrendered, all rights under an agreement, if he had any, and agreed to go back to an original contract, it was erroneous. *Acme Mfg. Co. v. McPhail*, 179 N. C. 383, 387, 102 S. E. 611.

Instruction as to Subordinate Features.—In the absence of a special request for instruction it is not reversible error under this section for the trial judge to have failed to instruct the jury that they should scrutinize the testimony of detectives who were paid to secure evidence to convict the defendant, the same being as to subordinate and not substantive features of the evidence in the case. *State v. O'Neal*, 187 N. C. 22, 120 S. E. 817.

Processioning Proceedings.—An instruction was held insufficient in *Bradshaw v. Warren*, 215 N. C. 442, 2 S. E. (2d) 375.

Duty of Judge in Issue of Contributory Negligence.—Where no requests for instruction are made by counsel as to the application of the law to the testimony bearing upon an issue involving contributory negligence, it is the duty of the trial judge to give the general definition of ordinary care. *McCracken v. Smathers*, 119 N. C. 617, 26 S. E. 157.

Same—Fraud Necessary to Violate Deed.—It is not required to charge the jury of the full definitions of fraud upon which equity will set aside a deed, the subject of the action, if he instructs them correctly and clearly upon such of the principles as are applicable to the issue under the relevant evidence in the case, and the general charge, as so given, is within the intent and meaning of this section. *Williams v. Hedgepeth*, 184 N. C. 114, 113 S. E. 602.

Same—Bills and Note.—Where from the pleadings and evidence an issue is raised for the jury to determine whether the holder of a note had elected to sue the original payee instead of the maker, under the provisions of this section it is the duty of the trial judge to charge the jury upon the phase of the case, material to the determination of the controversy upon the principles of law applying thereto, without a prayer for special instructions. *Darden v. Baker*, 193 N. C. 386, 387, 137 S. E. 146.

Same—Fraud in Negotiable Instrument.—Where there is evidence in a suit to set aside an instrument for fraud, tending to show the existence of the fraud both in the factum and in the treaty, a failure of the trial judge to charge the principles arising therefrom upon fraud in the factum is error. *Parker v. Thomas*, 192 N. C. 798, 136 S. E. 118.

Same—Illegality of Contract.—Where in an action upon a contract there is evidence that the contract was a wagering one, the judge should explain the statute, the consideration of the contract which would make it illegal, and the law applicable; and his merely instructing the jury to answer the issue "Yes" if the defendant had shown it was illegal, but if it had failed in this respect to answer it "No", is insuffi-

cient. *Orvis Bros. & Co. v. Holt-Morgan Mills*, 173 N. C. 231, 91 S. E. 948.

Same—Forcible Trespass.—In a prosecution for forcible trespass, a charge to the jury that the defendant's guilt depended on the fact of his presence, without further instructions, is not a compliance with this section. *State v. Lawson*, 98 N. C. 759, 4 S. E. 134.

Contributory Negligence.—Where the trial judge has charged correctly and fully upon the issue of contributory negligence in regard to the defendant, it is not error for him to fail to charge the alternate propositions of law in regard to the plaintiff under the provisions of this section. *Lipscomb v. Cox*, 197 N. C. 64, 147 S. E. 683.

Instruction as to contributory negligence of 8½ year old child, held to fully comply with this section, where the judge explained that the degree of care required of a child is that he exercise care and prudence equal to his capacity. *Leach v. Varley*, 211 N. C. 207, 210, 189 S. E. 636.

Concurrent Negligence.—Where the theory of trial in the lower court was that the negligence of defendant was the sole proximate cause of the accident, plaintiff's exception to the charge for its failure to submit the question of concurrent negligence cannot be sustained. *Smith v. Bonney*, 215 N. C. 183, 1 S. E. (2d) 371.

Particulars of Duty Required of Automobile Driver.—Where the plaintiff was not walking along the highway but ran out from behind another automobile near an intersection and was struck and injured by the defendant's car for which injury he seeks to recover damages: Held, it is not reversible error for the trial judge to fail to charge the jury specifically upon the various particulars as to the speed, etc., required of the driver of an automobile upon the highway at a cross-road, if he charges correctly upon the general law arising from the evidence. *Fisher v. Deaton*, 196 N. C. 461, 146 S. E. 66, distinguishing *Bowen v. Schnibben*, 184 N. C. 248, 114 S. E. 170.

Negligence in Injury to Passenger.—In an action to recover damages of a bus line where there is sufficient evidence tending to show that a passenger was injured by the negligence of the defendant in not providing an adequate catch or other device to prevent a folding seat from falling when raised, and that it fell upon the plaintiff's hand and caused the injury in suit; and also evidence that the injury thus inflicted was caused by the independent act of a fellow passenger or by the act of the plaintiff herself, a charge of the court correctly placing the burden of proof and generally defining the law of actionable negligence, etc., but omitting to explain the law arising upon the particular phases of the evidence, is not a compliance with the mandate of this section and constitutes reversible error. *Williams v. Eastern Carolina Coach Co.*, 197 N. C. 12, 147 S. E. 435.

Cited in *Mulholland v. Brownrigg*, 9 N. C. 349; *Currie v. Clark*, 90 N. C. 355; *Fry v. Currie*, 91 N. C. 436; *Dupree v. Virginia Home Ins. Co.*, 92 N. C. 418; *State v. Chastain*, 104 N. C. 900, 904, 10 S. E. 519; *McMillan v. Baxley*, 112 N. C. 578, 16 S. E. 845; *Dissension of C. J. Faircloth in State v. Melton*, 120 N. C. 591, 597, 26 S. E. 933; *State v. Kale*, 124 N. C. 816, 32 S. E. 892; *Gates v. Max*, 125 N. C. 139, 34 S. E. 266; *Davis v. Blevins*, 125 N. C. 433, 34 S. E. 541; *Neal v. Carolina Cent. R. Co.*, 126 N. C. 634, 36 S. E. 117; *State v. Edwards*, 126 N. C. 1051, 1053, 35 S. E. 540; *Kearns v. Southern R. Co.*, 139 N. C. 470, 52 S. E. 131; *State v. Rogers*, 168 N. C. 112, 83 S. E. 161; *Ball Thrash Co. v. McCormack*, 172 N. C. 677, 90 S. E. 916; *Futch v. Atlantic, etc., R. Co.*, 178 N. C. 282, 100 S. E. 436. See *State v. Cline*, 179 N. C. 703, 103 S. E. 211.

Cited in *State v. Alston*, 215 N. C. 713, 3 S. E. (2d) 11; *State v. Buchanan*, 216 N. C. 709, 6 S. E. (2d) 521; *State v. McManus*, 217 N. C. 445, 8 S. E. (2d) 251; *Greene v. Greene*, 217 N. C. 649, 9 S. E. (2d) 413; *Barnes v. Teer*, 218 N. C. 122, 10 S. E. (2d) 614; *Queen City Coach Co. v. Lee*, 218 N. C. 320, 11 S. E. (2d) 341.

§ 1-181. Request for instructions.—Counsel praying of the judge instructions to the jury, must put their requests in writing entitled of the cause, and sign them; otherwise the judge may disregard them. They must be filed with the clerk as a part of the record. (Rev., s. 538; Code, s. 415; C. C. P., s. 239; C. S. 565.)

Editor's Note.—This section does not fix a time limit within which the request for instructions must be filed, and there is an apparent conflict in the reported cases as to the proper time allowed. The succeeding section, section 1-182, requires requests for written instructions from the judge to be made at or before the close of the evidence. There seems to be a divergence of opinion in the Supreme

Court as to whether these two sections should be read together. In *Craddock v. Barnes*, 142 N. C. 89, 54 S. E. 1003, it was held that these two sections should not be read together and the time limit expressed in section 1-182 had no bearing on this section. In *Barringer v. Deal*, 164 N. C. 246, 80 S. E. 161, section 1-182 was read into this section and the headnote to the case stated that requests for special instructions had to be made before the close of the evidence. This is mere dicta, however, for the requests in this case were handed up after the conclusion of the charge.

The headnote to *Merrill v. Whitmire*, 110 N. C. 367, 15 S. E. 3, also, defined "apt time" as "at or before the close of testimony." In this case, however, the requests for special instructions was made after argument had opened. The definition of the court as to "apt time" is dicta, therefore the headnote to *Ward v. Albemarle*, etc., R. Co., 112 N. C. 168, 16 S. E. 921, makes the same error. Here, too, the request for special instructions was made during argument.

The discrepancy here is more apparent than real and the error seems to have crept into the headnotes rather than into the decisions. The *Craddock* case seems correct. In that case at the close of the testimony the court adjourned until the next day, and at the opening of the court the next morning the plaintiff tendered in writing certain special instructions and the refusal of the judge to consider them was held to be error. There seems to be no reason, other than propinquity, why section 1-182 should be read into this section. The true rule, as garnered from the decided cases, seems to be that requests for special instructions must be in before the beginning of argument. This rule apparently fits all the decisions, though dicta to the contrary will be found.

Time Limit for Request for Instructions.—See Editor's note above.

Requests for special instructions should be presented in time to give the Court opportunity to consider them before submitting them to the jury. *State v. Rowe*, 98 N. C. 629, 4 S. E. 506.

Special instructions requested after the Judge has concluded his charge will not be considered on appeal. *Posey v. Patton*, 109 N. C. 455, 14 S. E. 64. But this does not mean that the court is prevented from granting the request if he desires, and it has been held that it is discretionary with the presiding judge whether he will recall the jury and submit instructions, which were not presented until the charge was finished and the jury had retired to consider their verdict. *Scott v. Green*, 89 N. C. 278.

Section Mandatory.—Failure to grant an instruction not asked for in writing is not ground for exception. *Marshall v. Stine*, 112 N. C. 697, 17 S. E. 495. And the trial judge may disregard oral requests. *Justice v. Gallert*, 131 N. C. 393, 42 S. E. 850; *State v. Horton*, 100 N. C. 443, 6 S. E. 238; *Hicks v. Nivens*, 210 N. C. 44, 47, 185 S. E. 469.

A party must apply tender written request for special instructions desired by him in order for an exception to the charge for its failure to contain such instructions to be considered on appeal. *State v. Spillman*, 210 N. C. 271, 186 S. E. 322.

A party desiring more particular instructions on a subordinate feature of the case must apply tender request therefor. *McKay v. Bullard*, 219 N. C. 589, 14 S. E. (2d) 657.

Failure to Give Proper Instruction Is Reversible Error.—When a party tenders a request for a specific instruction, correct in itself and supported by the evidence, the failure of the trial court to give such instruction, in substance at least, either in response to the prayer or in some portion of the charge, is reversible error. *Calhoun v. State Highway*, etc., Comm., 208 N. C. 424, 181 S. E. 271.

Failure to Sign—Discretion of Court.—It is within the sound discretion of the trial judge to give or refuse a prayer for special instruction not signed by the attorneys tendering it as required by this section. *Avery County Bank v. Smith*, 186 N. C. 635, 120 S. E. 215.

Court Need Not Use Exact Words of Instruction.—Where a party prays for an instruction to which he is entitled, it is error to refuse it. The court, however, is not required to adopt the words of the instruction prayed for, but it is error to change its sense or to so qualify it as to weaken its force. *Brink v. Black*, 77 N. C. 59; *Lloyd v. Bowen*, 170 N. C. 216, 86 S. E. 797; *Coral Gables v. Ayres*, 208 N. C. 426, 181 S. E. 263.

Party Cannot Complain of Favorable Instructions.—The defendants cannot, on appeal from a conviction, complain of an erroneous instruction which was not prejudicial to them but in their favor. *State v. Freeman*, 122 N. C. 1012, 29 S. E. 94.

Instruction on Matters Arising Only on Verdict.—It is not error in the judge to omit to charge the jury upon matters of law which can only arise upon the verdict, and have no

bearing on the questions to be considered by the jury. *Dupree v. Virginia Home Ins. Co.*, 92 N. C. 418.

Oral Exception.—Where the judge in instructing the jury, submitted a phase of a question which there was no evidence to support, an oral exception to the question immediately taken and noted and assigned as error for the case on appeal is sufficient to present the matter on appeal, though no written instruction on the subject was prayed for. *Lee v. Williams*, 112 N. C. 510, 17 S. E. 165.

Assignment of Error.—Though the failure to give an instruction asked for in writing is deemed excepted to, yet, if it is not set out in the case on appeal, it will be deemed to have been waived, and will not be passed on by the Supreme Court. *Marshall v. Stine*, 112 N. C. 697, 17 S. E. 495. *Taylor v. Plummer*, 105 N. C. 56, 11 S. E. 266.

Exceptions to the refusal of the court to grant a prayer for instructions, or in granting a prayer, or to instructions generally, cannot be taken for the first time in the Supreme Court; they should be made on a motion for a new trial, but it is sufficient if they are assigned in the statement of the case on appeal. *Lee v. Williams*, 111 N. C. 200, 16 S. E. 175.

The appellant is entitled to have his assignments of error for refusing or granting special instructions, if set out by him in his statement of the case on appeal, incorporated by the judge in the case settled. If they are omitted, certiorari will lie. *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. 383.

Judge's Statement of Oral Instructions Binding.—A statement of the trial judge as to what the instructions to the jury were, where orally given, and in the absence of a request that they be put in writing, is binding on appeal. *Justice v. Gallert*, 131 N. C. 393, 42 S. E. 850.

Conflicting Evidence.—The trial judge commits reversible error in failing to give substantially a material instruction duly requested under this section embodying a correct principle of law supported by the evidence in the case, though the evidence may be conflicting. *Parks v. Security Life*, etc., Co., 195 N. C. 453, 142 S. E. 473.

Applied in *Taylor v. Rierison*, 210 N. C. 185, 185 S. E. 627. **Quoted in** *Ryals v. Carolina Contracting Co.*, 219 N. C. 479, 14 S. E. (2d) 531 (dis. op.).

Cited in *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. 383; *Pleasants v. Raleigh* and *Augusta R. R.*, 95 N. C. 195; *State v. Macon*, 198 N. C. 483, 152 S. E. 407; *Penland v. French Broad Hospital*, 199 N. C. 314, 318, 154 S. E. 406; *Pyatt v. Southern R. Co.*, 199 N. C. 397, 402, 154 S. E. 847; *Lane v. Paschall*, 199 N. C. 364, 154 S. E. 626; *State v. Sims*, 213 N. C. 590, 197 S. E. 176; *Clarke v. Martin*, 217 N. C. 440, 8 S. E. (2d) 230.

§ 1-182. Instructions in writing; when to be taken to jury room.—The judge, at the request of any party to an action on trial, made at or before the close of the evidence, before instructing the jury on the law, must put his instructions in writing and read them to the jury. He shall then sign and file them with the clerk as a part of the record of the action.

When a judge puts his instructions in writing either of his own will or at the request of a party to the action, he must, at the request of either party to the action, allow the jury to take his instructions with them on their retirement, and the jury must return the instructions with their verdict to the court. (Rev., ss. 536, 537; Code, s. 414; C. C. P., s. 238; 1885, c. 137; C. S. 566.)

Editor's Note.—It is not the policy or purpose of the statute, nor does the language used bear such rigorous construction as to forbid any and all oral expressions from the presiding judge. As what he may tell the jury in matters of law for their information and guidance must be written and read, so he is not permitted to add to, take from, modify or explain what he delivers as his charge, for this would be to change perhaps the meaning which would otherwise be ascribed to the writing and produce the very mischief intended to be remedied. But the act, upon any reasonable interpretation of its terms, does not go further and put an interdict upon every oral utterance which is in precise accord with what is written and affects it in none of the suggested particulars, at the peril of a venire de novo if he does thus speak. *Currie v. Clark*, 90 N. C. 355, 361. See *State v. Crowell*, 116 N. C. 1052, 1058, 21 S. E. 502.

For discussion of this section with the preceding section, see the Editor's Note to § 1-181.

Section Mandatory.—The requirements of this section are

mandatory in criminal as well as civil cases and if the judge fails to comply with a request duly made that he reduce his charge to writing, a new trial will be ordered. *Currie v. Clark*, 90 N. C. 355; *State v. Connelly*, 107 N. C. 463, 12 S. E. 251. The question is not whether the record contains the instructions as actually delivered, there being no admission in regard to it, but whether the request was duly made and refused and the refusal followed by an exception. *State v. Black*, 162 N. C. 637, 638, 78 S. E. 210.

The court must put its charge, as to the law, in writing, however inconvenient, if the request is made in apt time. *Jenkins v. Wilmington, etc., R. Co.*, 110 N. C. 438, 15 S. E. 193.

Applies to Later Instructions.—It is error to charge the jury orally upon any point when they return into court for instructions, when counsel has requested written instructions. *State v. Young*, 111 N. C. 715, 16 S. E. 543.

"Instructions" Defined.—The word "instructions" as used in this section, relates to the principles of law applicable to the case, and which would influence the action of the jury, after finding the facts, in shaping their responses to the issue. *State v. Dewey*, 139 N. C. 556, 51 S. E. 937.

Does Not Include Evidence.—A request to give instructions in writing, under this section does not require that the recapitulation of evidence be in writing. *Phillips v. Wilmington, etc., R. Co.*, 130 N. C. 582, 41 S. E. 805; *Dupree v. Virginia Home Ins. Co.*, 92 N. C. 418.

Request Must be Specific.—A request that the trial judge "charge the jury in writing, and as follows" is a request solely to deliver those instructions to the jury, and is not a request to put the entire charge in writing. *Phillips v. Wilmington, etc., R. Co.*, 130 N. C. 582, 41 S. E. 805.

But where the defendant at the close of the evidence requested the court "to put the charge to the jury in writing and in part to charge the jury as follows," and the whole charge on the law was not put in writing, this was held to be error. *Sawyer v. Lumber Co.*, 142 N. C. 161, 55 S. E. 84.

Oral Instructions Same as Written.—Where the court gave oral instructions not differing from those set out in the written charge, and the appellant makes no suggestion to the contrary, his exception to the oral part of the charge does not constitute ground for a new trial. *Currie v. Clark*, 90 N. C. 355.

Exception.—An exception to the failure of the judge to put his charge in writing, when asked "at or before the close of the evidence," is taken in time if first set out in appellant's "case on appeal." *Sawyer v. Lumber Co.*, 142 N. C. 161, 55 S. E. 48. The headnote to *Phillips v. Wilmington, etc., R. Co.*, 130 N. C. 582, 41 S. E. 805, is not the holding of that case but is merely dicta.

An exception "for refusal of prayers for instructions" does not embrace a refusal or failure to grant a prayer to put the charge in writing. *State v. Adams*, 115 N. C. 775, 26 S. E. 722.

Effect of Violation.—When it appears from inspection of the record, that the court below refused to put its charge in writing, at the request of one of the parties made in apt time, a new trial will be granted by the Supreme Court. *State v. Connelly*, 107 N. C. 463, 12 S. E. 251.

Judge's Statement of Oral Instructions Controlling.—A statement of the trial judge as to what the instructions to the jury were, where orally given, and in the absence of a request that they be put in writing, is binding on appeal. *Justice v. Gallert*, 131 N. C. 393, 42 S. E. 850; *Cameron v. Power Co.*, 137 N. C. 99, 49 S. E. 76.

Request of Juror.—It is proper for the court to permit the jury to carry the charge with them on retiring to the jury room, at the request of one of the jurors. *Gaither v. Carpenter*, 143 N. C. 240, 55 S. E. 625.

Request Made after Charge in Hands of Jury.—Where the trial judge, having at the request of plaintiff put his charge in writing, read and handed it to the jury and allowed them to carry it to the jury room, the plaintiff objected upon the ground that the court had not been requested to hand the written charge to the jury. Thereupon, and after his Honor had offered to withdraw the written charge from the jury in whose possession it had been about five minutes, the defendant requested that the jury be permitted to keep the written charge, it was held that it was not error upon such request of the defendant to permit the jury to retain the written charge. *Little v. Carolina Central R. Co.*, 119 N. C. 771, 26 S. E. 106.

Special Prayers Not Included.—Where the charge of the court was taken to the jury room on retirement, but by oversight the special prayers asked by appellant and given were not also handed to the jury, this does not constitute error, where his counsel were present in the court room and did not then, or at any time before verdict, call the matter to the attention of the court. *Gaither v. Carpenter*, 143 N. C. 240, 55 S. E. 625.

Data Other than Charge.—It is error for the trial judge, under objection, to permit the jury to take plats of or certificates relating to the location of disputed lands to their room and inspect them in their deliberations. *Nicholson v. Eureka Lumber Co.*, 156 N. C. 59, 72 S. E. 86. So with plaintiff's estimate of damages. *Burton v. Wilkes*, 66 N. C. 604. An account rendered. *Watson v. Davis*, 52 N. C. 178. Depositions read on trial. *Lafoon v. Shearin*, 95 N. C. 391. Papers read as evidence. *Williams v. Thomas*, 78 N. C. 47.

Cited in *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. 383; *Powell v. Wilmington, etc., R. Co.*, 68 N. C. 395; *Merrill v. Whitmire*, 110 N. C. 367, 15 S. E. 3; *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53; *Craddock v. Barnes*, 142 N. C. 89, 54 S. E. 1003; *Barringer v. Deal*, 164 N. C. 246, 80 S. E. 161.

§ 1-183. Motion for nonsuit.—When on trial of an issue of fact in a civil action or special proceeding, the plaintiff has introduced his evidence and rested his case, the defendant may move to dismiss the action, or for judgment as in case of nonsuit. If the motion is allowed the plaintiff may except and appeal to the supreme court. If the motion is refused the defendant may except, and if the defendant introduces no evidence the jury shall pass upon the issues in the action, and the defendant has the benefit of his exception on appeal to the supreme court. After the motion is refused he may waive his exception and introduce his evidence just as if he had not made the motion, and he may again move to dismiss after all the evidence on both sides is in. If the motion is then refused, upon consideration of all the evidence, he may except, and after the jury has rendered its verdict, he has the benefit of the latter exception on appeal to the supreme court. (Rev., s. 539; 1897, c. 109; 1899, c. 131; 1901, c. 594; C. S. 567.)

Editor's Note.—The power of the superior court to grant an involuntary nonsuit is altogether statutory, and did not exist prior to the passing of this section in 1897. See *Riley v. Stone*, 169 N. C. 421, 422, 86 S. E. 348.

Under this section as originally passed, Acts 1897, chap. 109, upon the defendant's motion being refused, he could introduce evidence, and at the close of the evidence on both sides, renew the motion to dismiss, on the first motion and also on the second motion. *Purnell v. Raleigh, etc., R. Co.*, 122 N. C. 832, 29 S. E. 953; *Wood v. Bartholomew*, 122 N. C. 177. But under the amendment of 1899, Acts of 1899, chap. 138, this practice is not allowed. The defendant may stop his case at the close of the plaintiff's evidence, and move to dismiss upon the ground that the plaintiff has not made a prima facie case. And if his motion is refused he has the right of appeal from the ruling of the court.

But if he does not stop his case and appeal, and introduce evidence, he loses the right of appeal from the refusal to dismiss. When the evidence is all in, he may again move to dismiss upon the ground that the plaintiff has not made out a case, and the only difference between this motion and the one made at the close of the plaintiff's evidence, is that the plaintiff's evidence stands as it stood when the first motion was made, and he also has the benefit of any new evidence that may have been introduced since that motion was made, by either side, favorable to the plaintiff.

The rule now seems to stand just as it did before the passage of the Act 1897, chap. 109, and the amendment of 1899, except that under this legislation it is now discretionary with the defendant whether he will introduce evidence after the motion to dismiss, or not; while before these acts, it was discretionary with the court whether it would allow the defendant to introduce evidence after resting his case and making the motion. See *Means v. Carolina Central R. R. Co.*, 126 N. C. 424, 35 S. E. 813.

It was held in *State v. Houston*, 155 N. C. 432, 71 S. E. 65, that this statute did not apply to criminal cases. Thereupon the legislature enacted chap. 73, Laws 1913 (Sec. 15-173), extending this section to all criminal courts. For Criminal Cases, see annotations under that section.

Section Explained.—Under this section the defendant is not put to his election to move for a judgment of nonsuit or proceed with the evidence unless the plaintiff has produced his evidence and rested his case. If the motion for judgment is therein refused he can note his exception and proceed as if he had made no motion. *Worth v. Ferguson*, 122 N. C. 381, 29 S. E. 574.

It was not intended to deprive parties of the right to trial by jury where there is any evidence to sustain the allegations of the complaint. *Fox v. Asheville Army Store*, 215 N. C. 187, 189, 1 S. E. (2d) 550.

Nonsuit under this section, is permissible only on demurrer to the evidence, and not on demurrer to the complaint or motion for judgment on the pleadings. *Dix-Downing v. White*, 206 N. C. 567, 174 S. E. 451.

Time to Make Motion to Nonsuit.—The allowance of a motion as of nonsuit is based upon purely statutory grounds, and the requirements of this section must be strictly followed, and where the defendant fails to move for judgment as of nonsuit at the close of the plaintiff's evidence, his exception to the refusal of his motion therefor at the close of all the evidence is not sufficient to present on appeal the question of whether upon all the evidence the plaintiff is entitled to recover. *Penland v. French Broad Hospital*, 199 N. C. 314, 154 S. E. 406.

Where a party fails to move for judgment as of nonsuit at the close of plaintiff's evidence, its motion therefor at the close of all the evidence cannot be granted, since the right to demur to the evidence is waived. *Jones v. Dixie Fire Ins. Co.*, 210 N. C. 559, 187 S. E. 769. See also *State v. Ormond*, 211 N. C. 437, 191 S. E. 22.

Admissions and Inferences.—A motion to dismiss under this section, is substantially a demurrer to the evidence, which waives all objection to its competency, and admits as true that which the evidence tends to prove. *Roscoe v. Lumber Co.*, 124 N. C. 42, 32 S. E. 389.

The demurrer to the evidence admits all facts of which there is any evidence and all conclusions which can be fairly and logically drawn from such facts. This rule is substantiated by a long array of cases. See *Snider v. Newell*, 132 N. C. 614, 44 S. E. 354. *Hopkins v. Bowers*, 111 N. C. 175, 16 S. E. 1.

A demurrer to evidence is defined to be a proceeding by which the court, in which the action is pending, is called upon to decide what the law is upon the facts shown in evidence; and it is regarded in general as analogous to a demurrer upon the facts alleged in pleading. *Van Stone v. Stillwell, etc., Mfg. Co.*, 142 U. S. 128, 134, 12 S. Ct. 181, 35 L. Ed. 961.

Evidence Adjudged Against Defendant.—In cases of demurrer and motions to dismiss under this section the evidence must be taken most strongly against the defendant. *Gates v. Max*, 125 N. C. 139, 34 S. E. 266; *Purnell v. Raleigh, etc., R. Co.*, 122 N. C. 832, 29 S. E. 953; *Cowles v. McNeill*, 125 N. C. 385, 34 S. E. 499.

Plaintiff Entitled to Benefit of Inferences.—On a motion to nonsuit, the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment and reasonable inference to be drawn therefrom. *Standard Oil Co. v. Hunt*, 187 N. C. 157, 121 S. E. 184. *Southwill v. Atlantic Coast Line R. Co.*, 189 N. C. 417, 127 S. E. 361; *Lindsey v. Suncrest Lumber Co.*, 189 N. C. 118, 126 S. E. 174. *Ghorley v. Atlantic, etc., Ry. Co.*, 189 N. C. 634, 127 S. E. 634. *Inge v. Seaboard Air Line R. Co.*, 192 N. C. 522, 135 S. E. 522. Considering only so much of the evidence as is favorable to the plaintiff and rejecting that which is unfavorable. *Newby v. Atlantic, etc., Realty Co.*, 182 N. C. 34, 108 S. E. 323; *Rush v. McPherson*, 176 N. C. 562, 97 S. E. 613. For other cases following this rule, see *Smith v. Raleigh Granite Co.*, 202 N. C. 305, 162 S. E. 731; *Pearson v. Standard Garage, etc., Co.*, 202 N. C. 14, 161 S. E. 536; *Almond v. Oceola Mills*, 202 N. C. 97, 161 S. E. 731; *Sampson v. Jackson Bros. Co.*, 203 N. C. 413, 166 S. E. 181; *Puckett v. Dyer*, 203 N. C. 684, 167 S. E. 43; *Pendergraft v. Royster*, 203 N. C. 384, 166 S. E. 285; *Tuttle v. Bell*, 203 N. C. 154, 165 S. E. 333; *Thigpen v. Jefferson Standard Life Ins. Co.*, 204 N. C. 551, 168 S. E. 845; *Lynch v. Carolina Tel., etc., Co.*, 204 N. C. 252, 167 S. E. 847; *Holton v. Northwestern Oil Co.*, 201 N. C. 744, 146, 161 S. E. 391; *Broadway v. Gate City Life Ins. Co.*, 201 N. C. 639, 160, 161 S. E. 71; *Sanders v. Atlantic Coast Line R. Co.*, 201 N. C. 672, 161 S. E. 320; *Nance v. Merchants' Fertilizer, etc., Co.*, 200 N. C. 702, 158 S. E. 486; *Hunt v. Meyers Co.*, 201 N. C. 636, 161 S. E. 74; *Smithwick v. Colonial Pine Co.*, 200 N. C. 519, 157 S. E. 612; *Moore v. Atlantic Coast Line R. Co.*, 201 N. C. 26, 158 S. E. 556; *Hobbs v. Kirby*, 205 N. C. 238, 171 S. E. 94; *Keller v. Southern R. Co.*, 205 N. C. 269, 171 S. E. 73; *Smith v. Equitabis Life Assur. Soc.*, 205 N. C. 387, 171 S. E. 346; *Moore v. Powell*, 205 N. C. 636, 172 S. E. 327; *Dickerson v. Reynolds*, 205 N. C. 770, 172 S. E. 402; *Broadway v. Cope*, 208 N. C. 85, 179 S. E. 452; *Gossett v. Metropolitan Life Ins. Co.*, 208 N. C. 152, 179 S. E. 438; *Brunswick County v. North Carolina Bank, etc., Co.*, 206 N. C. 127, 173 S. E. 327; *Hood v. Mitchell*, 206 N. C. 156, 173 S. E. 61; *Sherwood v. Southeastern Exp. Co.*, 206 N. C. 243, 173 S. E. 605; *Blackman v. New York Life Ins. Co.*, 206 N. C. 429, 174

S. E. 294; *Kitchen Lbr. Co. v. Tallassee Power Co.*, 206 N. C. 515, 174 S. E. 427; *Pearson v. Luther*, 212 N. C. 412, 193 S. E. 739; *York v. York*, 212 N. C. 695, 194 S. E. 483; *Predry v. Britt*, 212 N. C. 719, 194 S. E. 494; *Briley v. Robertson*, 214 N. C. 295, 199 S. E. 73; *Smith v. Carolina Coach Co.*, 214 N. C. 314, 199 S. E. 90. See *Owens v. Blackwood Lbr. Co.*, 210 N. C. 504, 187 S. E. 804; *Miller v. Wood*, 210 N. C. 520, 187 S. E. 765; *Ford v. Atlantic Coast Line R. Co.*, 209 N. C. 108, 182 S. E. 717; *Teseneer v. Henrietta Mills Co.*, 209 N. C. 615, 184 S. E. 535; *Hancock v. Wilson*, 211 N. C. 129, 189 S. E. 631; *Harper v. Seaboard Air Line Ry. Co.*, 211 N. C. 398, 190 S. E. 750; *Cole v. Atlantic Coast Line R. Co.*, 211 N. C. 591, 191 S. E. 353; *Debnam v. Whiteville*, 211 N. C. 618, 191 S. E. 325; *Headen v. Bluebird Transp. Corp.*, 211 N. C. 639, 191 S. E. 331; *Independent Oil Co. v. Broadfoot Iron Works*, 211 N. C. 668, 191 S. E. 508; *Riddle v. Whisnant*, 220 N. C. 131, 16 S. E. (2d) 698; *Edwards v. National Council, etc.*, 220 N. C. 41, 16 S. E. (2d) 466; *Warren v. Breedlove*, 219 N. C. 383, 14 S. E. (2d) 43.

On a motion to nonsuit under this section, the evidence is to be taken in the light most favorable to the plaintiff and he is entitled to the benefits of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. *Brown v. Southern Ry. Co.*, 195 N. C. 699, 701, 143 S. E. 536; *Cromwell v. Logan*, 196 N. C. 588, 593, 146 S. E. 233; *Newbern v. Western Union Tel. Co.*, 195 N. C. 258, 141 S. E. 592; *Gilbert v. Wright*, 195 N. C. 165, 168, 141 S. E. 577; *Finch v. North Carolina R. Co.*, 195 N. C. 190, 141 S. E. 550; *Nash v. Royster*, 189 N. C. 408, 410, 127 S. E. 356; *Smith v. Ritch*, 196 N. C. 72, 74, 144 S. E. 537; *Cromartie v. Stone*, 194 N. C. 663, 140 S. E. 612; *State v. Carter*, 194 N. C. 293, 139 S. E. 604; *Newbern v. Leary*, 215 N. C. 134, 1 S. E. (2d) 384; *Bright v. Hood*, 214 N. C. 410, 199 S. E. 630; *Reid v. City Coach Co.*, 215 N. C. 469, 2 S. E. (2d) 578, 123 A. L. R. 140; *Barnes v. Teer*, 218 N. C. 122, 10 S. E. (2d) 614; *Watson v. Atlantic Coast Line R. Co.*, 218 N. C. 457, 11 S. E. (2d) 312; *Smith v. Kappas*, 218 N. C. 758, 12 S. E. (2d) 693; *Daniel v. East Tennessee Packing Co.*, 215 N. C. 762, 3 S. E. (2d) 282; *White v. North Carolina R. Co.*, 216 N. C. 79, 3 S. E. (2d) 310; *Coltrain v. Atlantic Coast Line R. Co.*, 216 N. C. 263, 4 S. E. (2d) 853; *Blalock v. Whisnant*, 216 N. C. 417, 5 S. E. (2d) 130; *Barnes v. Wilson*, 217 N. C. 190, 7 S. E. (2d) 359; *Queen City Coach Co. v. Lee*, 218 N. C. 320, 11 S. E. (2d) 341.

Consideration of Defendant's Evidence.—Upon a motion as of nonsuit the defendant's evidence will not be considered unless favorable to the plaintiff or not in conflict therewith, when it may be used to explain or make clear the evidence introduced by the plaintiff. *Harrison v. North Carolina R. Co.*, 194 N. C. 656, 146 S. E. 598; *Jeffries v. Powell*, 221 N. C. 415, 20 S. E. (2d) 561; *Tarrant v. Pepsi-Cola Bottling Co.*, 221 N. C. 390, 20 S. E. (2d) 565.

While this section requires a consideration of the whole evidence, only that part of the defendant's evidence which is favorable to plaintiff can be taken into consideration, since, otherwise, the court would pass upon the weight of the evidence, the credibility of which rests solely with the jury. *Wall v. Bain*, 222 N. C. 375, 23 S. E. (2d) 330.

Defendant's evidence, which conflicts with that tending to support plaintiff's claim, is not to be considered on motion to nonsuit under this section. *Davidson v. Western Union Tel. Co.*, 207 N. C. 790, 178 S. E. 603.

When Motion Should Be Disallowed.—Defendant's motion as of nonsuit, will be denied when the evidence, taken in the light most favorable to the plaintiff, and every reasonable intendment therefrom, is sufficient to take the case to the jury and support a verdict as a matter of law in the plaintiff's favor. *Robinson v. Ivey & Co.*, 193 N. C. 805, 138 S. E. 173.

The defendant, after the court has refused his motion as of nonsuit upon the evidence, may except, introduce evidence, and renew his motion after all the evidence has been introduced; but his last motion only can be considered, and upon all the evidence in the case, and if therein the plaintiff has made out a case, the motion should be disallowed. *Blackman v. Woodmen*, 184 N. C. 75, 113 S. E. 565.

Not Allowed after Verdict.—An exception that there is no evidence on an issue in a case can only be taken before verdict. *Hart v. Cannon*, 133 N. C. 10, 45 S. E. 351; *Sugg v. Fatson*, 101 N. C. 188, 7 S. E. 709; *Wilson Cotton Mills v. Randleman Cotton Mills*, 115 N. C. 475, 20 S. E. 770.

Where the court reserves his rulings on motions of nonsuit until after rendition of a verdict the court may not set aside the verdict for insufficiency of the evidence as a matter of law, and grant the motion for judgment as of nonsuit made at the close of all the evidence. *Batson v. City Laundry Co.*, 202 N. C. 560, 163 S. E. 600; *Jones v. Dixie Fire Ins. Co.*, 210 N. C. 559, 187 S. E. 769.

Nonsuit under this section is "permissible only on demurrer to the evidence, and not on demurrer to the complaint or motion for judgment on the pleadings." Sykes v. Blakey, 215 N. C. 61, 63, 200 S. E. 910.

Plaintiff's Evidence Must be Nil.—If there is more than a scintilla of evidence tending to prove the plaintiff's contention it must be submitted to the jury. *Gates v. Max*, 125 N. C. 139, 34 S. E. 266. *Cable v. Southern Ry. Co.*, 122 N. C. 892, 29 S. E. 377. *Cox v. Norfolk, etc., R. Co.*, 123 N. C. 604, 31 S. E. 848, and cases therein cited.

It was not the intention or effect of the passage of this section, to deprive parties of the right of trial by jury in cases where there is any evidence or to make the weight and effect of the evidence always a question of law for the courts. *Willis v. Atlantic, etc., R. Co.*, 122 N. C. 905, 29 S. E. 941.

How Questions of Law and Fact Presented.—Whether there is evidence from which the jury could answer an issue in the affirmative is a question of law, and is presented to the court for decision by motion for judgment of nonsuit. *McCall v. Textile Industrial*, 189 N. C. 775, 128 S. E. 349.

On demurrer to evidence, the court is substituted in the place of the jury, as judges of the facts. *Bank v. Gutschlick*, 14 Pet. 19, 10 L. Ed. 335.

A motion to nonsuit questions the sufficiency of the evidence to carry the case to the jury and to support a recovery, which is always a question of law to be determined by the court. *Godwin v. Atlantic Coast Line R. Co.*, 220 N. C. 281, 17 S. E. (2d) 137.

Additional Evidence Allowable.—Where a motion to nonsuit under this section is made, it is discretionary with the judge, before passing on it, to allow the plaintiff to introduce additional evidence. *Featherston v. Wilson*, 123 N. C. 623, 31 S. E. 843.

The trial court, after the plaintiff had rested his case, and after the motion of the defendants for judgment as of nonsuit under this section was denied, and before either of the defendants had offered evidence, allowed the plaintiff to offer additional evidence. This action of the court was within its discretion, and for that reason is not reviewable by this court, and the rights of the defendants under this section were not affected by the action of the court. *Pearson v. Simon*, 207 N. C. 351, 354, 177 S. E. 124.

Motion Must be Renewed.—Where defendant moved to dismiss the case and direct a verdict, when plaintiff rested her case, but after denial of the motion introduced evidence, and did not renew at the close of the whole case, it was held that the defendant could not, on appeal, complain of the denial of his motion to dismiss. *Cole Mfg. Co. v. Mendenhall*, 240 Fed. 641; *Choate Rental Co. v. Justice*, 211 N. C. 54, 188 S. E. 609.

Waiver.—The introduction of evidence by the defendant upon the overruling of his motion at the conclusion of the plaintiff's evidence, and his failure to renew his motion on all the evidence, is a waiver of his right under the statute. *Wooley v. Bruton*, 184 N. C. 438, 114 S. E. 628; *Nash v. Royster*, 189 N. C. 408, 127 S. E. 356; *Gilland v. Carolina, etc., Co.*, 189 N. C. 783, 128 S. E. 158; *Ferrell v. Metropolitan Life Ins. Co.*, 208 N. C. 420, 181 S. E. 327; *Stephenson v. Honeycutt*, 209 N. C. 701, 184 S. E. 482.

The defendant waives his right to maintain the insufficiency of the evidence to take the case to the jury by not making a motion as of nonsuit thereon at the close of the evidence. *Gibbs v. Telegraph Co.*, 196 N. C. 516, 146 S. E. 509; *Murphy v. Power Co.*, 196 N. C. 484, 494, 146 S. E. 204.

Where the defendant in a civil action does not comply with the provisions of this section, in making a motion for judgment as of nonsuit he waives the question of the sufficiency of the evidence. *Harris v. Buie*, 202 N. C. 634, 163 S. E. 693.

A motion for dismissal or for judgment of nonsuit made, under this section at the close of the plaintiff's evidence and not renewed at the close of all the evidence is waived. *Debnam v. Rouse*, 201 N. C. 459, 460, 160 S. E. 471.

Where a defendant makes a motion as of nonsuit at the close of the plaintiff's evidence, and upon the motion being overruled, introduces evidence in his own behalf, he waives his right to present the question of the sufficiency of the evidence to go to the jury by failing to renew his motion at the close of all the evidence, and his appeal will be regarded as if no motion had been made by him. *Lee v. Penland*, 200 N. C. 340, 157 S. E. 31.

Where the defendant does not move for nonsuit as provided by this section, in the lower court he waives his right to have the insufficiency of the evidence to be submitted to the jury considered on appeal. *Harrison v. Metropolitan Life Ins. Co.*, 207 N. C. 487, 177 S. E. 423.

Same—Introduction of Evidence.—A defendant waives his right to object to the sufficiency of the evidence on

his motion of nonsuit made at the close of the plaintiff's evidence by introducing evidence in his own behalf and not renewing his motion after the close of all the evidence in the case. *Grant v. Power Co.*, 196 N. C. 617, 146 S. E. 531; *Harrison v. North Carolina R. R. Co.*, 194 N. C. 656, 140 S. E. 598.

Exception Considered on Appeal.—Where exception is taken to the refusal of the court to dismiss the action, both after the close of plaintiff's evidence and after the defendant's evidence has been introduced, only the exception taken after the close of all the evidence will be considered on appeal, under the express provision of this section, and, so considered, the evidence must be accepted as true and construed in the light most favorable to the plaintiff. *Butler v. Holt-Williamson Mfg. Co.*, 182 N. C. 547, 109 S. E. 559.

Where exception is taken to refusal to grant defendant's motion to nonsuit made at close of plaintiff's evidence, but he then elected to offer evidence, only the exception noted at the close of all the evidence could be urged or considered on appeal. *Harrison v. North Carolina R. Co.*, 194 N. C. 656, 140 S. E. 598, citing *Nash v. Royster*, 189 N. C. 408, 127 S. E. 356; *Harper v. Supply Co.*, 184 N. C. 204, 114 S. E. 173.

Under this section an exception to a motion to dismiss in a civil action, taken after the close of the plaintiff's evidence and renewed by defendant after the introduction of his own evidence, does not confine the appeal to the plaintiff's evidence alone, and a judgment will be sustained under the second exception if there is any evidence on the whole record of the defendant's liability. *Lynn v. Pinehurst Silk Mills*, 208 N. C. 7, 11, 179 S. E. 11.

Motion to Set Aside Verdict.—An order of the court setting aside a verdict upon motion that it was against the weight of evidence is in conflict with his further sustaining a motion to nonsuit the plaintiff upon the evidence under this section. *Riley v. Stone*, 169 N. C. 421, 86 S. E. 348.

Motion for Judgment on Exceptions.—In a proceeding attacking the validity of an improvement assessment, the burden is on the defendant municipality to sustain the assessment, and a motion by the plaintiff for judgment on her exceptions after defendant's evidence is in, is in effect a motion for judgment as of nonsuit under this section. *Holton v. Mocksville*, 189 N. C. 144, 125 S. E. 326.

Effect of Remanding Case.—When in the Supreme Court the lower court is reversed for refusing a motion to dismiss upon the evidence as of nonsuit, it is equivalent to the direction to dismiss the action. *Tussey v. Owen*, 147 N. C. 335, 61 S. E. 180; *Hollingsworth v. Skelding*, 142 N. C. 246, 55 S. E. 212.

The superior court is without authority to allow an amendment or to proceed contrary to the opinion, but the plaintiff may bring another suit within twelve months after the judgment of nonsuit. *Tussey v. Owen*, 147 N. C. 335, 61 S. E. 180.

Evidence Sufficient for Jury.—Defendant's motion as of nonsuit upon the evidence will be denied if there is any sufficient evidence, testified to by either the plaintiff's or defendant's witnesses, circumstantial or otherwise, viewed in the light most favorable to the plaintiff, to take the issue to the jury for determination. *Goss v. Williams*, 196 N. C. 213, 145 S. E. 169. See *Dalton v. Stoneville Cabinet Co.*, 195 N. C. 870, 142 S. E. 480; *Burnett v. Williams*, 196 N. C. 620, 146 S. E. 533; *Cromartie v. Stone*, 194 N. C. 663, 140 S. E. 612; *Cameron v. Cameron*, 212 N. C. 674, 194 S. E. 102.

Same—Illustrative Cases.—Where the defense of an independent contractor is relied upon in an action to recover damages for alleged negligent injury, evidence in plaintiff's behalf tending to show that the relationship of independent contractor had before the happening of the accident been severed and that the defendant's employees were in charge of and loading logs upon the defendant's tramroad when the plaintiff's injury occurred in the course of his employment, is sufficient to take the case to the jury as to his employment by the defendant at the time, upon defendant's motion as of nonsuit. *Lilley v. Interstate Cooperaage Co.*, 194 N. C. 250, 139 S. E. 369.

Where in a personal injury negligence case there is evidence for defendant that the injury in suit was caused either by the act of God, etc., or by an accident, and, per contra, that it was proximately caused by the defendant's negligence in the exercise of ordinary care to furnish the plaintiff, his employee, a reasonably safe place to work or reasonably safe appliances under the circumstances, defendant's motion for nonsuit will be denied. *Jones v. Atlantic Coast Line R. Co.*, 194 N. C. 227, 139 S. E. 242.

When the father has entered into a contract with his son for support of himself and wife for life, and gives as a consideration certain of his property, without retaining sufficient property to pay his then existing creditors, and

the pleadings and evidence raise the question of the son's good faith and part performance without notice, these questions should be submitted to the jury upon appropriate issues; and motion for nonsuit is properly refused. *Peoples Bank, etc., Co. v. Mackorell*, 195 N. C. 741, 143 S. E. 518.

In an action for negligence of defendant's delivery truck driver, evidence as to the driver's identity and that he was acting within scope of his employment at time of injury, is sufficient to take the case to the jury and deny defendant's motion for a nonsuit. *Misenheimer v. Hayman*, 195 N. C. 613, 143 S. E. 1.

In an action for injuries against a municipality for failure to keep highway in safe condition, defendant's motion for judgment as in case of nonsuit, provided for by this section, was properly granted, where the evidence disclosed that accident occurred outside the town limits. *Spell v. Roseboro*, 214 N. C. 364, 199 S. E. 265.

Evidence tending to show that plaintiff's intestate was struck and killed by defendant's train, that the engineer failed to blow for the crossing, and that the track was straight and unobstructed for a distance of about two hundred yards and that the engineer could have seen the intestate and the cow for that distance is held sufficient to take the case to the jury on the doctrine of last clear chance, the evidence tending to show that the intestate was on the track oblivious or otherwise insensible of danger, and defendant's motion for judgment as of nonsuit is properly denied. *Triplett v. Southern R. Co.*, 205 N. C. 113, 110 S. E. 146.

In an action on a disability clause in a policy of life insurance where plaintiff testified that at the time of the issuance of the policy his eyesight was not impaired and that he was thoroughly examined by insurer's physician upon his application for the policy, and that no impairment or disease of his sight was disclosed by the physician's examination and test of his eyes, and that subsequent blindness had rendered him disabled, and defendant introduced testimony of an eye specialist that from his examination of plaintiff's eyes plaintiff was suffering from a chronic eye disease several years prior to the application for the policy, and moved for a nonsuit on the ground that the evidence showed that the disease resulting in plaintiff's disability originated prior to the issuance of the policy: Held, the evidence, viewed in the light most favorable to plaintiff, was sufficient to be submitted to the jury and a motion for a nonsuit was properly overruled. *Misskelley v. Home Life Ins. Co.*, 205 N. C. 496, 171 S. E. 862.

The parking of a truck on a public highway at night without lights in violation of statute, is negligence per se, and where the evidence is conflicting as to whether such improper parking proximately caused plaintiff's injuries, resulting from a collision between the truck and the car in which he was riding as a guest, the question of proximate cause is for the determination of the jury upon an appropriate issue, and a motion as of nonsuit is properly denied. *Barrier v. Thomas, etc., Co.*, 205 N. C. 425, 171 S. E. 626.

In an action by the daughter of the deceased against his administrators to recover the value of services rendered deceased, it was held that under the evidence the relationship between plaintiff and her father raised no presumption that the services were gratuitous, and a motion as of nonsuit was properly denied. *Keiger v. Sprinkle*, 207 N. C. 733, 178 S. E. 666.

The conviction of the defendant in a criminal action in a lower court procured by the prosecuting witness upon evidence known to him to be perjured is not conclusive evidence of probable cause, and in an action by the defendant against the plaintiff for malicious prosecution, a motion for judgment as in case of a nonsuit is properly denied. *Moore v. Winfield*, 207 N. C. 767, 178 S. E. 605.

Where the evidence tended to show an agent had apparent authority, the evidence that the act of agent was within his apparent authority and binding on his principal is a question for the jury, and a motion as of nonsuit on the ground of not being bound by an agent's unauthorized act is properly denied. *Charleston, etc., Ry. Co. v. Lassiter & Co.*, 207 N. C. 408, 177 S. E. 9.

It is improper for the court to sustain a motion for judgment under this section where the evidence is anticipated, the plaintiff not having "introduced his evidence and rested his case" as provided by this section. *Hershey Corp. v. Atlantic Coast Line R. Co.*, 207 N. C. 122, 176 S. E. 265.

Where there is evidence in support of plaintiff's contention as to the amount of indebtedness sued on, defendant's motion as of nonsuit under this section is properly denied, although there is evidence in contradiction. *Pearson v. Simon*, 207 N. C. 351, 177 S. E. 124.

Where every element of the crime of having carnal

knowledge of a female child under sixteen years of age in violation of § 14-26, is supported by the State's evidence in the case, defendant's motion as of nonsuit under this section is properly denied. *State v. Houpe*, 207 N. C. 377, 177 S. E. 20.

Where the evidence is sufficient to support a verdict in plaintiff's favor, defendant's motion as of nonsuit under this section is properly overruled. *Davidson v. Western Union Tel. Co.*, 207 N. C. 790, 178 S. E. 603.

Evidence which raises only a mere suspicion or conjecture of the issue to be proved is insufficient to be submitted to the jury. *Sutton v. Herrin*, 202 N. C. 599, 163 S. E. 578; *Shuford v. Scruggs*, 201 N. C. 685, 161 S. E. 315; *Shuford v. Brown*, 201 N. C. 17, 18, 158 S. E. 698.

It is well settled that evidence which does no more than raise a suspicion, that a fact material to the cause of action alleged in the complaint may be as alleged therein, is not sufficient for submission to the jury as tending to sustain the allegation of the complaint. *Broughton v. Standard Oil Co.*, 201 N. C. 282, 283, 159 S. E. 321.

Evidence tending to show a definite contract by deceased to devise his property to plaintiff, and upon the death of the deceased intestate, is sufficient to be submitted to the jury in plaintiff's action against deceased's administrator for breach of the contract and motion as of nonsuit was properly refused. *Hager v. Whitner*, 204 N. C. 747, 169 S. E. 645.

Where the plaintiff brought suit on a policy of accident insurance in which she was named beneficiary, and which provided for the payment of a certain sum if the assured was killed by being struck by a gasoline propelled vehicle: the evidence that the assured met his death by being struck by a vehicle propelled by gasoline was sufficient to be submitted to the jury and motion for nonsuit was properly refused. *Colboch v. Independent Life Ins. Co.*, 204 N. C. 716, 169 S. E. 709.

Where the answer pleads a counterclaim the plaintiff may not take a voluntary nonsuit over the defendant's objection. *Aetna Life Ins. Co. v. Griffin*, 200 N. C. 251, 156 S. E. 515.

Defendant Cannot Withdraw Counterclaim in Order to Enter Motion as of Nonsuit.—Where the defendant in an action on a contract sets up a counterclaim arising out of the same contract declared upon by the plaintiff, the defendant may not withdraw his counterclaim over the plaintiff's objection in order to enter a motion as of nonsuit as provided by this section, on the plaintiff's cause of action. *McGee v. Frohman*, 207 N. C. 475, 177 S. E. 327.

Judgment as of Nonsuit May Be Entered by Trial Court of Its Own Motion.—A judgment as of nonsuit entered by the trial court of its own motion will not be held for error when the evidence would justify a directed verdict, a nonsuit and a directed verdict having the same legal effect. *Ferrell v. Metropolitan Life Ins. Co.*, 208 N. C. 420, 181 S. E. 327.

When Nonsuit Proper.—Where the evidence of plaintiff is not sufficient to be submitted to the jury it is proper for the court to sustain defendant's motion for judgment as in case of nonsuit at the close of plaintiff's evidence. *Lloyd v. Speight*, 195 N. C. 179, 180, 141 S. E. 574; *Blackwell v. Coca-Cola Bottling Co.*, 208 N. C. 751, 182 S. E. 469. See also *Lamb v. Smith*, 215 N. C. 463, 2 S. E. (2d) 361.

In the absence of any evidence tending to sustain an affirmative answer to the issue submitted to the jury there was error in the refusal of the court to allow defendant's motion, at the close of all the evidence, for judgment as of nonsuit. *Ford v. Willys-Overland*, 197 N. C. 147, 150, 147 S. E. 822.

Where there is no evidence tending to sustain the plaintiff's cause of action the defendant's exceptions to the refusal of the trial court to grant his motion of nonsuit or his request for a directed verdict will be sustained on appeal. *Ferguson v. Glenn*, 201 N. C. 128, 159 S. E. 5.

Same—Illustrative Cases.—Where a contract creating a local representative for the sale of automobiles by interpretation as to its effect, creates the relationship of vendor and purchaser, the local representative may not bind the vendor upon a warranty of the machines, and the vendor is not liable for representations or warranties made by the local dealer, and an action against it on such warranty is properly nonsuited. *Ford v. Willys-Overland*, 197 N. C. 147, 147 S. E. 822.

Evidence tending to show that the plaintiff was injured by an explosion of a cartridge which the defendant's young son threw in defendant's store on Saturday when the son was helping his father therein, is insufficient to hold his father liable in damages, and defendant's motion as of nonsuit is properly granted. *Norman v. Porter*, 197 N. C. 222, 143 S. E. 41.

A contract of hire at a stipulated hourly wage, without

reference to the number of hours the employment was to continue, gives the employee no right of action for damages because he was employed a fewer number of hours than other employees engaged at the same time, and it was not error to nonsuit the plaintiff under this section. *Sherrill v. Graham County*, 205 N. C. 178, 170 S. E. 636.

Where plaintiff's evidence tended to show plaintiff was not acting within the scope of his employment at the time of the injury, defendant's motion as of nonsuit should have been allowed, plaintiff being sui juris. *Colvin v. Atlantic Coast Line R. Co.*, 205 N. C. 168, 170 S. E. 639.

In an action by an employee against her employer to recover for personal injury alleged to have resulted from the employer's negligence, it was held that where there was no evidence of any negligence on the part of defendant employer, the evidence tending to show that the injury resulted solely from the act of plaintiff's fellow-servant, a judgment as of nonsuit should be sustained under this section. *Armstrong v. Acme Spinning Co.*, 205 N. C. 553, 172 S. E. 313.

Where the evidence tended to show the negligence of a municipality in the care of its streets, it was held that to be liable the danger must be of an unusual character and one that exposes travelers to unusual hazards, and that a demurrer to the evidence should be properly sustained unless danger was shown. *Haney v. Lincoln*, 207 N. C. 282, 176 S. E. 573.

Contributory Negligence.—The burden of proof on an issue as to contributory negligence rests upon the defendant, and while the court can hold that a party upon whom rests the burden of proof has failed to offer any evidence to sustain it, it cannot adjudge that he has proved his case, for where there is any evidence the jury alone can pass upon its truth. *Sims v. Lindsay*, 122 N. C. 678, 30 S. E. 19.

One defendant's motion to nonsuit on the ground that the negligence of his codefendant insulated his alleged negligence, is properly refused when the evidence tends to show that the injury was the result of the joint and concurrent negligence of the defendants. *Lewis v. Hunter*, 212 N. C. 504, 193 S. E. 814.

A judgment of involuntary nonsuit on the ground of contributory negligence of the plaintiff cannot be rendered unless the evidence is so clear on that issue that reasonable minds could draw no other inference. *Manheim v. Blue Bird Taxi Corp.*, 214 N. C. 689, 691, 200 S. E. 682.

A judgment of nonsuit upon the evidence may not be granted under this section when there is legal evidence of the employer's negligence upon the sole ground of the plaintiff's contributory negligence. *Inge v. Seaboard Air Line R. Co.*, 192 N. C. 522, 135 S. E. 522.

Where the plaintiff's evidence made out a case of negligence, and contributory negligence was relied upon as a defense, under this section it was not error to refuse to dismiss the action. *Wood v. Bartholomew*, 122 N. C. 177, 29 S. E. 959.

But where the evidence on the part of the plaintiff (the defendant having introduced none) is demurred to, and if true, establishes negligence on the part of the plaintiff, and of the defendant, concurrent to the last moment, a judgment as of nonsuit, sustaining the demurrer, is proper. *Neal v. Carolina Central R. Co.*, 126 N. C. 634, 36 S. E. 117. See *Hollingsworth v. Skelding*, 142 N. C. 246, 55 S. E. 212.

Contributory negligence may be taken advantage of on a motion as of nonsuit when the plaintiff's own evidence tends only to establish it. *Elder v. Plaza Ry.*, 194 N. C. 617, 140 S. E. 298. See also *Hendrix v. So. R. Co.*, 198 N. C. 142, 144, 150 S. E. 873; *Ramsey v. Nash Furniture Co.*, 209 N. C. 165, 170, 183 S. E. 536; *Hinshaw v. Pepper*, 210 N. C. 573, 187 S. E. 786; *Owens v. Atlantic Coast Line R. Co.*, 207 N. C. 856, 857, 175 S. E. 717; *Godwin v. Atlantic Coast Line R. Co.*, 220 N. C. 281, 17 S. E. (2d) 137.

Originally, under this section, in cases to which it was applicable, there was considerable doubt as to whether a plea of contributory negligence—the burden of such issue being on the defendant—could be taken advantage of on a motion to nonsuit, but it is now well settled that such may be done when the contributory negligence of the plaintiff is established by his own evidence, as he thus proves himself out of court. *Hayes v. Western Union Tel. Co.*, 211 N. C. 192, 193, 189 S. E. 499.

In an action for wrongful death at a railroad crossing it was held that the defendant's motion as of nonsuit should have been sustained on the issue of contributory negligence. *Harrison v. North Carolina R. Co.*, 194 N. C. 656, 140 S. E. 598.

Same—Logging Railroad Employee.—As the contributory negligence of a logging railroad employee under §§ 28-173, 60-67, and 60-70 does not bar the recovery of damages for his death when engaged in performance of his duties, defendant's motion for judgment as of nonsuit is properly

refused. *Brooks v. Suncrest Lumber Co.*, 194 N. C. 141, 138 S. E. 532.

Same—Evidence Sufficient to Deny Nonsuit.—Where the failure of defendant employer to furnish the plaintiff, its employee, a safe place to work, concurs with the negligence of a fellow servant in proximately causing the injury in suit, the defendant is liable in damages for the consequent injury, and his motion as of nonsuit upon the evidence, under this section is properly denied. *Beck v. Thomasville Chair Co.*, 188 N. C. 743, 125 S. E. 615.

Where there is evidence that the defendant railroad company negligently coupled a car under which the deceased was at work to its train, causing his death, the fact that the deceased was guilty of contributory negligence in failing to place the customary signals where he was at work, does not entitle the defendant to a judgment as of nonsuit. *Ritchie v. Denton R. Co.*, 192 N. C. 666, 26 S. E. 136.

Where a railroad company has for some time kept a watchman to warn travelers crossing its tracks at a public street and this is known to the plaintiff, who was injured by a train while attempting to cross, the absence of the watchman and the failure to give warning is an implied invitation to the traveler to cross, which may be considered by the jury and the defendant's motion as of nonsuit upon the evidence is properly denied. *Barber v. Southern R. Co.*, 193 N. C. 691, 138 S. E. 17.

See, also, *Brooks v. Suncrest Lumber Co.*, 194 N. C. 141, 138 S. E. 532.

Same—Demurrer Sustained.—Where the plaintiff was employed by defendant, and defendant's superintendent, as a matter of accommodation, invited the plaintiff to ride to his home in an automobile furnished him by defendant, during which ride plaintiff was injured as a result of the superintendent's negligent driving, it was held that defendant's demurrer to the evidence should have been sustained. *Peters v. Great Atlantic & Pacific Tea Co.*, 194 N. C. 172, 138 S. E. 595.

Where the evidence tended to show that plaintiff's inattention was negligent up to the time of the injury and the doctrine of the "last clear chance" is inapplicable, it was held that defendant's demurrer to the evidence should have been sustained. *Lemings v. Southern Ry. Co.*, 211 N. C. 499, 191 S. E. 39.

Evidence Sufficient to Deny Nonsuit.—See *Niblock v. Blue Bird Taxi Co.*, 208 N. C. 737, 182 S. E. 330; *Hampton v. Thomasville Coca-Cola Bottling Co.*, 208 N. C. 331, 180 S. E. 584; *Dilling v. Federal Life Ins. Co.*, 209 N. C. 546, 183 S. E. 752; *Daniels v. Swift & Co.*, 209 N. C. 567, 183 S. E. 748; *Teseneer v. Henrietta Mills Co.*, 209 N. C. 615, 184 S. E. 535; *Roberts v. Grogan*, 222 N. C. 30, 21 S. E. (2d) 829.

Sufficiency of Evidence May Be Res Judicata on Second Appeal.—Where the Supreme Court has ruled on a former appeal that the evidence was sufficient to overrule defendant's motion as of nonsuit under this section, and the evidence upon the second trial is substantially the same, the question of the sufficiency of the evidence is res judicata and will not be considered on the second appeal. *Jernigan v. Jernigan*, 207 N. C. 831, 178 S. E. 587.

Setting Aside after Refusal of Motion.—Where the trial court has refused to grant the defendant's motion as of nonsuit, he may not set aside the verdict on the ground of the insufficiency of the evidence as a matter of law, but may do so only as a matter within his discretion. *Lee v. Penland*, 200 N. C. 340, 157 S. E. 31.

Ejectment.—On a trial in an action of ejectment, where the question involved is whether a tenant holding over the possession from a former owner had agreed to pay rent to the purchaser, and the evidence is conflicting, a motion as of nonsuit is properly denied. *Carnegie v. Perkins*, 191 N. C. 412, 131 S. E. 750.

However it is error for the judgment to incorporate an adjudication in defendant's favor as to his title, as such is only permissible on affirmative findings sufficient to justify it. *Moore v. Miller*, 179 N. C. 396, 102 S. E. 627.

Where the defendant denied being in possession, but there was evidence that he was present at a survey made for the plaintiff, and claimed to be the owner, pointed to wood he had cut upon it, and forbade the surveyor to enter on it, a judgment of nonsuit was improper. *Cowles v. McNeill*, 125 N. C. 385, 34 S. E. 499.

Where, in an action to recover damages for procuring the sheriff to wrongfully seize and sell plaintiff's property, the complaint alleged that the sheriff sold his property under an execution, it was incumbent on the plaintiff to show on the trial that the seizure and sale were unlawful, and upon his failure to offer any evidence as to the invalidity of the judgment, it was not error to nonsuit the plaintiff under this section. *O'Brian v. Wilkerson*, 122 N. C. 304, 30 S. E. 126.

Agency.—Where there is evidence to show that defendant's

night watchman was employed to perform his duties only within a certain enclosure; that he had been deputized to act for defendant as special policeman; that he had arrested the plaintiff at a remote place on the mill settlement property, where he was not authorized to guard, and caused his incarceration in the city jail; that the case was dismissed by the justice of the peace for the lack of evidence and the plaintiff finally discharged: It was held, a question for the jury in plaintiff's action for damages, of whether the defendant's night watchman was acting within the scope of his employment and a motion of nonsuit upon the evidence was properly denied. *Butler v. Holt-Williamson Mfg. Co.*, 182 N. C. 547, 109 S. E. 559.

New Trial Granted.—In an action to set aside a sale of lands under a former judgment defendants moved to nonsuit at the close of the plaintiff's evidence, but did not renew the motion at the close of the plaintiff's evidence. As fraud was alleged, which plaintiff might show, a new trial was granted by the Supreme Court instead of dismissing the action. *Rackley v. Roberts*, 147 N. C. 201, 60 S. E. 975.

Joinder in Demurrer.—No judgment can be rendered upon a demurrer to the evidence, until there is a joinder in demurrer. *Fowle v. Alexandria*, 11 Wheat. 320, 6 L. Ed. 484. But it is a matter of discretion with a court, whether it will compel a party to join in demurrer to evidence. *Young v. Black*, 7 Cranch 565, 3 L. Ed. 440.

One party cannot insist upon the other party joining in demurrer, without distinctly admitting upon the record, every fact, and every conclusion, which the evidence given for his adversary conduced to prove. *Young v. Black*, supra.

Applied in Sakellaris v. Wyche, 205 N. C. 173, 170 S. E. 638; *Love v. Queen City Lines*, 206 N. C. 575, 576, 174 S. E. 514; *Keith v. Liggett, etc.*, *Tobacco Co.*, 207 N. C. 645, 178 S. E. 90.

Applied, in action for sale of land to pay debts of intestate, in *Chambers v. Byers*, 214 N. C. 373, 199 S. E. 398; in action for damages to plaintiff's land caused by defendant's dam, in *Sink v. Lexington*, 214 N. C. 548, 200 S. E. 4; in action for damages due to defective food, in *Scott v. Swift & Co.*, 214 N. C. 580, 200 S. E. 21; in action for slander, in *Bryant v. Reedy*, 214 N. C. 748, 200 S. E. 896; in action on a contract of settlement with defendant bank, in *Jones v. Bank of Chapel Hill*, 214 N. C. 794, 1 S. E. (2d) 135; in action for reformation of a mortgage, in *Lowery v. Wilson*, 214 N. C. 800, 200 S. E. 861; in action by tenant to recover for breach of a half-share farming contract, in *Doyle v. Whitley*, 214 N. C. 814, 200 S. E. 888; in action to recover for damages to private lands resulting from the operation by a city of its sewage disposal plant, in *Ivester v. Winston-Salem*, 215 N. C. 1, 1 S. E. (2d) 88; in action by a student to compel defendant university to award certain degrees, in *Pate v. Duke University*, 215 N. C. 57, 1 S. E. (2d) 127; in action by plaintiff to recover for an injury received at a night baseball game, in *Cates v. Cincinnati Exhibition Co.*, 215 N. C. 64, 1 S. E. (2d) 131; in action by a minor employee to recover for injuries received from an unguarded saw, in *McLaughlin v. Black*, 215 N. C. 85, 1 S. E. (2d) 130; in action by guest passenger on motorcycle to recover for injuries when the motorcycle collided with a car, in *Mason v. Johnston*, 215 N. C. 95, 1 S. E. (2d) 379; in action by plaintiff to recover for injuries sustained from falling over roots of trees in defendant municipality, in *Finch v. Spring Hope*, 215 N. C. 246, 1 S. E. (2d) 634.

Applied in *Davenport v. Pennsylvania Fire Ins. Co.*, 207 N. C. 861, 177 S. E. 187; *Burns v. Charlotte*, 210 N. C. 48, 185 S. E. 443; *Woodley v. Combs*, 210 N. C. 482, 187 S. E. 762; *Ollis v. Board of Education*, 210 N. C. 489, 187 S. E. 772; *Exum v. Baumrind*, 210 N. C. 650, 188 S. E. 200; *Joyner v. Dail*, 210 N. C. 663, 188 S. E. 209; *Dixson v. Johnson Realty Co.*, 209 N. C. 354, 183 S. E. 382; *Queen v. DeHart*, 209 N. C. 414, 184 S. E. 7; *McGraw v. Southern Ry. Co.*, 209 N. C. 432, 184 S. E. 31; *Jackson v. Scheiber*, 209 N. C. 441, 184 S. E. 17; *Williams v. Greensboro Fire Ins. Co.*, 209 N. C. 765, 185 S. E. 21; *Federal Life Ins. Co. v. Nichols*, 209 N. C. 817, 185 S. E. 10; *Betts v. Jones*, 208 N. C. 410, 181 S. E. 334; *Planters' Nat. Bank, etc., Co. v. Atlantic Coast Line R. Co.*, 208 N. C. 574, 181 S. E. 635; *Cordell v. Brotherhood of Locomotive Firemen, etc.*, 208 N. C. 632, 182 S. E. 141; *Morris v. Seashore Transp. Co.*, 208 N. C. 807, 182 S. E. 487; *Anderson v. American Mut. Liability Ins. Co.*, 211 N. C. 23, 188 S. E. 642; *Wilson v. Perkins*, 211 N. C. 110, 189 S. E. 179; *Kelly v. Hunsucker*, 211 N. C. 153, 189 S. E. 664; *Yates v. Thomasville Chair Co.*, 211 N. C. 200, 189 S. E. 500; *Breece v. Standard Oil Co.*, 211 N. C. 211, 189 S. E. 498; *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 213, 189 S. E. 873; *Cashatt v. Brown*, 211 N. C. 367, 190 S. E. 480; *Stovall v. Ragland*, 211 N. C. 536, 190 S. E. 899; *Jackson v. Thomas*, 211 N. C. 634, 191 S. E.

327; *Creech v. Sovereign Camp, W. O. W.*, 211 N. C. 658, 191 S. E. 840; *Smith v. Sink*, 211 N. C. 725, 192 S. E. 108.

Cited in Daniels v. Fowler, 123 N. C. 35, 31 S. E. 598; *State v. Cooke*, 176 N. C. 731, 97 S. E. 171; *White v. Boyd*, 124 N. C. 177, 32 S. E. 495; *Gore v. Wilmington*, 194 N. C. 450, 452, 140 S. E. 71; *Boswell v. Tabor*, 196 N. C. 196, 145 S. E. 17; *Standard Supply Co. v. Vance Plumbing, etc., Co.*, 195 N. C. 629, 632, 143 S. E. 248; *Abel v. Dworsky*, 195 N. C. 867, 142 S. E. 475; *Southerland v. Crump*, 195 N. C. 856, 857, 142 S. E. 7; *Tyler v. Atlantic Coast Line R. R. Co.*, 194 N. C. 800, 801, 139 S. E. 773; *Cox v. Albemarle Drainage District*, 195 N. C. 264, 266, 141 S. E. 885; *Ogle v. Black Mountain Ry. Co.*, 195 N. C. 795, 797, 143 S. E. 833; *Tate v. Parker*, 196 N. C. 499, 501, 146 S. E. 85; *Askew v. Interstate Hotel Co.*, 195 N. C. 456, 457, 142 S. E. 590; *Morris v. Cleve*, 197 N. C. 253, 254, 148 S. E. 253; *Hemphill v. Standard Oil Co.*, 197 N. C. 339, 340, 148 S. E. 443; *Stamey v. Suncrest Lumber Co.*, 197 N. C. 391, 392, 148 S. E. 436; *Frady v. Harris Granite Quarries Co.*, 198 N. C. 207, 208, 151 S. E. 246; *Groves Mills v. Carolina & N. R. Co.*, 197 N. C. 388, 389, 148 S. E. 441; *Farr v. Tallassee Power Co.*, 198 N. C. 247, 151 S. E. 242; *George v. Smathers*, 198 N. C. 212, 151 S. E. 194; *Gibson v. Leaksville Cotton Mills*, 198 N. C. 267, 151 S. E. 251; *Conley v. Cable*, 198 N. C. 298, 299, 151 S. E. 645; *Houck v. American Eagle Fire Ins. Co.*, 198 N. C. 303, 304, 151 S. E. 628; *Moseley v. Atlantic Coast Line R. Co.*, 197 N. C. 628, 633, 150 S. E. 184; *Bonapart v. Nissen*, 198 N. C. 180, 151 S. E. 94; *Harper v. Bullock*, 198 N. C. 448, 152 S. E. 405; *Sheppard v. Jackson*, 198 N. C. 627, 628, 152 S. E. 801; *Hawkins v. Rowland Lumber Co.*, 198 N. C. 475, 152 S. E. 169; *Smith v. Aetna Life Ins. Co.*, 198 N. C. 573, 581, 152 S. E. 688; *Begnall v. Safety Coach Line*, 198 N. C. 688, 153 S. E. 264; *Nat. Exch. Bank v. Sklut*, 198 N. C. 589, 592, 152 S. E. 697; *Morris v. Y. and B. Corp.*, 198 N. C. 719, 721, 153 S. E. 335; *Morris v. Y. and B. Corp.*, 198 N. C. 705, 153 S. E. 327; *Berry v. Inter-Carolina Motor Bus Co.*, 198 N. C. 817, 818, 151 S. E. 245; *Citizen's Lumber Co. v. Elias*, 199 N. C. 103, 111, 154 S. E. 54; *Southerland v. Crump*, 199 N. C. 111, 112, 153 S. E. 845; *Smith v. Wharton*, 199 N. C. 246, 250, 154 S. E. 12; *Pyatt v. Southern R. Co.*, 199 N. C. 397, 402, 154 S. E. 847; *Eaker v. International Shoe Co.*, 199 N. C. 379, 381, 154 S. E. 667; *Lane v. Paschall*, 199 N. C. 364, 154 S. E. 626; *Gruber v. Ewbanks*, 199 N. C. 335, 338, 154 S. E. 318; *Reich v. Triplett*, 199 N. C. 678, 155 S. E. 573; *Chambers v. Winston-Salem, etc., R. Co.*, 199 N. C. 682, 685, 155 S. E. 571; *Dix v. High Point, etc., R. Co.*, 199 N. C. 651, 652, 155 S. E. 448; *Winfree v. Seaboard, etc., R. Co.*, 199 N. C. 590, 591, 155 S. E. 259; *Duncan v. Gulley*, 199 N. C. 552, 556, 155 S. E. 244; *Denny v. Snow*, 199 N. C. 773, 774, 155 S. E. 874; *Merritt v. Charlotte, etc., Foundry Co.*, 199 N. C. 775, 777, 155 S. E. 873; *Flythe v. Lassiter*, 199 N. C. 804, 805, 153 S. E. 844; *Greene v. Carroll*, 205 N. C. 459, 171 S. E. 627; *Sharp v. Latham*, 205 N. C. 827, 828, 170 S. E. 654; *Holland v. Dulin*, 205 N. C. 202, 203, 170 S. E. 784; *Bell's Department Store v. Washington Fire Ins. Co.*, 208 N. C. 267, 270, 180 S. E. 63; *Reid v. Reid*, 206 N. C. 1, 3, 173 S. E. 10; *Lipe v. Citizens' Bank, etc., Co.*, 206 N. C. 24, 29, 173 S. E. 316; *Bowie v. Tucker*, 206 N. C. 56, 59, 173 S. E. 28; *High Point v. Brown*, 206 N. C. 664, 175 S. E. 169; *Rand v. Home Ins. Co.*, 206 N. C. 760, 174 S. E. 749; *Lamm v. Lamm*, 206 N. C. 905, 173 S. E. 309; *Hanson v. Dickson*, 206 N. C. 912, 174 S. E. 442; *Security Nat. Bank v. Bridgers*, 207 N. C. 91, 176 S. E. 295; *Davis v. Alexander*, 207 N. C. 417, 177 S. E. 417; *Alexander v. Southern Public Utilities Co.*, 207 N. C. 438, 177 S. E. 427; *Gaffney v. Phelps*, 207 N. C. 553, 555, 178 S. E. 231; *Hinton v. West*, 207 N. C. 708, 178 S. E. 356; *Garren v. Youngblood*, 207 N. C. 86, 176 S. E. 252; *Bank of Beaufort v. Commercial Nat. Bank*, 207 N. C. 216, 176 S. E. 734; *Oliver v. Hecht*, 207 N. C. 481, 177 S. E. 399; *James v. Carolina Coach Co.*, 207 N. C. 742, 178 S. E. 607; *Lincoln v. Atlantic Coast Line R. Co.*, 207 N. C. 787, 178 S. E. 601; *Gasque v. Asheville*, 207 N. C. 821, 178 S. E. 848; *Whitehurst v. Elks*, 212 N. C. 93, 192 S. E. 850; *In re West*, 212 N. C. 189, 193 S. E. 137; *Young v. Lucas*, 212 N. C. 194, 193 S. E. 25; *Talley v. Murchison*, 212 N. C. 205, 193 S. E. 148; *Batton v. Atlantic Coast Line R. Co.*, 212 N. C. 256, 193 S. E. 674; *Lee v. Atlantic Coast Line R. Co.*, 212 N. C. 340, 193 S. E. 395; *Payne-Farris Co. v. Kuester*, 212 N. C. 545, 193 S. E. 707; *Lofin v. High Point, etc., R. Co.*, 212 N. C. 595, 194 S. E. 104; *Seymour v. Peoples Bank*, 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682; *Grimsley v. Scott*, 213 N. C. 110, 195 S. E. 83; *Sitton v. Twigg*, 213 N. C. 261, 195 S. E. 801; *Smith v. Phillips*, 213 N. C. 339, 196 S. E. 305; *Fenner v. Tucker*, 213 N. C. 419, 196 S. E. 357; *Odum v. National Oil Co.*, 213 N. C. 478, 196 S. E. 823; *Jinkins v. Rose's*, 5, 10 and 25c. Stores, 213 N. C. 606, 197 S. E. 174; *Taylor v. Atlantic Coast Line R. Co.*, 213 N. C. 671, 197 S. E. 159; *Keith v. Gregg*, 210 N. C. 802, 188 S. E. 849;

Stallings v. Keeter, 211 N. C. 298, 190 S. E. 473; *Little v. Rhyne*, 211 N. C. 431, 190 S. E. 725; *Noland Co. v. Jones*, 211 N. C. 462, 190 S. E. 720; *Long v. Melton*, 218 N. C. 94, 10 S. E. (2d) 699; *Mack v. Marshall Field & Co.*, 218 N. C. 697, 12 S. E. (2d) 235; *George v. Winston-Salem Southbound R. Co.*, 217 N. C. 684, 9 S. E. (2d) 373; *Clarke v. Martin*, 215 N. C. 405, 2 S. E. (2d) 10.

§ 1-184. Waiver of jury trial.—Trial by jury may be waived by the several parties to an issue of fact, in actions on contract, and with the assent of the court in other actions, in the manner following:

1. By failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent, entered in the minutes. (Rev., s. 540; Code, s. 416; C. C. P., s. 240; C. S. 568.)

Cross References.—As to waiver of jury trial, see the North Carolina Constitution, Article IV, section 13. As to provision for trial of issue of fact by jury, see § 1-172. As to reference of issues, fact or law, by consent, see § 1-185.

Consent Necessary.—A party cannot be deprived of the right to a trial by jury except by his own consent. *Key-stone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427.

Methods of Waiver.—The waiver of a jury trial by consent, must be in writing, filed with the papers in the case, or by oral consent entered on the minute-docket of the court. *Hahn v. Brinson*, 133 N. C. 7, 45 S. E. 359.

Waiver by Failure to Make Motion in Apt Time.—The parties to an action may waive their right to trial by jury guaranteed by our State Constitution, Article IV, § 13, but the manner of such waiver is governed by this section, and where the plaintiff in mandamus proceedings to compel a power company to furnish it electricity for redistribution to its customers at retail fails to move in apt time for the preservation of its right to trial by jury under § 1-513, but makes such motion after the judge has heard the evidence and argument, and is ready to decide the facts at issue and enter judgment thereon, the motion is not made in apt time, and the right to trial by jury is waived. *Holmes Electric Co. v. Carolina Power & Light Co.*, 197 N. C. 766, 150 S. E. 621.

Reference.—If a reference is made by consent it is a mode of trial selected by the parties and is a waiver of the right of trial by a jury. *Green v. Castlebury*, 70 N. C. 21; *Green v. Castleberry*, 77 N. C. 164. See § 1-188 and notes thereto.

Consent Necessary to Vacate Waiver.—Consent to waiver under this section binds both parties until it is vacated by common consent. *Morisey v. Swinson*, 104 N. C. 555, 10 S. E. 754.

Failure to Object.—Failure to object to an order of reference at the time it is made is equivalent to consent. *Key-stone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427.

Judge May Disregard Waiver.—The trial judge, in the exercise of a sound discretion, may disregard the agreement of the parties that a jury trial shall be waived. *Lumber Co. v. Lumber Co.*, 137 N. C. 431, 49 S. E. 946.

Review of Decision Refusing to Submit Issues.—Where after the jury has been empanelled the parties to an action on a note admit facts sufficient to support a judgment determining the rights of the parties under the law applicable to such facts, the refusal of the court to submit issues to the jury will be upheld in view of this section. *Federal Reserve Bank v. Jones*, 205 N. C. 648, 172 S. E. 185.

Applied in Blades v. Wilmington Trust Co., 207 N. C. 771, 772, 178 S. E. 565; *Shore v. Norfolk Nat. Bank of Commerce*, 207 N. C. 798, 178 S. E. 572; *Best v. Garriss*, 211 N. C. 305, 190 S. E. 221.

Cited in Governor v. Lassiter, 83 N. C. 38; *Caldwell v. Wilson*, 121 N. C. 425, 526, 28 S. E. 554; *Green Sea Lumber Co. v. Pemberton*, 188 N. C. 532, 125 S. E. 119; *Brown v. Sheets*, 197 N. C. 268, 271, 148 S. E. 233.

§ 1-185. Findings of fact and conclusions of law by judge.—Upon trial of an issue of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately. Upon trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision must be filed with the clerk during the court at which the trial takes place, and judgment upon it shall be entered accordingly. (Rev., s. 541; Code, s. 417; C. C. P., s. 241; C. S. 569.)

Cross Reference.—As to how the issue shall be tried, see § 1-172.

Consent Necessary.—On the trial of a civil action a jury was sworn and impaneled and issues framed, but no evidence adduced on either side, and the jury was discharged without rendering a verdict, it was held that the judge had no right to pass upon the issues, except upon a waiver of jury trial in accordance with this section. *Chasteen v. Martin*, 81 N. C. 51.

Sufficient Compliance.—Where the court does nothing more than indicate from what source the facts may be gleaned, it is not a sufficient compliance with the requirements of this section that the court's decision shall contain a statement of the facts found. *Shore v. Norfolk National Bank of Commerce*, 207 N. C. 798, 799, 178 S. E. 572.

Separate Conclusions of Facts and Law.—A judge of the Superior Court, in passing upon a mixed question of law and fact, should, as required by this section, state the facts found and the conclusions of law separately. *Foushee v. Pattershall*, 67 N. C. 453; *Walker v. Walker*, 204 N. C. 210, 167 S. E. 818. See also, *Harrison v. Brown*, 222 N. C. 610, 613, 24 S. E. (2d) 470.

The decision of the judge in writing, with a separate statement of his findings of fact and conclusions of law is sufficient under this section. *Eley v. Atlantic, etc., R. Co.*, 165 N. C. 78, 80 S. E. 1064.

Where the court fully and completely sets out the facts found by him and renders judgment thereon, an exception that the court did not state his findings of fact and conclusions of law separately as required by this section, cannot be sustained, since the judgment constitutes the court's conclusion of law on the facts found. *Dailey v. Washington Nat. Ins. Co.*, 208 N. C. 817, 182 S. E. 332.

Findings of Judge Conclusive.—When a trial by jury has been waived by the parties for the judge to find the facts his findings thereof are conclusive on appeal if there is evidence to support them. *Eley v. Atlantic, etc., R. Co.*, 165 N. C. 78, 80 S. E. 1064; *Yarborough v. Moore*, 151 N. C. 116, 65 S. E. 763.

Exceptions.—Where the judge has acted according to this section the relevant and pertinent facts found by him are conclusive on appeal when there is sufficient legal evidence to support them. An exception to a finding of fact on the ground that there was no evidence thereof, must be made in apt time before the judge. *Buchanan v. Clark*, 164 N. C. 56, 80 S. E. 424; *Best v. Garriss*, 211 N. C. 305, 190 S. E. 221.

Where the Court simply responded formally to the issues and directed judgment, to which no exception was taken, and no assignment of error was made, the judgment will be affirmed. *Parks v. Davis*, 98 N. C. 481, 4 S. E. 202.

Exception to Judgment Presents Only Question Whether Facts Found Support It.—An exception to a judgment rendered in a trial by the court, without exception to the evidence or the court's findings of fact, presents the sole question of whether the facts found support the judgment. *Best v. Garriss*, 211 N. C. 305, 190 S. E. 221.

Motion to Vacate Attachment.—This section is not applicable to a motion to vacate a warrant of attachment. *Millhiser v. Balsley*, 106 N. C. 433, 11 S. E. 314.

Judgment Granting Defendant's Motion as of Nonsuit.—Where cause is heard by the court by consent, its written judgment granting defendant's motion as of nonsuit is equivalent to a finding that all the evidence, considered in the light most favorable to plaintiffs, is insufficient to show facts entitling plaintiffs to recover on any issue raised by the pleadings, and is sufficient finding of facts by the court as required by this section. *Home Real Estate Loan, etc., Co. v. Carolina Beach*, 216 N. C. 778, 7 S. E. (2d) 13.

Cited in Surratt v. Dennis, 199 N. C. 757, 758, 155 S. E. 865.

Quoted in Berry v. Payne, 219 N. C. 171, 13 S. E. (2d) 217.

§ 1-186. Exceptions to decision of court.—1. For the purposes of an appeal, either party may except to a decision on a matter of law arising upon a trial by the court within ten days after the judgment, in the same manner and with the same effect as upon a trial by jury. Where the decision does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may except thereto, and make a case or exception as above provided in case of an appeal.

2. Either party desiring a review, upon the evidence appearing on the trial of the questions of

law, may at any time within ten days after the judgment, or within such time as is prescribed by the rules of the court, make a case or exceptions in like manner as upon a trial by jury, except that the judge in settling the case must briefly specify the facts found by him, and his conclusions of law. (Rev., s. 542; Code, s. 418; C. C. P., s. 242; C. S. 570.)

See the next foregoing section and the note thereto.

Editor's Note. — In *Green v. Castlebury*, 70 N. C. 20, which since its decision has been cited as the case par excellence on this section it was held that the right of appeal, and not the mere matter of making up the case, was the subject of this section.

In that case it was also decided that "case or exceptions" was a correct print and an attempt to point out that this section should read "case on exceptions" was erroneous.

Purpose of Section. — The main object of this section is to declare that the trial by the Court shall not be conclusive; but that just as an appeal lies when the trial is by jury, so an appeal lies when the trial is by the court. *Green v. Castlebury*, 70 N. C. 20, 25.

Exceptions Necessary. — Where the decision of all questions both of law and fact is left to the judge, his findings and conclusions will not be reviewed by the Supreme Court, unless exceptions appear to have been aptly taken, or error is distinctly pointed out. *Chastain v. Coward*, 79 N. C. 543.

§ 1-187. Proceedings upon judgment on issue of law.—On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by the first two subdivisions of section 1-211 herein upon failure of the defendant to answer, where the summons was personally served. If judgment is for the defendant, upon an issue of law, and if taking of an account or the proof of any fact is necessary to enable the court to complete the judgment, a reference or assessment by jury may be ordered, as provided in section 1-212 herein. (Rev., s. 543; Code, s. 419; C. C. P., s. 243; C. S. 571.)

Cited in *Ranson v. McClees*, 64 N. C. 17; *Morisey v. Swinson*, 104 N. C. 555, 10 S. E. 754.

Art. 20. Reference.

§ 1-188. By consent.—Any or all of the issues in an action, whether of fact or law, may be referred, upon the written consent of the parties, except in actions to annul a marriage, or for divorce and separation. (Rev., s. 518; Code, s. 420; C. C. P., s. 244; C. S. 572.)

Cross References.—As to how issues shall be tried, see § 1-172. As to compulsory reference, see § 1-189.

Editor's Note. — A trial by reference cannot have the effect of withdrawing the actions or the causes of action from the jurisdiction of the court. The referee, by consent of the parties, becomes a mere adjunct, and acts in the place of the court, and, in appropriate cases, in the place of the court and jury, in respect to the trial.

He must make a report of his proceedings and actions, and his report, unless objected to in the way prescribed, stands as the decision of the court, and on application to the judge, he may enter judgment upon the same.

If the judge does not formally find the facts, it is presumed that he accepts the facts as found by the referees.

A reference, by consent of the parties, of an entire cause, for the determination of its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. *Oteri v. Scalzo*, 145 U. S. 578, 12 S. Ct. 895, 36 L. Ed. 824.

It was not intended by this and the following sections to deprive parties of the right to refer all or any matters in controversy to arbitrators with power to make an award, which should be a rule of the court. It was said by the court in *Lusk v. Clayton*, 70 N. C. 185, 187, that "The parties can undoubtedly make such a reference, and the

only question possible would be whether the judge would recognize the award and make it a rule of court, enforceable by its process, or leave the parties to their action on the arbitration bond or other like remedy. We can not suppose it was intended to abolish so useful a mode of adjusting rights by indirection, and we think that the power to make an award a rule of court still exists as included to every court under its power to enter judgment by confession." It has often been held by the court that these sections have not repealed the common law practice of reference to arbitrators, and that the practice is still extant, notwithstanding them. See *Keener v. Goodson*, 89 N. C. 273, 276, and citations.

The common law practice was extant until the legislature of 1927 passed a statute regulating arbitration and award. This statute has been codified as §§ 1-544 et seq., and the notes written thereto which set forth the prior law, discuss the relation to this and the following sections, and set out pertinent annotations from cases construing similar provisions of the statutes of other states.

Definitions. — A reference has been defined as the act of sending any matter by a court of chancery, or (as in North Carolina), one exercising equitable powers, to a master or other officer, in order that he may ascertain facts and report to the court. *Bouv. Law Dict.*, title Reference.

Distinction between Consent and Compulsory Reference. — Where a reference is by consent, the parties waive the right to have any of the issues of fact passed on by a jury. Where the reference is compulsory, either party has the right to have all issues of fact which arise on the pleadings submitted to a jury, but not the questions of fact which arise on exceptions to the findings of fact by the referee. *State v. Askew*, 94 N. C. 194; *State v. Brown*, 70 N. C. 27.

What May Be Referred. — All or any of the issues in an action may be referred by consent of the parties. *Lusk v. Clayton*, 70 N. C. 184, 185, 187.

Waiver of Jury Trial. — A reference made by consent is a waiver of the right of trial by a jury. *Green v. Castlebury*, 70 N. C. 20; *In re Parker*, 209 N. C. 693, 184 S. E. 532; *Anderson v. McRae*, 211 N. C. 197, 189 S. E. 639.

Judge May Disregard Agreement to Refer. — The trial judge, in the exercise of a sound discretion, may disregard the agreement of parties that a reference shall be made. *Lumber Co. v. Lumber Co.*, 127 N. C. 431, 49 S. E. 946.

Strict Words of Statute Not Required. — It is proper that the agreement to refer should specify in terms the "issues of law and fact;" but where the purpose is obvious, the strict words of the statute will not be required. *Morisey v. Swinson*, 104 N. C. 555, 10 S. E. 754; *Vaughan v. Lewellyn*, 94 N. C. 472.

Order Entered of Record Sufficient. — An order of reference by consent entered of record is a sufficient compliance with this section requiring the same to be in writing. And when entered it must stand until a full report is made. *White v. Utley*, 86 N. C. 415.

Plea in Bar.—A reference of a cause cannot be ordered when anything is pleaded in bar of plaintiff's right of action, until such plea is tried. *Jones v. Beaman*, 117 N. C. 259, 23 S. E. 248.

Reference Does Not Deprive Court of Jurisdiction. — Sending a case to be tried by a referee does not deprive the court of its jurisdiction, and it can make any and all necessary orders therein pending the trial before the referee. *McNeill v. Lawton*, 97 N. C. 16, 1 S. E. 493.

Plaintiff May Take Non-Suit.—A plaintiff may take a non-suit while the case is pending before a referee, if the case be one in which he is entitled to do so. *McNeill v. Lawton*, 97 N. C. 16, 1 S. E. 493.

No Appeal from Order of Reference. — Upon a consent reference to try a cause, the question as to whether all the issues raised by the pleadings are to be considered depends upon the extent of the agreement of the parties, and the finding of the trial court is conclusive. *Barrett v. Henry*, 85 N. C. 322.

Referee Must Discharge Duties. — The referee selected by the parties must remain in the discharge of his duties, unless with like consent another is substituted in his place, until the order has been fully executed and the final report made. *Perry v. Tupper*, 77 N. C. 413.

Referee's Report Set Aside. — When for cause the referee's report is set aside, the order of reference is not thereby revoked; it continues, and a second trial may be had before the same referee, although a party may not consent to such a second trial. *Flemming v. Roberts*, 77 N. C. 415.

Consent Necessary to Vacate Reference. — Where an action is once referred the order of reference cannot be annulled except by the consent of all parties. *Keystone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427; *Morisey*

v. Swinson, 104 N. C. 555, 10 S. E. 754. Unless a sufficient cause therefor is made to appear. *Patrick v. Richmond*, etc., R. Co., 101 N. C. 602, 8 S. E. 172.

Cited in *Green Sea Lumber Co. v. Pemberton*, 188 N. C. 532, 125 S. E. 119; *Andrews v. Jordan*, 205 N. C. 618, 623, 172 S. E. 319.

§ 1-189. Compulsory.—Where the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1. Where the trial of an issue of fact requires the examination of a long account on either side; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein.

2. Where the taking of an account is necessary for the information of the court, before judgment, or for carrying a judgment or order into effect.

3. Where the case involves a complicated question of boundary, or one which requires a personal view of the premises.

4. Where a question of fact other than upon the pleadings arises upon motion or otherwise, in any stage of the action.

5. Where the issues of fact and questions of fact arise in an action of which the courts of equity of the state had exclusive jurisdiction prior to the adoption of the constitution of one thousand eight hundred and sixty-eight, and in which the matter or amount in dispute is not less than the sum or value of five hundred dollars.

The compulsory reference under this section does not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial shall be only upon the written evidence taken before the referee. (Rev., s. 519; Code, s. 421; 1897, c. 237, ss. 1, 2; C. C. P., s. 245; 1917, c. 280; 1919, c. 7; C. S. 573.)

I. Editor's Note.

II. General Consideration.

III. Illustrative Cases.

I. EDITOR'S NOTE.

Editor's Note.—It is the order of reference that extends the jurisdiction and controls the relation of the court to the trial by referees of the issues of fact and law, and extends its authority to compel the parties to the action, by proper judgments and orders in the regular course of procedure, to do and submit to what ought to be done as the result of the reference.

The referee, once appointed, is like the judge when there is a waiver of a jury trial, invested with the powers of both judge and jury, but with the difference that the authority is conferred upon the referee not for a particular term or limited time, but until a final hearing of the cause.

The difficulty of examining or taking long and often complicated accounts in the progress of a trial, so as to enable a jury to reach a satisfactory conclusion in reference to the bearing of such evidence upon their verdicts, rendered it necessary to confer upon the trial judge the power to order compulsory reference for the purpose of making calculations and presenting results instead of data.

The right to refer by consent is without limit, but the court cannot order a compulsory reference except in the cases enumerated in this section. This distinction exists because in the compulsory reference the parties reserve their right to jury trial upon the coming in of the report of the referee, and as the parties will be subjected to expense and delay of two trials, it ought not to be resorted to for the trial of the issues raised by the pleadings, except when a long account, complicated boundary, or some other intricate questions arise which cannot be intelligently investigated before a jury (*Hall v. Craig*, 65 N. C. 51, 53; *Peyton v. Hamilton-Brown Shoe Co.*, 167 N. C. 280, 282, 83 S. E. 487). Where there is a plea in bar it must be disposed of before a reference for an account can be made. *Royster v. Wright*, 118 N. C. 152, 24 S. E. 746; *Oldham v. Rieger*, 145 N. C. 254, 255, 58 S. E. 1091. The reason of this rule is that it would be useless to take an account, if the plea in bar would defeat the plaintiff's action, if found for the

defendant. But it is otherwise where the matter pleaded in bar would not defeat the plaintiff's action, if found for the defendant. *Humble v. Mebane*, 89 N. C. 410. This is so for the reason that what is pleaded in bar is not a bar. See *Lee v. Thornton*, 176 N. C. 208, 97 S. E. 23.

When a reference is ordered for any of the reasons set forth in this section, it should appear clearly and affirmatively that the courts act upon the authority herein found. See *Kerr v. Hicks*, 133 N. C. 175, 177, 45 S. E. 529.

No order of reference should be permitted by the court until the pleadings are in and the parties are at issue. The failure to observe the law of procedure always results in confusion and too often in sacrifice of substantive rights.

In *State v. McKenzie*, 65 N. C. 102 it was held that a party had no right to demand a trial by jury of an issue involving a complicated account, but the court subsequently declared the ruling modified (*State v. Brown*, 70 N. C. 27; *Lippard v. Roseman*, 70 N. C. 34) so as to concede the right, if not barred by failure to demand it in apt time (*Keystone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427).

II. GENERAL CONSIDERATION.

Liberal Construed.—This section, allowing a compulsory reference by order of the trial judge, should be liberally construed, to expedite the trial of causes and to promote substantial justice between the parties litigant. *Murchison Nat. Bank v. Evans*, 191 N. C. 535, 132 S. E. 563.

Where several causes of action arising out of the same transaction or series of transactions are properly joined in the complaint, the court may not ordinarily order that one of them be referred to a referee, but under the facts and circumstances of this case the court's order of compulsory reference of one of the causes of action was upheld, it appearing that the action involved a long account and that the controversy was so involved that it could not be readily presented to a jury, this section being liberally construed to afford the salutary procedure therein provided. *Fry v. Pomona Mills*, 206 N. C. 768, 175 S. E. 156.

What Constitutes a "Long Account."—There is no statutory or judicial definition of a "long account," but a correct conclusion as to whether an account was "long" would depend upon the facts and circumstances of a given case, and the account in controversy was correctly classified as a "long account." *Dayton Rubber Mfg. Co. v. Horn*, 203 N. C. 732, 167 S. E. 42.

What constitutes a "long account" must be determined upon the facts of each particular case, it not being necessary that the action be for an accounting, it being sufficient if a long account is directly and not merely collaterally involved in the action. *Fry v. Pomona Mills*, 206 N. C. 768, 175 S. E. 156.

Where action was instituted to recover for services rendered defendant county by plaintiff as an attorney, plaintiff alleging as a basis of recovery, services rendered in a certain civil action and services rendered relating to twenty-one different transactions extending over a period of more than a year subsequent to the termination of the civil action, it could not be said as a matter of law that the cause of action does not require the consideration of a long account, and defendants' exception to the order of compulsory reference on this ground could not be sustained. *Grimes v. Beaufort County*, 218 N. C. 164, 10 S. E. (2d) 640.

No Waiver of Jury Trial.—By a compulsory reference the parties waive nothing, and are still entitled to a trial by jury, on the issues as if no reference had been made. *State v. Askew*, 94 N. C. 194; *Green v. Castlebury*, 70 N. C. 20.

But a failure to object to an order of reference, at the time it is made, is a waiver of the right to a trial by jury. *Belvin v. Raleigh Paper Co.*, 123 N. C. 138, 31 S. E. 655.

Exception to Order of Court.—By excepting to an order of court referring to a long account between the parties as determinative, a party may preserve his right to a trial by jury upon the evidence thus taken, unless he waives his right during the progress of the reference; and while an issue determinative of the action should first be tried before a reference is ordered, a party excepting to the order may not successfully insist thereon when the issue is to be determined solely by the reference provided for by this section. *Green Sea Lumber Co. v. Pemberton*, 188 N. C. 532, 125 S. E. 119.

A party duly and aptly excepting to an order of reference, and also to the admissions of evidence before the referee, and submitting issues, secures his right thereby to a trial by jury upon the issues presented by him. *Brown v. Buchanan*, 194 N. C. 675, 140 S. E. 749.

But the failure of a party to except to an order for compulsory reference and to file exceptions in apt time to particular findings of fact by the referee when the report is unfavorable and to tender issues on the exceptions

and demand a jury trial thereon will be deemed a waiver of his right to trial by jury. Section 1-189. *Booker v. Highlands*, 198 N. C. 282, 151 S. E. 635.

A party who would preserve his right to a jury trial in a compulsory reference must object to the order of reference at the time it is made, and on the coming in of the report of the referee. If it be adverse, he should reasonably file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. *Marshville Cotton Mills v. Maslin*, 200 N. C. 328, 329, 156 S. E. 484.

Where a case is one properly subject to a compulsory reference under this section, a party excepting to the order of reference is not entitled to have issues tendered upon the hearing of exceptions to the referee's report submitted to the jury when the issues do not arise upon the exceptions. *Atlantic Joint Stock Land Bank v. Fisher*, 206 N. C. 412, 173 S. E. 907.

Where defendant sets up no plea in bar, and the pleadings indicate the necessity of examining a long account between the parties, defendant's exception to an order for compulsory reference will not be sustained under this section. *Texas Co. v. Phillips*, 206 N. C. 355, 174 S. E. 115.

Common Law Arbitration. — The provisions of the code of Civil Procedure have not repealed the common law practice of reference to arbitrators. *Keener v. Goodson*, 89 N. C. 273, 276.

Judge of Probate Court Cannot Refer. — A judge of the court of probate cannot refer the taking of the account to a referee, and, if he does, the account will be set aside as irregularly taken. This section does not extend the jurisdiction of the probate judge. *Rowland v. Thompson*, 65 N. C. 110.

Power of Court to Vacate Reference.—Where the trial judge has ordered a compulsory reference upon the ground that the complaint stated a long and involved account, and where no exception is taken to the order by either party, the court is without authority to set aside the order of reference and submit the case to the jury when upon his rulings the referee has committed error in excluding certain evidence materially bearing upon the controversy. *American Trust Co. v. Jenkins*, 196 N. C. 428, 146 S. E. 68.

Motion to Refer Must Be Timely. — A motion for a compulsory reference should be made in an action before the jury has been impaneled, or the rights of a party thereto will be considered as waived. *Peyton v. Hamilton-Brown Shoe Co.*, 167 N. C. 280, 83 S. E. 487.

It is not error to refuse a compulsory reference, when the motion to refer is not until after the close of the evidence. *Hughes v. Boone*, 102 N. C. 137, 138, 9 S. E. 286.

Reference Should Follow Pleas. — A reference should not be ordered, after overruling a demurrer, until the pleadings are in and the parties are at issue. *Penn. Lumber Co. v. McPherson*, 133 N. C. 287, 45 S. E. 577.

Reference Precedes Court Adjudication of Liability. — A reference to hear and determine all matters in controversy, under this section, precedes any adjudication by the court of the liability of the parties. *Governor v. Lassiter*, 83 N. C. 38.

But it is irregular to proceed with a reference to state an account while there are matters of defense left open which, if sustained by evidence, would bar the claim to have such account. The issue raised by the replication should be submitted to the jury before ordering a reference to take the account demanded. *Sloan v. McMahon*, 85 N. C. 296.

Appeal before Judgment Premature. — In *Leroy v. Saliba*, 182 N. C. 575, 108 S. E. 303, it was said: "The jury having found that the partnership existed, an appeal from the order of reference before judgment upon the report thereon is premature and must be dismissed. The defendant should have noted his exception and upon the coming in of the report and exceptions thereto should have brought up his appeal from the final judgment."

When Non-Suit Allowed. — A plaintiff may take a non-suit while the case is pending before a referee, if the case be one in which he is entitled to do so. *McNeill v. Lawton*, 97 N. C. 16, 1 S. E. 493.

However, in cases purely equitable in their nature, if a reference for an account has been ordered and a report made, the plaintiff will not be allowed to take judgment of nonsuit. *Boyle v. Stallings*, 140 N. C. 524, 53 S. E. 346.

Jury Trial on Issues. — In a case of a compulsory reference either party may, at some stage of the proceedings to be determined by the Court, demand a trial by jury of the issues arising in the report of the referee. *State v. Brown*, 70 N. C. 27.

Plea in Bar Defeats Order of Reference. — When the

answer raises a plea in bar, which if established would end the action, a compulsory order of reference can not be properly ordered until such plea is decided. *Bank v. Fidelity, etc., Co.*, 126 N. C. 320, 35 S. E. 588; *Commissioners v. White*, 123 N. C. 534, 31 S. E. 670.

It is error for trial court to order a compulsory reference under this section before disposing of pleas in bar set up by defendants on the grounds of laches and the bar of the statute of limitations. *Graves v. Pritchett*, 207 N. C. 518, 177 S. E. 641.

A plea in bar such as will preclude a compulsory reference is one which extends to the whole cause of action so as to defeat it absolutely and entirely, and which if found in favor of the pleader will put an end to the case, leaving nothing further to be determined. *Grimes v. Beaufort County*, 218 N. C. 164, 10 S. E. (2d) 640.

A plea in bar of a reference is not conclusive unless it extends to the whole cause of action so as to defeat it absolutely and entirely. *Reynolds v. Morton*, 205 N. C. 491, 171 S. E. 781.

Pleas in Bar. — The following pleas have held to be pleas in bar: (1) Statute of Limitations. *Oldham v. Rieger*, 145 N. C. 254, 58 S. E. 1091. (2) Account stated. *Kerr v. Hicks*, 129 N. C. 141, 39 S. E. 797; *Kerr v. Hicks*, 131 N. C. 90, 42 S. E. 532; *Jones v. Wooten*, 137 N. C. 421, 49 S. E. 915. (3) Failure to comply with the provisions of a contract which are conditions precedent to liability. *Bank v. Fidelity, etc., Co.*, 126 N. C. 320, 35 S. E. 588. (4) Plea of sole seizin by reason of adverse possession of twenty years against a tenant in common. But plea of sole seizin which by its very terms involves an accounting, is not a good plea. *Duckworth v. Duckworth*, 144 N. C. 620, 57 S. E. 396. (5) Release. *McAuley v. Sloan*, 173 N. C. 80, 91 S. E. 701. (6) Accord and satisfaction. *McAuley v. Sloan*, 173 N. C. 80, 91 S. E. 701. (7) Estoppel by judgment. *Jones v. Beaman*, 117 N. C. 259, 23 S. E. 248. (8) Answer denying trust. *Reynolds v. Morton*, 205 N. C. 491, 171 S. E. 781.

Party Cannot Object to Reference. — A party to an action may not successfully object to a compulsory reference when the same is allowed by this section and the complaint states a good cause of action, and no complete plea in bar to the entire cause is set up by him. *Murchison Nat. Bank v. McCormick*, 192 N. C. 42, 133 S. E. 183.

Consent Necessary to Vacate Reference. — Where an action is once referred the order of reference cannot be annulled except by the consent of all parties. *Keystone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427.

Failure to Refer Not Error. — Where the controversy involves the taking of a long account, it should be referred but where it has otherwise been tried, without error or prejudice to the appellant, the judgment of the trial court will not be disturbed. *Ragland v. Lassiter-Ragland*, 174 N. C. 579, 94 S. E. 100.

Report of Referee as Evidence.—Compulsory references are authorized in certain instances by this section, but when such a reference is ordered under the statute neither party is deprived of his constitutional right to a trial by jury of the issues of fact arising on the pleadings. It is provided, however, that "such trial shall be only upon the written evidence taken before the referee." This refers to the testimony of all the witnesses taken down by the referee, or under his direction, signed by them, and returned to the court as a part of the record in the cause as required by § 1-193. But the report of the referee, consisting of his findings of fact and conclusions of law, would not be competent as evidence before the jury. See *Bradshaw v. Hilton Lumber Co.*, 172 N. C. 219, 90 S. E. 146. *Booker v. Highlands*, 198 N. C. 282, 285, 151 S. E. 635.

It has been said, however, that where an amendment to the pleadings is allowed, after the report is in, containing an additional charge, the parties ought to be allowed to offer evidence before the jury as to such charge, for it was not embraced in the reference. See *Moore v. Westbrook*, 156 N. C. 482, 72 S. E. 482. *Booker v. Highlands*, 198 N. C. 282, 285, 151 S. E. 635.

Applied in Marshville Cotton Mills v. Maslin, 200 N. C. 328, 156 S. E. 484; *Perry v. Pulley*, 206 N. C. 701, 702, 175 S. E. 89.

III. ILLUSTRATIVE CASES.

Location of Dividing Line.—A compulsory reference may be ordered by the trial judge in an action involving the true location of a dividing line between the owners of adjoining lands, in an action of trespass, and the wrongful cutting of timber, where the location of the line is complicated or requires a personal view of the premises. *Waller v. Dudley*, 194 N. C. 139, 138 S. E. 595.

Suit to Vacate Deed. — Where a suit to set aside a deed to lands, an action for possession, and a petition for dower, have been consolidated, an allegation of the wife's

adultery is in bar of the wife's right, and whether the compulsory order of reference be treated as one of consolidation and reference of the consolidated action, or a reference of each action and proceeding under one form, it is immaterial. *Lee v. Thornton*, 176 N. C. 208, 97 S. E. 23.

Reservation of Timber. — When a conveyance of lands reserved all the trees of a certain size on the date of the deed, it is error for the court to dissolve an order restraining the cutting of the trees solely upon the ground that it was impossible to ascertain at a later date which trees were of the required size on the date of the deed, as such may be fairly approximated by experts, who, upon the failure of the parties to agree, may be appointed by the court. *Kelly v. Enterprise Lumber Co.*, 157 N. C. 175, 72 S. E. 957.

Suit to Sell Corporation Assets. — Where a stockholder sued to compel the corporation to sell certain lands and distribute the proceeds among the stockholders, and the corporation claimed that such lands should have been included in a conveyance previously made by it to another corporation, but that they were omitted by mistake it was a proper case for a reference. *Pinchback v. Bessemer Min., etc., Co.*, 137 N. C. 171, 72, 49 S. E. 106.

Contract for Rent. — Where the question involved in the action is the amount of rent due under a contract placing the rental at not less than a certain monthly sum, with obligation of the lessee to pay more in accordance with what other tenants were paying in the locality for other stores, etc., of the same rental value, the question to be determined by the jury does not require a view of the premises, entitling the party requesting it to a compulsory reference under the provisions of this section. *Kearns v. Huff*, 191 N. C. 532, 193 S. E. 566.

Suit on Confessed Judgment. — A compulsory reference cannot be ordered by the court in a suit on a judgment confessed by the defendants as executors before the Civil War, where the only matters of defense are payments made by them in Confederate currency during the war, and alleged counter-claims for notes due from the plaintiffs to them as executors. *Hall v. Craig*, 65 N. C. 51.

Action by Ward against Guardian. — Where in an action by a guardian to impeach a former decree, it appeared that alleged expenditures for the benefit of the ward should be ascertained before final judgment, it was held not to be error in the court to direct a mistrial and order a reference. *Sutton v. Schonwald*, 80 N. C. 20.

Action on Administration Bond. — A plea in an answer to a complaint on an administration bond of "performance of the condition of the bond by payment to the next of kin," is good in substance, and an issue taken upon it may be the subject of a compulsory reference under this section. *Flack v. Dawson*, 69 N. C. 42.

Suit by Creditor against Executor. — In an action by a creditor against an executor if the defendant denies the debt, and also that he has assets, the issue as to the debt is tried in the ordinary way; and if the debt be established a reference is to be had to ascertain the amount of the debts and their several classes, and upon the coming in of the report a judgment will be entered in favor of all the creditors who have proved their debts, for such part of the fund as they may be entitled to. *Heilig v. Foard*, 64 N. C. 710.

Cited in *Wall v. Covington*, 76 N. C. 150; *Patrick v. Richmond*, etc., R. Co., 101 N. C. 602, 8 S. E. 172; *Lassiter v. Upchurch*, 107 N. C. 411, 414, 12 S. E. 63; *Dunn v. Johnson*, 115 N. C. 249, 258, 20 S. E. 390; *Kerr v. Hicks*, 133 N. C. 175, 45 S. E. 529; *Corporation Comm. v. Farmers, etc., Bank*, 192 N. C. 366, 135 S. E. 48; *Waller v. Dudley*, 194 N. C. 139, 138 S. E. 595; *Bank of Rose Hill v. Graham*, 198 N. C. 530, 132 S. E. 493; *Nissen v. Baker*, 198 N. C. 433, 152 S. E. 34, 38.

§ 1-190. How referee chosen or appointed.—In all cases of reference the parties as to whom issues are joined in the action (except when the defendant is an infant or an absentee) may agree in writing upon a person or persons, not exceeding three, and a reference shall be ordered to him or them, and to no other person or persons. And if such parties do not agree, the court shall appoint one or more referees, not more than three, who are free from exception. No person may be appointed referee to whom all parties in the action object. No judge or justice of any court may sit as referee in action pending in the court of which he is judge or justice, and not already referred,

unless the parties otherwise stipulate. (Rev., s. 520; Code, s. 423; C. C. P., s. 247; C. S. 574.)

§ 1-191. Referees may administer oaths.—Every referee has power to administer oaths in any proceeding before him, and has generally the power vested in a referee by law. (Rev., s. 521; Code, s. 599; C. C. P., s. 356; C. S. 575.)

§ 1-192. Powers of referee of trial.—The trial by referees shall be conducted in the same manner as a trial by the court. Referees have the same power to grant adjournments and to allow amendments to pleadings and to the summons as the court upon such trial, upon the same terms and with like effect. They shall have the same power to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses before them by attachment and to punish them as for contempt for nonattendance or refusal to be sworn or to testify, as is possessed by the court. (Rev., s. 522; Code, s. 422; C. C. P., s. 246; C. S. 576.)

Referee Has No Inherent Power. — A referee has no inherent or original powers and can only do those things expressly enumerated by statute, and such as he is authorized to do by the court which sends him the case. While he may "allow amendments to any pleadings," he is not authorized to allow a defendant who has not previously done so to file an answer, except by consent. *Jones v. Beaman*, 117 N. C. 259, 23 S. E. 248.

May Make New Parties. — Under this section, a referee has power to admit new parties to an action. *Perkins v. Berry*, 103 N. C. 131, 9 S. E. 621.

However a notice issued by a referee and served upon a surety on the administrator's bond to appear before him, no order having been made to make such surety a party, is not a legal process effective to bring him into court. *Koonce v. Pelletier*, 115 N. C. 233, 20 S. E. 391.

Power to Enforce Rulings. — The referee has power to enforce obedience to the rulings on the trial of the issues before him, just as the court would have upon the trial before it. *LaFontaine v. Southern Underwriters Ass'n.*, 83 N. C. 133.

To review the action of the referee in permitting amendments to pleadings and the making of new parties, under this section, and contending successfully on appeal that there was a misjoinder of parties and causes of action, it is required that the appellant should have excepted in apt time and have preserved his exceptions or they will not be considered on appeal to the Supreme Court. *Sheffield v. Alexander*, 194 N. C. 744, 140 S. E. 726.

Power to Amend Pleadings and Make New Parties.—The authority of the referee to allow amendments to pleadings and to make new parties is expressly given by this section. *Sheffield v. Alexander*, 194 N. C. 744, 140 S. E. 726, citing *Rosenbacher & Bro. v. Martin*, 170 N. C. 236, 86 S. E. 785; *Blanton v. Bostic*, 126 N. C. 418, 35 S. E. 1035; *Koonce v. Pelletier*, 115 N. C. 233, 20 S. E. 391. See note under § 1-163.

Cited in *Gillam v. Life Ins. Co.*, 121 N. C. 369, 373, 28 S. E. 470.

§ 1-193. Testimony reduced to writing.—The testimony of all witnesses on both sides must be reduced to writing by the referee, or under his direction, and signed by the witnesses, and the evidence so taken and signed shall be filed in the cause, and constitute a part of the record. (Rev., s. 523; 1897, c. 237, s. 3; C. S. 577.)

The referee should ordinarily enter his rulings on each objection to the evidence taken before him; but where the exceptions are very numerous and relate to a single ground of objection, it is a sufficient compliance with this rule if the referee incorporates in his report a general statement of his rulings sufficient to give the parties and the reviewing judge full opportunity to consider the referee's rulings on, and findings from the evidence reported. *Pack v. Katzin*, 215 N. C. 233, 1 S. E. (2d) 566.

Cited in *American Trust Co. v. Jenkins*, 196 N. C. 428, 146 S. E. 68; *Texas Co. v. Phillips*, 206 N. C. 355, 358, 174 S. E. 115.

§ 1-194. Report; review and judgment.—The referee shall make and deliver a report, within the time ordered by the court, to the clerk of the court in which the action is pending. Either party, during the term or upon ten days notice to the adverse party out of term, may move the judge to review the report, and set aside, modify or confirm it in whole or in part, and no judgment may be entered on any reference except by order of the judge. (Rev., s. 524; Code, s. 423; C. C. P., s. 247; C. S. 578.)

See note under § 1-195.

Editor's Note.—Originally, as cited in C. C. P. sec. 247, the time limit of the referee's report was 60 days, and in default thereof either party could end the reference. Maxwell v. Maxwell, 67 N. C. 383.

Power of Judge—Recommitment of Case.—The supervisory power of the trial judge over the referee's report under this section is broad and comprehensive. Dumas v. Morrison, 175 N. C. 431, 95 S. E. 775. In the exercise of the power the trial judge may recommit the report for the correction of errors and irregularities, or for more definite statement of facts or conclusions of law, and such order recommitting the report for such purpose is not appealable. Mills v. Apex Ins., etc., Realty Co., 196 N. C. 223, 225, 145 S. E. 26, citing Commissioners v. Magnin, 85 N. C. 115; Lutz v. Cline, 89 N. C. 186; State v. Jackson, 183 N. C. 695, 110 S. E. 593; Coleman v. McCullough, 190 N. C. 590, 130 S. E. 508; Carolina Mineral Co. v. Young, 211 N. C. 387, 190 S. E. 520.

Reference to Another Referee.—Where a compulsory reference is made, and the report filed containing findings of fact and conclusions of law, the trial judge may not refer it to another referee with partial approval thereof for action upon the unapproved parts. Mills v. Apex Ins. etc., 196 N. C. 223, 145 S. E. 26.

Judge May Set Aside Reference.—The judge, in his discretion, may set aside a reference after the report is filed and proceed and try the case. Cummings v. Swepson, 124 N. C. 579, 32 S. E. 966.

When Decisions Reviewable.—The decision of the judge in revising the report of a referee, is available as to questions of law, but not as to the findings of fact. Vaughan v. Lewellyn, 94 N. C. 472.

The Supreme Court has no power to review the conclusions of fact as found by the referee and sustained by the judge, unless it appears that such findings have no evidence to support them. Boyle v. Stallings, 140 N. C. 524, 53 S. E. 346.

The court retains the cause and its jurisdiction in every case of reference, with power to review and reverse the conclusions of law of the referee; and a discretion to modify or set aside the report, and its ruling in the latter respect is not reviewable unless it appears that such discretion has been abused. Cummings v. Swepson, 124 N. C. 579, 32 S. E. 966.

Under this section the Superior Court, on exceptions taken to the referee's report, may affirm, set aside, make additional findings, modify, or disaffirm the report. Wallace v. Benner, 200 N. C. 124, 156 S. E. 795. But the findings of fact of a referee approved by the trial judge cannot be reviewed upon appeal if supported by any competent evidence. Cummings v. Swepson, 124 N. C. 579, 32 S. E. 966; Anderson v. McRae, 211 N. C. 197, 189 S. E. 639; Dent v. English Mica Co., 212 N. C. 241, 193 S. E. 165; Holder v. Home Mtg. Co., 214 N. C. 128, 198 S. E. 589.

Upon the filing of the report of the referee in a consent reference, as well as in a compulsory one, the trial court has the power to affirm, amend, modify, set aside, make additional findings and confirm, in whole or in part, or disaffirm the report of the referee, and where the court has made additional findings and there is evidence to sustain them the action of the court will be given the effect of a verdict of a jury and will not ordinarily be disturbed on appeal. Thigpen v. Farmers' Bankings, etc., Co., 203 N. C. 291, 165 S. E. 720.

The referee's findings are subject to review by the District Judge and where exceptions are not filed in the District Court to the admission of testimony before the referee, they will not be considered by the Circuit Court of Appeals. Fruit Growers' Exp. Co. v. Plate Ice Co., 59 F. (2d) 605.

§ 1-195. Report, contents and effect.—The referee must state the facts found and the conclusions of law separately. His decision must be

given, and may be excepted to by either party within thirty days from the filing of the report and reviewed in like manner and with like effect in all respects as in cases of appeal; and he may in like manner settle a case or exceptions. The report of the referee upon the whole issue stands as the decision of the court, and judgment may be entered thereon upon application to the judge. When the reference is to report the facts, the report has the effect of a special verdict. (Rev., s. 525; Code, s. 422; C. C. P., s. 246; 1943, c. 222; C. S. 579.)

Cross Reference.—As to reviewing, on appeal, findings of fact by referee, see § 1-194 and the note thereto.

For reference by consent, see annotations under sec. 1-188. As to compulsory reference, see annotations under sec. 1-189.

Editor's Note.—The 1943 amendment inserted in the second sentence of this section the following words: "by either party within thirty days from the filing of the report."

The referee must state in his report his findings of fact and law separately, and when the judge, who hears exceptions to the report, makes no special finding of fact, it is presumed that he adopts those of the referee which are considered prima facie correct. In such cases the Supreme Court will not review the findings of fact made or adopted by the judge below, its appellate jurisdiction being confined to the review of matters of law. This is so even though the action is one cognizable in a court of equity prior to 1868. Battle v. Mayo, 102 N. C. 413, 9 S. E. 384; Barcroft & Co. v. Roberts & Co., 91 N. C. 363.

In the exercise of the power conferred by this section, as well as in the application of general principles of procedure of courts of equity, the court has authority to set aside, modify, or confirm, in whole or in part, the report of the referee, and the appellate jurisdiction attaches to the ruling in matters of law only. Vaughan v. Lewellyn, 94 N. C. 472. The court may modify the report and recommit the matter to the referee. Morisey v. Swinson, 104 N. C. 555, 10 S. E. 754. Also see Barcroft & Co. v. Roberts & Co., 91 N. C. 363; Patterson v. Wadsworth, 89 N. C. 407.

One valid objection may be raised to the findings of fact by the referee adopted by the judge, directly or by failure to modify them, or to those of the judge substituted for the referee's, but this raises in reality only a question of law, i. e., whether there is any evidence to support the conclusions of fact. When no such objection is made in apt time, the findings of the judge, whether made or adopted, are final and cannot be reviewed in the Supreme Court. If, upon hearing such exceptions when taken, it appears in the Supreme Court that there is no evidence to sustain the finding it will be deemed conclusive. Usry v. Suit, 91 N. C. 406; Reaves v. Davis, 99 N. C. 425, 6 S. E. 715.

In cases of reference by consent if no exceptions be taken before the referees, and their report goes up without exceptions, and either party desires to except, then and there in term time he must be permitted to do so. And then his honor must pass upon the exceptions as if they had been taken before the referees. The practice is the same in compulsory references, except that when a report is made, exceptions filed, and issues made by the exceptions, either party has the right to have the issues submitted to a jury; because, not having waived a jury trial, as is done when the reference is by consent, the party has a constitutional right to a trial by jury. And in a case where the reference is by consent, if issues arise on exceptions which the judge is unwilling to try himself he may order a jury to find the issue to aid him, but it is not a right which the party has. Green v. Castlebury, 70 N. C. 20, 24, 26.

Exceptions to the order of the court should conform to the ruling of the Supreme Court in Keystone Driller Co. v. Worth, 117 N. C. 515, 23 S. E. 427. For a striking illustration of the confusion and uncertainty into which the rights of the parties litigant are thrown by a failure to observe the provisions of this section and the holdings thereunder, see Kerr v. Hicks, 133 N. C. 175, 45 S. E. 529.

Referee's Duty under This Section.—It is the duty of a referee to state positively and definitely all the facts constituting the grounds of action or defence, and not to leave to inference what is the precise fact intended to be found. Conclusions of law and fact must be stated separately; otherwise the appellate court cannot review the referee's conclusions of law, and the report of the referee will be set aside as being defective. Earp v. Richardson, 75 N. C. 84; State v. McKenzie, 65 N. C. 102.

Findings of Fact Conclusive. — The findings of fact by a referee, adopted by the trial judge, are conclusive. *Joyner v. Stancill*, 108 N. C. 153, 12 S. E. 912, following *Battle v. Mayo*, 102 N. C. 413, 9 S. E. 384.

Presumption. — The findings of fact reported by a referee are presumed to be right unless shown to be wrong. If there is no evidence to support them, they will not be sustained. *Green v. Jones*, 78 N. C. 265.

Report Has Effect of Special Verdict. — Where the reference is by consent the referee's report has the effect of a special verdict. *Battle v. Mayo*, 102 N. C. 413, 9 S. E. 384. Subject however to the right of either party, on notice, to move the court to review his report, to set it aside, to modify or confirm it. *Barrett v. Henry*, 85 N. C. 322, 325.

Agreement to Arbitrate Made Out of Court. — Where an agreement to submit the matters in controversy in a pending action is made out of court, and no order of court is made to make the award when filed a rule of court, the court has no power to enter a judgment on the award, but the remedy is by a new action on the award. *Jackson v. McLean*, 96 N. C. 474, 1 S. E. 785.

Judge May Submit Issues to Jury. — It is not the duty of a judge, in passing on exceptions to a referee's report, to decide all questions of fact without a jury, but on the contrary, if the facts depend upon doubtful and conflicting testimony, he may cause issues to be framed and submitted to a jury for information. *Maxwell v. Maxwell*, 67 N. C. 383.

Unfinished Report. — It is error for the judge to pass upon exceptions to an unfinished report. *White v. Uteley*, 86 N. C. 415.

Right to Jury Trial. — In case of a compulsory reference a litigant can renew his demand for a jury trial by excepting to the report of the referee and pointing out the findings so excepted to as a basis for the issues. *Wilson v. Featherstone*, 120 N. C. 446, 27 S. E. 124.

But to avail himself of this right he should, by exceptions made in apt time, distinctly designate the controverted facts that he demands shall thus be determined. *Yelverton v. Coley*, 101 N. C. 248, 7 S. E. 672.

Conclusiveness—Exception to Report.—Construing this and § 1-195 together as being in *pari materia*: it is held that a party moving for a reference to report the facts is not bound by the findings of the report as if a special verdict, and he is entitled to except to the report of the referee. *Hardaway Contracting Co. v. Western Carolina Power Co.*, 195 N. C. 649, 143 S. E. 241.

Exceptions to Referees' Report Must be Specific. — An exception to the report of a referee must be specific; it must point out the conclusion at which it is aimed and the precise error complained of. *Battle v. Mayo*, 102 N. C. 413, 9 S. E. 384.

An exception to the admission of evidence by a referee, which is not specific, but is vague and indefinite in form, will not be considered. *Perkins v. Berry*, 103 N. C. 131, 9 S. E. 621.

Exceptions to a referee's report made the basis of a demand for a trial by jury should be explicit enough for the opposing party to see clearly what the issue will be, so as to prepare to meet it with his evidence. *Wilson v. Featherstone*, 120 N. C. 446, 27 S. E. 124.

An exception, "The plaintiff excepts to such rulings adverse to it and appeals," is too general to be considered. *Commissioners v. Erwin*, 140 N. C. 193, 52 S. E. 785.

Exceptions before Court. — If no exceptions be taken before the referees and their reports go up without exceptions and either party desires to except then and there in term time, he must be permitted to do so. The court must then pass upon them as if they had been taken before the referees. *Green v. Castlebury*, 70 N. C. 20, 21; *Green v. Castleberry*, 77 N. C. 164.

Failure to Specify Objection Constitutes Waiver. — Although a party has his objection to a compulsory reference entered in apt time, he may waive his right to a trial by jury by failing to assert it definitely and specifically in each exception to the referee's report. *Keystone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427.

Exceptions Should Be to Court Action. — Where an appeal is taken from the action of the trial court in passing upon exceptions to the report of a referee, exceptions should be taken and stated in the record to the rulings of the court which it is sought to have reviewed, and the case ought not to be sent to the Supreme Court to be heard only on the exceptions taken to the ruling of the referee. *Traders Nat. Bank v. Lawrence Mfg. Co.*, 96 N. C. 298, 3 S. E. 363.

All Evidence Not Reported. — That the referee has not reported all the evidence is not a ground of exception. If all the evidence is not sent up, the remedy of the prejudiced party is, by application to the judge for an order di-

recting the referee to send up that which has been omitted. *Perkins v. Berry*, 103 N. C. 131, 9 S. E. 621.

No Appeal From Order Recommending Report. — Where the court orders a compulsory reference, an appeal does not lie from an order recommending the report of the referee for the correction of errors and irregularities. *State v. Magnin*, 85 N. C. 115.

Art. 21. Issues.

§ 1-196. Defined.—Issues arise upon the pleadings, when a material fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds:

1. Of law.

2. Of fact.

(Rev., s. 544; Code, s. 391; C. C. P., s. 219; C. S. 580.)

In General. — An issue is a single, certain and material point, arising out of the allegations or pleadings of the parties, and, generally, should be made up by an affirmative and negative. *Simonton v. Witner*, 5 Pet. 141, 149, 8 L. Ed. 75.

An issue is a statement of a material fact in the pleading of one party which is denied in the pleading of another party. 7 Ohio Law Reporter 163, 164.

Form of Issues. — Defendant can not complain of the form of the issues where he did not except or submit other issues. *Drennan v. Wilkes*, 178 N. C. 512, 103 S. E. 9.

Failure to Submit Issue. — Where defendant in a processioning proceeding did not tender any issues, and did not except to the one submitted, he can not complain on appeal that no issue of title was submitted, particularly where he offered no evidence to support his allegations of title. *Exum v. Chase*, 180 N. C. 95, 104 S. E. 67.

Province of Judge and Jury. — The province of the jury is restricted to passing upon issues of fact raised by the pleadings in the light of the testimony offered. When no testimony is offered, it is the duty of the trial judge to determine the issues of law, if any are raised, and then to proceed to enter such judgment as either of the parties may have the right to demand upon the admissions of fact contained in the pleadings and the determination of the controverted questions of law. *McQueen v. Peoples Nat. Bank*, 111 N. C. 509, 513, 515, 16 S. E. 270.

Cited in *Braswell v. Johnston*, 108 N. C. 150, 12 S. E. 911; *Piedmont Wagon Co. v. Byrd*, 119 N. C. 460, 468, 26 S. E. 144; *Tucker v. Satterthwaite*, 120 N. C. 118, 119, 121, 27 S. E. 45; *Dees v. Apple*, 207 N. C. 763, 766, 178 S. E. 557.

§ 1-197. Of law.—An issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof. (Rev., s. 545; Code, s. 392; C. C. P., s. 220; C. S. 581.)

§ 1-198. Of fact.—An issue of fact arises—

1. Upon a material allegation in the complaint controverted by the answer; or,

2. Upon new matter in the answer, controverted by the reply; or,

3. Upon new matter in the reply, unless an issue of law is joined thereon. (Rev., s. 546; Code, s. 393; C. C. P., s. 221; C. S. 582.)

Pleadings Must Raise Issues. — The issues in a cause are made by the pleading, and it is not error to refuse to submit an issue which the pleadings do not raise. *McElwee v. Blackwell & Co.*, 82 N. C. 345; *Wright v. Cain*, 93 N. C. 296; *Patton v. Western N. C. R. Co.*, 96 N. C. 455, 1 S. E. 863. But see *Lackett v. Rumbaugh*, 45 Fed. 23. See also, *Ellis Motor Co. v. Belcher*, 204 N. C. 769, 169 S. E. 708.

An issue should be directed to the matter alleged on the one side and denied on the other. The judge may, in addition to the issue, submit a question to the jury pertinent to the matters in controversy, but he is not compelled to do so and his refusal is not reviewable. *Crawford v. Masters*, 140 N. C. 205, 52 S. E. 663.

However, it is error to submit an issue as to a contract different from that alleged in the complaint. *Dickens v. Perkins*, 134 N. C. 220, 46 S. E. 490.

In an action for the recovery of land, if the defendant wishes to disclaim as to any portion of the locus in quo and put in issue the title to only a specific portion, he

should do so in his answer. *Crawford v. Masters*, 140 N. C. 205, 52 S. E. 663.

Error to Submit Issue Not Raised by Pleadings.—Where the contract sued on is admitted in the answer, an issue as to the existence of the contract does not arise upon the pleadings, and it is error for the court to submit such issue to the jury. *Fairmont School v. Bevis*, 210 N. C. 50, 185 S. E. 463.

Issue Cannot Be Raised by Evidential Fact.—Where there are no allegations in the pleadings which suggest the matter set out in the issue, it is improper to submit such an issue to the jury nor can an issue be raised by evidential facts. *Portesque v. Crawford*, 105 N. C. 29, 31, 10 S. E. 910, citing *Miller v. Miller*, 89 N. C. 209; *Howard v. Early*, 126 N. C. 170, 35 S. E. 258.

Issues Should Be Material.—It is only necessary to submit such issues as arise out of the pleadings material to be tried and such as will admit all material evidence upon the whole matter in controversy. *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481.

Refusal to Submit Defendant's Issue.—Where an issue raised by the new matter in the answer, controverted by the reply, is material to the defense, there is error in refusing to submit the issue tendered by defendants, or at least an issue involving the matters relied upon by the defendants, and alleged in their answer. *Brown v. Ruffin*, 189 N. C. 262, 126 S. E. 613, 615.

Cited in *Abbott v. Georgia, etc., R. Co.*, 90 N. C. 462.

§ 1-199. Order of trial.—Issues both of law and of fact may arise upon different parts of the pleadings in the same action. In these cases the issues of law must be first tried, unless the court otherwise directs. (Rev., s. 547; Code, s. 394; C. C. P., s. 222; C. S. 583.)

Editor's Note.—Pleas in bar must be tried before a reference is ordered. See annotations under sections 1-188, 1-189.

§ 1-200. Form and preparation.—Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues. The issues arising upon the pleadings, material to be tried, must be made up by the attorneys appearing in the action, or by the judge presiding, and reduced to writing, before or during the trial. (Rev., ss. 548, 549; Code, ss. 395, 396; C. S. 584.)

Editor's Note.—The Supreme Court in construing this section has laid down three rules: (1) only issues of fact raised by the pleadings must be submitted; (2) the verdict, whether in response to one or many issues must establish facts sufficient to enable the court to proceed to judgment; (3) of the issues raised by the pleadings, the judge may, in his discretion, submit one or many, provided that neither of the parties to the action is denied the opportunity to present to the jury any view of the law arising out of the evidence through the medium of pertinent instructions on some issues passed upon.

This section is mandatory and where no issues are tendered by either party it is the duty of the judge either to compel counsel to prepare the proper issues or to prepare them himself and submit them to the jury. Such an adherence to the statute is absolutely essential, not only to the fair trial of the case, but to an intelligent appreciation of its merits upon an appeal. *Denmark v. Atlantic, etc., R. Co.*, 107 N. C. 185, 12 S. E. 54; *Burton v. Rosemary Mfg. Co.*, 132 N. C. 17, 43 S. E. 480. See *Stanback v. Haywood*, 209 N. C. 798, 799, 184 S. E. 831, citing *Tucker v. Satterthwaite*, 120 N. C. 118, 27 S. E. 45.

It should be borne in mind that the code system contemplates distinct findings upon material issues. These should be submitted where it can be done without repetition or confusion. *Emery v. Raleigh, etc., R. Co.*, 102 N. C. 209, 9 S. E. 139. It is not necessary that the language of the pleadings should be incorporated in the issues, or that it should be clearly followed in drawing them.

While the pleadings are to be construed liberally with a view to substantial justice between the parties, the proof must conform substantially to the allegation. As was said by the Supreme Court in *Parsley v. Nicholson*, 65 N. C. 207, 209, "The rules of pleadings at common law have not been abrogated by the Code of Civil Procedure, the essential principles still remain and have only been modified as to the technicalities and matters of form. The object of pleading, both in the old and the new system, is to produce

proper issues of law and fact, so that justice may be administered between the parties litigant with regularity and certainty." See *Tucker v. Satterthwaite*, 120 N. C. 118, 27 S. E. 45; *Braswell v. Johnston*, 108 N. C. 150, 12 S. E. 911.

For an excellent discussion by the Supreme Court of the provisions and requirements of this section see *Piedmont Wagon Co. v. Byrd*, 119 N. C. 460, 26 S. E. 144.

When Sufficient.—It seems that the law is settled that if the issues submitted by the court are sufficient in form and substance to present all phases of the controversy, there is no ground for exception to the same. *Bailey v. Hassell*, 184 N. C. 450, 459, 115 S. E. 166.

Issues Precede Testimony.—This section contemplates that the issues shall be drawn before the introduction of testimony. *Beasley v. Surles*, 140 N. C. 605, 53 S. E. 360.

Multiplicity of Issues.—This section does not contemplate or require that an issue shall be submitted to the jury as to every important material fact controverted by the pleadings, nor is it necessary, expedient, or proper to do so. *Patton v. Western N. C. R. Co.*, 96 N. C. 455, 464, 1 S. E. 863.

The only issues proper to be submitted to the jury are those raised by the constitutive facts alleged on the one side and denied on the other; and those issues which are merely evidential, when found by the jury only furnish facts which would be evidence to prove the main issue, should never be submitted. *Patton v. Western N. C. R. Co.*, 96 N. C. 455, 456, 1 S. E. 863.

Separate Causes of Action.—Where the plaintiff brings a single suit on two distinct causes of action a separate issue should be submitted as to the damages arising on each separate cause of action. *Kelly v. Durham Tract Co.*, 133 N. C. 418, 45 S. E. 826.

Complaint Differs with Issue.—Where a contract alleged in the complaint is different from that submitted in the issue, an instruction that if the contract was as alleged, the issue should be answered in the affirmative, is error. *Dickens v. Perkins*, 134 N. C. 220, 46 S. E. 490.

Issues Not Determinative.—A judgment upon the verdict of the jury upon issues raised by the pleadings which are not determinative of the controversy between the parties, is erroneously entered. *Merchants Nat. Bank v. Carolina Broom Co.*, 188 N. C. 508, 125 S. E. 12.

Single Issue Sufficient.—It is not error for the court, to submit only an issue involving the question whether a plaintiff has been injured and has sustained damage through the negligence of a defendant, even where contributory negligence is set up as a defense. *McAdoo v. Richmond, etc., R. Co.*, 105 N. C. 140, 11 S. E. 316; *Boyer v. Teague*, 106 N. C. 576, 633, 11 S. E. 665.

Insufficient Issues.—When issues of fact are raised by the pleadings it is error to submit only the question whether the plaintiff is entitled to recover; that is a question of law arising after verdict and addressed solely to the court. *Braswell v. Johnston*, 108 N. C. 150, 12 S. E. 911.

Example of Insufficient Issues.—Where in an action for damages, the defendant tendered the issues: (1) Were plaintiff's injuries caused by the defendant's negligence? (2) Was there contributory negligence on the part of the plaintiff? (3) What damage is the plaintiff entitled to recover? And the court declined to submit these, but substituted instead a single issue—What damages, if any, is the plaintiff entitled to recover? It was held to be error. *Denmark v. Atlantic, etc., R. Co.*, 107 N. C. 185, 186, 12 S. E. 54.

Inconsistent Causes of Action.—Where the plaintiff alleged inconsistent causes of action in different counts of his complaint, it was error for the court to submit the case on a single issue as to whether plaintiff was injured by defendant's negligence, as alleged in the complaint. *Griffin v. Atlantic, etc., R. Co.*, 134 N. C. 101, 46 S. E. 7.

It is within the sound discretion of the trial judge to determine what issues shall be submitted, and to frame them subject to the restrictions, first, that only issues of fact raised by the pleadings are submitted; secondly, that the verdict constitutes a sufficient basis for a judgment; and thirdly, that it does not appear that a party was debarred for want of an additional issue or issues of the opportunity to present to the jury some view of the law arising out of the evidence. *Stanback v. Haywood*, 209 N. C. 798, 799, 184 S. E. 831.

Court Adding Issue of Contributory Negligence.—Where the plaintiff brought suit against two defendants as joint tort-feasors, one defendant answering alleging contributory negligence and one defendant not filing an answer, and where the plaintiff tendered issues of negligence of the answering defendant, the court adding the issue of contributory negligence arising upon the pleading of this defendant, it was held that as a rule the court must submit the

issue arising on the pleadings, but the plaintiff waived this by tendering only one issue as to the answering defendant, and allowing the case to be tried on that theory. *Ammons v. Fisher*, 208 N. C. 712, 182 S. E. 479.

Cited in *Wilson v. Featherstone*, 120 N. C. 446, 27 S. E. 124, 126; *Howard v. Early*, 126 N. C. 170, 35 S. E. 258.

Art. 22. Verdict.

§ 1-201. General and special.—A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. (Rev., s. 550; Code, s. 408; C. C. P., s. 232; C. S. 585.)

- I. General Consideration.
- II. Rendition and Reception.
- III. Polling Jury.

I. GENERAL CONSIDERATION.

General Verdict.—The verdict is general when the jury, under appropriate instructions from the court as to the law applicable, simply respond affirmatively or negatively to the issues submitted. *Porter v. Western, etc., R. Co.*, 97 N. C. 66, 71, 2 S. E. 591; *Morrison v. Waston*, 95 N. C. 479.

Such a verdict settles in favor of the prevailing party every litigated question of fact. It is to be liberally construed, and to be sustained unless it is clearly inconsistent with any theory provable under the issues that the evidence may tend to support. Ed. Note.

Same—Embodies Law & Fact.—A general verdict embodies both the law and facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict. *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 596, 17 S. Ct. 421, 41 L. Ed. 837.

The only way in which the jury can decide the law of a case is by finding a general verdict. *Georgea v. Brailsford*, 3 Dall. 1, 5, 1 L. Ed. 483.

Special Verdict.—The adoption of this section wrought a radical change upon the old practice in regard to what should be stated in special verdicts. Under the former practice, after the finding as to all the facts necessary in determining the rights of the parties, with a prayer for the advice of the court as to the law arising thereon, the special verdict concluded conditionally, that if, upon the whole matter, the court shall be of opinion that the plaintiff has a cause of action, they then find for the plaintiff; if otherwise, for the defendant. Under the law as it now stands it is no longer necessary for the condition to be included. Ed. Note.

See 13 N. C. Law Rev. 321, for a note on the special verdict in Criminal Procedure.

Special Verdict Cannot be Added to.—"In any case, the trial judge may decline to receive a special verdict, and insist that the jury return a general verdict of guilty or not guilty; but when a special verdict is found by the jury, neither the trial court nor the appellate court can add any fact not directly found, nor can its existence be presumed." *State v. Colonial Club*, 154 N. C. 177, 186, 69 S. E. 771.

The court can not add any facts to the verdict, nor pass upon any facts not stated or derivable from the facts appearing by such verdict, except such as are admitted by the pleadings. 8 N. Y. 483.

Where Findings of Jury in Conflict.—If there be an irreconcilable conflict in the findings of the jury upon the issues submitted, or between the verdict and the judgment, a new trial will be awarded. *Morrison v. Watson*, 95 N. C. 479. And where such is the case, the rule that requires a special verdict to prevail over a general (under section 1-202) one has no application. *Porter v. Western, etc., R. Co.*, 97 N. C. 66, 2 S. E. 581.

II. RENDITION AND RECEPTION.

Presence of Court.—A special verdict requires the presence and assent of the court. *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978.

If it is not received by the court, nor in any way made matter of record, and where, with the assent of the attorney of the party in whose favor it was given, the jury retire by the courts direction and consider further of their verdict and return another verdict of which ouster is entered, it is of no weight as evidence for any purpose. *United States v. Addyson*, 6 Wall. 291, 18 L. Ed. 919.

Presence of Parties.—A party has the right to be present upon the rendition of the verdict. *State v. Jones*, 91 N. C. 654. This right is personal to the parties themselves and the absence of the counsel at the rendition is not a ground

for a new trial. *Barger Bros. v. Alley*, 167 N. C. 362, 83 S. E. 612.

But the entry of a verdict against a plaintiff, who is not present either in person or by attorney, is irregular. *Graham v. Tate*, 77 N. C. 120.

Waiver of Right to be Present — (1) **In Civil Cases.**—The right of the parties to be present when the verdict is returned in a civil case is waivable. *Barger Bros. v. Alley*, 167 N. C. 362, 83 S. E. 612, and cases there cited.

Same — (2) **Criminal Cases.**—In the trial of capital felonies the rule of practice seems to be uniform in all the states that the prisoner **must** be present during the whole trial. See *State v. Paylor*, 89 N. C. 539, 541, which contains also a full discussion of the application of the principle in regard to felonies of a lower nature and as to misdemeanors.

Verdict Received by Clerk.—A clerk of the court may by consent receive a verdict, even if the judge is not in the court room, provided it was done before the expiration of the term. *Ferrell v. Hales*, 119 N. C. 199, 25 S. E. 821; *Barger Bros. v. Alley*, 167 N. C. 362, 83 S. E. 612.

III. POLLING JURY.

Not Indispensable but May be Asked for.—It is not essential to the validity of the proceedings that the jury be polled, this being merely a privilege which may be asked for by either party. *State v. Toole*, 106 N. C. 736, 11 S. E. 168; *Smith v. Paul*, 133 N. C. 66, 67, 45 S. E. 348.

The right of a party to have the jury polled after the rendition of its verdict exists in civil as well as criminal cases. *Smith v. Paul*, 133 N. C. 66, 45 S. E. 348; *State v. Toole*, 106 N. C. 736, 11 S. E. 168; *State v. Young*, 77 N. C. 498.

Dissent or Disagreement of Jurors.—On a poll of the jury, the dissent of one juror renders the verdict invalid. *Owens v. Southern R. Co.*, 123 N. C. 183, 31 S. E. 383; but mere reluctance on the part of one juror will not be fatal to the verdict. *Lowe v. Morgan*, 125 N. C. 301, 34 S. E. 442.

§ 1-202. Special controls general.—Where a special finding of facts is inconsistent with the general verdict, the former controls, and the court shall give judgment accordingly. (Rev., s. 552; Code, s. 410; C. C. P., s. 234; C. S. 586.)

Editor's Note.—It is well settled by the reported cases in other states, construing provisions of their codes similar to this section, that a general verdict should stand unless the special findings are necessarily repugnant to it. To be inconsistent with the general verdict it must appear that the special findings are irreconcilable, in a legal sense, with the general verdict; and to justify the court in setting aside the general verdict on the ground that it is inconsistent with such findings the conflict must be clear and irreconcilable. See 69 Ohio State Reports 101. In other words the special verdict must admit of no rational conclusion which is consistent with the general verdict.

See note of *Porter v. Western, etc., R. Co.*, 97 N. C. 66, 2 S. E. 581, under sec. 1-201, analysis line "General Considerations."

§ 1-203. Character of, for different actions.—In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury shall assess the value of the property, if their verdict is in favor of the plaintiff; or if they find in favor of the defendant, and that he is entitled to a return thereof, they may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding the property. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the

minutes. (Rev., s. 551; Code, s. 409; C. C. P., s. 233; C. S. 587.)

Cross References.—As to the provisional remedy of claim and delivery for personal property, see § 1-472 et seq. As to judgment in action for recovery of possession of personal property, see § 1-230.

When Character of the Verdict Discretionary with Jury.—The section contains two specific cases in which the jury may, in their discretion, render either a general or special verdict, they being for the recovery of, (1) money only or (2) specific real property. In every other case the court may insist upon a special verdict upon any or all the issues. See *Porter v. Western etc., R. Co.*, 97 N. C. 66, 2 S. E. 581. Ed. Note.

Injuries to Personal Property in Seizure.—In claim and delivery, when for any cause judgment cannot be given for the recovery of the property in specie, as where *pendente lite* the property was sold under order of the court, judgment should be rendered for the recovery of the value of the property at the time of the tortious taking, with interest thereon, in lieu of damages for deterioration and detention, and for the costs. *Hall v. Tillman*, 110 N. C. 220, 14 S. E. 745, and cases there cited.

Time of Assessment of Damages.—In an action for claim and delivery of personal property, when the property cannot be redelivered by plaintiff in specie, the value thereof, in case of a judgment for the defendant, should be assessed at the time of the trial and not at the time of its seizure by the sheriff. *Holmes v. Godwin*, 69 N. C. 467, 468.

Account and Settlement of Trust Fund.—The court has the power under this section, to direct a special finding upon an issue in an action for an account and settlement of a trust fund, and so also, in all other cases except where the suit is for "money only" or "specific real property." *Commissioners v. Lash*, 89 N. C. 159; *Porter v. Western, etc., R. Co.*, 97 N. C. 66, 2 S. E. 581. See also, *Bean v. Western, etc., R. Co.*, 107 N. C. 731, 742, 12 S. E. 600.

§ 1-204. Jury to assess damages; counterclaim.—When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury must also assess the amount of the recovery; they may also, under the direction of the court, assess the amount of the recovery when the court gives judgment for the plaintiff on the answer. If a counterclaim, established at the trial, exceeds the plaintiff's demand so established, judgment for the defendant must be given for the excess; or if it appears that the defendant is entitled to any other affirmative relief, judgment must be given accordingly. (Rev., s. 553; Code, s. 411; C. C. P., s. 235; C. S. 588.)

Editor's Note.—Great difficulty has been encountered in the decision of the question whether an affirmative judgment can be given in favor of a defendant upon a counterclaim, the amount of which is not within the jurisdiction of the court. This section serves as an additional guide-post for the courts and its chief purpose would seem to be to carry out the provisions of the Code to the effect that the superior court may render such judgment as is necessary to do justice between the parties in administering both law and equity, thus placing the decision of this much disputed question in the same category with those cases falling within the accepted construction of the general provisions of the Code. This being the true interpretation of the section, then, as was said in 1 N. C. Law Rev. 229:

"These decisions (falling under and bearing on this section) fix the rule of practice in North Carolina in accordance with the practice declared to exist in other jurisdictions. In a court of limited jurisdiction, the defendant may use his demand as set-off or recoupment to defeat or reduce the plaintiff's demand, but he cannot obtain an affirmative judgment upon his counterclaim, when the amount exceeds the jurisdiction. In a court of general jurisdiction, judgment may be rendered for the excess of defendant's claim, although no original action could have been brought thereon in such court." (Parentheses and black type supplied.)

Allowance of "Interest to Date."—The verdict must be understood in connection with the charge, and when it allows "interest to date," it must be taken to intend it, and in conformity with the instruction, and thus the time for which

the computation is to be made is rendered definite and certain. *Greenleaf v. Norfolk, etc., R. Co.*, 91 N. C. 33, 38.

Reduction of Verdict.—The trial judge has no power to reduce a verdict without the consent of the party in whose favor the verdict is rendered, but when the trial judge thinks injustice has been done it is his duty to set aside the verdict, and he may set it aside as to damages either excessive or inadequate. *Isley v. Bridge Co.*, 143 N. C. 51, 55 S. E. 416; *Shields v. Whitaker*, 82 N. C. 516, 523.

Punitive Damages.—The question of punitive damages is one properly to be submitted to the jury as one within their discretion, under a proper charge of the law applicable, and is not a matter of law for the court. *Blow v. Joyner*, 156 N. C. 140, 72 S. E. 319.

§ 1-205. Entry of verdict and judgment.—Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon or an order that the cause be reserved for argument or further consideration. If a different direction is not given by the court, the clerk must enter judgment in conformity with the verdict. (Rev., s. 554; Code, s. 412; C. C. P., s. 236; C. S. 589.)

To Whom Returnable.—The verdict should be returned before the presiding judge, *Zagier v. Southern Exp. Co.*, 171 N. C. 692, 89 S. E. 43, but by consent of the counsel, the clerk of the superior court can represent the judge in taking the verdict of the jury. *Barger Bros. v. Alley*, 167 N. C. 362, 83 N. C. 612.

The discretionary act of the trial judge in rendering judgment upon a verdict of the jury returned during recess of the court without the consent of counsel will not be reviewed on appeal when it appears from the finding of the court that the jury had not discussed the case before delivering it to the clerk, though several had done so thereafter with appellee's attorney; that the verdict was agreed to before the jurors separated, no improper influence had induced it, and the issues were not recorded until after the verdict was returned to the judge. *Zagier v. Southern Express Co.*, 171 N. C. 692, 89 S. E. 43.

An agreement empowering the judge to sign judgment "out of terms" gave him no power after the adjournment of the term to hear and pass upon a motion to set the verdict aside. *Knowles v. Savage*, 140 N. C. 372, 374, 52 S. E. 930.

Verdict Must Be Accepted.—Before a verdict returned into open court by a jury is complete, it must be accepted by the court for record, and it is the duty of the judge to look after the form and substance of a verdict, so as to prevent a doubtful or insufficient finding from passing into the records. *State v. Godwin*, 138 N. C. 582, 50 S. E. 277.

Informal and Irregular Verdict.—When a jury returns an informal, insensible, or a repugnant verdict, or one that is not responsive to the issues submitted, they may be directed by the court to retire and reconsider the matter and bring in a verdict in proper form; but it is incumbent upon the judge not even to suggest the alteration of a verdict in substance. *State v. Godwin*, 138 N. C. 582, 50 S. E. 277.

§ 1-206. Exceptions.—1. If an exception is taken upon the trial, it must be reduced to writing at the time with so much of the evidence or subject matter as may be material to the exception taken; the same must be entered in the judge's minutes and filed with the clerk as a part of the case upon appeal.

2. If there is error, either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same is deemed excepted to without the filing of any formal objections. (Rev., s. 554; Code, s. 412; C. C. P., s. 236; C. S. 590.)

I. Exceptions Generally.
II. Instructions.

Cross References.
As to exceptions in case on appeal, see § 1-282. As to instructions generally, see §§ 1-180, 1-181, 1-182.

I. EXCEPTIONS GENERALLY.

Exceptions as Condition for Appeal.—See section 1-282 and

the notes thereto—analysis line, “Requisites of Case on Appeal,” III.

Time for Exception.—It is a general rule, applicable alike to criminal and civil causes, that exceptions must be taken in apt time on the trial, *State v. Ballard*, 79 N. C. 627, and unless so taken it will be deemed to have been waived. *Byrd v. Hudson*, 113 N. C. 203, 213, 18 S. E. 209.

It is too late after the trial to make exceptions to the evidence, remarks of the judge, or other matters occurring during the trial, except as to the charge. *Alley v. Howell*, 141 N. C. 113, 114, 53 S. E. 821.

Where, however, evidence is made incompetent by statute, exception thereto may be made after verdict. *Broom v. Broom*, 130 N. C. 562, 41 S. E. 673.

Taking and Noting.—Under this section, the trial judge is not required to take down the exceptions himself, but may require the attorneys for the excepting party to prepare them in writing. *Buckner v. Madison County R. Co.*, 164 N. C. 201, 80 S. E. 225.

Exception Should be Specific.—Exceptions taken upon the trial should be as specific as possible and should point out the nature of the error complained of. *Williams v. Johnston*, 94 N. C. 633; *State v. English*, 164 N. C. 497, 498, 80 S. E. 72, and cases cited.

Indefinite Exception.—An indefinite exception will be overruled. *Streator v. Streator*, 145 N. C. 337, 9 S. E. 112; *Hendricks v. Ireland*, 162 N. C. 523, 77 S. E. 1011.

A “broadside” exception cannot be entertained on appeal. *Jackson v. Williams*, 152 N. C. 203, 67 S. E. 755; *Kelly v. Johnson*, 135 N. C. 650, 47 S. E. 672.

Motion for Judgment.—If an answer or reply is insufficient, the opposite party may move for judgment, and if the motion is refused he can have his exception noted. If he fails to do this, the objection is usually waived. *Walker v. Scott*, 106 N. C. 56, 57, 11 S. E. 364.

II. INSTRUCTIONS.

Editor's Note.—The courts have given to this provision a rather limited interpretation. The phrase “the refusal to grant a prayer for instructions” has been construed as not to have for its purpose the elimination of the necessity for formal objections. The phrase “in his instructions generally” has been construed to mean to embrace erroneous statements of the law, that is, for inherent and apparent error, and not to allow the broad wording of this enactment to be used by counsel as a method for obtaining a review of every instruction given by the trial judge.

Where Exceptions Taken Orally.—Where the Judge below, in instructing the jury, submitted a phase of a question which there was no evidence to support, an oral exception to the question immediately taken and noted and assigned as error for the case on appeal is sufficient to present the matter on appeal, though no written instruction on the subject was prayed for by the excepting counsel. *Lee v. Williams*, 112 N. C. 510, 511, 17 S. E. 165.

Errors in Charge.—An exception taken for the first time in the appellant's assignment of error will not be considered on appeal, except under this section as to the charge of the court, etc., when it is required that the record show that the exception had been duly and properly taken. *Brown v. Brown*, 182 N. C. 42, 108 S. E. 380.

Errors in the charge of the court, or in granting or refusing to grant prayers for instruction, shall be deemed excepted to without the filing of any formal objections, if specifically raised and properly presented in the case on appeal, prepared and tendered in proper time; and when exceptions are taken they should be considered and passed upon by the trial court, and upon being overruled, made to appear in the record on the appeal to the Supreme Court. Secs. 1-278, 1-279, 1-282, and this section. *Paul v. Burton*, 180 N. C. 45, 104 S. E. 37. See *Rice v. Swannanoa-Berkeley Hotel Co.*, 209 N. C. 519, 184 S. E. 3.

Exceptions to the Judge's charge taken for the first time after the trial, but set out in the appellant's case on appeal duly tendered or served, are aptly taken under the provisions of section 1-282, and this section. And an exception to a previous intimation of the judge made upon the trial to the effect objected to, is not required. *Cherry v. Atlantic Coast Line R. Co.*, 186 N. C. 263, 119 S. E. 361.

Failure to Give Charge Requested.—An omission to give a charge to which a party would have been entitled is not error, unless the same was requested on the trial and refused. *Fry v. Currie*, 91 N. C. 436. See sec. 1-182.

Effect of Failure to Object or Except.—Instructions, the giving or refusal of which was not excepted to on the trial, and where the attention of the court was not called to anything objectionable therein, will not be considered on appeal. *White v. Clark*, 82 N. C. 6.

An assignment of error cannot be considered if it appears from the record that neither objection nor exception,

as provided by this section, was made at the trial. *Stadtem v. Harvell*, 208 N. C. 103, 106, 179 S. E. 448.

Cited in Metropolitan Life Insurance Co. v. Boddie, 196 N. C. 666, 667, 146 S. E. 598; *La Vecchia v. North Carolina Joint Stock Land Bank*, 218 N. C. 35, 9 S. E. (2d) 489.

§ 1-207. Motion to set aside.—The judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion can only be heard at the same term at which the trial is had. When the motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had. (Rev., s. 554; Code, s. 412; C. C. P., s. 236; C. S. 591.)

Sufficiency, Scope, and Time for Taking Exceptions.—See note to sec. 1-206.

Discretion of the Judge.—A motion to set aside a verdict as not in conformity with the evidence is addressed to the discretion of the trial judge, when the evidence is conflicting, and will not be considered on appeal. *Hoke v. Tilley*, 174 N. C. 658, 94 S. E. 446.

A discretionary order entered at the term of the trial setting aside a verdict as contrary to the weight of the evidence is not reviewable, and an appeal therefrom will be dismissed in the absence of abuse of discretion. *Anderson v. Holland*, 209 N. C. 746, 184 S. E. 511.

The discretion given by this section to the trial judge to set aside a verdict, is not an arbitrary one to be capriciously exercised, but reasonably with the view to an equitable result in the correct administration of justice, and will not be reviewed on appeal except in cases of abuse thereof. *Baily v. Dibblell Mineral Co.*, 183 N. C. 525, 112 S. E. 29. See also *Strayhorn v. Fidelity Bank*, 203 N. C. 383, 166 S. E. 312; *Goodman v. Goodman*, 201 N. C. 808, 161 S. E. 686; *Harrison v. Metropolitan Life Ins. Co.*, 207 N. C. 487, 177 S. E. 423.

The trial judge has the discretionary power during the term to set aside a verdict as being against the weight and credibility of the evidence, and his action in so doing is not ordinarily reviewable, but an order setting aside the verdict on such grounds at a succeeding term of court upon a continuance of the defendant's motion therefor will be reversed on appeal where the record shows that the plaintiff did not consent to the continuance and did not waive his right to except thereto. *Manufacturers' Finance Accept. Corp. v. Jones*, 203 N. C. 523, 166 S. E. 504.

The power of a trial court to set aside a verdict and to order a new trial, in its discretion, is inherent, and is necessary to the proper administration of justice, which is after all the function of a court, and is recognized by this section; its exercise at any time during the term at which the action was tried has been uniformly approved by this court. *Brantley v. Collie*, 205 N. C. 229, 231, 171 S. E. 83.

The discretionary action of the trial court in setting aside a verdict on the issue of damages because excessive or contrary to the weight of the evidence is not appealable in the absence of a denial of some legal right. It is likewise a matter of discretion as to whether the verdict should be set aside in whole or in part. *Hawley v. Powell*, 222 N. C. 713, 24 S. E. (2d) 523.

Same—Reduction of Verdict.—The discretionary power of the trial judge to set aside the verdict of the jury for “excessive” or “inadequate” damages, does not extend to his authority to reduce the verdict and render judgment accordingly, unless assented to by the party against whose interest it has been done, and without this consent the Supreme Court, on appeal, will direct that the amount of the judgment be entered according to the verdict. *Hyatt v. McCoy*, 194 N. C. 760, 140 S. E. 807.

Where Jury Commits Palpable Error.—When it appears from the evidence, the charge of the court, and the verdict, that the jury has committed a palpable error in the answer to one of the issues, it is the duty of the trial judge to set it aside to prevent a miscarriage of justice. *Hussey v. Atlantic Coast Line R. Co.*, 183 N. C. 7, 110 S. E. 599.

Court Not Empowered to Change Verdict.—The trial judge has the authority to set aside the verdict of the jury as to matters in his sound discretion or as a matter of law, leaving the cause at issue, but he may not change the verdict and thereupon dismiss the action as a matter of law, the exercise of such power being allowed only for want of jurisdiction or upon the ground that no cause of action has been sufficiently

alleged in the complaint. *Rankin v. Oates*, 183 N. C. 517, 112 S. E. 32.

The court under this section has the power to set aside the verdict, but none to reverse the answers of the jury. *Bundy v. Sutton*, 207 N. C. 422, 427, 177 S. E. 420.

While the trial court has the power to set aside a verdict when he is of the opinion that it is not supported by the evidence or is against the weight of the evidence, under this section, he has no power to change or modify a verdict because in his opinion the jury made an error in computing the amount returned in their answer, and a new trial will be awarded upon appeal from a judgment rendered on the verdict as modified by the court. *Edwards v. Upchurch*, 212 N. C. 249, 193 S. E. 19.

Agreement Made by Attorney for Client.—Where the trial judge has announced his decision to set aside a verdict unless the parties should agree in a certain particular, to which the plaintiff's attorney agreed without the consent of his client and against her instructions, and the judgment so agreed upon has been accordingly entered, the plaintiff may not thereafter repudiate the agreement made in her behalf by her attorney, and also repudiate the result thereby attained, and she is estopped from resisting the entry of judgment setting aside the verdict *nunc pro tunc*. *Bizzell v. Auto Tire, etc., Co.*, 182 N. C. 98, 108 S. E. 439.

Where Matter Determined Out of Term.—Where the losing party moves to set aside a verdict after the trial, as within the statutory discretion of the trial judge, and the judge intimates he will grant the motion, but the parties agree that he may determine the matter out of the term, in view of attempting to compromise the disputed matter; and not hearing from the parties the judge renews his previous intimation, and sets a time and place for hearing, at which one of the parties appears and refuses the suggestion of the judge as a basis of a just settlement, his then setting the verdict aside within his reasonable discretion deals with the record as it originally stood, and is not abuse of the discretion given him by this section. *Bailey v. Dibbell Mineral Co.*, 183 N. C. 525, 112 S. E. 29.

SUBCHAPTER VIII. JUDGMENT.

Art. 23. Judgment.

§ 1-208. **Defined.**—A judgment is either interlocutory or the final determination of the rights of the parties in the action. (Rev., s. 555; Code, s. 384; C. C. P., s. 216; C. S. 592.)

Definition of Final Judgment.—A judgment is final which decides the case upon its merits without reservation for other and future directions of the court. *Sanders v. May*, 173 N. C. 47, 91 S. E. 526; *Flemming v. Roberts*, 84 N. C. 532.

Definition of Interlocutory Order.—An interlocutory order or decree is provisional or preliminary only. It does not determine the issues joined in the suit, but merely directs some further proceedings preparatory to the final decree. *Johnson v. Robertson*, 171 N. C. 194, 88 S. E. 231.

It remains in the control of and in the breast of the court, and upon good cause shown they may be amended, modified, charged or rescinded, as the court may think proper. *Maxwell v. Blair*, 95 N. C. 317, 318.

Jurisdiction.—It is a well established principle that in order that a judgment or decree may be valid and binding, the court rendering the same must have jurisdiction both of the person and of the subject matter. *Wetmore v. Rarrick*, 205 U. S. 141, 27 S. Ct. 434, 51 L. Ed. 745.

Nature of Judgment.—In its ordinary acceptation, a judgment is the conclusion of the law or facts admitted or in some way established. *Sedbury v. Southern Exp. Co.*, 164 N. C. 363, 79 S. E. 286.

Judgments are the solemn determinations of judges upon subjects submitted to them, and the proceedings are recorded for the purpose of perpetuating them. They are the foundation of legal repose. *Williams v. Woodhouse*, 14 N. C. 257.

A judgment or decree has been defined as an act or conclusion of the mind, founded upon a view of all the facts and circumstances surrounding the subject as to which that conclusion is formed. *Steamer Oregon v. Rocca*, 13 How. 570, 15 L. Ed. 515.

It is the result of the court's exercise of its jurisdiction, or right to hear and determine. *Daniels v. Tearney*, 102 U. S. 415, 26 L. Ed. 187.

Sanction of Court.—Every judgment should and must have the sanction of the court, except in case of consent judgments, and those must be entered with its knowledge and permission. *Branch v. Walker*, 92 N. C. 87.

Relief Granted.—Since the gist of the accepted definition of a judgment is "the final determination of the rights of the parties to an action," courts are required to recognize both the legal and equitable rights of the parties, and to frame their judgments so as to determine all the rights of the parties, equitable as well as legal. *Hutchinson v. Smith*, 68 N. C. 354, 355; *Lee v. Pearce*, 68 N. C. 77, 80; *McCown v. Sims*, 69 N. C. 159, 161.

A judgment may grant to the defendant any affirmative relief to which he may be entitled. *Hutchinson v. Smith*, 68 N. C. 354, 355.

Judgment as a Contract.—While judgments are sometimes spoken of as contracts, they are not in reality contracts, and are never so considered in reference to the clause in the federal constitution which forbids that contracts should be impaired by state legislation. *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969.

However, judgments are considered as contracts to distinguish a cause of action thereon from one *ex delicto*. *Moore v. Nowell*, 94 N. C. 265.

A judgment for damages, estimated in money, is sometimes called by text-writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered, and, by a fiction of law, the promise to pay is implied where such legal obligation exists. *Louisiana v. New Orleans*, 109 U. S. 285, 3 S. Ct. 211, 27 L. Ed. 936.

It is upon this principle that an action in form *ex contractu* will lie on a judgment of a court of record. *Chitty on Contracts* 87. *Garrison v. New York*, 21 Wall. 196, 22 L. Ed. 612. But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it. *Louisiana v. New Orleans*, 109 U. S. 285, 3 S. Ct. 211, 27 L. Ed. 936.

Operation of Judgment In Rem as Passing Title.—A condemnation in a proceeding in rem does not necessarily exclude all claim to other interests than those which were seized. *Day v. Micou*, 18 Wall. 156, 21 L. Ed. 860. In admiralty cases and in revenue cases a condemnation and sale generally pass the entire property to the thing condemned and sold. *Day v. Micou*, 18 Wall. 156, 21 L. Ed. 860.

But such is not the case in many proceedings which are in rem. Decrees of courts of probate or orphan's courts directing sales for the payment of a decedent's debt or for distribution are proceedings in rem. So are sales under attachments or proceedings to foreclose a mortgage in rem. In none of these is anything more sold than the estate of the decedent, or of the debtor, or of the mortgagor in the thing sold. The interests of others are not cut off or affected. *Day v. Micou*, 18 Wall. 156, 21 L. Ed. 860.

Extrinsic Evidence.—Extrinsic evidence to aid in the interpretation of a judgment or decree is inadmissible, unless, after reference to the pleadings and proceedings, there remains some ambiguity or uncertainty in it. *Burthe v. Denis*, 133 U. S. 514, 10 S. Ct. 335, 33 L. Ed. 768.

Cited in Never Fall Land Co. v. Cole, 197 N. C. 452, 456, 149 S. E. 585; *McFetters v. McFetters*, 219 N. C. 731, 734, 14 S. E. (2d) 833.

§ 1-209. **Judgments authorized to be entered by clerk; sale of property; continuance pending sale; writs of assistance and possession.**—The clerks of the superior courts are authorized to enter the following judgments: (a) All judgments of voluntary nonsuit. (b) All consent judgments. (c) In all actions upon notes, bills, bonds, stated accounts, balances struck, and other evidences of indebtedness within the jurisdiction of the superior court. (d) All judgments by default final and default and inquiry as are authorized by §§ 1-211, 1-212, 1-213, and in this section provided. (e) In all cases where the clerks of the superior court enter judgment by default final upon any debt secured by mortgage, deed of trust, conditional sale contract or other conveyance of any kind, either real or personal property, or by a pledge of property, the said clerks of the superior court are authorized and empowered to order a foreclosure of such mortgage, deed of trust, conditional sale contract, or other conveyance, and order a sale of the property so conveyed or pledged upon such terms as appear to be just; and the said clerks of the superior court shall have all the power

and authority now exercised by the judges of the superior court to appoint commissioners to make such sales, to receive the reports thereof, and to confirm the report of sale or to order a resale, and to that end they are authorized to continue such causes from time to time as may be required to complete the sale, and in the final judgment in said causes they shall order the execution and delivery of all necessary deeds and make all necessary orders disbursing the funds arising from the sale, and may issue writs of assistance and possession upon ten days notice to parties in possession. The commissioners appointed to make foreclosure sales, as herein authorized, may proceed to advertise such sales immediately after the date of entering judgment and order of foreclosure, unless otherwise provided in said judgment and order.

In any tax foreclosure action pending on March 15, 1939 or thereafter brought under the provisions of § 105-414 in which there is filed no answer which seeks to prevent entry of judgment of sale, the clerk of the superior court may render judgment of sale and make all necessary subsequent orders and judgments to the same extent as permitted by this section in actions brought to foreclose a mortgage. All such judgments and orders heretofore rendered or made by a clerk of the superior court in such tax foreclosure actions are hereby, as to the authority of said clerk, ratified and confirmed. (1919, c. 156; Ex. Sess. 1921, c. 92, s. 12; 1929, cc. 35, 49; 1939, c. 107; 1943, c. 301, s. 1; C. S. 593.)

Local Modification.—Vance: 1941, c. 139, s. 1.

Editor's Note.—The primary object of this section is to effect a speedy hearing and determination of uncontested rights involved in the particular class of actions enumerated herein. It was settled even when the section provided for a different return day, that this section was not repugnant to section 1-89 which purports to apply to "all civil actions in the superior court," and hence the general repealing clause of that section did not serve to repeal the remedy herein provided for in these specially designated cases. The courts, in their endeavor to discover the legislative intent, have construed the two sections together and section 1-209, although ratified four days prior to the amendment of section 1-89 in 1919, was considered an exception to that section and the remedy prescribed regarded as an additional and more speedy method of relief in the stated classes of suits. *Young v. Davis*, 182 N. C. 200, 108 S. E. 630.

Prior to the amendment of this section by the Public Laws of 1921, the section pertained merely to what is now the third class (c); the other classes (a), (b), (d) and (e), were added by the act of 1921. See 1 N. C. Law Rev. 16. This section was amended twice by the Public Laws 1929. Ch. 35 added the last sentence to the first paragraph and provided that the amendment should not affect pending litigation or vested rights. Ch. 49 inserted the words "conditional sales contract" in subsection (e).

The 1939 amendment added the second paragraph.

The 1943 amendment struck out the words "judgments coming within the meaning of (a) and (b) may be entered at any time," which formerly appeared at the end of subdivision (b) of this section.

Constitutionality.—This section is not an unconstitutional interference with the jurisdiction of the judge of the court, as the clerk is a component part of the superior court, and the exercise of the power of the judge is recognized and preserved by the right of appeal. *Thompson v. Dillingham*, 183 N. C. 566, 112 S. E. 321.

An Enabling Act.—This statute is an enabling act and does not deprive the superior court in term of its jurisdiction to render judgments, and the jurisdiction of a judge in term to render judgments upon voluntary non-suits, by consent of the parties to the action, upon notes, bills, bonds, stated accounts, balances struck, or other evidences of debt within the jurisdiction of the superior court, is not affected by the provisions of this section. The authority of the clerk is concurrent with and additional to that of

the judge in term. *Caldwell v. Caldwell*, 189 N. C. 805, 128 S. E. 329; *Hill v. Huffines Hotel Co.*, 188 N. C. 586, 125 S. E. 266; *Young v. Davis*, 182 N. C. 200, 108 S. E. 630, 1 N. C. Law Rev. 16, 282.

The clerk of the Superior Court has jurisdiction under this section to sign a consent judgment in an action even while the action is pending before a referee. *Weaver v. Hampton*, 204 N. C. 42, 167 S. E. 484.

Judgment by Default When Plaintiff Fails to Answer.—Where the parties are properly before the court and the subject-matter of the action is also jurisdictional in the superior court, the clerk, having authority under the provisions of this section, may render a judgment against the plaintiff by default for want of a reply to an answer setting up affirmative relief. *Finger v. Smith*, 191 N. C. 818, 133 S. E. 186.

Judgment of Voluntary Nonsuit.—While a plaintiff, in cases where nothing more than costs can be recovered against him, may elect to be nonsuited, the nonsuit must be effected by a judgment of the clerk of superior court, under this section, or by the judge at term. *McFetters v. McFetters*, 219 N. C. 731, 14 S. E. (2d) 833.

Effect of Judgments Entered by Clerk.—Judgments entered by the clerk as authorized by this section, are judgments of the superior court, and are of the same force and effect, in all respects, as if entered in term and before a judge of the superior court. *Caldwell v. Caldwell*, 189 N. C. 805, 128 S. E. 329.

Judgment Entered without Authority May Be Set Aside.—A judgment by default final entered by the clerk in an instance in which he is without authority to enter such judgment is subject to attack, and may be set aside and vacated upon motion in the cause. *Cook v. Bradsher*, 219 N. C. 10, 12 S. E. (2d) 690.

Action to Cancel Deed of Trust and Surrender Notes Secured Thereby.—The clerk of the superior court is given no authority to render a judgment by default final for want of an answer in an action for the cancellation of a deed of trust and for surrender of notes secured thereby upon payment by plaintiffs to defendant of the balance claimed by plaintiffs to be due upon the notes. *Cook v. Bradsher*, 219 N. C. 10, 12 S. E. (2d) 690.

Appeals from Clerk to Judge.—There is no provision in the statute regulating an appeal from a judgment entered by the clerk under the authority of the statute upon the ground that such judgment is erroneous. It would seem that the appeal from such judgment, upon this ground, may be taken from the clerk to the judge, as provided by the statute for appeals from orders and judgments upon other grounds. The proper practice, we think, is for the complaining party to except to the judgment, as entered by the clerk, and to appeal therefrom to the judge, as in other cases provided for in the statute. An appeal will then lie from the judge of the superior court to the Supreme Court. *Caldwell v. Caldwell*, 189 N. C. 805, 128 S. E. 329, 332.

In *Ward v. Agrillo*, 194 N. C. 321, 139 S. E. 451, cited in *Howard v. Queen City Coach Co.*, 211 N. C. 329, 331, 190 S. E. 478, it was said that in the absence of statutory provision to that effect, the resident judge of a judicial district has no jurisdiction to hear and determine an appeal from a judgment of the clerk of the Superior Court of any county in his district, rendered pursuant to the provisions of this section, except when such judge is holding the courts of the district by assignment under the statute, or is holding a term of court by exchange, or under a special commission from the Governor.

Statutory Lien, see notes to sec. 1-211,—analysis line "Definite Debt."

Stated in *Buncombe County v. Penland*, 206 N. C. 299, 302, 173 S. E. 609.

Cited in *Ward v. Agrillo*, 194 N. C. 321, 323, 139 S. E. 451; *Standard Supply Co. v. Vance Plumbing, etc., Co.*, 195 N. C. 629, 143 S. E. 248; *Baker v. Corey*, 195 N. C. 299, 141 S. E. 892; *Beaufort County v. Bishop*, 216 N. C. 211, 4 S. E. (2d) 525; *Keen v. Parker*, 217 N. C. 378, 8 S. E. (2d) 209.

§ 1-210. Return of execution; order for disbursement of proceeds.—In all executions issued by the clerk of the Superior Court upon judgment before the clerk of the Superior Court, under § 1-209, and execution issued thereon, the sheriff shall make his return to the clerk of the Superior Court, who shall make the final order directing the sheriff to disburse the proceeds received by him under said execution: Provided,

that any interested party may appeal to the Superior Court, where the matter shall be heard de novo. (1925, c. 222, s. 1.)

§ 1-211. By default final.—Judgment by default final may be had on failure of defendant to answer—

1. Where the complaint sets forth one or more causes of action, each consisting of the breach of an express or implied contract to pay, absolutely or upon a contingency, a sum or sums of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation. Upon proof of personal service of summons, or of service of summons by publication, on one or more of the defendants, and upon the complaint being verified, judgment shall be entered for the amount mentioned in the complaint, against the defendant or defendants, or against one or more of several defendants.

2. Where the defendant, by his answer in such action, does not deny the plaintiff's claim, but sets up a counterclaim, amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of his claim over the counterclaim, in like manner in any such action, upon the plaintiff's filing with the court a statement admitting the counterclaim, which statement must be annexed to and be a part of the judgment roll. Or the court may in its discretion, order the pleadings to be so amended and the action severed as to entitle the plaintiff to judgment upon all of the claims admitted over and above the setoff or counterclaim pleaded by the defendant; and, upon application of the plaintiff, shall enter judgment for the plaintiff for so much of the claim as is admitted. The action shall thereupon be continued as to subsequent proceedings, as if it had been brought for the remainder of the claim, and the counterclaim or setoff as pleaded by the defendant shall apply thereto. Said remainder of the claim shall in any event be sufficient to cover the full amount of the principal and interest set up by the defendant in the counterclaim or setoff, and an amount in excess thereof, if in the discretion of the court the same is necessary, the court being empowered to designate and determine what part of the plaintiff's claim shall be held for the subsequent proceedings herein referred to.

3. In actions where the service of the summons was by publication, the plaintiff may, in like manner, apply for judgment, and the court must thereupon require proof to be made of the demand mentioned in the complaint, and if the defendant is not a resident of the state, must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use on account of such demand, and may render judgment for the amount which he is entitled to recover. Before rendering judgment the court may in its discretion require the plaintiff to cause to be filed satisfactory security to abide the order of the court touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under and by virtue of said judgment, in case the defendant or his

representatives apply and are admitted to defend the action, and succeed in such defense.

4. In actions for the recovery of real property, or for the possession thereof, upon the failure of the defendant to file the undertaking required by law, or upon failure of his sureties to justify according to law, unless the defendant is excused from giving such undertaking before answering.

5. In actions for the recovery of personal property, or for the possession thereof, or to have the plaintiff or plaintiffs adjudged the owner or owners thereof, if the complaint be verified. (Rev., s. 556; Code, ss. 385, 390; C. C. P., s. 217; 1870-1, c. 42; 1869-70, c. 193, s. 4; 1919, c. 26; 1929, c. 66; C. S. 595.)

I. In General.

A. Failure to File Answer.

B. The Complaint.

II. Nature and Essentials.

A. Definite Debt.

B. Service of Summons.

III. Affirmative Relief by Defendant, (Counterclaim).

IV. Real Property.

V. Personal Property.

VI. Setting Aside.

I. IN GENERAL.

A. Failure to File Answer.

Cross Reference.—See also, § 1-209.

Against State. — It has been held in several instances by the U. S. Supreme Court that judgment by default for want of appearance may be entered against a state. *United States v. Girault*, 11 How. 22, 13 L. Ed. 587.

Time to Answer. — As to time for answering, see sec. 1-89 and the notes thereto. As to time of filing complaint and extension thereof, see sec. 1-121 and notes thereto.

In a suit to set aside certain deeds alleged to be void and to declare the plaintiff the owner of the title to lands, a judgment by default is regularly entered when the defendant has failed to file an answer within the statutory time, and the summons has been duly served. *Jernigan v. Jernigan*, 178 N. C. 84, 100 S. E. 184.

Where a complaint in an action set up two causes of action, one for indebtedness due on a note and the other for fraudulent conversion of money, the court may, where the defendant makes no appearance or defense, enter judgment by default final as to the first charge but not as to the second. *Stewart v. Bryan*, 121 N. C. 46, 28 S. E. 18.

Where Answer Insufficient. — When matters are alleged in the complaint to be in the personal knowledge of the defendant, an averment in the answer thereto that he "has no knowledge or information sufficient to form a belief as to the truthfulness thereof and, therefore, denies the same," is insufficient, and judgment can be rendered for want of an answer if such allegation goes to the cause of action. *Streator v. Streator*, 145 N. C. 337, 59 S. E. 112.

Effect of Failure Promptly to Take Judgment by Default.—A failure to take a judgment by default as soon as the same is allowable does not work a discontinuance. *Governor v. Lassiter*, 83 N. C. 38.

B. The Complaint.

Should Conform to the Complaint. — Judgment by default should be so drawn as to be in strict conformity with the complaint filed. *Currie v. Mining Co.*, 157 N. C. 209, 72 S. E. 980.

Complaint Should Be Definite. — A pleader desiring a judgment by default must set forth clearly the facts upon the admission of which, by failure to answer, he bases his right to relief, that the court may, upon the interpretation of his complaint, adjudge his rights to correspond with such facts, for otherwise the judgment would be irregular. *Currie v. Mining and Milling Co.*, 157 N. C. 209, 72 S. E. 980.

Court Must Construe Complaint. — Upon motion made before the clerk to set aside a judgment by default final for the want of an answer, under this section, and also heard on appeal in the superior court, the failure of the defendant to have filed his answer only admits the truth of the facts alleged in the complaint, leaving the court to construe the complaint to ascertain if the facts alleged are sufficient to sustain the judgment, and if not, the judgment will be set aside. *Beard v. Sovereign Lodge*, 184 N. C. 154, 113 S. E. 661.

New Parties. — Where a complaint was filed against the defendant, and in the progress of the action another party defendant is brought in, the complaint must be amended or another complaint filed as to him, unless he waive his right to the same by answering the original complaint. *Vass v. Building, etc., Ass'n.*, 91 N. C. 55. If no complaint is filed as to such new parties the judgment is irregular and may be set aside. *Id.*

Verification of Complaint Essential. — A complaint which is not verified as required by statute is insufficient and must be regarded as unverified, upon which a final judgment by default can not be rendered, for it is only proper to render a final judgment when the complaint is verified. *Witt v. Long*, 93 N. C. 388.

Same — Substantial Compliance Sufficient. — While it is essential that the complaint be verified it is not necessary that it be subscribed by the party making it, and a substantial compliance is sufficient, and meets the requirements when it appears that the plaintiff swore to the complaint before an officer authorized to administer oaths. *Currie v. Mining Co.*, 157 N. C. 209, 72 S. E. 980; *Miller v. Curl*, 162 N. C. 1, 77 S. E. 952.

Same—Where Complaint Improperly Verified. — Where a properly verified complaint would entitle a plaintiff to a judgment final, for want of an answer, if the complaint is not properly verified, the judgment should be by default and inquiry. *Cole v. Boyd*, 125 N. C. 496, 34 S. E. 557.

Breach of Contract.—In order to authorize a judgment by default final in an action based on the contract the complaint must set forth not only the agreement of the parties, but the alleged breach, so that the court may determine whether the action as stated can be maintained. *Baker v. Corey*, 195 N. C. 299, 141 S. E. 892.

II. NATURE AND ESSENTIALS.

A. Definite Debt.

Editor's Note. — This section, authorizing the clerk to enter judgment in all cases where the defendant fails to answer, carries out the general intent of the statute, namely, to effect a speedy settlement of the controversies in litigation. To warrant the granting of a judgment by default final the debt must be definite; when it is for an unascertained amount, the judgment is by default and inquiry, the case going up to the term for the inquiry. See 1 N. C. Law Rev. 17.

Express Promise to Pay.—When personal service on the defendant has been properly made, a judgment by default for want of an answer may be obtained, if the complaint alleges an express promise to pay a sum due. *Currie v. Mining and Milling Co.*, 157 N. C. 209, 72 S. E. 980.

Implied Promise to Pay. — Where the allegation is of a sum certain expended for the benefit of the defendant and therefore upon an implied promise to repay, and the complaint is verified and no answer filed, the judgment is properly by default final. *Cowles v. Cowles*, 121 N. C. 272, 28 S. E. 476.

Same — Goods Sold and Delivered. — Where the action is on an implied contract to pay for goods sold and delivered the judgment rendered should be by default and inquiry and not by default final. *Jeffries v. Aaron*, 120 N. C. 167, 26 S. E. 696.

On Note. — A judgment by default on a note for the payment of money only, against one who fails to appear and answer the complaint, is regular in all respects. *Morehead Banking Co. v. Duke*, 121 N. C. 110, 28 S. E. 191.

Failure to Allege Promise to Pay. — Where the complaint only alleges the value of the goods sold without also alleging a promise to pay, upon a failure to answer, the judgment should be by default and inquiry. *Hartman v. Farrier*, 95 N. C. 177, 178.

Damages Must Be Certain. — When the amount of the debt is precise and final by the agreement of the parties, or can be rendered certain by mere computation, there is no need of proof, as the judgment by default admits the claim. *Adrian v. Jackson*, 75 N. C. 536, 539.

Same—Breach of an Official Bond.—In an action on an official bond, on failure of a defendant to answer, a judgment entered against him on default cannot be final since the action is not for the breach of an express or implied contract to pay a definite sum of money. *Battle v. Baird*, 118 N. C. 854, 24 S. E. 668.

Same—Bail Bond. — A judgment by default final for want of an answer in a suit upon a bail bond cannot be sustained. It should be by default and inquiry. *Roulhac v. Miller*, 90 N. C. 175.

Sum Certain or Computable.—A judgment by default final is irregularly entered upon a pleading that does not allege a sum certain or computable, due upon contract, ex-

press or implied. *Byerly v. Acceptance Corporation*, 196 N. C. 256, 145 S. E. 236.

Express Promise to Pay.—If the verified complaint alleges a breach of an express promise to pay absolutely a definite sum of money particularly specified for valuable consideration, judgment by default final is proper. *Standard Supply Co. v. Vance Plumbing, etc., Co.*, 195 N. C. 629, 143 S. E. 248.

Goods Sold and Delivered.—A judgment by default final is irregular when rendered for the want of an answer filed in an action upon contract for goods sold and delivered when the alleged cause, as appearing from the complaint, is not upon an expressed contract, but for the reasonable value of the goods, in which event a judgment by default and inquiry is the proper one, unless it is made to appear that the defendant has by his acts or conduct or in some recognized legal way admitted owing the amount in suit. *Standard Supply Co. v. Vance Plumbing, etc., Co.*, 195 N. C. 629, 143 S. E. 248.

Goods Sold under Consignment.—In an action to recover for goods sold under consignment upon allegations that the purchaser failed to properly account and that he was guilty of fraudulent misappropriation, plaintiff is not entitled to judgment by default final upon failure of answer, but only to judgment by default and inquiry. *Chozon Confections v. Johnson*, 218 N. C. 500, 11 S. E. (2d) 472.

Action to Cancel Deed of Trust and Surrender Notes Secured Thereby.—The clerk of the superior court is given no authority to render a judgment by default final for want of an answer in an action for the cancellation of a deed of trust and for surrender of notes secured thereby upon payment by plaintiffs to defendant of the balance claimed by plaintiffs to be due upon the notes. *Cook v. Bradsher*, 219 N. C. 10, 12 S. E. (2d) 690.

Services Rendered Decedent.—In order for the plaintiff to be entitled to a judgment by default final upon the complaint for the want of an answer in his action to recover from the estate of the deceased for services rendered before her death, in taking care of and providing a support for her, at her request and promise to pay for them, there must have been a definite price fixed upon and understood and agreed to by both of the parties; and where the complaint alleges merely an estimate by the parties of a reasonable price to be paid for such services it supports a judgment by default and inquiry only. *Baker v. Corey*, 195 N. C. 299, 141 S. E. 892.

Where Complaint States More than One Cause of Action.—Where a complaint states two or more causes of action arising from the same default, and any one is sufficient to uphold a judgment by default final for the want of an answer, which has been entered in the due course of practice of the courts, such judgment will be upheld. *Bostwick & Bros. v. Laurinburg R. Co.*, 179 N. C. 485, 102 S. E. 882.

Same—Separate Notes Sued on in Same Complaint. — Where two notes are set out in the complaint, each being used as a separate cause of action, and no defense is interposed as to one, it is error to refuse judgment as to this one, and from such refusal, since it is a denial of a substantial right, an appeal may be taken. *Curran v. Kerchner*, 117 N. C. 264, 265, 23 S. E. 177.

Where Complaint Sets up Matter Constituting Statutory Lien. — Where the complaint declares upon a contract and alleges damages for its breach in a sum certain, and sets up matters that would constitute a statutory lien upon the subject-matter of the contract, the clerk of the court, under the provisions of our statute, has authority to render judgment by default for the want of an answer in the specific amount demanded, and to declare and enforce the lien (sections 1-209, 1-211), and issue an execution thereunder, and order a distribution of the funds so received. *Crye v. Stoltz*, 193 N. C. 802, 138 S. E. 167.

B. Service of Summons.

As to summons generally, see secs. 1-83 et seq.

Necessity for Service of Summons. — As in the case of judgments and decrees generally it is essential to the rendition of a valid decree pro confesso, for failure to appear, that the court shall have acquired jurisdiction of the defendant by due service of sufficient process. *Thomson v. Wooster*, 114 U. S. 104, 5 S. Ct. 788, 29 L. Ed. 105.

Judgments by default form no exception to the general rule that in order to render a valid judgment or decree a court must have jurisdiction of the person as well as of the subject matter, and it is essential that jurisdiction of the person shall have been obtained by the due service of process. *Wetmore v. Karrick*, 205 U. S. 141, 27 S. Ct. 434, 51 L. Ed. 745.

When Personal Service Required. — Where a personal

judgment is sought against a defendant it is essential that personal service of summons be made on him. *Currie v. Mining Co.*, 157 N. C. 209, 72 S. E. 980.

Charged with Notice. — Notice to the adverse party of a motion in term for a judgment by default for the want of an answer is not necessary, for in legal contemplation the defendant is in court by service of a summons and is charged with notice of whatever action the court takes during the pendency of the suit. *Reynolds v. Greensboro Boiler, etc., Co.*, 153 N. C. 342, 69 S. E. 248; *Jernigan v. Jernigan*, 178 N. C. 84, 100 S. E. 184.

Judgment Void Where No Process Had. — Where there is no service of process the court has no jurisdiction and its judgment is void. *Bank v. Wilson*, 80 N. C. 200; *Stancill v. Gay*, 92 N. C. 455, 462.

III. AFFIRMATIVE RELIEF BY DEFENDANT.

Judgment by Default Not Allowed Where Court Permits Formal Denial. — The defendant is not entitled to judgment by default on his counterclaim where the court in the exercise of its discretion allows a formal denial to be entered. *Tillinghast Co. v. Cotton Mills*, 143 N. C. 268, 55 S. E. 621; *Bernhardt v. Dutton*, 146 N. C. 206, 59 S. E. 651.

IV. REAL PROPERTY.

Recovery of the Property Sought. — Where in an action to recover land, the defendant fails to file, or is not excused from filing the required bond, a judgment by default may be entered; and this is true even if there has been a failure to file an answer arising from excusable neglect. *Vick v. Baker*, 122 N. C. 98, 100, 29 S. E. 64.

Possession of the Property. — In an action to recover possession of land, where the defendant fails to file an answer or the required bond, and does not ask leave to answer without giving bond until the time for answering has expired, it is proper to enter judgment by default. *Jones v. Best*, 121 N. C. 154, 28 S. E. 187.

Where a tenant is joined with his landlord as co-defendant, and the tenant fails to give the required undertaking, judgment may be entered against him. *Harkey v. Houston*, 65 N. C. 137.

Time of Filing. — The trial judge, in his discretion, may permit a defendant at the trial to file the required bond. *Carraway v. Stancill*, 137 N. C. 472, 49 S. E. 957.

Notice. — Upon the failure of the defendant to file the necessary bond, it is error to strike out his answer and enter judgment by default without due notice and an opportunity to show cause. *Cooper v. Warlick*, 109 N. C. 672, 14 S. E. 106. See also, *McMillan v. Baker*, 92 N. C. 111.

Waiver of Bond. — The bond required of the defendant is for the benefit of the plaintiff and he can waive it, and will be deemed to have done so, if he allows a number of terms of court to pass without demanding it. If not waived entirely, it is waived until demanded. *McMillan v. Baker*, 92 N. C. 111.

Failure to "Justify" Bond. — A failure to file a "justified" bond, as is required, does not necessarily avoid the bond, but it is a defect which may be cured by waiver. *Becton v. Dunn*, 137 N. C. 559, 560, 50 S. E. 289.

V. PERSONAL PROPERTY.

Editor's Note.—The Act of 1929 added subsection 5.

VI. SETTING ASIDE.

Meritorious Defense.—A judgment by default final for want of an answer, when it is made to appear on appeal that one by default and inquiry should have been entered, is an irregular judgment, but on defendant's motion to set aside, he must show a meritorious defense. *Baker v. Corey*, 195 N. C. 299, 141 S. E. 892; *Standard Supply Co. v. Vance Plumbing, etc., Co.* 195 N. C. 629, 143 S. E. 248.

Remand for Determination of Question.—Where on appeal from the setting aside an irregular judgment of default final it does not appear that the question of a meritorious defense was considered or passed upon, and that the movent intended to allege one, the case will be remanded for the determination of this question as to whether the defendant has such meritorious defense as calls for the vacating of the judgment. *Baker v. Corey*, 195 N. C. 299, 141 S. E. 892.

§ 1-212. By default and inquiry.—In all other actions, except those mentioned in § 1-211, when the defendant fails to answer and upon a like proof, judgment by default and inquiry may be had, and inquiry shall be executed at the next succeeding term. If the taking of an intricate or long

account is necessary to execute properly the inquiry, the court, at the return term, may order the account to be taken by the clerk of the court or some other fit person, and the referee shall make his report at the next succeeding term; in all other cases the inquiry shall be executed by a jury, unless by consent the court is to try the facts as well as the law. (Rev., s. 557; Code, s. 386; C. S. 596.)

Cross References.—See also, § 1-209. See note under § 1-211.

Editor's Note. — This section is somewhat in the nature of a "residuary clause," the provisions of which are applicable to all those classes of cases not falling within the provisions of section 1-211. The same purpose found in section 1-211 is likewise embodied in this section, although the procedure herein provided is more time-consuming since it is necessary in these cases to determine, by way of inquiry, the respective rights of the parties and, more particularly the precise amount of recovery the one is entitled to receive.

Nature in General. — "A judgment by default is one thing; a judgment by default and inquiry consists of two things. There are two kinds of judgments by default—one final, the other interlocutory. In actions sounding in damages the interlocutory judgment, which is rendered for want of an answer, is an admission or confession of the cause of action; and there follows a writ of inquiry by means of which the damages are to be assessed." (Black type by the Court.) *Junge v. MacKnight*, 137 N. C. 285, 288, 49 S. E. 474. See also *Bowie v. Tucker*, 206 N. C. 56, 173 S. E. 28, also referring to sections 1-209 to 1-211.

A judgment by default and inquiry for the want of an answer establishes the cause of action and leaves the question of the amount of damages open to the inquiry. *Farmer-Cole Plumbing Co. v. Wilson Hotel Co.*, 168 N. C. 577, 84 S. E. 1008; *Armstrong v. Ashbury*, 170 N. C. 160, 86 S. E. 1038; but the burden of proving any damages beyond such as are nominal still rests upon the plaintiff. *Hill v. Hotel Co.*, 188 N. C. 586, 125 S. E. 266.

A judgment by default and inquiry is conclusive that the plaintiff has a cause of action and entitles him to nominal damages without further proof. *Foster v. Hyman*, 197 N. C. 189, 148 S. E. 36.

A judgment by default final as authorized by § 1-211, is different in effect and result from a judgment by default and inquiry as authorized by this section. The former establishes the allegations of the complaint and concludes by way of estoppel, while the latter "establishes a right of action in the plaintiff of the kind stated in the complaint" the precise character and extent of which remain to be determined by a hearing in damages and final judgment thereon. *DeHoff v. Black*, 206 N. C. 687, 689, 175 S. E. 179.

Where Action Sounds in Damages. — In an action sounding in damages, for an unliquidated money demand, the judgment should be by default and inquiry. *Moore v. Mitchell*, 61 N. C. 304.

In actions sounding in damages, as in assumpsit, covenant and trespass, a judgment by default is only interlocutory, and the amount of damages must be ascertained by a jury. But in actions not sounding in damage it is held, that if the plaintiff's claim for damages is precise and final by the agreement of the parties, or can be rendered certain by mere computation, there is no need of proof, as the judgment by default admits the claim. An inquiry is necessary only where the claim is uncertain. *Adrian v. Jackson*, 75 N. C. 536, 539, cited in note in 20 L. R. A., N. S., 23.

Where a complaint has been properly filed showing a right of action for unliquidated damages, a judgment by default and inquiry establishes plaintiff's right of action and that he is entitled at least to nominal damages. And in this State it is further held that such a judgment concludes on all issuable facts properly pleaded and that evidence in bar of plaintiff's right of action is not admissible on the inquiry as to damages. *DeHoff v. Black*, 206 N. C. 687, 689, 175 S. E. 179.

Action on Official Bond. — See note of *Battle v. Baird*, 118 N. C. 854, 24 S. E. 668. Section 1-211,—Analysis Line, "Definite Debt."

Action on Contract for Goods Sold and Delivered. — See note of *Jeffries v. Aaron*, 120 N. C. 167, 26 S. E. 496, Section 1-211,—Analysis Line, "Definite Debt."

Where Amount Cannot Be Ascertained by Computation. —Where it appears that the amount of the final judgment on default of answer could not be ascertained by computa-

tion or be fixed by the terms of the contract sued on, it is proper to enter judgment by default and inquiry. *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118.

Time of the Inquiry.—An inquiry as to damages cannot be executed at the same term or that at which judgment by default is rendered, unless it is expressly allowed by statute. *Brown v. Rinehart*, 112 N. C. 772, 774, 16 S. E. 840.

Where it appears on appeal that the inquiry was made at the same term the cause will be remanded so that the inquiry may be made as this section provides. And this is true although the defendant was in the courtroom and did not except to the inquiry or to the submission of the issues there in the capacity of a witness for plaintiff. As to whether a party may waive this provision of the statute, *quare?* *Foster v. Hyman*, 197 N. C. 189, 148 S. E. 36.

Cited in *Ward & Ward v. Agrillo*, 196 N. C. 95, 96, 144 S. E. 697.

§ 1-213. By default for defendant.—If the answer contains a statement of new matter constituting a counterclaim, and the plaintiff fails to reply or demur thereto, the defendant may move for such judgment as he is entitled to upon such statement; and if the case requires it, an order for an inquiry of damages by a jury may be made. (Rev., s. 558; Code, s. 249; C. C. P., s. 106; C. S. 597.)

Editor's Note.—In the dissenting opinion by Walker, J., in *Wilmington v. Bryan*, 141 N. C. 666, 682, 54 S. E. 543, it is intimated that in view of the fact that the section does not expressly make provision for the defendant taking judgment for the excess of his counterclaim, as is the case of the plaintiff whose claim exceeds the defendant's counterclaim, it is contemplated that there be rendered a separate judgment for the respective claims of the parties. But there was an inclination to construe the section so as to conform with the general spirit of the code that all controversies should be settled in one action and as far as possible by one judgment.

Section Applicable Only Where Affirmative Relief Sought.—It is only when a counterclaim is relied on as grounds for substantial relief that the plaintiff's failure to reply may afford grounds for a judgment for want of a replication, but not when the matter constitutes a defense to the action merely. *Barnhardt v. Smith*, 86 N. C. 473, 483.

Where Defendant's Counterclaim Unanswered.—Where the defendant seeks substantial relief in his answer, by way of counterclaim, and the plaintiff fails to reply (or demur) thereto in apt time, the defendant is entitled to judgment for such relief as the facts therein set forth may warrant. *Dempsey v. Rhodes*, 93 N. C. 120, 127, and the defendant is entitled to judgment even though the objection to his counterclaim would have been granted if it had been made in apt time and form. *Rountree v. Britt*, 94 N. C. 104.

Where in an action in which defendants set up a counterclaim, the plaintiff failed to reply thereto, and the defendants failed to except to a refusal of their motion for judgment by default, it was held, that the defendants had waived the right to judgment on their counterclaim for failure to except. *Faucette v. Ludden*, 117 N. C. 170, 171, 23 S. E. 173.

Recovery by Administrator Prior to That on Defendant's Counterclaim.—Where an administrator recovers judgment upon his cause of action, and the defendant also upon his counterclaim, the former is entitled to an execution for the entire amount of his recovery; but the execution on the defendant's judgment will be stayed until it is ascertained what amount of the assets of the estate of the intestate is applicable thereto. *Rountree v. Britt*, 94 N. C. 104.

Cited in *Standard Supply Co. v. Vance Plumbing, etc., Co.*, 195 N. C. 629, 143 S. E. 248; *Baker v. Corey*, 195 N. C. 299, 141 S. E. 892; *Bowie v. Tucker*, 206 N. C. 56, 58, 173 S. E. 28.

§ 1-214. Judgment by default where no answer filed; record; force; docket.—If no answer is filed, the plaintiff shall be entitled to judgment by default final or default and inquiry as authorized by §§ 1-211, 1-212, and 1-213, and all present or future amendments of the said sections; and all judgments by default final shall be duly recorded by the clerk and be docketed and indexed in the same manner as judgments rendered in term, and in all respects be and become judgments of the

superior court and be of the same force and effect as if rendered in term and before a judge of the superior court; and in all cases of judgment by default and inquiry rendered by the clerk, the clerk shall docket the case in the superior court at term time for trial upon the issues raised before a jury, or otherwise, as provided by law, and all judgments by default and inquiry shall be of the same force and effect as if rendered in term and before a judge of the superior court. (Ex. Sess., 1921, c. 92, s. 9; C. S. 597(a).)

Cited in *Earle v. Earle*, 198 N. C. 411, 151 S. E. 884; *Cook v. Bradsher*, 219 N. C. 10, 12 S. E. (2d) 690.

§ 1-215. Time for rendering judgments and orders.—Judgments and orders may be rendered by the clerk on any day of the week except Sundays. All judgments rendered by the clerk in any county on the same day and docketed on that day, or within ten days thereafter, are held and deemed to have been rendered and docketed on the same day for the purpose only of establishing equal priority as among such judgments. In a special proceeding, the clerk may enter any judgment or order, either interlocutory or final, and confirm any sale on any day of the week except Sundays. (Ex. Sess. 1921, c. 92, s. 10; 1923, c. 68; 1943, c. 301, s. 2; C. S. 597(b).)

Local Modification.—Vance: 1941, c. 139, s. 2.

Editor's Note.—Prior to the 1943 amendment, which made this section applicable to orders, judgments were required to be entered by the clerk on Mondays.

Cross References.—As to judgments authorized to be entered by clerk, see § 1-209. As to validation of certain deeds and judgments made after foreclosure of mortgages and deeds of trust wherein confirmation of sale was made on a day other than the first or third Monday of the month, see § 45-31.

§ 1-215.1. Judgments or orders not rendered on Mondays validated.—In any case where, prior to the ratification of this section, any judgment or order, required to be rendered or signed on Monday, has been rendered or signed by any clerk of the superior court on any day other than Monday, such judgment or order is hereby declared to be valid and of the same force and effect as if the day on which it was signed or rendered had been a Monday; and any conveyance executed by any commissioner or other person authorized to make a conveyance in any action or special proceeding where the appointment of the commissioner or other person, the order of sale, the order of resale, or the confirmation of sale was made on a day other than Monday, is hereby declared to be valid and to have the same force and effect as if the day on which such judgment or order was rendered had been a Monday. (1943, c. 301, s. 4.)

Editor's Note.—The act from which this section derives was ratified February 26, 1943.

§ 1-216. Repealed by Session Laws 1943, c. 301, s. 3.

§ 1-217. Certain default judgments validated.—In every case where, prior to the first day of January, one thousand nine hundred and twenty-seven, a judgment by default final has been entered by the clerk of the Superior Court of any county in this state on a day other than Monday, contrary to §§ 1-215 and 1-216, such judgment shall be deemed to have been entered as of the first Monday immediately following the default and is hereby to all intents and purposes validated;

provided, however, nothing in this section shall be construed to affect the rights of any interested party, as provided in section 1-220 other than for irregularity as to date of entry of the judgment by the clerk of the court. (1927, c. 187.)

§ 1-217.1. Judgments based on summons erroneously designated alias or pluries validated.—In all civil actions and special proceedings where the defendants were served with summons and judgment thereafter entered, or any final decree made, the said judgments or decrees shall not be invalidated by reason of the fact that the summons, although designated an alias or pluries summons, was not actually such: Provided, that this section shall not apply where the first summons was issued more than five years preceding March 6, 1943. (1943, c. 532.)

§ 1-218. Rendered in vacation; confirmation of judicial sales.—In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election.

Sales made by receivers or commissioners appointed by the superior court, unless governed by the provisions of § 45-28, as amended, may after ten days from the date of sale, in the absence of objection or raise in bid, be confirmed, or in case of objection or raise in bid, resales may be ordered, without notice, in chambers in any county in the judicial district, in which the proceedings are pending, by the resident judge or the judge holding the courts of said district; but this shall not diminish the power of the court in term time to act in such matters as now provided by law where no order has been made under this section. (Rev., s. 559; Code, s. 230; 1871-2, c. 3; 1937, c. 361; C. S. 598.)

Cross References.—As to jurisdiction, in vacation and at term, see § 7-65. As to appeal from decision of utilities commissioner, at term or in vacation, see §§ 62-20, 62-22. As to relief in mandamus, at term or in vacation, see § 1-513. For corresponding sections to the second paragraph of this section, see also, §§ 1-404, 1-506, 55-154, 45-23, 46-45.

Editor's Note.—The 1937 amendment added the second paragraph of this section.

For article discussing effect of amendment, see 15 N. C. Law Rev. 338.

Judgment May Be Taken out of Term by Consent.—By consent of the counsel of both sides, a judgment may be entered in vacation. *Westhall v. Hoyle*, 141 N. C. 337, 53 S. E. 863, and cases cited.

Amendment of Judgment after Adjournment without Consent Invalid.—An amendment of a judgment made by a judge after the last session of the court, in his room at a hotel, without the consent, and in the absence of the opposing counsel, is invalid. *Hinton v. Insurance Co.*, 116 N. C. 22, 21 S. E. 201.

Resale.—Where a commissioner, appointed to hold a foreclosure sale, advertises and sells the property in conformity with the order, but reports that the last and highest bid is less than the value of the property and recommends a resale, and the clerk orders a resale, the judge of the superior court, upon the appeal of one of the trustees from the order of the clerk, has jurisdiction to hear and determine the matter and order a resale at chambers while holding a criminal term of court in the county. *Harriss v. Hughes*, 220 N. C. 473, 17 S. E. (2d) 679.

Cited in *Edmundson v. Edmundson*, 222 N. C. 181, 22 S. E. (2d) 576.

§ 1-219. On frivolous pleading.—If a demurrer, answer or reply is frivolous, the party prejudiced thereby may apply to the court or judge for judgment thereon, which may be given accordingly.

(Rev., s. 560; Code, s. 388; C. C. P., s. 218; C. S. 599.)

Cross References.—As to sham or irrelevant defenses, stricken out on motion, see § 1-126. As to irrelevant or redundant matter in pleading, stricken on motion, see § 1-153.

Purpose of the Section.—The main object of this section is to prevent the rights of one of the parties from being prejudiced by the impertinent and unwarranted pleadings of the other, and to accomplish this result the provision of the section, when brought into operation, simply sets the demurrer (or answer) aside, and leaves the party prejudiced by it to obtain his judgment as if it had not been filed. *Shinner v. Terry*, 107 N. C. 103, 12 S. E. 118.

Nature of Frivolous Answer.—A frivolous answer, entitling the plaintiff to a judgment on the pleadings, is one which is manifestly impertinent, as alleging matters which do not affect the plaintiff's right to recover. *Dail & Bros. v. Harper*, 83 N. C. 5, 8.

When the answer is filed in good faith, and the matter of it is not manifestly impertinent, the defendant is entitled to have the facts alleged therein admitted by demurrer or passed on by the jury. *Dail & Bros. v. Harper*, 83 N. C. 5.

Its Bad Character Should Be Apparent.—An answer should never be held frivolous unless it is so clearly and palpably bad as to require no argument or illustration to show its character. *Hull Co. v. Carter*, 83 N. C. 249.

Manner of Objecting.—On the refusal of the court to hold the answer frivolous, no appeal lies, but the plaintiffs should have their exception noted in the record, and if they should lose their case at the trial term the exception would then come up on appeal from the final judgment, or by motion for judgment *non obstante veredicto*. *Walters v. Starnes*, 118 N. C. 842, 24 S. E. 713; *Joyner v. Roberts*, 112 N. C. 111, 113, 16 S. E. 917; *Abbott v. Hancock*, 123 N. C. 89, 31 S. E. 271.

Judgment on Frivolous Answer.—When the complaint in an action on a note is verified, judgment may be rendered on a frivolous answer. *Bank v. Pearson*, 119 N. C. 494, 26 S. E. 46.

Nature of Frivolous Demurrer.—A demurrer is not frivolous that raises a question fit for consideration or discussion. *New Bern Banking Co. v. Duffy*, 156 N. C. 83, 72 S. E. 96.

Relief.—When a demurrer to the complaint is frivolous, the plaintiff is entitled to judgment by default, unless the trial court is of the opinion that in the exercise of a discretion the facts justify permission to answer over. *Morgan v. Harris*, 141 N. C. 358, 54 S. E. 381.

Cited in *Shuford v. Yarbrough*, 198 N. C. 5, 150 S. E. 618.

§ 1-220. Mistake, surprise, excusable neglect.—The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding. The clerk may hear and pass upon motions to set aside judgments rendered by him, whether for irregularity or under this section, and an appeal from his order on such motion shall lie to the judge at the next term, who shall hear and pass upon such motion *de novo*: Provided, however, nothing in this section shall be construed to affect the rights of innocent purchasers for value in foreclosure proceedings where personal service is obtained. (Rev., s. 513; Code, s. 274; 1893, c. 81; C. C. P., s. 133; Ex. Sess. 1921, c. 92, s. 14; C. S. 600.)

I. In General.

II. The Relief.

III. Application of the Principles.

A. Neglect of Party.

B. Neglect of Counsel.

C. Omissions.

IV. Pleading and Practice.

Cross Reference.

As to authority of a judge to enlarge time for pleadings, etc., in his discretion, see § 1-152.

I. IN GENERAL.

Editor's Note.—The last provision of this section was added by the Ex. Sess. of 1921.

The older decisions indicate that this section received, at first, a rather strict construction and the party seeking relief hereunder was required to show that his case fell within the accepted definition, which was a rigid one, of the particular term on which he based his request. However, the courts, in the more recent cases, have been far more liberal. The statute is remedial in its nature and bespeaks the legislative intent for the courts to discover the substantial rights and equities of the parties and to prevent as far as possible the miscarriage of justice because of some technical rule of law.

In reference to the conflicting decisions under this section, the court in *Depriest v. Patterson*, 85 N. C. 376, 378, said: "The cases are numerous and not in entire harmony upon the proper rendering of this statute, which enlarges the authority of the court over its own judgments, and permits, in specified cases, their reversal (or modification) within a year after notice of their rendition, at the discretion of the court." (Parentheses supplied.)

Applies only to Matters of Fact.—This section does not extend to mistakes as to the law applicable, but only as to matters of facts by which the party may reasonably be misled or surprised. *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118.

The remedy provided by this section is restricted to the parties aggrieved by the judgment or order sought to be set aside, and the superior court has no power to set aside a judgment or order once rendered upon motion of a stranger to the cause. In *re Hood*, 208 N. C. 509, 511, 181 S. E. 621, citing *Smith v. New Bern*, 73 N. C. 303; *Edwards v. Phillips*, 91 N. C. 355.

Applicable to Both Adult and Infant Parties.—In application for relief under this section no distinction is made between adult and infant parties, provided the latter are represented according to the requirements of the law and the practice of the court. *Mauney v. Gidney*, 88 N. C. 200.

Not Applicable to Irregular Verdicts.—Where an irregular verdict is rendered by the court the same cannot be set aside or altered under the provisions of this section. *Becton v. Dunn*, 137 N. C. 559, 50 S. E. 289; *Gough v. Bell*, 180 N. C. 268, 104 S. E. 535; *Hood v. Stewart*, 209 N. C. 424, 184 S. E. 36.

Nor to irregular judgment. *Simms v. Sampson*, 221 N. C. 379, 386, 20 S. E. (2d) 554, citing *Duffer v. Brunson*, 188 N. C. 789, 125 S. E. 619; *Becton v. Dunn*, 137 N. C. 559, 50 S. E. 289.

Where Judgment Rendered on Verdict.—The statute, in conferring the power, confines its exercise to judgments rendered under the specified conditions, and does not embrace such as necessarily follow the verdict, and the setting aside of which, without at the same time disturbing the verdict, would be of no advantage to the party, for it must again be entered in response to the jury findings. *Flowers v. Alford*, 111 N. C. 248, 16 S. E. 319. Hence, where a judgment has been rendered on a verdict the judgment and verdict may not be set aside for excusable neglect under this section. *Brown v. Rhinehart*, 112 N. C. 772, 777, 16 S. E. 840; *Clemmons v. Field*, 99 N. C. 400, 6 S. E. 790.

Applicable only to Judgments Rendered at Prior Terms.—A motion to set aside a judgment for excusable neglect, made at the time the judgment was signed, will be denied, such matters being *in fieri* during the term, as this section applies only to judgments rendered at prior terms. *Gold v. Maxwell*, 172 N. C. 149, 90 S. E. 115.

Excusable Neglect and Meritorious Defense.—A judgment may be set aside under this section if the moving party can show excusable neglect, and that he has a meritorious defense. *Dunn v. Jones*, 195 N. C. 354, 356, 142 S. E. 320. And see *Henderson Chevrolet Co. v. Ingle*, 202 N. C. 158, 162 S. E. 219; *Bowie v. Tucker*, 206 N. C. 56, 59, 173 S. E. 28, affirming 197 N. C. 671, 150 S. E. 200; *Jones v. Craddock*, 211 N. C. 382, 190 S. E. 224.

The action of the trial court in setting aside the judgment for surprise and excusable neglect, etc., and placing the parties *in statu quo*, will be upheld on appeal, under this section, the record disclosing that the answer of the defendant set up a meritorious defense. *Cagle v. Williamson*, 200 N. C. 727, 158 S. E. 391.

The court's order setting aside the judgment by default against the corporation that had not been properly served with summons on the ground of excusable neglect was not error, the motion having been made in apt time and a meritorious defense also being found as a fact upon supporting evidence. *Hershey Corp. v. Atlantic Coast Line R. Co.*, 203 N. C. 184, 165 S. E. 550.

Where a cause has been remanded to the State from the Federal court by the latter court, and the clerk of the former court has had entered, without notice to defend-

ant, a judgment by default and inquiry for the want of an answer, pending the disposition of the cause in the Federal Court, and the order of remand has been regularly made, upon motion of the plaintiff's attorney, the judge of the Superior Court of the State having jurisdiction may set aside the judgment by default and inquiry upon the ground of mistake, inadvertence, surprise, or excusable neglect, upon the showing of a meritorious defense. *Abbitt v. Gregory*, 195 N. C. 203, 141 S. E. 587.

Where the judge presiding at a term of the Superior Court corrects a judgment he has inadvertently signed dismissing the action, and in the absence of the defendant, enters a judgment sustaining a demurrer to the complaint and granting the parties additional time in which to file amended pleadings, and the plaintiff files an amended complaint, a copy of which the defendant fails to receive, and the clerk grants a judgment by default and inquiry thereon, the action of the trial court at a succeeding term setting aside such judgment for excusable neglect without a finding of a meritorious defense will be reversed. *Bowie v. Tucker*, 197 N. C. 671, 150 S. E. 200.

Meritorious Defense Must Be Shown.—In order to set aside a judgment for mistake, surprise or excusable neglect, there must be a showing of a meritorious defense so that the courts can reasonably pass upon the question whether another trial, if granted, would result advantageously for the defendant. *Farmers, etc., Bank v. Duke*, 187 N. C. 386, 122 S. E. 1; *Hill v. Huffines Hotel Co.*, 188 N. C. 586, 125 S. E. 266. See also *Fellos v. Allen*, 202 N. C. 375, 162 S. E. 905; *Hooks v. Neighbors*, 211 N. C. 382, 385, 190 S. E. 236; *Garrett v. Trent*, 216 N. C. 162, 4 S. E. (2d) 319.

A party seeking to have a judgment set aside on the ground of excusable neglect, must at least set forth in his application such a case as *prima facie* amounts to a valid defence; whether the defence is valid, is a question to be determined by the court, not by the party. *Mauney v. Gidney*, 88 N. C. 200.

A denial of a motion to set aside a judgment under this section, will not be disturbed on appeal when there is neither allegation nor finding of a meritorious defense, and the supreme court will not consider affidavits for the purpose of finding facts in motions of this sort. *Clayton v. Clark*, 212 N. C. 374, 193 S. E. 404.

Same—When Defendant Non Compos Mentis.—A judgment obtained against one who was non compos mentis is not void, but voidable, and can only be set aside for excusable neglect and the showing of a meritorious defense. *Farmers, etc., Bank v. Duke*, 187 N. C. 386, 122 S. E. 1.

Under this section a verification of a complaint which is sworn to with uplifted hand rather than on the Bible is not a sufficient ground for setting aside a judgment entered by default. *Fellos v. Allen*, 202 N. C. 375, 376, 162 S. E. 905.

Where the trial court upon conflicting evidence finds as a fact that the summons in the action was in fact served on the defendant, the finding is conclusive. *Hooker v. Forbes*, 202 N. C. 364, 162 S. E. 903.

Consent Judgment.—Where the court enters a judgment on its record appearing to have been by the consent of the parties, it cannot thereafter be changed or altered, or set aside, without the consent of the parties to it, unless it appears, upon proper allegation and proof and a finding of the court wherein it had been entered, that it was obtained by fraud or mutual mistake, or that consent had not in fact been given. The burden is on the party attacking the judgment to show facts which will entitle him to relief. *Gardiner v. May*, 172 N. C. 192, 89 S. E. 955.

Where, upon a motion to set aside a judgment for surprise and excusable neglect as provided by this section, on the ground that the judgment was a consent judgment and was signed by movent's attorney without authority, and a motion to set aside the consent judgment for such want of authority by movent's attorney, the court finds, upon evidence by affidavits, that the attorney was duly authorized to sign the judgment for movent, the finding is conclusive on the Supreme Court upon appeal, and the order refusing the motions will be upheld. *Alston v. Southern Ry. Co.*, 207 N. C. 114, 176 S. E. 292.

Valid Judgment Regularly Entered.—In order for the trial judge to set aside a judgment of the clerk of court, for default of an answer, under this section, the judgment must be a valid one and regularly entered. *Abbitt v. Gregory*, 195 N. C. 203, 141 S. E. 587.

The "Mistake, etc.," Must Be of the Party Seeking Relief.—This section applies only where the mistake, surprise, etc., is that of the party seeking relief and has no application where the mistake, and surprise arises from the fraudulent conduct of another, *Boyden v. Williams*, 80 N. C. 95; nor where a motion is made to correct an erroneous judgment rendered at a former term if it appears that the error committed was

that of the **court** and not that of the **party**. *Simmons v. Dowd*, 77 N. C. 155.

Time.—A party operating under this section has a right to set aside a judgment rendered against him within a year after notice thereof, *Howell v. Harrell*, 71 N. C. 161, 162; *Long v. Cole*, 74 N. C. 267; and where the motion is not made within such time it is fatal to the proceedings. *Young v. Greenlee*, 85 N. C. 593, 594. But an irregular judgment need not be set aside within this period. *Monroe v. Whitted*, 79 N. C. 508, 510.

Same—Estimation of Period Allowed.—Where the judgment complained of is rendered on a summons personally served within the jurisdiction, this one-year period shall be estimated from its rendition. *Lee v. McCracken*, 170 N. C. 575, 87 S. E. 497; *McLean v. McLean*, 84 N. C. 366.

Personal Notice Required.—The language "through his" contained in this section indicates personal knowledge. *Foster v. Allison Corp.*, 191 N. C. 166, 131 S. E. 648. Where not personally served, the party may make his motion within twelve months after actual notice of the judgment. *McLean v. McLean*, 84 N. C. 366, 367; *Jernigan v. Jernigan*, 178 N. C. 84, 100 S. E. 184.

Where a party has been brought into court by the personal service of a summons, or voluntarily does so as a party defendant, he is presumed to take notice of all the various legal steps in the proceedings, and when he seeks to have a judgment therein rendered set aside after notice, etc., he must show the surprise, mistake or excusable neglect necessary for his purpose within one year, under the provisions of this section. *Foster v. Allison Corp.*, 191 N. C. 166, 131 S. E. 648; *Askew v. Capehart*, 79 N. C. 17.

Where judgment was rendered against the defendant in a justice's court, from which he appealed to the superior court, where judgment was again rendered against him, he making no defence to the action, and more than one year after the docketing of the judgment the judge of the superior court sets the same aside and ordered the case to be reopened on the ground that defendant had no notice of the judgment, it was held to be error. *McDaniel v. Watkins*, 76 N. C. 399.

Same—Where Service Had by Publication.—Where the summons is served by publication the rights of the parties are more directly affected and controlled by sec. 1-108 and not under this section. *Bank v. Palmer*, 153 N. C. 501, 69 S. E. 507; *Foster v. Allison Corp.*, 191 N. C. 166, 131 S. E. 648.

Applicable in Supreme Court.—Although this section, in terms, applies only to a judge of the superior court, the spirit and equity of its provisions extend equally to the Supreme Court, and the same power resides here to relieve from a judgment taken against a party through "mistake, inadvertence, surprise or excusable negligence." *Wade v. New Bern*, 73 N. C. 318, 319.

Facts Must be Stated.—Before a judge can vacate a judgment under this section on the grounds of excusable neglect he must find and state the facts. *Clegg v. New York White Soapstone Co.*, 66 N. C. 391; *Powell v. Weith*, 66 N. C. 423.

Nature of Question Involved.—The mistake, surprise, inadvertence or excusable neglect, as a ground for relieving a party from a judgment, etc., is a question of law, and if the judge below errs in his ruling in regard thereto, his decision is subject to review. *Powell v. Weith*, 68 N. C. 342, 343.

Applied in *Anderson v. National Union Fire Ins. Co.*, 202 N. C. 835, 162 S. E. 922; *Spell v. Arthur*, 205 N. C. 405, 171 S. E. 171.

Cited in *Buchanan v. B. & D. Coach Line*, 194 N. C. 812, 813, 140 S. E. 439; *Union Nat. Bank v. Hagaman*, 208 N. C. 191, 193, 179 S. E. 759; *O'Briant v. Bennett*, 213 N. C. 400, 196 S. E. 336; *Rosser v. Matthews*, 217 N. C. 132, 6 S. E. (2d) 849; *State v. Pelley*, 222 N. C. 684, 24 S. E. (2d) 635.

II. THE RELIEF.

Discretionary with the Judge.—The application for relief under this section is addressed to the discretion of the judge presiding. *Bank v. Foote*, 77 N. C. 131, 132.

The discretion to set aside a judgment is not given by this section, unless there has been excusable neglect. If the judge finds correctly that the negligence was inexcusable, that ends the motion; if he finds correctly that the negligence was excusable or not, his discretion to set aside is not reviewable, unless in case of gross abuse of discretion. *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269. As to setting aside the judgment see note of *Beck v. Bellamy*, 93 N. C. 129—analysis line, "Pleading and Practice."

The setting aside of a judgment under this section is in the sound legal discretion of the trial judge. *Dunn v. Jones*, 195 N. C. 354, 142 S. E. 320.

Nature of Relief.—A judgment may be set aside, in whole or in part; the court is invested by the statute with full legal discretion over the matter. *Geer v. Reams*, 88 N. C. 197, 198.

Refusal to Entertain Motion.—The provisions of this section

make it discretionary with a judge whether he will relieve a party against a judgment taken against him through his "inadvertence, mistake, surprise, or excusable neglect." If a judge refuses to entertain a motion to set aside a judgment for any of the enumerated causes, because he thinks he has no power to grant it, then there is error, and he has failed to exercise the discretion conferred on him by law. *Hudgins v. White*, 65 N. C. 393.

Injunction Imperer.—An injunction to restrain plaintiff from executing his judgment against defendant will not be granted. The proper remedy to remove an alleged grievance is an application to modify the terms of the judgment. *Parker v. Bledsoe*, 87 N. C. 221; *Walker v. Gurley*, 83 N. C. 429, 430.

Modification by One Judge of Judgment Rendered by Another.—Where on notice and showing that there was on the part of the complainant a mistake, inadvertence, surprise or excusable neglect by which he was injured, the judgment rendered against him may be modified by a judge other than the one by whom it was rendered. *Johnson v. Marcom*, 121 N. C. 83, 28 S. E. 58.

Effect of Availability of Other Relief.—The fact that a plaintiff may, when nonsuited, bring a new action within a year does not prevent the judgment from being set aside, like any other judgment, on the ground of excusable neglect, but to authorize the court to set aside such a judgment excusable neglect must clearly appear. *Stith v. Jones*, 119 N. C. 423, 25 S. E. 1022.

III. APPLICATION OF THE PRINCIPLES.

A. Neglect of Party.

For the personal inattention of a suitor no relief can be granted under this section. *Royster & Co. v. Wicker*, 87 N. C. 14, 15.

Where Summons Regularly Served.—A party is guilty of inexcusable neglect, and is not entitled to relief against a judgment rendered against him, where it appears that a summons was regularly served, and he paid no attention to the case either in person or by attorney, even although he supposed he was not required by the law to answer the complaint until served with a copy. *Churchill v. Brooklyn Life Ins. Co.*, 88 N. C. 205.

Mistake as to Nature of Summons.—The fact that a defendant supposed a summons which was served on him to be a paper in another cause pending between himself and plaintiff, and for that reason did not take any measure to answer the same, is not such excusable neglect as entitled him to relief. *White v. Snow*, 71 N. C. 232, 233. See *Holden v. Purefoy*, 108 N. C. 163, 167, 12 S. E. 848, where relief was granted a party who thought he was being summoned as a witness when in fact he was summoned as the defendant.

Where Party Very Old and Forgetful.—That the defendants were old and feeble, although of sound mind, and that they forgot about the service of summons upon them, and therefore took no steps to defend the action does not show excusable neglect. *Pierce v. Eller*, 167 N. C. 672, 83 S. E. 758.

Sickness of Party.—Where the defendant was of sound mind, and, though his bodily infirmities confined him, carried on business and defended other suits, a default judgment against such defendant will not be vacated on account of excusable neglect, because of his infirmities. *Jernigan v. Jernigan*, 179 N. C. 237, 102 S. E. 319.

Sickness of Family.—Where the defendant indorser of a note was required by the illness of his wife to be outside the state, and the complaint was filed on the first day of the term, and judgment by default was entered two days later, there was sufficient excuse for failure to answer to justify the opening of the default. *Bank v. Brock*, 174 N. C. 547, 94 S. E. 301.

Where Party Obligated to Question His Counsel.—While, as a general rule a client will be relieved against a judgment by default taken against him through the negligence of his attorney, yet where it devolves upon the client to question his counsel in regard to his case, his failure to do so is inexcusable neglect and relief will be denied. *Holland v. Edgecombe Benev. Ass'n*, 176 N. C. 86, 97 S. E. 150.

Where the defendant, upon the suggestion of his counsel, allows judgment by default to go against him, he cannot, upon discovering that the recovery is greater than he had anticipated, seek relief under this section for his action does not amount to excusable neglect. *State v. Matthews*, 81 N. C. 289.

Where Endeavor Is Made to Compromise.—Judgment by default for the want of an answer will not be set aside for excusable neglect, when it was regularly entered at the preceding term of the court, and it appears that the moving party, after endeavoring to compromise, promised to send at once the amount sued for, failed to do so, and his attorney had been notified before the commencement of the term at which the judgment was entered that this course would be

taken. *Union Guano Co. v. Middlesex Supply Co.*, 181 N. C. 210, 106 S. E. 832.

Misled by Conversation of Counsel.—The fact that the party was misled by a conversation between his counsel and the attorney for the adversary does not entitle him to relief under this section. *Hutchinson v. Rumfelt*, 83 N. C. 441, 443.

Change of Post Office.—A judgment by default will not be set aside on the ground of excusable neglect, when it appears that defendants changed their postoffice and did not receive the answer mailed to them by their counsel until eleven months after it was mailed, no inquiry for letters having been made by them at their former postoffice, and no communication being addressed to their counsel concerning the matter until eleven months after the time for answering the complaint had expired. *Vick v. Baker*, 122 N. C. 98, 29 S. E. 64.

Attorney's Death within Knowledge of Client.—Where an attorney, in whose hands a cause has been placed, dies and the client has notice of such fact and fails to file his answer at the proper time, he cannot later claim relief under this section on the ground of excusable neglect. *Simpson v. Brown*, 117 N. C. 482, 23 S. E. 441.

Under this section wife's neglect to file answer upon assurances of her husband that he would do so is excusable in joint action against them. *Wachovia Bank, etc., Co. v. Turner*, 202 N. C. 162, 162 S. E. 221.

Absence from Trial.—It is the duty of a party to be present in court at the trial of his cause for the performance of matters outside the proper duties of his attorney, and where he without cause remains out of court, he cannot claim relief under this section as his act amounts to inexcusable neglect. *Cobb v. O'Hagan*, 81 N. C. 293.

But the fact that an order in the cause which in effect deprived the plaintiff of the right of appeal, was made at midnight when the plaintiff was absent and did not know, and had no reason to believe that the court was in session, and his counsel not being able to attend to the trial, constitutes a case of "excusable neglect." *Long v. Cole*, 74 N. C. 267.

Where it appears that a party was in the courtroom at the time the court announced that motions in his case would be heard the following day, his motion to set aside an order made on the day stipulated on the ground of excusable neglect is properly denied. *Abernethy v. First Security Trust Co.*, 211 N. C. 450, 190 S. E. 735.

Failure to Defend after Denial of Motion for Continuance.—Where the trial court finds that defendants and their attorney were present in court, that defendants' motion for a continuance was refused, and that defendants and their attorney thereupon left the court room without definite agreement with the court or opposing counsel, and did not return to defend the case, and that both defendants and their attorney had failed to exercise due diligence, the court's refusal of the motion to set aside the judgment will be affirmed on appeal. *Carter v. Anderson*, 208 N. C. 529, 181 S. E. 750.

Applied in *Colt Co. v. Martin*, 201 N. C. 354, 160 S. E. 287.

B. Neglect of Counsel.

Editor's Note.—As to what acts of an attorney are or are not attributable to the client, the courts do not appear to be entirely in accord. All seem to adhere to the same general principles, but an almost irreconcilable conflict arises upon the application of these principles to the particular cases. The ruling in each case had been predicated upon one or two outstanding features found therein, and the great weight attached thereto by the courts. A few of the leading cases illustrative of the applicability of the provisions of this section to this particular subject are found in the following passages.

Dividing Line between the Cases Difficult to Determine.—It is difficult to deduce any distinct practical principle from the numerous adjudications, or to run a well-defined line separating those neglects that are, from those that are not excusable in the sense of the statute, and hence the facts relied on must be arranged on the one and then on the other side of that line, in each case as they arise. *Mebane v. Mebane*, 80 N. C. 34, 40.

Gross Negligence of Attorney.—The omission of an attorney, retained as counsel in a cause, to perform his duty as such in the conduct of the cause is excusable neglect in the party, and the judgment may be vacated under this section. *Wiley v. Logan*, 94 N. C. 564, 566; *Griel v. Vernon*, 65 N. C. 76; and this is especially true where the counsel is insolvent and unable to respond in damages for his negligence. *Ice Mfg. Co. v. Raleigh, etc., R. Co.*, 125 N. C. 17, 24, 34 S. E. 100. This view was adopted in *English v. English*, 87 N. C. 497, and also in *Deal v. Palmer*, 68 N. C. 215.

Where Reputable Counsel Employed.—Where a party to an action employs a reputable attorney and is guilty of no

negligence himself, the attorney's negligence in failing to appear and answer will not be imputed to such parties in proceeding to vacate default judgment, but the law will excuse the party and afford him relief. *Stallings v. Spruill*, 176 N. C. 121, 96 S. E. 890.

Where defendants who employed counsel, learned in the law, and skillful and diligent in its practice, whose zeal and fidelity to the cause of a client are unquestioned, verified their answers promptly and trusted them to their attorneys for filing, attorneys' failure to file the answers within time required by law was not due to such negligence on part of defendants as deprived the judge of power to grant them relief from a default judgment under this section. *Abbutt v. Gregory*, 195 N. C. 203, 141 S. E. 587.

Where a defendant has employed a licensed, reputable attorney of good standing, residing in one county of the state, to defend an action brought in another county, and has put him in possession of the facts constituting his defense, and the attorney has prepared and duly filed an answer, and the case has been calendared and called for trial without notice to the defendant or his attorney, upon a judgment being obtained by default against the defendant, the defendant may, upon his motion aptly made, have the judgment set aside for surprise, excusable neglect, etc., under this section upon a showing of a meritorious defense, the negligence of the attorney, if any, not being imputed to the client, and the latter being without fault. *Meece v. Commercial Credit Co.*, 201 N. C. 139, 159 S. E. 17.

This section has no bearing on a case of neglect to file answer to a summons and complaint. *Washington v. Hodges*, 200 N. C. 364, 156 S. E. 912.

Where Counsel Instructed to Employ Other Counsel.—Where the defendant in an action has retained an attorney for his defense, of high character and reputation for diligence and faithfulness in the practice of his profession, with instructions to employ an attorney local to the litigation, and has fully relied on him to notify him of the steps necessary to be taken in his defense, and seeks to set aside a judgment by default therein entered against him for his failure to answer, the laches of the attorney, if any, nothing else appearing, is not attributable to the defendant and the order of the superior court setting aside the judgment for his excusable neglect when otherwise correct will be sustained on appeal. *Helderman v. Hartsell Mills Co.*, 192 N. C. 626, 135 S. E. 627.

Where Counsel Notified by Mail.—The refusal of a motion as provided by this section, to set aside a judgment for surprise and excusable neglect will be upheld where the trial court finds from competent evidence that notice of the time set for trial was duly sent movant's counsel through the mail, but was not received by him. *Clayton v. Adams*, 206 N. C. 920, 175 S. E. 185.

Client Misinformed by Attorney as to Time of Trial.—When a defendant moved to vacate a judgment, upon the ground of excusable neglect, and the excuse assigned was that his counsel, by mistake, had misinformed him as to the time of holding court whereby he failed to answer, it was held that the excuse was not sufficient, when the facts show that the defendant did not suffer harm by the mistake of his counsel. *Clegg v. New York White Soapstone Co.*, 67 N. C. 302, 304.

Where an attorney has ample notice as to the day of the trial, the continued absence of the client for two successive calls is inexcusable neglect for which no relief can be had under this section. *Henry v. Clayton*, 85 N. C. 372, 374.

Disqualification of Counsel During Pendency of Trial.—Pending a reference, the counsel for a party to the action became disqualified, but the client, although having notice of the subsequent orders, proceedings, etc., in the cause, neglected to retain another counsel. It was held, that this did not require the court to set aside the report and recommit the matter passed upon therein. *Smith v. Smith*, 101 N. C. 461, 8 S. E. 128.

Where Attorney Withdraws.—Though an attorney may withdraw from a case with the permission of the court in proper instances, his client is entitled to such specific notice, either before or after the withdrawal, as will permit him to protect his rights, and where for the failure of such notice a judgment upon a verdict has been obtained against the client and he was without laches in moving to set it aside for surprise and excusable neglect upon a showing of a meritorious defense, it is correct for the trial judge to grant his motion under this section. *Gosnell v. Hilliard*, 205 N. C. 297, 171 S. E. 52.

Where the court finds that defendant in claim and delivery proceedings was in court when his attorney was allowed to withdraw the case, and was told he would have to employ other counsel, and the case continued to the next term, the refusal of the motion made by himself and the surety on his replevin bond to set aside the judgment taken at the next succeeding term on the ground of mistake, sur-

prise, and excusable neglect is properly refused. *Baer v. McCall*, 212 N. C. 389, 193 S. E. 406.

The court's permitting counsel for defendant to withdraw from the case, upon the calling of the case for trial, in the absence of notice to defendant constitutes "surprise" but does not entitle defendant to have the judgment set aside in the absence of a showing of a meritorious defense. *Roediger v. Sapos*, 217 N. C. 95, 6 S. E. (2d) 801.

Mistaken Legal Advice.—Mistaken legal advice by counsel acted on by client, is not remediable under this section—being a mistake of law and not of fact. *Phifer v. Travellers Ins. Co.*, 123 N. C. 405, 406, 31 S. E. 715.

Attorney Prevented from Examining Complaint.—On motion to set aside a judgment on the ground of excusable negligence, it appeared that the defendant had twice called on the clerk to enter upon the docket the name of the attorney whom he had employed, and the clerk promised to do so. The attorney himself applied to the clerk to examine the plaintiff's complaint, but was unable to see it, and during the remainder of the term was absent in obedience to a summons as a witness, it was held that the defendant's neglect was excusable. *Wynne v. Prairie*, 86 N. C. 73.

Where Negligence of Attorney Attributable to Party.—A judgment will not be set aside for irregularity and surprise when it appears that it had come to issue and was regularly set upon the trial docket, and judgment entered in the due course and practice of the court, the only grounds upon which relief is sought being the employment of nonresident local attorneys, who were not notified, though means of easy communication in ample time were available, the neglect of the attorneys being personally attributable to the party of the action, whose duty it was also to attend to the action himself, as well as to employ attorneys for the purpose. *Hyde County Land, etc., Co. v. Thomasville Chair Co.*, 190 N. C. 437, 130 S. E. 12.

Failure of Defendant's Attorney to File Answer.—Where it appears upon the defendant's motion to set aside a judgment by default, pursuant to this section, that the same was regularly calendared for trial, the defendant had notice thereof and was afforded full opportunity to file his answer, but that his attorney had failed to do so, and that the judgment was accordingly rendered, he has not shown such excusable neglect as will entitle him to have the judgment set aside on his motion under the provisions of the statute. *Gaster v. Thomas*, 188 N. C. 346, 124 S. E. 609; but where no laches are attributable to the client he will be granted relief. *Geer v. Reams*, 88 N. C. 197, 198.

Removal to Federal Court.—Where the clerk has erroneously granted defendants' motion to remove a cause to the Federal Court under § 1-584, the moving defendants may assume that no further proceedings will be had in the State Court until the cause has been remanded from the Federal Court, and where a judgment by default and inquiry has been entered therein for the want of an answer, without notice, nothing else appearing to show laches on the part of defendants' attorneys upon relevant findings of the trial judge, including that of meritorious defense, the action of the trial judge in setting aside the judgment and permitting the defendant to file answer will not be disturbed on appeal. *Abbitt v. Gregory*, 195 N. C. 203, 141 S. E. 587.

C. Omissions.

Duty of Court to Supply Omissions.—It is the duty of every court to supply the omissions of its officers in recording its proceedings and to see that its record truly sets forth its action in each and every instance; and this it must do upon the application of any person interested, and without regard to its effect upon the rights of parties, or of third persons; and neither is it open to any other tribunal to call in question the propriety of the action or the verity of its records, as made — and no lapse of time will debar the court of the power to discharge this duty. *Walton v. Pearson*, 85 N. C. 35, 49.

May Not Be Collaterally Attacked.—The effect of an amendment made by the court cannot be collaterally considered, but must be done in a proceeding brought for that purpose. *Foster v. Woodfin*, 65 N. C. 29.

IV. PLEADING AND PRACTICE.

Burden of Proof.—A party seeking to vacate a judgment under this section is always at default and the burden is upon him to show facts which would make the refusal to vacate appear to be an abuse of discretion. *Kerchner v. Baker*, 82 N. C. 119, 170.

Filing of Affidavits.—In hearing a motion to set aside judgments under this section, there is no rule requiring the affidavits to be filed before the hearing of the motion is entered on. *Jones v. Swepson*, 94 N. C. 700, 706.

Failure of Judge to State the Facts Found.—When, in setting aside a judgment for excusable negligence, the judge does not state the ground on which he founded his order, his

action will be upheld if in any aspect of the case it would be proper. *Foley, Bro. & Co. v. Blank*, 92 N. C. 476.

In setting aside a judgment under this section, the court is required to find the facts not only in regard to the excusable neglect relied on, but also the facts in regard to meritorious defense, and a finding of a "meritorious defense" without finding the facts showing a meritorious defense, is insufficient. *Parnell v. Ivey*, 213 N. C. 644, 197 S. E. 128.

Rehearing.—A rehearing under this section is not a matter of right, but rests in the sound discretion of the court. *Williams v. Alexander*, 70 N. C. 665.

Appeal from Order of Clerk.—A motion to set aside and vacate a judgment entered by the clerk, as authorized by statute, may be made before and passed upon by either the judge or the clerk. From an order made by the judge, upon such motion, an appeal may be taken to this court, which has jurisdiction to pass upon and determine all matters of law or legal inference duly presented by appeal. Const. of N. C., art. 4, § 8. From an order made by the clerk, upon such motion, an appeal will lie to the judge, who shall hear and pass upon the motion, de novo. *Caldwell v. Caldwell*, 189 N. C. 805, 128 S. E. 329, 332.

The findings of fact by the trial judge upon an appeal from an order of the clerk denying defendant's motion to set aside a judgment under this section, are not reviewable when supported by competent evidence. *Kerr v. North Carolina Joint Stock Land Bank*, 205 N. C. 410, 171 S. E. 367.

Presumption on Appeal.—When the court below refused a party permission to file an answer at a term subsequent to the time allowed by a former order, the appellate court must assume that the question of "excusable neglect" was passed upon. *Clegg v. New York White Soapstone Co.*, 67 N. C. 302, 304.

Where no evidence appears in the case on appeal from an order setting aside a judgment for surprise and excusable neglect under this section, it will be presumed that the findings of fact are based upon sufficient evidence in the absence of exceptions to the findings, and the order will be affirmed where the findings sustain the court's holding that movents have shown excusable neglect and meritorious defense. *Radeker v. Royal Pines Park*, 207 N. C. 209, 176 S. E. 285.

Right of Appeal May be Lost.—The right of appeal from a judgment, and a review thereof for errors of law in it, cannot be restored to a party who has lost the right by a mere motion to vacate and an appeal from the refusal, whether founded on irregularity or for the causes under this section. *Badger v. Daniel*, 82 N. C. 468, 470.

Same—Certiorari.—The writ of certiorari, as a substitute for an appeal lost, as alleged in this case, will be granted only when the petitioner shows that he has been diligent, and there has been no laches on his part in respect to his appeal, and further, that his failure to take and perfect the same was occasioned by some act or misleading representation on the part of the opposing party, or some other person or cause in some way connected with it and not within his control. *Graves v. Hines*, 106 N. C. 323, 324, 11 S. E. 362. *Williamson v. Boykin*, 99 N. C. 238, 5 S. E. 378.

Questions Reviewable on Appeal.—Whether upon the facts found by the judge, the neglect of attorneys for defendants to file answers to the complaint within the time required by statute was excusable, or whether, in any event, such neglect was imputable to defendants, are questions of law, with respect to which the conclusions of the judge are reviewable on appeal. *Abbitt v. Gregory*, 195 N. C. 203, 141 S. E. 587.

Discretion of Judge Not Reviewable on Appeal.—The Supreme Court can review on appeal what is a mistake, surprise or excusable neglect under this section, but it cannot review the discretion exercised by a judge of the superior court under the section. *Foley, Bro. & Co. v. Blank*, 92 N. C. 476; *Branch v. Walker*, 92 N. C. 87, 91. But should the judge set aside a judgment upon a state of facts which did not bring the case within the scope of the statute, his action would be subject to correction on appeal. *Beck v. Bellamy*, 93 N. C. 129.

When the judge grants the relief, in the exercise of his discretion, that conclusion is also not reviewable; but whether the facts found constitute, in law, mistake, inadvertence, surprise, or excusable neglect, may be reviewed, and if it be determined that the court below erred therein, the judgment will be corrected, and the motion remanded, to the end that the trial judge may exercise the discretion conferred on him alone by the statute. *Weil & Bro. v. Woodard*, 104 N. C. 94, 10 S. E. 129.

The findings of fact by the trial court upon the hearing of a motion to set aside a judgment for excusable neglect are conclusive on appeal when supported by any competent evidence. *Carter v. Anderson*, 208 N. C. 529, 181 S. E. 750.

Same—Abuse of Discretionary Power.—The refusal of a motion to set aside a judgment on the grounds of surprise or excusable neglect is a matter of discretion with the judge below and cannot be reviewed on appeal, unless it should appear that such discretion was abused. *Cowles v. Cowles*, 121 N. C. 272, 273, 28 S. E. 476.

After hearing the evidence and finding the facts under this section, the action of the judge is conclusive upon the parties, from which there is no appeal; yet this discretion, however, is not arbitrary, but implies a legal discretion. As for instance, if the judge mistake the meaning of the statute as to what is "mistake, inadvertence, surprise, or excusable neglect." In such cases his judgment is the subject of appeal and review. *Hudgins v. White*, 65 N. C. 393; *Albertson v. Terry*, 108 N. C. 75, 77, 12 S. E. 892.

Where Remedy Sought by Independent Action.—The institution of an independent action in lieu of a renewal of the motion is such an abandonment of the remedy by motion as worked a discontinuance of the same. *Norwood v. King*, 86 N. C. 81, 85.

§ 1-221. Stands until reversed.—Every judgment given in a court of record having jurisdiction of the subject is, and continues to be, in force until reversed according to law. (Rev., s. 561; Code, s. 935; R. C., c. 31, s. 103; 4 Hen. IV, c. 23; C. S. 601.)

Editor's Note.—See 13 N. C. Law Rev. 251, for note on the "Effect of judgment pending" with reference to this section.

Irregular Judgments.—Even though the judgment be irregular it stands until vacated or reversed. *Stafford v. Gallops*, 123 N. C. 19, 20, 31 S. E. 265; and such judgment may be corrected only in a direct proceeding. *Pinnell v. Burroughs*, 168 N. C. 315, 84 S. E. 364; *Brown v. Harding*, 170 N. C. 253, 86 S. E. 1010.

Applied in *Myers v. Wilmington-Wrightsville, etc., Causeway Co.*, 204 N. C. 260, 167 S. E. 858.

Cited in *Tallassee Power Co. v. Peacock*, 197 N. C. 735, 150 S. E. 510.

§ 1-222. For and against whom given; failure to prosecute.—1. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves.

2. It may grant to the defendant any affirmative relief to which he may be entitled.

3. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

4. The court may also dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served. (Rev., s. 563; Code, s. 424; C. C. P., s. 248; C. S. 602.)

Editor's Note.—The primary object of the provisions of this section is to prevent as far as possible multiplicity of actions, and to settle in a single suit all the controverted matter arising or likely to arise out of the transaction. That this end may be accomplished the courts, wherever the particular case can be justly and equitably brought within the provisions of this section, have allowed, and sometimes compelled, the parties to submit and litigate all the issuable matters in one suit, whether the respective claim be against a party on the same side or against one on the other side.

Both Legal and Equitable Rights Recognized.—The courts in North Carolina are required to recognize both the legal and equitable rights of the parties, and to frame their judgments so as to determine all the rights of the parties, equitable as well as legal. *Hutchinson v. Smith*, 68 N. C. 354, 355; *Melvin v. Stephens*, 82 N. C. 284, 288. And this is true of any relief to which the facts alleged and proved entitle him, whether demanded in the prayer for relief or not. *McNeill v. Hodges*, 105 N. C. 52, 55, 11 S. E. 265.

Anyone or All May be Compelled to Answer.—The proper construction of this section is that when the plaintiffs bring the defendant into court to answer a claim for a debt which

he owes them, he cannot only require them, but either one of them, to answer for a debt due him, whether it is connected specially with their debt against him or is an independent claim. *Sloan & Co. v. McDowell*, 71 N. C. 356, 358.

The Rights and Liabilities of the Defendants May be Determined.—The court is fully empowered under this section to determine the rights and liabilities of the defendants, not to the plaintiff but among themselves. *Clark v. Williams*, 70 N. C. 679, 684. And when in the exercise of their power a judgment is rendered in favor of a plaintiff and an affirmative one in favor of a defendant, they constitute but one judgment though written and attested separately. *Hall v. Younts*, 87 N. C. 285.

Where the Defense Set up Applies to Entire Res.—When a bill is filed for the specific performance of a contract to convey a tract of land, and the defendant alleges that the tract consists of two parts, of which he admits that he is the owner of one, but avers that the other belongs to his wife, and sets up a defense which, if good, applies to the whole contract, it is erroneous to make a decree in favor of the plaintiff as to the part of which the defendant admits he is the owner, and to reserve the question as to the other part. *Swepson v. Rouse*, 65 N. C. 34.

Primary and Secondary Liability.—The primary and secondary liability as between two joint tort-feasors should be adjusted in the same action, where there are two defendants sued for the same negligent act alleged in the complaint, and judgment in the consolidated cases accordingly may be rendered under this section. *Bowman v. Greensboro*, 190 N. C. 611, 130 S. E. 502.

Where Another Suit Pending.—The entire spirit of our code procedure is to avoid multiplicity of actions and where an action for damages arising by tort from a collision between automobiles has been brought by one of the parties, he may successfully plead the pendency of this action to one brought against him by the opposing party in another county, and have it dismissed, the remedy of the defendant in the second action being by way of counterclaim, pursuant to this section; and that relief may be asked for by each in his own action does not affect the fact that the subject of both actions is the same acts or transactions, to be determined by one judgment either for the plaintiff or defendant in the case. *Allen v. Salley*, 179 N. C. 147, 101 S. E. 545.

"Cross Complaint" Allowed.—Under this section the defendant is entitled to file a "cross complaint" to establish his rights in the premises and to seek the appropriate relief. *Dillon v. Raleigh*, 124 N. C. 184, 186, 32 S. E. 548.

Same—Conformity to Original Complaint Required.—A cross action by a defendant against a co-defendant or third party must be in reference to the claim made by the plaintiff and based upon an adjustment of that claim. Independent and unrelated causes of action cannot be litigated by cross actions. *Bowman v. Greensboro*, 190 N. C. 611, 130 S. E. 502.

A defendant may file a cross action against a codefendant only if such cross action is founded upon or is necessarily connected with the subject matter and purpose of plaintiff's action, and while this section permits the determination of questions of primary and secondary liability and the right to contribution as between joint tort-feasors, it does not permit cross actions between defendants which are independent of the cause alleged by plaintiff. *Montgomery v. Blades*, 217 N. C. 654, 9 S. E. (2d) 397.

Recovery on Counterclaim.—Where an action on contract has originally and properly been brought in the superior court because of an equity involved, or its being for the possession of personal property, the recovery on a counterclaim, in the superior court, will not be denied for want of jurisdiction on the ground that the demand thereof was for a less sum than two hundred dollars, the jurisdiction as to matters of counterclaim coming within the provisions of G. S. sections 1-135, 1-137, and this section. *Singer Sewing Mach. Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

Where There is Concert of Action Among the Defendants.—Where an injury is caused by the separate action of several persons whose interests are adverse to the plaintiff, it is proper under this section, to join them as defendants in an action for damages. *Long v. Swindell*, 77 N. C. 176.

Where, however, there is no unity of design or concert of action, and the separate action of each defendant causes the single injury, the share of each in causing it is separable and may be accurately measured. In such case the jury can properly assess several damages. *Long v. Swindell*, 77 N. C. 176.

In an action against a railroad company and the Director General of Railroads, following the opinion of the Supreme Court of the United States, there is no liability upon the railroad company, but the action may be continued against the Director General under the provisions of this section, that a several judgment may be entered. *Kimbrough v. R. R.*, ante, 234, cited and applied. *Smith v. Seaboard Air Line R. Co.*, 182 N. C. 290, 109 S. E. 22.

Dismissal "as of Nonsuit."—A nonsuit under § 1-183 is permissible only on demurrer to the evidence, and when the court refuses plaintiff's motion for a continuance, it is error for the court to enter an involuntary nonsuit, but the court should order plaintiff to proceed to trial, and if plaintiff should refuse to go to trial, the court may then dismiss the cause "as of nonsuit" under this section or in its inherent power. *Sykes v. Blakey*, 215 N. C. 61, 200 S. E. 910.

Cited in *Blades v. Southern Ry. Co.*, 218 N. C. 702, 12 S. E. (2d) 553; *Bost v. Metcalfe*, 219 N. C. 607, 14 S. E. (2d) 648.

§ 1-223. Against married women.—In an action brought by or against a married woman, judgment may be given against her for costs or damages or both, in the same manner as against other persons, to be levied and collected solely out of her separate estate. (Rev., 563; C. S. 603.)

Cross Reference.—As to statutes concerning married women generally, see § 52-1 et seq.

Where the Wife Can Sue and be Sued Alone.—It is not required that the wife, as such, prosecute or defend an action concerning the lands by guardian or next friend. *Craddock v. Brinkley*, 177 N. C. 125, 98 S. E. 280.

Same—Husband, When Joined, is the Agent of the Wife.—The joinder of the husband in an action maintainable against the wife alone, though unnecessary, makes the husband the agent of the wife, when she is not present in person or by attorney, for the purpose of the suit. *Craddock v. Brinkley*, 177 N. C. 125, 98 S. E. 280.

Judgment by Consent Not Binding on The Wife.—Where a married woman, pending an appeal by her from a personal judgment rendered against her husband on notes given for property bought by her husband and secured partly by a mortgage on her land, consented to withdraw the appeal and to allow a compromise judgment to be entered against her husband for a certain amount payable in installments, it was held, that she had no power to consent to such judgment, and it had no binding force on her although she was personally present and represented by counsel of her own selection at the time of its rendition. *McLeod v. Williams*, 122 N. C. 451, 30 S. E. 129.

§ 1-224. Nonsuit not allowed after verdict.—In actions where a verdict passes against the plaintiff, judgment shall be entered against him. (Rev., s. 1520; Code, s. 936; R. C., c. 31, s. 110; 2 Hen. IV, c. 7; C. S. 604.)

Cross Reference.—As to entry of verdict and judgment, see § 1-205.

Theory of Nonsuit Explained.—"A plaintiff can at any time before verdict withdraw his suit, or, as it is termed, 'take a nonsuit,' by absenting himself at the trial term. If he does so and fails to answer, when called, by himself or by his attorney, the court directs a nonsuit to be entered, the cost is taxed against him, and that is an end of the case. Even when the plaintiff appears at the trial, takes a part in it by challenging jurors, examining and cross-examining witnesses, and by the argument of his counsel, if he finds from an intimation of the court that the charge will be against him, he may submit to a nonsuit and appeal. This is every day's practice. It is based upon the idea that the plaintiff announces his purpose not to answer when called to hear the verdict, and the advantage is that the plaintiff can have his Honor's opinion reviewed, and should the decision of the Supreme Court be against him, he can commence another action; whereas if he allows a verdict to be entered it is conclusive unless set aside." *Graham v. Tate*, 77 N. C. 120. *Southern Cotton Oil Co. v. Shore*, 171 N. C. 51, 55, 87 S. E. 938.

The Principle Stated.—The principle would seem to be that a plaintiff may elect to be nonsuited in every case where no judgment other than for costs can be recovered against him by the defendant, and when such judgment may be recovered he cannot so elect. *McKesson v. Mendenhall*, 64 N. C. 502, 504.

Retirement of Jury for Correction of Formal Defect.—It is too late after verdict upon an issue or issues of fact for a plaintiff to take a nonsuit; and where the jury, after rendering a verdict, had returned to the jury-room to correct a mere formal defect in the verdict, and as they retired the counsel for plaintiff informed the trial judge that the plaintiff would take a nonsuit, there was no error in refusing it. *Strause v. Sawyer*, 133 N. C. 64, 45 S. E. 346.

Where Defendant Seeks Affirmative Relief.—When, by the pleadings, the plaintiff ceases to be merely an actor, and becomes also a defendant, as, for example, if the defendant seeks affirmative relief and demands judgment, the right

to take a nonsuit ceases. *McKesson v. Mendenhall*, 64 N. C. 502, 504; *McLean v. McDonald*, 173 N. C. 429, 92 S. E. 148. But after a plea of tender or payment of money into court the plaintiff may take a nonsuit. *Id.*

Same—Counter Claim Must be Independent of Plaintiffs' Complaint.—When the counterclaim on a cause of action arises independently of that alleged in the complaint, the plaintiff may submit to a voluntary nonsuit as to his own cause of action. *Yellowday v. Perkinson*, 167 N. C. 144, 83 S. E. 341.

Same—Where Counterclaim Arises Out of Matter Set Forth in Complaint.—Where, however, the defendant's counterclaim arises out of the contract or transaction set forth in the complaint as the grounds of the plaintiff's cause of action, the plaintiff cannot take a nonsuit, this being placed on the principle that it is equitable and just that the right of the parties arising out of such contract be settled in one suit and at the same time. *Yellowday v. Perkinson*, 167 N. C. 144, 83 S. E. 341.

Where Interlocutory Order Entered.—An interlocutory judgment does not deprive a plaintiff of the right to take a nonsuit. *Piedmont Mfg. Co. v. Buxton*, 105 N. C. 74, 11 S. E. 264.

Nonsuit Not Allowed Where Defendant Wrongfully Dispossessed.—Whenever a defendant is wrongfully dispossessed of his land by legal process, he is entitled to a writ of restitution and an inquisition of damages in that action of which the plaintiff is not permitted to deprive him by taking a nonsuit. *Lane v. Morton*, 81 N. C. 38, 39.

Refusal to Allow Nonsuit after Verdict Not Reviewable.—Refusal of the superior court to allow a nonsuit after verdict and judgment will not be reviewed in the Supreme Court. *Brown v. King*, 107 N. C. 313, 12 S. E. 137.

§ 1-225. Party dying after verdict.—In no action shall the death of either party between the verdict and the judgment be alleged for error, if the judgment is entered within two terms after the verdict. (Rev., s. 564; Code, s. 938; R. C., c. 31, s. 112; 17 Charles II, c. 8; C. S. 605.)

Cross References.—As to rights of action which do not survive, see § 28-175. As to rights of action which survive to and against representative, see § 28-172. As to abatement of action by death of party after verdict, see § 1-74, paragraph 2.

Judgment for or against Deceased Parties.—The great weight of authority in this country is to the effect that where the court has acquired jurisdiction of the subject matter and the person during the lifetime of a party, a judgment for or against a deceased person is not wholly void or open to collateral attack. *De La Vergne, etc., Mach. Co. v. Featherstone*, 147 U. S. 209, 37 L. Ed. 138, 13 S. Ct. 283.

Judgment Neither Void nor Irregular.—A judgment in favor of a dead man is not void, and not, on that account, irregular. *Wood v. Watson*, 107 N. C. 52, 12 S. E. 49.

Judgment Against Dead Person Voidable.—A judgment against a party to a suit rendered after his death is voidable, even if the fact of death was unknown. *Wood v. Watson*, 107 N. C. 52, 12 S. E. 49.

Parties on Appeal.—If appeal by the adverse party was desired, the proper course was to make the heirs at law parties to the action, and serve notice of appeal upon them. *Wood v. Watson*, 107 N. C. 52, 12 S. E. 49.

§ 1-226. When limited by demand in complaint.—The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue. (Rev., s. 565; Code, s. 425; C. C. P., s. 249; C. S. 606.)

Purpose of the Section.—The apparent purpose of this section, while simplifying the method of procedure, is to afford any relief to which the plaintiff may be entitled upon the facts set out in his complaint, although misconceived and not specially demanded in his prayer. *Jones v. Mial*, 79 N. C. 164, 168.

General Relief Where Answer Filed.—If there be an answer any relief may be granted which is consistent with the case made by the complaint and embraced within the issue, although other and different relief may be sought by the pleader and demanded in the prayer for judgment. *Wright v. Teutonia Ins. Co.*, 138 N. C. 488, 492, 51 S. E. 55; *Bryan v. Canady*, 169 N. C. 579, 86 S. E. 584; *Council v. Bailey*, 154 N. C. 54, 69 S. E. 760.

Relief Limited to That Demanded Where No Answer Filed.—

Where no answer is filed then the relief shall not exceed that demanded in the complaint. *Jones v. Mial*, 82 N. C. 252, 257.

And when judgment grants relief in excess thereof it is irregular and respondents are entitled to have it set aside. *Simms v. Sampson*, 221 N. C. 379, 20 S. E. (2d) 554.

Where Improper Action Brought.—Where a plaintiff, in his complaint alleged and set out a case in trover, and the proof showed that it should have been in the nature of an assumpsit for money had and received, it was held that the plaintiff was entitled to recover, notwithstanding the variance. *Oats, etc., Co. v. Kendall*, 67 N. C. 241.

Where Amount Tendered is Larger than Amount Due.—The verdict of the jury rendered in an action upon a mortgage note will not be affected by a tender of a larger amount made before the commencement of the action, which was refused and not kept good, and the relief will be confined to that found to be due. *DeBruhl v. Hood*, 156 N. C. 52, 72 S. E. 83.

Cited in *Bowie v. Tucker*, 206 N. C. 56, 59, 173 S. E. 28.

§ 1-227. When passes legal title.—In any action wherein the court declares a party entitled to the possession of real or personal property, the legal title of which is in another party to the suit, and the court orders a conveyance of such legal title to him so declared to be entitled, or where, for any cause, the court orders that one of the parties holding property in trust shall convey the legal title to be held in trust to another person although not a party, the court, after declaring the right and ordering the conveyance, has power also, to be used in its discretion, to declare in the order then made, or in any made in the progress of the cause, that the effect thereof is to transfer to the party to whom the conveyance is directed to be made the legal title of the said property, to be held in the same plight, condition and estate as though the conveyance ordered were in fact executed; and shall bind and entitle the parties ordered to execute or to take benefit of the conveyance, in and to all such provisions, conditions and covenants as are adjudged to attend the conveyance, in the same manner and to the same extent as the conveyance would if the same were executed according to the order. A party taking benefit under the judgment has the same redress at law on account of the matter adjudged as he might on the conveyance, if the same had been executed. (Rev., s. 566; Code, s. 426; R. C., c. 32, s. 24; 1850, c. 107; 1874-5, c. 17; C. S. 607.)

Strict Conformity with the Section Required.—A decree does not operate as a conveyance, unless it complies with the requirements of this section and section 1-228 declaring "that it shall be regarded as a deed of conveyance" — and the mere fact that the court, while omitting this statement, intended that the decree should have such effect, is not sufficient for this purpose. *Morris v. White*, 96 N. C. 91, 2 S. E. 254.

This decision was criticized in the case of *Evans v. Brendle*, 173 N. C. 149, 91 S. E. 723; it was said that a too narrow construction was being given to the statute. The precise point arose in both cases, namely, the failure of the court to insert in the decree the words "that it shall be regarded as a deed of conveyance," although it was left undecided in the *Evans* case, the court merely expressing its disfavor as to the former holding and then resting its own decision upon a different ground. In the dissenting opinion in *Evans v. Brendle*, in which two justices concurred, much weight is attached to the argument used by the court in *Morris v. White*. Ed. Note.

Same—Where Specific Performance Asked for.—It is not necessary that a decree in favor of the plaintiff in a suit for specific performance should declare that it should operate as a conveyance in order to constitute a complete adjudication of the rights of the holder of the naked legal title — and the failure to make such insertion in no manner affects the equitable title which the plaintiff acquired by decree. *Skinner v. Terry*, 134 N. C. 305, 309, 46 S. E. 517.

Married Woman May be Declared Trustee.—Where a married woman admits the execution of a fraudulent deed which does not convey all that was expected by the grantee, she will not be allowed to profit by the fraud but will be declared a trustee of the part of the land not conveyed, the

purchase price of which she has received. *Bell v. McJones*, 151 N. C. 85, 65 S. E. 646.

Consent Decree until Impeached Passes Legal Title.—A decree by consent binds the parties and their privies in estate, but is open to impeachment by the privies on the ground that it was fraudulent to their injury; but until impeached the decree passes a legal title. *Rollins v. Henry*, 78 N. C. 342, 352.

Cited in *Ayden v. Lancaster*, 197 N. C. 556, 562, 150 S. E. 40.

§ 1-228. Regarded as a deed and registered.—Every judgment, in which the transfer of title is so declared, shall be regarded as a deed of conveyance, executed in due form and by capable persons, notwithstanding the want of capacity in any person ordered to convey, and shall be registered in the proper county, under the rules and regulations prescribed for conveyances of similar property executed by the party. The party desiring registration of such judgment must produce to the register a copy thereof, certified by the clerk of the court in which it is enrolled, under the seal of the court, and the register shall record both the judgment and certificate. All laws which are passed for extending the time for registration of deeds include such judgments, provided the conveyance, if actually executed, would be so included. (Rev., ss. 567, 568; Code, ss. 427, 429; R. C., c. 32, ss. 25, 27; 1850, c. 107, ss. 2, 4; 1874-5, c. 17, ss. 2, 4; C. S. 608.)

Cross Reference.—See sec. 1-227 and notes thereto.

Consent Decrees Convey Title.—A consent decree for the recovery of the lands in fee has the effect of conveying the legal estate in fee "as between the parties," and is good as against third persons in the absence of fraud or collusion. *Morris v. Patterson*, 180 N. C. 484, 105 S. E. 25.

Same—Agreement in Divorce Proceedings.—In an action brought by the wife for a divorce a mensa, an agreement that the wife have a life estate in certain of her husband's lands, is binding as a consent judgment, though a divorce has not been decreed therein; and it is not affected by the fact that an award of the children has therein been made with the sanction of the court. *Morris v. Patterson*, 180 N. C. 484, 105 S. E. 25.

Marginal Cancellation Not Essential but Advisable.—When a decree of court adjudges a deed to be void, no marginal cancellation of record, as in the case of mortgages and deeds of trust, is required, but it is commendable and convenient practice. *Smith v. King*, 107 N. C. 273, 277, 12 S. E. 57.

Cited in *Ayden v. Lancaster*, 197 N. C. 556, 562, 150 S. E. 40.

§ 1-229. Certified registered copy evidence.—In all legal proceedings, touching the right of parties derived under such judgment, a certified copy from the register's books is evidence of its existence and of the matters therein contained, as fully as if proved by a perfect transcript of the whole case. (Rev., s. 569; Code, s. 428; R. C., c. 32, s. 26; 1850, c. 107, s. 3; 1874-5, c. 17, s. 3; C. S. 609.)

§ 1-230. In action for recovery of personal property.—In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or for the value thereof in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or for the value thereof in case a return cannot be had, and damages for taking and withholding the same. (Rev., s. 570; Code, s. 431; C. C. P., s. 251; C. S. 610.)

Cross References.—As to the provisional remedy of claim and delivery for personal property, see § 1-472 et seq. As

to character of verdict in action for recovery of specific personal property, see § 1-203.

In General.—Where the defendant in claim and delivery replevies the property, the form of the judgment against him should be for the possession of the property with damages for its detention and costs, or for the value thereof if delivery cannot be had and damages for its detention. *Boyd v. Walters*, 201 N. C. 378, 160 S. E. 451.

Judgment Should Be Alternative.—In claim and delivery the judgment should be for the delivery of the property or its value. *Oil Co. v. Messick Grocery Co.*, 136 N. C. 354, 48 S. E. 781; *Hendrick v. Ireland*, 162 N. C. 523, 77 S. E. 1011; and this is true of a judgment on a forthcoming bond in claim and delivery proceedings. *Grubbs v. Stephenson*, 117 N. C. 66, 67, 23 S. E. 97.

Same—When Judgment for Defendant.—When the pleadings, in an action to declare valid a sale of property under mortgage, raise questions as to whether the mortgage had been released, and the sale was unlawful, and the property wrongfully seized under claim and delivery proceedings, the defendant, if successful, is entitled to judgment "for a return of the property, or for the value thereof in case return cannot be had, and damages for taking and withholding the same" and issues were properly submitted to the jury to ascertain the value of the property alleged to have been wrongfully converted. *Penny v. Ludwick*, 152 N. C. 375, 67 S. E. 919.

Applicability of Doctrine of Res Judicata.—Where judgment is rendered against the defendant and the surety on his bond in claim and delivery, and therein no issue is submitted to the jury on the question of damages for the wrongful detention of the property it does not estop the plaintiff from bringing an independent action to recover such damages. *Moore v. Edwards*, 192 N. C. 446, 135 S. E. 302; *Woody v. Jordan*, 69 N. C. 189.

Same—Where Judgment Unsatisfied.—Where the plaintiff, who had recovered judgment in an action of claim and delivery (in which he was defendant) for the return of the property, but the same had not been returned, thereafter brought suit against the plaintiff, in such action for damages for the conversion of the property, it was held that he was entitled to recover. *Asher v. Reizenstein*, 105 N. C. 213, 10 S. E. 889.

Same—Applicable Only as to Matters Litigated upon.—The fundamental reasons for the application of the doctrine of res adjudicata are that there should be an end of litigation and that no one should be vexed twice for the same cause; therefore, when the defendant in claim and delivery proceedings has recovered of the plaintiff therein such damages for his wrongful seizure of the defendant's property as allowed by this section and he has claimed no more, he may, by an independent action, sue for such damages to his business as may have been caused by the malicious prosecution of the plaintiff's action, for such was not the subject of recovery in the claim and delivery proceedings, and the doctrine of res adjudicata has no application. *Ludwick v. Penny*, 158 N. C. 104, 105, 73 S. E. 228.

Where Counterclaim Filed.—A suit for maliciously prosecuting a proceeding in claim and delivery for the purpose of breaking up the business of another will not lie before the termination of the claim and delivery proceedings, and the defendant in such proceedings cannot therefore set up a counterclaim in that action for the damages he may have sustained in his business. *Ludwick v. Penny*, 158 N. C. 104, 105, 73 S. E. 228.

Measure of Damages When Property Beyond Control of Court.—In an action of claim and delivery, where it appears that the defendant was in possession under a contract of purchase, and the property had been placed beyond the control of the court, the equities will be adjusted and judgment rendered against the defendant for the balance of the purchase money, with interest from the date of purchase. *Hall v. Tillman*, 115 N. C. 500, 20 S. E. 726.

Estimation of Interest.—When the verdict of the jury has only established that the plaintiff has wrongfully converted to his own use an excess of property in a certain sum over that required to pay off defendant's mortgage to him, the judgment thereon should not include interest from the time of the alleged conversion, but only from the date of the judgment, the conversion being a tort and the damages unliquidated; and when on appeal the judgment of the court is erroneous in this respect only, it will be ordered to be amended and affirmed. *Penny v. Ludwick*, 152 N. C. 375, 67 S. E. 919.

Where Additional Item Allowed by Consent.—Where the defendant in claim and delivery of crops has replevied the property, and the plaintiff has recovered final judgment, an additional item of expense or cost allowed by consent to the plaintiff will be held as binding upon the parties on appeal. *Hendricks v. Ireland*, 162 N. C. 523, 77 S. E. 1011.

Liability of Surety.—Where the plaintiff is successful in

his action wherein claim and delivery have been issued, the surety on the defendant's replevin bond, given in accordance with this section, is liable for the full amount thereof to be discharged upon the return of the property and the payment of damages and cost recovered by the plaintiff; or second, if the return cannot be had, the judgment should order that the surety be discharged upon the payment to the plaintiff of the amount of his recovery, within the amount limited in the bond, for the value of the property at the time of its wrongful taking and detention, with interest thereon, together with the cost of the action. *Orange Trust Co. v. Hayes*, 191 N. C. 542, 132 S. E. 466.

Where the defendant in the action has retained possession of the property in claim and delivery, and the plaintiff is successful in the action, the latter is entitled to summary judgment against the surety on the replevin bond given in accordance with the provisions of the statute. *Orange Trust Co. v. Hayes*, 191 N. C. 542, 132 S. E. 466.

Issues and Judgment Should Cover Whole Case.—Where the action is brought to recover property conveyed to secure a debt, in order to avoid circuity of action, when the debt is denied, the issues and judgment should cover the whole case, including the balance due upon the debt, and for the benefit of the sureties upon the undertaking the value of the property at the time of the seizure should also be ascertained, as they are liable for such value, not exceeding the indebtedness secured. *Griffith v. Richmond*, 126 N. C. 377, 35 S. E. 620.

Cited in Harrell v. Tripp, 197 N. C. 426, 149 S. E. 548; **Green v. Carroll**, 205 N. C. 459, 464, 171 S. E. 627.

§ 1-231. What judge approves judgments.—In all cases where a judgment, decree or order of the superior court is required to be approved by a judge, it shall be approved by the judge having jurisdiction of receivers and injunctions. (Rev., s. 571; Code, s. 432; 1876-7, c. 223, s. 3; 1879, c. 63; 1881, c. 51; C. S. 611.)

Motions for the appointment of a receiver may be made before the resident judge of the district, or one assigned to the district, or one holding the courts thereof by exchange, at the option of the mover. *Corbin v. Berry*, 83 N. C. 28.

Restraining Orders must be made returnable before the judge in the district in which the action is pending. *Galbreath v. Everett*, 84 N. C. 546.

§ 1-232. Judgment roll.—Unless the party or his attorney furnishes a judgment roll, the clerk, immediately after entering the judgment, shall attach together and file the following papers which constitute the judgment roll:

1. In case the complaint is not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment. (Rev., s. 572; Code, s. 434; C. C. P., s. 253; C. S. 612.)

Section Directory.—The provisions of this section as to the judgment roll should be complied with, but they are directory, and the clerk's failure to "attach together" the papers did not vitiate the judgment which was entered of record and regular in form. See *Brown v. Harding*, 171 N. C. 686, 89 S. E. 222, in spite of the holding in *Dewey v. Sugg*, 109 N. C. 328, 329, 13 S. E. 923, to the effect that a judgment to constitute a lien must be docketed in the "prescribed manner."

§ 1-233. Docketed and indexed; held as of first day of term.—Every judgment of the superior court, affecting the right to real property, or requiring in whole or in part the payment of money, shall be entered by the clerk of said superior court on the judgment docket of the court. The entry must contain the names of the parties, and the relief granted, date of judgment, and the date, hour and minute of docket-

ing; and the clerk shall keep a cross-index of the whole, with the dates and numbers thereof. In all cases affecting the title to real property the clerk shall enter upon the judgment docket the number and page of the minute docket where the judgment is recorded, and if the judgment does not contain particular description of the lands, but refers to a description contained in the pleadings, the clerk shall enter upon the minute docket, immediately following the judgment, the description so referred to.

All judgments rendered in any county by the superior court, during a term of the court, and docketed during the same term, or within ten days thereafter, are held and deemed to have been rendered and docketed on the first day of said term, for the purpose only of establishing equality of priority as among such judgments. (Rev., c. 573; Code, s. 433; C. C. P., s. 252; Supr. Ct. Rule VIII; 1909, c. 709; 1929, c. 183; 1943, c. 301, s. 4½; C. S. 613.)

Local Modification.—Durham: 1929, c. 88.

Editor's Note.—The Act of 1929 added to the second paragraph the words "for the purpose only of establishing equality of priority as among such judgments."

The 1943 amendment inserted in the second sentence the requirement that the entry contain the hour and minute of docketing.

For article on Names—Married Women—Change of Name by Legal Process—Notice, see 16 N. C. Law Rev. 187.

Strict Compliance Necessary.—The observance of this law is regarded as so important to subsequent purchasers and mortgages that, wherever the system of docketing obtains, a very strict compliance with its provisions in every respect is required. Jones v. Currie, 190 N. C. 260, 129 S. E. 605.

Clerk Liable upon Failure to Index Judgment.—An action of tort will lie against the clerk upon his failure to index a judgment, such neglect resulting in damage to the plaintiff. Shackelford v. Staton, 117 N. C. 73, 23 S. E. 101.

Same—Duty of Judgment Creditor to See Judgment Properly Docketed.—It is the duty of a judgment creditor to see that his judgment is properly docketed. If the clerk neglects to docket the judgment, subsequent encumbrancers and claimants under the judgment debtor are not to be prejudiced thereby, and the remedy of the judgment creditor is against the clerk for loss suffered by reason of the failure to docket the judgment. Holman v. Miller, 103 N. C. 118, 9 S. E. 429.

Where Judgment Docketed in Foreign County.—Where the transcript of a judgment recovered in one county is sent to another for docketing, the transcript must not only be docketed but must be entered on the cross-index, giving the names of all the judgment debtors and the name of at least one plaintiff. Jones v. Currie, 190 N. C. 260, 129 S. E. 605; Dewey v. Sugg, 109 N. C. 328, 13 S. E. 923.

Contents of the Index and Purpose Thereof.—When there are several judgment debtors in the docketed judgment, the index should and must specify the name of each one, because the index as to one would not point to all or any of the others. The purpose is, that the index shall point to a judgment against the particular person inquired about if there be a judgment on the docket against him. A judgment not thus fully docketed does not serve the purpose of the statute, and is not docketed in contemplation of law. Dewey v. Sugg, 109 N. C. 328, 13 S. E. 923. Jones v. Currie, 190 N. C. 260, 129 S. E. 605.

Initials in Index Valid.—"J. Mizell" or "Jo. Mizell" is a sufficient cross-indexing for a judgment against "Josiah Mizell." Valentine v. Britton, 127 N. C. 57, 37 S. E. 74.

One Cross-Indexing Not Sufficient for Two Judgments.—One cross-indexing is insufficient for two judgments, though they appear on the same page and include the same parties, and only the first judgment on its page will constitute a lien. Valentine v. Britton, 127 N. C. 57, 37 S. E. 74.

Judgment Signed out of Term.—The provisions of this section that judgments relate to the first day of the term, apply when the judgment was rendered and docketed during the term, or within ten days after adjournment thereof, and not to a judgment signed out of term by the consent of the parties, except where third persons are prejudiced; and the position may not be maintained that a sale of lands to be made by commissioners appointed to sell property, etc., was not made within the time prescribed by the order, under the theory that the date of the order was to relate back to the

commencement of the term, when it appears that by consent the order was signed after the term of court, and the sale occurred within the time prescribed from the actual date on which the judge signed it. Contestee Chemical Co. v. Long, 184 N. C. 398, 114 S. E. 465.

Consent Judgments.—The provisions of this section that judgments rendered during a term should relate back to the first day thereof, and that the liens of all judgments rendered on the same Monday shall be of equal priority, do not apply to judgments by consent. Hood v. Wilson, 208 N. C. 120, 179 S. E. 425.

Judgment against Corporations.—A judgment against a corporation does not relate back, by implication of law, to the beginning of the term, so as to create a lien on the corporate property as against the vesting of the title in a receiver, under the statute, who had in the meantime been appointed. Odell Hdw. Co. v. Holt-Morgan Mills, 173 N. C. 308, 92 S. E. 8.

Cited in Pentuff v. Park, 195 N. C. 609, 143 S. E. 139; Henry v. Sanders, 212 N. C. 239, 193 S. E. 15; Massachusetts Bonding, etc., Co. v. Knox, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438 (dis. op.).

§ 1-234. Where and how docketed; lien.—Upon filing a judgment roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment docket of the superior court of the county where the judgment roll was filed, and may be docketed on the judgment docket of the superior court of any other county upon the filing with the clerk thereof of a transcript of the original docket, and is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for ten years from the date of the rendition of the judgment. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the ten years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith. (Rev., s. 574; Code, s. 435; C. C. P., s. 254; C. S. 614.)

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Cross Reference.

As to docketed judgment for a fine constituting a lien, see § 15-185.

I. IN GENERAL.

See 11 N. C. Law Rev. 365, 367.

Applicable to Legal and Equitable Estates.—This section is sufficiently comprehensive to include equitable as well as legal estates. Mayo v. Staton, 137 N. C. 697, 50 S. E. 331, the principle is equally applicable when the sale to satisfy the judgment is made by an administrator. Man-nix v. Ihrle, 76 N. C. 299, 301.

Where a debtor executes a deed in trust to a trustee to secure certain debts therein mentioned, and after the registration of the deed a creditor obtains judgment and has the same docketed, the judgment, under the provisions of this section, is a lien upon the equitable estate of the debtor. McKeithan v. Walker, 66 N. C. 95.

A judgment from the time it is docketed has a lien on all the interest of whatever kind the defendant has in real estate, whether it be such as can be seized under execution or not. *Glenn Co. v. Shober*, 69 N. C. 154.

A lien is a right of property, and not a mere matter of procedure. So far as it relates to lands, it is a technical term, that means a charge upon the lands running with them, and incumbering them in every change of ownership. *Ingles v. Bringham*, 1 Dall. 341, 345, 1 L. Ed. 167.

Property converted from its original nature, as land into money, is not subject to the lien of a judgment, or to sale under execution issued thereon, although the statute gives a lien, under the judgment, on all the real property of the debtor in the county, which by construction of this court embraced both legal and equitable estates. *Clifton v. Owens*, 170 N. C. 607, 87 S. E. 502, 505, citing *Dixon v. Dixon*, 81 N. C. 323.

Liability of Trustee. — A trustee having a surplus in his hands after the sale of land under a conveyance to secure money loaned thereunder, who is affected with notice by docketing of judgments against the trustor, or the one who otherwise is entitled to receive it, under the provisions of this section may not pay the same to the trustor without incurring liability; and in an action brought for that purpose the judgment creditors are necessary parties, and a final judgment therein entered without them is reversible error. *Barrett v. Barnes*, 186 N. C. 154, 119 S. E. 194.

Requirement That Clerk to Docket Judgment Mandatory. — A judge cannot, under this section, validly issue an order to the clerk not to docket a judgment pending the fulfillment of a conditional order directed to the parties. *Hopkins v. Bowers*, 111 N. C. 175, 179, 16 S. E. 1; see also, section 1-233 and notes thereto.

Applied in *Dillard v. Walker*, 204 N. C. 67, 167 S. E. 632; *Equitable Life Assur. Soc. v. Russos*, 210 N. C. 121, 185 S. E. 632.

Cited in *Jones v. Rhea*, 198 N. C. 190, 151 S. E. 255; *Crow v. Morgan*, 210 N. C. 153, 185 S. E. 668; *Edmonds v. Wood*, 222 N. C. 118, 22 S. E. (2d) 237.

II. CREATION OF THE LIEN AND PRIORITIES.

A. Sufficiency.

1. Realty.

Docketing Fixes the Lien. — The docketed judgment fixes the lien and the debtor cannot escape it; if he sells thereafter the purchaser takes subject to the statutory lien given by this section. *Moore v. Jordan*, 117 N. C. 86, 89, 23 S. E. 259. The mere rendition of the judgment will not constitute a lien, *Alsop v. Mosely*, 104 N. C. 60, 63, 10 S. E. 124; nor does the execution fix the lien. *Pasour v. Rhyne*, 82 N. C. 149, 152.

A judgment for a fine, duly docketed, constitutes a lien on realty under § 15-185, and attaches immediately upon the docketing of the judgment under the provisions of this section. *Osborne v. Board of Education*, 207 N. C. 503, 177 S. E. 642.

In other words, the section specifies two requisites as conditions precedent to the fixing of the lien, namely (1) rendition and (2) docketing; when these two requirements are met the lien attaches as of the date of rendition. *Ed. Note.*

Same—Subsequent Purchasers. — The docketing of the judgment having fixed the lien, the rights of the judgment creditor become fixed thereby, and the subsequent registration of a deed or mortgage to or on the same property cannot divest those rights. *Cowen v. Withrow*, 112 N. C. 736, 741, 17 S. E. 575. See post, this note, "Priorities" II, B.

Same—Not Essential to Issuing an Execution. — Docketing is not a condition precedent to the enforcement of the judgment by final process. *Bernhardt v. Brown*, 122 N. C. 587, 594, 29 S. E. 884. See also, *Holmon v. Miller*, 103 N. C. 118, 9 S. E. 429, where it was said, "under the present system no lien is acquired upon land in the absence of an execution and levy, until the judgment has been docketed."

Strict Compliance with Requirement as to Docketing. — To constitute a lien on real estate, the judgment must be docketed in the office of the clerk of the superior court of the county where such property is situate. And, for a lien to be obtained, the requirement as to docketing must be strictly complied with. *Southern Dairies v. Banks*, 92 F. (2d) 282, 286.

Docketing First in County of Rendition. — A judgment rendered in one county can not be docketed in another without having been first docketed in the county where it was rendered. *McAden v. Banister*, 63 N. C. 479; *Essex Inv. Co. v. Pickelsimer*, 210 N. C. 541, 187 S. E. 813.

Transcript Sent to Foreign County. — In *Wilson v. Patton*, 87 N. C. 318, it was held that the transcript of a judgment sent from one county to another to be docketed, which sets out the date of its rendition, the names of the parties to the suit, the amount of the judgment and the costs of the action, is a sufficient docketing to create a lien on the defendant's land. *Lee v. Bishop*, 89 N. C. 256, 260.

2. Personalty.

Levy Necessary to Constitute Lien on Personalty. — There is no lien upon personal property, except from the levying. *Merchants Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507, 524, 20 S. E. 765; *Selby v. Dixon*, 11 N. C. 424; *Summers Hdw. Co. v. Jones*, 222 N. C. 530, 532, 23 S. E. (2d) 883.

B. Priorities.

Record as Notice. — A plaintiff will be charged with notice of judgment entered at a regular term of court as of the time of the entry. *Sluder v. Graham*, 118 N. C. 835, 23 S. E. 924.

Consent judgments, under this section, have priority in accordance with priority of docketing, since the provisions of § 1-233 are not applicable to consent judgments. *Hood v. Wilson*, 208 N. C. 120, 179 S. E. 425.

Between Judgments. — If a number of justice's judgments be docketed in the superior court, they will, under this section, be a lien upon the land of the defendant from the time when they were docketed, and will have a priority over a judgment obtained in court by another person against the same defendant at a subsequent time, and though an execution be issued on the latter and the sheriff levies it on the land and advertises it for sale, yet, if before the sale executions are issued on a part of the justice's docketed judgments, and are placed in the hands of the sheriff, the proceeds of the sale of the land must be first applied to the payment of all the justice's judgments. *Perry v. Morris*, 65 N. C. 221.

A prior assignee of a judgment for a valuable consideration takes the title of his assignor unaffected by a subsequent assignment of the same judgment by the assignor to another for a valuable consideration without notice of the prior assignment, in the absence of fraud, even though the second assignee has his assignment first recorded on the judgment docket, there being no statute requiring an assignment of a judgment to be recorded. *In re Wallace*, 212 N. C. 490, 193 S. E. 819.

Between Docketed Judgment and Unrecorded Deed. — The lien of a regularly docketed judgment is superior to a claim under an unrecorded deed from the judgment debtor. *Eaton v. Doub*, 190 N. C. 14, 128 S. E. 494.

Where there is a lien by judgment under this section against the holder of an equitable title to lands who also holds a registered mortgage from his grantee under an unregistered deed to secure the balance of the purchase price, his deed registered after the lien of the judgment had taken effect, cannot render the lien under the mortgage superior to the judgment lien, and equity will remove the lien of the mortgage cloud upon the title of the purchaser at the execution sale holding the sheriff's deed. *Mayo v. Staton*, 137 N. C. 670, 50 S. E. 331; *Mills v. Tabor*, 182 N. C. 722, 109 S. E. 850.

An adverse holder of land under § 1-40, pursuant to an unrecorded deed, has title superior to the lien of a judgment based on this section, but acquired and registered after the elapse of the 20-year period against the original grantor. *Johnson v. Fry*, 195 N. C. 832, 143 S. E. 857.

Between Judgment and Previous Conveyance. — A judgment is not a lien upon the lands of the judgment debtor that he had previously conveyed bona fide either by registered deed or mortgage upon which foreclosure has been made. *Helsabeck v. Vass*, 196 N. C. 603, 146 S. E. 576.

Between Judgment and Subsequent Mortgage. — Where after the recordation of a judgment, the judgment debtor executes a mortgage on certain of his land, and the land is foreclosed under prior mortgages antedating the judgment, and the judgment debtor makes no claim to his homestead, the judgment creditor has a preference in the proceeds of the sale over the subsequent mortgage made. *Duplin County v. Harrell*, 195 N. C. 445, 142 S. E. 481.

Between Lien and Subsequent Purchaser. — Upon the docketing of a judgment it becomes a lien on all the land to which the judgment debtor has title for a period of ten years from the time of its docketing, under this section, and the land is not relieved of the judgment lien by a subsequent transfer of title by the judgment debtor. *Moses v. Major*, 201 N. C. 613, 160 S. E. 890.

A judgment creditor or his assignee has a lien on the lands of the judgment debtor, and where the judgment is duly docketed, under this section, the lien exists against

a subsequent purchaser from the judgment debtor, carrying with it the right to subject the property and improvements thereto to the satisfaction of the debt, but the judgment creditor or his assignee has no title or estate in the lands. *Byrd v. Pilot Fire Ins. Co.*, 201 N. C. 407, 160 S. E. 458.

When an heir acquires land or property to be treated as realty subsequent to docketing of several judgments against him, the judgment creditors are not entitled to priority in accordance with the date of the docketing of their respective judgments, but are entitled only to application of the property to the judgments pro rata. *Linker v. Linker*, 213 N. C. 351, 196 S. E. 329.

Execution Sale under Prior Judgment.—A judgment is not a lien upon the lands of the judgment debtor conveyed under execution sale of a prior docketed judgment. *Helsabeck v. Vass*, 196 N. C. 603, 146 S. E. 576.

Subject to Homestead.—A lien on the lands of the judgment debtor, is subject to the homestead interest as provided by Const., Art. X, sec. 2. *Farris v. Hendricks*, 196 N. C. 439, 146 S. E. 77.

Purchaser at Execution Sale.—Where the judgment creditor and a mortgagee under a prior registered mortgage claim the land from the same person, they are ordinarily estopped to deny the title of their common source, but where the deed from this common source, upon which the mortgagor's title depends, has been registered after the judgment lien has taken effect, this element of estoppel does not apply to the purchaser at the execution sale. *Mills v. Tabor*, 182 N. C. 722, 109 S. E. 850.

Sale under Junior Judgment.—The effect of a sale under a junior judgment is to pass the debtor's estate encumbered with the lien of an older docketed judgment; and the effect of a sale under both is to vest the title in the purchaser, and transfer the liens, in the same order of priority to the proceeds of sale. *Cannon v. Parker*, 81 N. C. 320, 321.

Same—Priorities Must Be Observed.—The sheriff must observe these priorities, of which he has notice upon the face of the execution, in paying out the money to the respective creditors. *Cannon v. Parker*, 81 N. C. 320, 321.

Merger.—Where a creditor sues on his judgment constituting a lien on the homestead of the debtor and obtains a new judgment, the first judgment is not merged in the second. *Springs v. Pharr*, 131 N. C. 191, 42 S. E. 590.

As to Bona Fide Purchasers.—Where a judgment is entered during the term, the lien has no application against claimants who have in the meantime acquired bona fide title, and in such case the law will take notice of fractions of a day in favor of such a purchaser, and receivers of the debtor should be classed as a purchaser. *Odell Hdw. Co. v. Holt-Morgan Mills*, 173 N. C. 308, 92 S. E. 8.

Bona fide purchasers are also protected where there is a great delay in making motion to revive the lien, and execution being issued after the lapse of the ten year period. See note of *Spicer v. Cambill*, post this note, analysis line, "Issuing Execution" IV.

Judgment Creditor Prior to Debtor's Homestead.—The lien of a judgment duly docketed in the county where the land lies is superior to that of a subsequently registered mortgage on land outside of the debtors allotted homestead, and therefore, the proceeds of the sale of such land should be applied first to the payment of the judgment debt. *Gulley v. Thurston*, 112 N. C. 192, 195, 17 S. E. 13. But see note of *Kirkwood v. Peden*, and also *Vanstory v. Thornton*, post this note, analysis line, "Property Subject to the Lien" III.

Interlocutory Judgment.—An interlocutory judgment, containing recitals made only for the purpose of directing a commissioner how to proceed in the sale of land, and the land was not sold, does not affect the rights of the parties. *Mayo v. Staton*, 137 N. C. 670, 50 S. E. 331.

III. PROPERTY SUBJECT TO THE LIEN.

A. Property Located in County Where Judgment Docketed.

In General.—A docketed judgment is a lien only upon so much of the real property of the defendant as is situated in the county where the same is docketed. *King v. Portis*, 77 N. C. 26, but it gives no peculiar lien upon any particular parcel of land. *Bryan v. Dunn*, 120 N. C. 36, 27 S. E. 37.

A judgment is a lien upon the lands of the judgment debtor that he may own in the county at the time the judgment was docketed. *Helsabeck v. Vass*, 196 N. C. 603, 146 S. E. 576.

The lien of a judgment is no more than that which is provided by the statute, and is effective only against "the real property in the county where the same is docketed of every person against whom any such judgment is ren-

dered." *Jackson v. Thompson*, 214 N. C. 539, 543, 200 S. E. 16.

Title to Standing Timber.—An estate created by a deed conveying standing timber, with a right to cut and remove the same within a specified time, is, while it exists, subject to the lien of a docketed judgment and to the ordinary methods of enforcing collection of the same as in other cases of realty. *Fowle v. McLean*, 168 N. C. 537, 84 S. E. 852.

Property converted from its original nature, see note of *Clifton v. Owens*, ante this note, analysis line "In General" I.

Homestead Not Subject to Judgment Lien.—The mere right of homestead is not such an estate or interest in land as is subject to a lien by judgment. *Kirkwood v. Peden*, 173 N. C. 460, 92 S. E. 264.

Same—Reversionary Interest May Be Subjected.—The only reason for keeping a judgment in full force and effect during the existence of the homestead is to subject the reversionary interest to its payment when the homestead expires, as such interest cannot be sold under execution during the life of the homestead. *Kirkwood v. Peden*, 173 N. C. 460, 92 S. E. 264.

A docketed judgment is a lien on all the land of the debtor in the county where docketed from the date of the docketing, and the creditor may presently enforce the same on all the debtor's land outside of the homestead boundaries, but must await the termination of the homestead estate to subject the land to which it pertains, and no act of the debtor can change or impair the creditor's rights under such lien. *Vanstory v. Thornton*, 112 N. C. 196, 204, 17 S. E. 566.

A judgment upon individual debt against holder of mere legal title held in trust for another has no lien upon the land so held. *Jackson v. Thompson*, 214 N. C. 539, 543, 200 S. E. 16.

Cited in *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465.

B. After-Acquired Property.

In General.—Under this section the lien of docketed judgments attaches to after-acquired lands in the same county at the moment that the title vests in the judgment debtor, and the proceeds of a sale under such judgments should be distributed pro rata without reference to the day when they were docketed. *Moore v. Jordan*, 117 N. C. 86, 87, 23 S. E. 259.

The lien extends to and embraces only such estate as the judgment debtor has at the time of the docketing thereof, or thereafter acquires while the judgment subsists. *Thompson v. Avery County*, 216 N. C. 405, 5 S. E. (2d) 146. See also, *Durham v. Pollard*, 219 N. C. 750, 14 S. E. (2d) 818.

Judgment by Confession.—Though a judgment by confession is given out of the ordinary course of procedure, nevertheless, it at once, when docketed, becomes a lien upon the judgment debtor's real property. *Sharp v. R. R.*, 106 N. C. 308, 319, 11 S. E. 530; *Keel v. Bailey*, 214 N. C. 159, 198 S. E. 654.

Judgments against Land Held in Remainder.—The docketing of judgments against a debtor who holds land in remainder, dependent upon a life estate in another, creates a lien upon such estate, which, not being susceptible of immediate occupancy, is not protected from sale under execution by the Constitution and laws relating to homestead exemptions. *Stern Bros. v. Lee*, 115 N. C. 426, 20 S. E. 736.

Successive Transfers of Different Tracts.—Where there is a judgment lien on land, part of which is sold by the debtor, the remaining portion will be first sold in satisfaction of the judgment before resorting to the land first sold, and the rule extends to a purchaser of the remaining land from the judgment debtor, but this equity is never enforced against the creditor when he will in any substantial way be prejudiced by it. *Brown v. Harding*, 170 N. C. 253, 86 S. E. 1010, rehearing denied 171 N. C. 686, 99 S. E. 222.

Attaches upon Conveyance to Judgment Debtor.—The lien of a judgment attaches when the land is conveyed to the judgment debtor, and is superior to any equity which his grantor could retain by a parol agreement or a subsequently recorded conveyance. *Colonial Trust Co. v. Sterchie Bros.*, 169 N. C. 21, 85 S. E. 40.

C. Nature of Right Acquired.

No Estate Vested.—The lien created by docketing a judgment does not vest any estate in the property subject to it in the judgment creditor, but only secures to the creditor the right to have the property applied to the satisfaction of his judgment, and such lien extends only to such estate, legal or equitable, as may be sold or disposed

of at the time it attaches. *Bruce v. Nicholson*, 109 N. C. 202, 13 S. E. 790.

Title to Property in Third Party. — A docketed judgment constitutes no lien upon real property purchased and paid for by the debtor, where title is taken in the name of some third person. *Dixon v. Dixon*, 81 N. C. 323, 324.

Same—Remedy of Creditor. — In such case the creditor has a right to follow the fund in equity, but the institution of a suit for that purpose confers no lien, and can have no further effect than to give the creditor first bringing his suit a priority over other creditors, and to disable the holder of the property from defeating, by a conveyance, the object of the proceedings. *Dixon v. Dixon*, 81 N. C. 323, 324.

Persons Entitled to Enforce. — In an action to enforce the lien of judgments against land formerly owned by the judgment debtor, it was no concern of the defendants that the person in whose name the judgments were taken was not the beneficial owner of the judgments, as defendants would be protected by payment to the plaintiff of record. *Brown v. Harding*, 170 N. C. 253, 86 S. E. 1010, rehearing denied, 171 N. C. 686, 89 S. E. 222.

Where Equitable Execution and Accounting Necessary. — Where there was a conflict as to the priorities of the secured creditors the plaintiff, whose docketed judgment constituted a lien on the resulting trust in a deed of trust, could not enforce his lien by the ordinary process of execution but had to resort to an action in the nature of an equitable execution where an account could be taken. *Trimble v. Hunter*, 104 N. C. 129, 134, 10 S. E. 291.

Same—Reason for the Rule. — As it (the resulting trust) could not be levied on or sold by the common law to satisfy the execution, no lien arose from its issuing or what the sheriff calls its levy. For as the lien arises or is created as a means to the end, it would be in vain for the law to raise it when the end could not be attained. *McKeithan v. Walker*, 66 N. C. 95, 96.

IV. ISSUING EXECUTION.

See the analysis line immediately following in this note.

Purpose. — The sole office of the execution is to enforce the lien by the sale of the land upon which it has attached. *Pasour v. Rhyne*, 82 N. C. 149, 152.

Time Allowed. — Leave to issue execution upon a docketed judgment may be granted at any time within ten years from the docketing. *Adams v. Guy*, 106 N. C. 275, 278, 11 S. E. 535.

Same—Appeal. — The motion for leave to issue execution is made in apt time, though the ten years expired pending the appeal and though no undertaking is given; this is true because the time during which the judgment creditor was restrained by the operation of the appeal is not to be counted, as the appeal had the effect to prevent the issuing of execution within the time prescribed. *Adams v. Guy*, 106 N. C. 278, 11 S. E. 535.

Motion to Revive. — Where a judgment creditor delays issuing execution until within a short time before the expiration of the lien of his judgment and then gives notice of a motion to revive and for leave to issue execution, and the motion is heard and execution issued after ten years from the date of the judgment, a purchaser at the execution sale of land gets no title as against one who bona fide bought the land during the ten years. *Pipkin v. Adams*, 114 N. C. 201, 19 S. E. 105; *Lilly v. West*, 97 N. C. 276, 1 S. E. 834. The same principle applies where the execution is levied before the expiration of the lien but the sale does not take place until after the expiration of the lien. *Spicer v. Gambill*, 93 N. C. 378, 383.

Failure to Docket Judgment. — If a party who obtains judgment below neglects to docket it in any county, then upon obtaining judgment in the Supreme Court, he will have no lien prior to the date of his execution from that court. *Rhyne v. McKee*, 73 N. C. 259, 260, 262.

V. LOSS OF THE LIEN.

In General. — The lien of a judgment docketed under this section is lost by the lapse of ten years from the date of the docketing of the judgment; and this is so notwithstanding execution has been issued within the ten years. *Pasour v. Rhyne*, 82 N. C. 149, 152; *Lyon v. Russ*, 84 N. C. 588.

The life of the lien of a judgment is ten years from the date of its rendition in the superior court, and an action to enforce the lien by condemning land of the judgment debtor to be sold is barred by the statute when sale of the land cannot be made and concluded within the ten-year period, even though the action is instituted within such period, when the running of the statute is not interrupted at any time or in any manner by order restraining and

proceeding on the judgment. *Lupton v. Edmundson*, 220 N. C. 188, 16 S. E. (2d) 840.

Appeal as Stopping Statute. — Where judgment was taken in 1926, and in 1931 defendant moved before the clerk to set the judgment aside, motion denied and appeal taken to the judge, and the clerk ordered that execution should not issue until the adjournment of the August, 1931, term of court, and the appeal to the judge was never heard, the order of the clerk and the appeal to the judge did not have the effect of stopping the statute and the judgment was barred in 1939 by the ten years statute of limitations. *Exum v. Carolina R. Co.*, 222 N. C. 222, 22 S. E. (2d) 424.

When Mandate to Sell the Land Expires. — A judgment recovered in the superior court for the payment of money is a lien on land from the moment it is docketed, and executions issued to enforce collection are returnable to the next term of the court beginning not less than forty days after they are issued. With the return day the mandate expires and the power to sell land under the particular writ is thereafter withheld. *Jeffreys v. Hocutt*, 193 N. C. 332, 335, 137 S. E. 177.

Cancellation of Judgment to Remove Cloud. — Where a deed of trust to secure certain bonds contains the provision that the bonds may be sold in part by the trustor with the consent of the trustee who is to receive and apply the purchase price on the bonds, and a judgment has been docketed against the trustor, after he has sold a part of said land under the agreement but without the joinder of the trustee and before the purchaser has registered his deed, the purchaser is entitled to have the judgment canceled as a cloud on his title since the purchase of the land was, in reality, through the trustee who received the money and not the trustor. *Boyd v. Bristol Typewriter Co.*, 190 N. C. 794, 130 S. E. 858.

In What Court Judgment Impeachable. — A justice's judgment docketed in the superior court is for the purpose of execution there, and that court has no power to set it aside, unless the cause be carried up by appeal or writ of *recordari*. A judgment can be vacated only by the court which rendered it. *Morton v. Rippey*, 84 N. C. 611, 612.

Cited in *Scales v. Scales*, 218 N. C. 553, 11 S. E. (2d) 569.

§ 1-235. Of supreme court docketed in superior court; lien. — It is the duty of the clerk of the supreme court, on application of the party obtaining judgment in that court, directing in whole or in part the payment of money, or affecting the title to real estate, or on the like application of the attorney of record of said party, to certify under his hand and the seal of said court a transcript of the judgment, setting forth the title of the court, the names of the parties thereto, the relief granted, that the judgment was so rendered by said court, the amount and date of the judgment, what part thereof bears interest and from what time; and said clerk shall send such certificate and transcript to the clerk of the superior court of such counties as he is directed; and the clerk of the superior court receiving the certificate and transcript shall docket them in like manner as judgment rolls of the superior court are docketed. And when so docketed, the lien of said judgment is the same in all respects, subject to the same restrictions and qualifications, and the time shall be reckoned as is provided and prescribed in the preceding sections for judgments of the superior court, so far as the same are applicable. The party desiring the certificate and transcript provided for in this section may obtain them at any time after such judgment has been rendered, unless the supreme court otherwise directs. (Rev., s. 575; Code, s. 436; 1881, c. 75, ss. 1, 4; C. S. 615.)

Editor's Note. — The foundation of the purpose of the enactment of this section is to be found in the great importance attached to the requirement that every judgment, to constitute a lien, must be docketed, the imperativeness of which has been dealt with in the preceding section. Hence by the very provisions of this section the substantial elements of a final judgment rendered by the Supreme Court must be transmitted to the various superior courts and when docketed (and not

until then) in the proper county the judgment forms a lien upon the real estate of the debtor situated therein.

Rendition Does Not Perfect Lien.—The simple rendition of a judgment in the Supreme Court will not constitute a lien upon the judgment debtor's land until "docketed" in the county where the land lies, as required by the statute. *Alsop v. Moseley*, 104 N. C. 60, 64, 10 S. E. 124.

Issuing Execution Prior to Docketing.—See note of Bernhardt v. Brown, under section 1-234.

Judgment of Supreme Court Applied to Docketed Lower Court Judgment.—The defendant, by a decree in the Supreme Court, had recovered from the plaintiffs a sum of money; while the execution was in the hands of the sheriff the plaintiff recovered from the defendant, by judgments before a magistrate, a like amount for items in their account not allowed in the case in the Supreme Court. These latter judgments were docketed, and executions were taken out upon them and returned *nulla bona*; the plaintiffs then asked for an order to have the amount of the decree in favor of the defendant applied to their judgments and it was held that they were entitled to such relief. *Hogan v. Kirkland*, 64 N. C. 250.

Cited in *Southern Dairies v. Banks*, 92 F. (2d) 282.

§ 1-236. Fees for filing transcripts of judgments by clerks of superior courts.—The fee for filing, docketing and indexing transcripts of judgments in the offices of the several clerks of the superior court in North Carolina shall be the same fee charged for filing, docketing and indexing transcripts of judgments in the office of the clerk of the superior court of the county from which the transcript of judgment is sent to said county. (1933, c. 435, s. 1.)

§ 1-236.1. Transcripts of judgments certified by deputy clerks validated.—Each transcript of judgment from the original docket of the superior court of a county where the same was rendered and docketed, heretofore certified under the official seal of said court, by a deputy clerk thereof, in his own name as such deputy clerk, and docketed on the judgment docket of another county in the state, is hereby validated and declared of full force and effect in such county where docketed, from the date of docketing of the same, to the same extent and with the same effect as if said transcript of judgment had been certified in the name of the clerk of the superior court of said original county, and under his hand and official seal. (1943, c. 11.)

§ 1-237. Judgments of federal courts docketed; lien on property; recordation; conformity with federal law.—Judgments and decrees rendered in the district courts of the United States within this state may be docketed on the judgment dockets of the superior courts in the several counties of this State for the purpose of creating liens upon property in the county where docketed; and when a judgment or decree is registered, recorded, docketed and indexed in a county in like manner as is required of judgments and decrees of the courts of this state, it shall become a lien and shall have all the rights, force and effect of a judgment or decree of the superior court of said county. When a judgment roll of a district court is filed with the clerk of the superior court, the clerk shall docket it as judgments of the superior court are required to be docketed. It is the intent and purpose of this section to conform the state law to the requirements of the Act of Congress entitled "An Act to Regulate the Liens on Judgments and Decrees of the Courts of the United States" being the Act of August first, one thousand eight hundred and eighty-eight, Chapter

seven hundred and twenty-nine. (Rev., s. 576; 1889, c. 439; 1943, c. 543; C. S. 616.)

Editor's Note.—Prior to the 1943 amendment this section also applied to judgments and decrees rendered in the federal circuit courts. The amendment made other changes in the wording of the section.

Judgment Rendered in District Court.—Judgment rendered by district and circuit courts, in order to be liens must be docketed as required by the state laws, and, since the United States may take advantage of any state or federal statute without being bound by its limitations, it may enforce the lien of the judgment in its favor though barred by the ten years limitation contained in this statute. *United States v. Minor*, 235 Fed. 101.

Date of Docketing Fixes the Lien.—Under the act of Congress as to docketing judgments of federal courts, and the provisions of this section authorizing the docketing of judgments and decrees of the federal courts on the judgment dockets of the superior courts of this state for the purpose of creating liens, such judgments on a money demand are liens on real property only from the date of their docketing in the county where the land is situated. *Riley v. Carter*, 165 N. C. 334, 81 S. E. 414.

Cited in *Southern Dairies v. Banks*, 92 F. (2d) 282.

§ 1-238: Repealed by Session Laws 1943, c. 543.

§ 1-239. Paid to clerk; docket credited; transcript to other counties.—The party against whom a judgment for the payment of money is rendered, by any court of record, may pay the whole, or any part thereof, to the clerk of the court in which the same was rendered, at any time thereafter, although no execution has issued on such judgment; and this payment of money is good and available to the party making it, and the clerk shall enter the payment on the judgment docket of the court, and immediately forward a certificate thereof to the clerk of the superior court of each county to whom a transcript of said judgment has been sent, and the clerk of such superior court shall enter the same on the judgment docket of such court and file the original with the judgment roll in the action. Entries of payment or satisfaction on the judgment dockets in the office of the clerk of the superior court, by any person other than the clerk, shall be made in the presence of the clerk or his deputy, who shall witness the same, and when entries of full payment or satisfaction have been made, the clerk or his deputy shall enter upon the judgment index kept by him, opposite and on a line with the names of the parties to the judgment, the words "Paid" or "Satisfied." (Rev., s. 577; Code, s. 438; R. C., c. 31, s. 127; 1823, c. 1212; 1911, c. 76; C. S. 617.)

Payment Made to Clerk.—A trustee may properly pay money to the clerk as part payment in satisfaction of a judgment. *Sugg v. Bernard*, 122 N. C. 155, 156, 29 S. E. 221.

A judgment debtor under this section is entitled to credit on the judgment for amounts paid by him on the judgment to the clerk of the Superior Court in whose office the judgment is docketed, although the clerk fails to enter payment on the judgment docket, the judgment debtor being under no duty to require the clerk to make entry of payment on the judgment docket and the clerk being in effect the statutory agent of the owner of the judgment in making such entries. *Dalton v. Strickland*, 208 N. C. 27, 179 S. E. 20.

Same—Where Execution is in the Hands of Sheriff.—A debtor has no right to pay the money to the clerk when the execution is in the hands of the sheriff. *Bynum v. Barefoot*, 75 N. C. 576.

Clerk Receiving Depreciated Currency.—Whenever it is sought to establish an authority in a clerk to bind a plaintiff by the receipt of depreciated currency in payment of a judgment, it must be shown either that the receipt was expressly authorized by the plaintiff or that the plaintiff has done acts from which such an authority may fairly be implied. *Purvis v. Jackson*, 69 N. C. 474.

Misappropriation of Payment by Clerk.—Where a judgment debtor has paid the judgment entered against him in the office of the clerk of the Superior Court, and the

clerk has misappropriated the payment, so that the debtor has again paid the judgment, the equitable doctrine as to whether he is subrogated to the right of the judgment creditor does not necessarily arise, and a right of action will lie against the surety on the clerk's bond for the direct misappropriation of the money. *Gilmore v. Walker*, 195 N. C. 460, 142 S. E. 579.

Liability for Loss.—The clerk of the Superior Court and the surety on his bond are liable for loss resulting to the owner of a judgment from the clerk's failure to perform his statutory duty to enter the judgment and payments thereon on the judgment docket or his failure to account to the owner for sums paid on the judgment by the judgment debtor, as provided by this section. *Dalton v. Strickland*, 208 N. C. 27, 179 S. E. 20.

§ 1-240. Payment by one of several; transfer to trustee for payor.—In all cases in the courts of this state wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tort-feasors, and the same has not been paid by all the judgment debtors by each paying his proportionate part thereof, if one of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the amount due on said judgment, and shall, at the time of paying the same, demand that said judgment be transferred to a trustee for his benefit, it shall be the duty of the judgment creditor or his attorney to transfer without recourse such judgment to a trustee for the benefit of the judgment debtor paying the same; and a transfer of such judgment as herein contemplated shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his proportionate part thereof to the extent of his liability thereunder in law and in equity, and in the event the judgment was obtained in an action arising out of a joint tort, and only one, or not all of the joint tort-feasors, were made parties defendant, those tort-feasors made parties defendant, and against whom judgment was obtained, may, in an action therefor, enforce contribution from the other joint tort-feasors; or at any time before judgment is obtained, the joint tort-feasors made parties defendant may, upon motion, have the other joint tort-feasors made parties defendant.

If the judgment debtors do not agree as to their proportionate liability, and it be alleged in such action by petition that any judgment debtor is insolvent or is a nonresident of the state and cannot be forced under the execution of the court to contribute to the payment of the judgment, the court shall, in the action in which the judgment was rendered, after notice to the defendants or such of them as may be within the jurisdiction of the court, submit proper issues to a jury to find the facts arising on such petition and any answer that may be filed thereto, and shall, upon such verdict and any admissions in the petition and answer, enter judgment declaring the proportionate part each judgment debtor shall pay.

Any judgment creditor who refuses to transfer a judgment in his favor to a trustee for the benefit of a judgment debtor who shall tender payment and demand in writing a transfer thereof to a trustee to preserve his rights in the same action, as contemplated by this section, shall not thereafter be entitled to an execution

against the judgment debtor so tendering payment. (1919, c. 194, ss. 1, 2; 1929, c. 68; C. S. 618.)

Editor's Note.—The Act of 1929 amended the first paragraph of this section by permitting contribution between joint tort-feasors, and the joinder of joint tort-feasors not made parties. The amendment, of course, does not apply to a suit commenced before its enactment. *Bargeon v. Transportation Co.*, 196 N. C. 776, 777, 147 S. E. 299.

This section creates a new right, provides an exclusive remedy, and substantial compliance with its terms is necessary to make it available. *Hoft v. Mohn*, 215 N. C. 397, 2 S. E. (2d) 23.

Its purpose being that the entire controversy between joint tort-feasors should be settled in one action. *Freeman v. Thompson*, 216 N. C. 484, 5 S. E. (2d) 434.

Discharge of Judgment by Compromise Payment.—Where one of several judgment debtors, jointly and severally liable, discharges the entire judgment under a compromise agreement with the judgment creditor by payment of a fraction of the amount of the judgment, he is entitled to an assignment of the judgment to a trustee for his benefit under this section, and is entitled to recover from each of his codefendants the proportionate part of such codefendant's liability in the amount of the compromise settlement, he being entitled to contribution on the basis of the amount actually paid for the full discharge of the judgment even though such amount does not equal his proportionate liability on the original amount of the judgment. *Scales v. Scales*, 218 N. C. 553, 11 S. E. (2d) 569.

Judgment Should Be Transferred to Trustee Not the Debtor.—A bank holding a note hypothecated by the payee bank obtained judgment thereon against the payee bank and the makers. Thereafter the payee bank became insolvent and the commissioner of banks made a payment on the judgment out of the assets of the payee bank and obtained an assignment of the judgment, which it transferred to plaintiff, who brought suit thereon against the makers. Held: The commissioner of banks in the payment of the judgment and in taking the assignment represented the bank and such acts were taken in the same right and with the effect as though they had been taken by the bank, and therefore the commissioner of banks may not act as a trustee for the transfer of judgment under this section, and the payment of the judgment by the commissioner of banks extinguished same. *Hoft v. Mohn*, 215 N. C. 397, 2 S. E. (2d) 23.

Assignment to Third Party Necessary to Claim Subrogation.—A surety defendant in a judgment with the principal according to principles heretofore obtaining in North Carolina, without the aid of a statute, in order to preserve the judgment lien and enforce it for his reimbursement, is required on payment to have it assigned to some third person for his benefit, and, in case of collateral security, he is in such instances also entitled to the full equitable doctrine of subrogation; but if he pays the judgment debt on which he himself is bound, without having it assigned, as indicated, he then becomes the simple contract creditor of his principal. *Bank v. Sprinkle*, 180 N. C. 580, 104 S. E. 477.

Subrogation Applicable between Co-Sureties.—A surety may preserve the lien of judgment against the principal and himself by paying the judgment creditor and having the judgment assigned to a third person for his own credit, and this also applies to a judgment against his co-sureties and himself in enforcing an equality of obligation between them. *Fowle v. McLean*, 168 N. C. 537, 84 S. E. 852.

What Constitutes a Refusal to Transfer.—Under a proper interpretation of the relevant parts of this section the refusal of the judgment creditor to transfer the judgment to some third person to preserve the lien thereof for the benefit of the surety, tendering payment of the same, means his final refusal to do so, and not when the status of the parties remain the same, and the judgment creditor subsequently offers and stands willing to assign the judgment as the statute requires. *Bank v. Sprinkle*, 180 N. C. 580, 104 S. E. 477.

The entry of transfer of judgment by the attorney of the judgment creditor upon the margin of the judgment as docketed in the office of the clerk of the superior court is prima facie evidence of transfer. *Harrington v. Buchanan*, 222 N. C. 698, 24 S. E. (2d) 534.

It is presumed that attorney acted within the scope of his authority. *Id.*

Proportionate Liability of Sureties.—The liability of sureties among themselves is controlled by the equitable principle of equality arising out of a common risk, and in case of insolvency or nonresidence these rights are adjusted by reference to the number of sureties who are solvent or who have property available to process within the jurisdiction of the court. *Fowle v. McLean*, 168 N. C. 537, 84 S. E. 852.

Surety Cannot Raise Question of Liability after Judgment.

ment.—By paying the whole judgment, one joint tort-feasor, under this section, can lose no right it has against the other tort-feasor or its surety. If the surety is a party to the judgment and bound thereby it cannot thereafter raise the question of its liability to the defendant, when it pays the judgment in full and requires the transfer of said judgment to a trustee by virtue of the provision of this section. *Hamilton v. Southern R. Co.*, 203 N. C. 468, 471, 166 S. E. 392.

Contribution between Joint Tort Feasors.—This section seems to abrogate the well-settled rule, that, subject to some exceptions (*Gregg v. Wilmington*, 155 N. C. 18, 70 S. E. 1070), there can be no contribution between joint tort-feasors. *Lineberger v. Gastonia*, 196 N. C. 445, 146 S. E. 79, 82, citing *Raulf v. Elizabeth City Light, etc.*, Co., 176 N. C. 691, 97 S. E. 236.

Right to contribution among joint tort-feasors exists solely by provision of this section. *Lumbermen's Mut. Cas. Co. v. United States Fidelity, etc., Co.*, 211 N. C. 13, 188 S. E. 634.

Section Does Not Apply to Insurers of Tort-Feasors.—An insurer of one joint tort-feasor paying the judgment recovered against both joint tort-feasors is not entitled to equitable subrogation as against the insurer of the other tort-feasor, there being no relation between the tort-feasors outside the provision of the statute upon which the doctrine of equitable subrogation can be based, and the insurers of the tort-feasors not coming within the provision of the statute in regard to contribution. *Lumbermen's Mut. Cas. Co. v. United States Fidelity, etc., Co.*, 211 N. C. 13, 188 S. E. 634.

Since the liability of insurance carriers of tort-feasors is contractual and not founded on tort, where no judgment had been recovered against such a carrier by any of the parties to an action, it was held that this section was inapplicable as by its express terms it applies only to joint tort-feasors and to joint judgment debtors. *Gaffney v. Lumbermen's Mut. Cas. Co.*, 209 N. C. 515, 184 S. E. 46; *Lumberman's Mut. Cas. Co. v. United States Fidelity, etc., Co.*, 211 N. C. 13, 188 S. E. 634.

Defendants May File Cross Action to Join Others as Joint Tort-Feasors.—Defendants in an action to recover for negligent injury are entitled, under this section to have other defendants joined with them upon filing a cross action against such other defendants, alleging that such defendants were joint tort-feasors with them in causing the injury. *Mangum v. Southern Ry. Co.*, 210 N. C. 134, 185 S. E. 644.

When a defendant in a negligent injury action files answer denying negligence but alleging that if it were negligent a third party was also guilty of negligence which concurred in causing the injury in suit, and demands affirmative relief against such third person, he is entitled to have such third person joined as a codefendant under this section. *Lackey v. Southern Ry. Co.*, 219 N. C. 195, 13 S. E. (2d) 234; *Freeman v. Thompson*, 216 N. C. 484, 5 S. E. (2d) 434. See also, *Bost v. Metcalfe*, 219 N. C. 607, 14 S. E. (2d) 648; *Lackey v. Southern Ry. Co.*, 219 N. C. 195, 13 S. E. (2d) 234.

Voluntary Nonsuit Not Permitted as to Joint Tort-Feasor Whom Other Tort-Feasor Claims Relief.—Where plaintiff sued defendants as joint tort-feasors, and appealing defendant in its amended answer denied negligence but also alleged that if appealing defendant were negligent its negligence concurred with the negligence of its codefendant, and asked for such relief against its codefendant as it was entitled to under this section, it was error for the court, over appealing defendant's objection, to permit plaintiff to take a voluntary nonsuit as to the codefendant before the close of plaintiff's evidence, since under the pleadings, appealing defendant requested affirmative relief against its codefendant and is entitled to hold the codefendant as a party under this section. *Smith v. Kappas*, 218 N. C. 758, 12 S. E. (2d) 693.

Although Judgment Not Transferred Surety May Sue on Contract.—Defendants were principals on a note and plaintiff was a surety. After judgment was obtained by the payee, plaintiff drew his check to one of the principals to be used in satisfying the judgment. Although upon the rendition of the judgment the note merged therein and the judgment became the only legal evidence of the indebtedness, the relative liability of defendants as principals and plaintiff as surety, as between themselves, remained the same as on the note, and plaintiff, even in the absence of an assignment of the judgment to a trustee for his benefit, became the contract creditor of defendants to the extent of the money advanced by him. *Saied v. Abeyounis*, 217 N. C. 644, 9 S. E. (2d) 399.

Section Inapplicable Where Defendant Alleges Sole Liability of Codefendant.—Where the defendant had another

party joined as codefendant, and filed answer denying negligence on his part and alleging that the negligence of his codefendant was the sole proximate cause of the injury in suit, but demanding no relief against his codefendant, it was held that the demurrer of the party joined should have been sustained as neither the complaint nor the answer of the original defendant alleged any cause of action against him, this section permitting contribution among joint tort-feasors, being therefore inapplicable since the answer of the original defendant alleges sole liability on the part of his codefendant and not joint tort-feasorship. *Walker v. Loyall*, 210 N. C. 466, 187 S. E. 565.

When a defendant simply denies negligence on its part and alleges that the negligence of its codefendant was the sole proximate cause of the injury, and makes no demand for affirmative relief against its codefendant, such defendant is not in a position to complain of nonsuit granted upon motion of the codefendant, upon its contention that it was entitled to keep the codefendant in the case as a joint tort-feasor, from whom it would be entitled to contribution under this section. *Perry v. Sykes*, 215 N. C. 39, 200 S. E. 923.

Rehearing.—Plaintiff's petition to rehear was allowed for inadvertence in the original opinion in stating that before trial appealing defendant had filed amended answer asking affirmative relief against its codefendant under this section, precluding plaintiff from taking a voluntary nonsuit as against the codefendant, it appearing of record that appealing defendant did not tender amended answer and moved that it be permitted to file same and did not request that its codefendant be made a party as a joint tort-feasor until after verdict. *Smith v. Kappas*, 219 N. C. 850, 15 S. E. (2d) 375.

Cited in *Jones v. Rhea*, 198 N. C. 190, 151 S. E. 255; *Gaffney v. Phelps*, 207 N. C. 553, 560, 178 S. E. 231; *Peterson v. McManus*, 208 N. C. 802, 182 S. E. 483.

§ 1-241. Clerk to pay money to party entitled.—The clerk, to whom money is paid as aforesaid, shall pay it to the party entitled to receive it, under the same rules and penalties as if the money had been paid into his office by virtue of an execution. (Rev., s. 578; Code, s. 439; R. C., c. 31, s. 128; 1823, c. 1212, s. 2; C. S. 619.)

§ 1-242. Credits upon judgments.—Where a payment has been made on a judgment docketed in the office of the clerk of the superior court, and no entry made on the judgment docket, or where any docketed judgment appealed from has been reversed or modified on appeal and no entry made on such docket, any person interested therein may move in the cause before the clerk, upon affidavit after notice to all persons interested, to have such credit, reversal or modification entered; and upon the hearing before the clerk he may hear affidavits, oral testimony, depositions and any other competent evidence, and shall render his judgment, from which any party may appeal in the same manner as in appeals in special proceedings. On the trial of any issue of fact on the appeal either party may demand a jury trial, which shall be had upon the evidence before the clerk, which he shall reduce to writing. On a final judgment ordering any such credit, reversal or modification, a transcript thereof shall be sent by the clerk of the superior court to each county in which the original judgment has been docketed, and the clerk of such county shall enter the same on the judgment docket of his county opposite such judgment and file the transcript. No final process shall issue on any such judgment after affidavit filed in the cause until the motion for credit, reversal or modification has been finally disposed of. (Rev., s. 579; 1903, c. 558; C. S. 620.)

Parol Agreement to Convey Land Not within Section.—Upon a motion to enter satisfaction of a judgment under this section, a defendant may not set up his parol executory agreement to convey lands to the plaintiff for that purpose,

such is not in the purview of the statute, and not enforceable by him under the statute of frauds. *Brown v. Hobbs*, 154 N. C. 544, 70 S. E. 906.

Amount Paid Plaintiff on Covenant Not to Sue as Credit.—Where some of defendants, sued as joint tort-feasors, pay plaintiff a sum in consideration of a covenant not to sue, and thereafter the action is prosecuted against the other defendants, and judgment recovered against them, the defendants against whom judgment was entered are entitled to have the judgment credited with the amounts paid by the other defendants for the covenant not to sue upon the motion made prior to execution, the motion coming within the spirit if not the letter of this section. *Brown v. Norfolk Southern R. Co.*, 208 N. C. 423, 181 S. E. 279.

§ 1-243. For money due on judicial sale.—The supreme and other courts ordering a judicial sale, or having possession of bonds taken on such sale, may, on motion, after ten days notice thereof in writing, enter judgment as soon as the money becomes due against the debtors or any of them, unless for good cause shown the court directs some other mode of collection. (Rev., s. 1524; Code, s. 941; R. C., c. 31, s. 129; C. S. 621.)

Constitutionality.—This section is constitutional and does not contravene the right of trial by jury. *Ex parte Cotten*, 62 N. C. 79, 81.

Motion Proper Method to Enforce Contract.—An independent action upon an obligation to secure the payment of money given on a purchase under a judicial sale will not be entertained if objection be made in apt time; the proper course is to enforce the contract by a motion in the cause in which the sale is decreed. *Lackey v. Pearson*, 101 N. C. 651, 8 S. E. 121; but this matter is within the control of the court and in proper instances the court may decree a resale of the land if the purchaser does not pay within a specified time—in this case, sixty days. *Davis v. Pierce*, 167 N. C. 135, 83 S. E. 182.

Same—When Independent Action Allowed.—If the objection is not made at the proper time the court may proceed with the independent action. *Lackey v. Pearson*, 101 N. C. 651, 8 S. E. 121. Such objection will not be entertained when made for the first time in the Supreme Court. *Id.*

Failure of Purchaser to Comply with His Bid.—If a purchaser at a judicial sale fails to comply with his bid, the court may either decree, first, that he specially perform his contract, or, second, that the land be resold and the purchaser released, or third, that without releasing the purchaser the land be resold; but in this case the purchaser must undertake, as a condition precedent to the order of sale, to pay all additional costs and to make good any deficiency in the price. *Hudson v. Coble*, 97 N. C. 260, 1 S. E. 688.

Ten Days' Notice Required.—Any court, which orders a judicial sale, has the power to make a decree for the money after ten days' notice thereof. *Ex parte Cotten*, 62 N. C. 79.

Waiver of Right to Jury Trial.—Although the defendant under this section is entitled to have the issue, where the debt sued on was contracted for the purchase of land, tried by a jury, yet, if after being duly summoned he fails to appear and answer, he waives that right. *Durham v. Wilson*, 104 N. C. 595, 10 S. E. 683.

Sale by Administrator.—A sale of land for assets, made by an administrator, pursuant to a judgment in a probate court, in a proceeding instituted for that purpose, is a judicial sale, and the provisions of this section are applicable thereto. *Mauney v. Pemberton*, 75 N. C. 219, 220; *Chambers v. Penland*, 78 N. C. 53.

When Court May Reopen Case.—Where the commissioner for the private sale of lands for division has withheld from the knowledge of the court the actual price the purchaser has agreed to pay, and reported a lesser sum, which the court has confirmed by final judgment, it is an imposition on the court, and will not conclude it from reopening the case on the petition of the commissioner in the cause, after notice, and affording the proper relief. *Lyman v. Southern Coal Co.*, 183 N. C. 581, 112 S. E. 242.

Petition by Commissioner.—A commissioner appointed for the sale of land in proceedings for partition, after confirmation of sale to a private purchaser, filed a petition in the cause after notice alleging in effect that in addition to the purchase price he had reported, the purchaser had agreed to pay a larger sum to include his commission, etc., and had paid only the smaller sum, reported and confirmed, and refused to pay the balance as agreed after having received the deed from the clerk's office, where it had been deposited. It was held, upon demurrer, that the allegations of the petition must be

considered as true, and it was reversible error for the trial judge to sustain the demurrer, and not require an answer to be filed to set the matters at issue for the purpose of proceeding to determine the controversy. *Lyman v. Southern Coal Co.*, 183 N. C. 581, 112 S. E. 242.

§ 1-244. Applicable to justices' courts.—This article applies, wherever appropriate, to proceedings in courts of justices of the peace. (Rev., s. 562; Code, s. 389; C. S. 622.)

§ 1-245. Cancellation of judgments discharged through bankruptcy proceedings.—When a referee in bankruptcy furnishes the clerk of the superior court of any county in this state a written statement or certificate to the effect that a bankrupt has been discharged, indicating in said certificate that the plaintiff or judgment creditor in whose favor judgments against the defendant bankrupt are docketed in the office of the clerk of the superior court have received due notice as provided by law from the said referee, and that said judgments have been discharged, it shall be the duty of the clerk of the superior court to file said certificate and enter a notation thereof on the margin of said judgments.

This section shall apply to judgments of this kind already docketed as well as to future judgments of the same kind.

For the filing of said instrument or certificate and making new notations the clerk of the superior court shall be paid a fee of one dollar (\$1.00). (1937, c. 234, ss. 1-4.)

Editor's Note.—It appears that the effect of filing the certificate as provided by this section is to give notice of the inefficacy of the judgment to attach as a lien after the bankruptcy; not to give notice that the judgment is no lien at all, for it may have become a lien before the bankruptcy. 15 N. C. Law Rev. 336.

§ 1-246. Assignment of judgment to be entered on judgment docket, signed and witnessed.—No assignment of judgment shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or assignor, but from the entry of such assignment on the margin of the judgment docket opposite the said judgment, signed by the owner of said judgment, or his attorney under power of attorney or his attorney of record, and witnessed by the clerk or the deputy clerk of the superior court of the county in which said judgment is docketed. (1941, c. 61.)

Editor's Note.—Public Laws 1941, c. 61, ratified March 4, 1941 to be effective July 1, 1941, provides: "This act shall not affect any suit, action or proceeding now pending in the courts of this state."

For comment on this enactment, see 19 N. C. Law Rev. 462.

Art. 24. Confession of Judgment.

§ 1-247. When and for what.—A judgment by confession may be entered without action either in or out of term, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this article. (Rev., s. 580; Code, s. 570; C. C. P., s. 325; C. S. 623.)

Cross Reference.—See section 1-248 and notes thereto.

This section and §§ 1-248, 1-249 are mere procedural statutes, regulating the practice of the courts, and can of course have no extraterritorial effect or be looked to as limiting the powers of corporations. *Monarch Refrigerating Co. v. Farmers' Peanut Co.*, 74 F. (2d) 790, 793.

They are in derogation of common right, and must be

strictly construed. *Gibbs v. Weston & Co.*, 221 N. C. 7, 18 S. E. (2d) 698.

Court Must Have Jurisdiction.—It is essential that the court have jurisdiction before a judgment on confession can be validly entered. *Slocumb v. Shingle Co.*, 110 N. C. 24, 14 S. E. 422.

Same—May Be Collaterally Impeached.—Judgment, void if for want of jurisdiction in the court, if such appears on the record, may be collaterally impeached in any court in which the question arises. *Hervey v. Edmunds*, 68 N. C. 243.

Manner of Attacking Judgment by Confession.—Judgment by confession, being a final judgment, cannot be collaterally attacked for fraud, this must be done by an independent action properly constituted for that purpose. *Sharp v. Danville etc.*, R. R. Co., 106 N. C. 308, 11 S. E. 530; *Uzzle v. Vinson*, 111 N. C. 138, 16 S. E. 6.

For What Judgment May be Confessed.—A judgment by confession may be taken to cover a future debt. *Bank v. Higginbottom*, 9 Pet. 48, 9 L. Ed. 46.

So also a judgment may, it seems, be confessed for a specific sum claimed, subject to the right of the party confessing to reduce the amount, and in case of failure or omission to do so the whole amount will be collectible. *Gear v. Parish*, 5 How. 168, 12 L. Ed. 100.

Confession by Partner.—It would seem to be well settled that, even before dissolution, one partner cannot confess judgment so as to bind his copartners. *Hall v. Lanning*, 91 U. S. 160, 23 L. Ed. 271.

Confession by Guardian.—A judgment confessed by a guardian of one non compos mentis, under the provisions of this section, if the statement required be verified by the guardian in the absence of fraud, is not irregular. *McAden v. Hooker*, 74 N. C. 24.

In *White v. Albertson*, 14 N. C. 241, the process had been served on the guardian above, [alone] and not on the infants also, as it should have been, and the guardian permitted judgment against the infants by nil dicit; yet it was held that the judgment was not irregular, although in that case it was said the court had acted unadvisedly in permitting the guardian whose interests were opposed to those of the ward to represent him in that case. The analogy between infants and lunatics is so close as to justify the conclusion that a similar judgment against a lunatic would not be irregular. *McAden v. Hooker*, 74 N. C. 24, 29.

A judgment confessed by executors on a debt created after the death of the testator and during the time of administration will bind them in their individual capacity, though they style themselves as executors in making such a confession. *Hall v. Craigie*, 65 N. C. 51.

Confession May be Made to State.—A person may confess a judgment, or recognizance on record, to the state for a sum of money, as well as to an individual. Therefore, where A was convicted on an indictment and fined, and ordered into the custody of the sheriff, and B, in consideration that A should be discharged from custody, confessed a judgment to the state for the fine and costs, it was held that the judgment could not afterwards be set aside. *State v. Love*, 23 N. C. 264.

Confession by Corporation.—A corporation, nothing to the contrary appearing, may by the action of its proper officers confess judgments as a natural person, if the essential requirements of the statute are complied with. *Sharp v. Danville etc.*, R. R. Co., 106 N. C. 308, 11 S. E. 530.

Same—Authority Should Be Shown.—A corporation may confess judgment, without action, in or out of term, but the record should show that the officer or person who represented the corporation in the proceedings was duly authorized to act, and that he did act under the direction of his principal. *Nimocks v. Cape Fear Shingle Co.*, 110 N. C. 20, 22, 14 S. E. 622.

Construction of Warrant of Attorney.—It seems to be an established principle that an authority given by warrant of attorney to confess a judgment against the maker of a note must be clear and explicit and strictly construed, and the court cannot supply any supposed omissions of the parties. *National Exch. Bank v. Wiley*, 195 U. S. 257, 25 S. Ct. 70, 49 L. Ed. 184.

Effect of Confession.—It has been held that the confession of a judgment does indeed create a contract; but it is only on the side of the defendant, who thus acknowledges or assumes upon himself a debt, which may be made the ground of an action. *Livingston v. Moore*, 7 Pet. 469, 8 L. Ed. 751.

But on the side of the plaintiff, the necessity of resorting to certain means of enforcing that judgment, is not an obligation arising out of contract, but one imposed upon him by the laws of the country. Id.

Lien from Date of Docketing.—A judgment by confession, like any other judgment, becomes a lien on the judgment debtor's real estate as of the date the judgment is docketed. *Keel v. Bailey*, 214 N. C. 159, 198 S. E. 654.

Parol Evidence Not Admissible.—Where a judgment is confessed by one against himself, and so entered of record, parol evidence is not admissible to show that it was intended to have been entered against another. *Davidson v. Alexander*, 84 N. C. 620.

Mistake as Ground for Relief.—If a judgment be confessed under a clear mistake, a court of law will set the judgment aside, if application be made, and the mistake shown, while the judgment is in its power. *Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963.

But, if the judgment is no longer in the power of a court of law, relief may be obtained in a court of chancery. Id.

Applied in *Davis v. Cockman*, 211 N. C. 630, 191 S. E. 322.

§ 1-248. Debtor to make verified statement.—A statement in writing must be made, signed, and verified by the defendant, to the following effect:

1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor.

2. If it is for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed is justly due, or to become due.

3. If it is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed does not exceed the same. (Rev., s. 581; Code, s. 571; C. C. P., s. 326; C. S. 624.)

Editor's Note.—This section must be read in connection with the preceding one, as compliance with the provisions of the one without the other is not sufficient. As was said in *Sharp v. Danville, etc.*, R. R. Co., 106 N. C. 308, 319, 11 S. E. 530, "It is not sufficient simply to confess and enter judgment. It is essential that the confession and entry shall have the additional requisites further prescribed by the statute." (Reference being made to this section.)

Section Strictly Construed.—Strict compliance with the provisions of this section is required, and if all the requirements are not met the judgment is void because of a want of jurisdiction in the court to render judgment, which is apparent on the face of the proceedings. *Smith v. Smith*, 117 N. C. 348, 23 S. E. 270.

It is essential to the validity of a judgment by confession that it be confessed and entered of record according to the provisions of this section. These are essential matters required by the section to confer jurisdiction on the court, and to insure validity of the judgment. *Farmers' Bank v. McCullers*, 201 N. C. 440, 160 S. E. 494.

Where the statutory requirements with respect to the form and contents of the statement have been fully complied with, as in the instant case, the court acquires jurisdiction, and a judgment by confession, as authorized by the debtor in the statement, is valid for all purposes. *Cline v. Cline*, 209 N. C. 531, 535, 183 S. E. 904.

The verified statement is jurisdictional, both as to its filing and as to its contents. *Gibbs v. Weston & Co.*, 221 N. C. 7, 9, 18 S. E. (2d) 698.

Verified Statement of Facts Required.—A judgment confessed under this section must contain a verified statement of the facts and transactions out of which the indebtedness arose. *Davenport v. Leary*, 95 N. C. 203, 204. And a mere statement that the debts are bona fide due, without embracing the account which was filed, is not a sufficient compliance. Id. See also, *Davidson v. Alexander*, 84 N. C. 620, and *Merchants Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765, the latter case holding that the confession is sufficient when it is for "goods sold and delivered," although omitting the time of sale, quantity, price and value of the goods.

Debts Evidenced by Note or Bond.—A judgment confessed upon the statement that defendant is indebted to the plaintiff in a certain sum "arising from the acceptance of a draft," setting out a copy thereof, is irregular and void. *Davidson v. Alexander*, 84 N. C. 621.

A statement that the amount was due by a certain note described in the judgment, that said note became due on a day named, and that the consideration was cotton sold and delivered—was a compliance with this section. *Merchants Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765.

Where the affidavit stated that the amount was due on a bond under seal for borrowed money, due and payable 2 November, 1876, it was held that the statement was sufficient. *Uzzle & Co. v. Vinson*, 111 N. C. 138, 16 S. E. 6.

Same—This Requirement Mandatory.—The filing of the concise statement of the facts out of which the indebtedness arose, required of the party confessing judgment, is mandatory. *Davidson v. Alexander*, 84 N. C. 620, 625.

Same—Reason for the Rule.—A confession of judgment being a proceeding in derogation of a common right, the statute requires, as a protection against the perpetration of fraud, that the consideration out of which the debt arose be stated, and an averment that the debt for which the judgment is confessed "is justly due." *Smith v. Smith*, 117 N. C. 348, 350, 23 S. E. 270.

Confession of Judgment with Defeasance.—It is a well recognized practice to confess a judgment with a defeasance, and the courts will take notice of the condition, and will not permit an execution to issue in violation of it. *Hardy v. Reynolds*, 69 N. C. 5.

A stipulation in a confession of judgment that no execution shall issue thereon within a time specified is not such a reservation for the benefit of the debtor as impairs the rights of other creditors, and does not vitiate the judgment. *Merchants Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765.

Where a judgment confessed by a wife in favor of her husband shows only that it was based upon a sum alleged to be due on account of money advanced by the husband from time to time to take care of obligations due at the banks by the wife, and fails to state the items constituting the claim, when advanced and to whom, and that the advancements were not gifts to the wife, the judgment is insufficient to meet the requirements of the statute, and is void. *Farmers' Bank v. McCullers*, 201 N. C. 440, 441, 160 S. E. 494.

Showing that Debt is Due Sufficient without Statement.—A confession of judgment which states the amount for which the judgment is confessed, and states that the same is due by a certain promissory note due and payable on a day named, and that the consideration for the same was an article sold and delivered, sufficiently conforms to the statute provided the statement is true, for then it follows that it is shown that the amount "is justly due." *Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765.

Description of the Nature of the Indebtedness Sufficient.—The failure to file with the confession of judgment the note or other evidence of indebtedness does not invalidate the judgment, provided the confession contains a sufficient description of the nature of the indebtedness to enable a party to make inquiry and ascertain the truth of the matter. *Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765.

Where Judgment Does Not Expressly Authorize Filing.—Although a confession of judgment does not contain words expressly authorizing the clerk to enter the same upon the records, yet, if the record shows that the confession was sworn to and filed and judgment thereupon entered, the filing is equivalent to an express authority for its entry and sufficiently conforms to the statute. *Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765.

Mere filing and entry of a verified statement, although recorded on the judgment docket, and cross-indexed as judgments are, will not be effective as a judgment. *Gibbs v. Weston & Co.*, 221 N. C. 7, 18 S. E. (2d) 698.

The failure to comply with the mandatory terms of the statute and especially the want of rendition of judgment upon the statement and affidavit of the defendant is not a mere irregularity, but constitutes a fatal defect, rendering the proceeding of no effect as against creditors whose judgments were subsequently docketed. *Id.*

Judgment Is a Lien for the Amount Named.—A judgment confessed to provide security against a contingent liability is authorized by the code, and must be a lien for the full amount named till the actual loss is determined at a lesser sum. *Darden v. Blount*, 126 N. C. 247, 250, 35 S. E. 479.

Judgment Containing Irregularities.—Ordinarily, a judgment by confession without action will not be set aside for mere irregularities, the party confessing the judgment being presumed to have waived them; but where the judgment is void for a cause appearing in the record, or the record omits some essential element, it will be set aside or quashed. *Nimocks v. Cape Fear Shingle Co.*, 110 N. C. 20, 22, 14 S. E. 622.

Same—Judgments by Confession May Be Amended as Other Judgments.—Such irregularities in a confession of judgment as might be corrected by amendment in the case of ordinary judgments may be the subject of amendment in a confession of judgment. *Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765.

Same—Irrregularities Only May Be Cured by Amendment.—If the proceedings are so defective in form and substance that it is void upon its face, no amendment can be made to give it life; but if there are irregularities they may be cured by amendment. *Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765.

Same—Who May Set Aside the Judgment.—A judgment may be set aside for irregularity only upon the application of a party thereto. *Uzzle v. Vinson*, 111 N. C. 138, 16 S. E. 6.

Applied in *Davis v. Cockman*, 211 N. C. 630, 191 S. E. 322.

§ 1-249. Judgment; execution; installment debt.—The statement may be filed with the clerk of the superior court of the county in which the defendant resides, or if he does not reside in the state, of some county in which he has property. The clerk shall indorse upon it and enter on his judgment docket a judgment of the court for the amount confessed, with three dollars costs, together with disbursements. The statement and affidavit, with the judgment indorsed, thenceforth become the judgment roll. Executions may be issued and enforced thereon in the same manner as upon judgments in other cases in such courts. When the debt for which the judgment is recovered is not all due, or is payable in installments, and the installments are not all due, the execution may issue upon such judgment for the collection of such installments as have become due, and shall be in the usual form; but must have indorsed thereon, by the attorney or person issuing it, a direction to the sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, with interest thereon, and costs of said judgment. Notwithstanding the issue and collection of such execution, the judgment remains as security for the installments thereafter to become due; and whenever any further installment becomes due, execution may, in like manner, be issued for its collection and enforcement. (Rev., s. 582; Code, s. 572; C. C. P., s. 327; C. S. 625.)

Substantial Compliance Required.—The requirements of this section, like those contained in the two preceding sections, must be, at least, substantially complied with. *Sharp v. Danville, etc.*, R. R. Co., 106 N. C. 308, 321, 11 S. E. 530.

The rendition of judgment in a proceeding of this kind is a distinct office of the court, not to be confused with the ministerial acts of filing and docketing. *Gibbs v. Weston & Co.*, 221 N. C. 7, 10, 18 S. E. (2d) 698.

When and Where Judgment Entered.—The mere fact that the judgments were entered in the night time and in the law office of counsel, which was near to the courthouse and convenient, did not render them void or irregular. *Sharp v. Danville, etc.*, R. R. Co., 106 N. C. 308, 321, 11 S. E. 530.

Failure to Endorse Judgment on Verified Statement Does Not Affect Validity.—The failure to endorse the judgment on the verified statement was an irregularity which does not affect the validity of the judgment, which the entry on the judgment docket made by the clerk, or under his immediate supervision, shows was rendered by the court. *Cline v. Cline*, 209 N. C. 531, 535, 183 S. E. 904.

Applied in *Davis v. Cockman*, 211 N. C. 630, 191 S. E. 322.

Art. 25. Submission of Controversy without Action.

§ 1-250. Submission, affidavit, and judgment.—Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The judge shall hear and determine the case, and render judgment thereon as if an action were pending. (Rev., s. 803; Code, s. 567; C. C. P., s. 315; C. S. 626.)

Editor's Note.—The prime (and practically the only) object

of this section is to prevent expensive litigation. This being true, its provisions are quite limited in their operation. They are applicable only to a case where there are parties to a question which might be the subject of a civil action in which a judgment might be rendered for one party against the other.

The purpose of this section, is to enable parties to a question in difference, which might be the subject of a civil action, where they agree as to the facts involved, to submit the facts to the court, for its decision of the question in difference, and for its judgment in accordance therewith, without the expense and formalities required for a civil action. *Hicks v. Greene County*, 200 N. C. 73, 76, 156 S. E. 164.

Where the parties submit to the court questions of law arising upon facts agreed, without showing that they have rights involved in the questions, upon which they would be entitled to judgment, in a civil action the court is without jurisdiction, under this section, and should decline to consider the questions submitted for its decision. *Id.*

The jurisdiction to render advisory opinions with respect to, or judgments declaring the rights and liabilities of parties to actions or proceedings on an agreed statement of facts, was not conferred by this section. *Wright v. McGee*, 206 N. C. 52, 54, 173 S. E. 31.

Court Must Have Jurisdiction.—The submission of controversy without action under this section must be to a court of competent jurisdiction over the subject matter. *Lenoir Drug Co. v. Town*, 160 N. C. 571, 76 S. E. 480: And as the superior court has no jurisdiction over an action to recover a town tax of \$5 paid to an incorporated town under written protest, an action therefor in that court should be dismissed. *Id.*

A special judge is without authority of law to hear and determine at chambers a controversy without action submitted under the provisions of this section, when the Governor has not specially appointed him under the provisions of statute to hold a term of court at that time, Constitution, Art. IV, § 11; and the proceedings of a special judge under such circumstances are a nullity, and on appeal the cause will be dismissed. *Greene v. Stadium*, 197 N. C. 472, 149 S. E. 685.

Not Applicable to Justices' Court.—This section has no application to the court of a justice of the peace. *Wilmington v. Atkinson*, 88 N. C. 54, 55.

The difference between the operation of the Declaratory Judgment Act and this section is that prior to the enactment of the Declaratory Judgment Act, the courts had no jurisdiction to render advisory opinions with respect to, or judgments declaring the rights and liabilities of parties to actions or proceedings on an agreed statement of facts. Such jurisdiction was not conferred by this section. *Tryon v. Duke Power Co.*, 222 N. C. 200, 203, 22 S. E. (2d) 450.

Verification by Affidavit Essential.—It is essential that the submission be verified by an affidavit. *Millikan v. Fox*, 84 N. C. 108, 109; *Hervy v. Edmunds*, 68 N. C. 243. And where there is a failure to file an affidavit to the effect that the controversy is real, and the proceedings are in good faith to determine the rights of the parties, the Supreme Court will refuse to hear the case, as this requirement, under the section, is an indispensable requisite to the exercise of jurisdiction in such a case. *Grant v. Newsom*, 81 N. C. 36, 37. See also, *Grandy v. Gulley*, 120 N. C. 176, 177, 26 S. E. 779; *Arnold v. Porter*, 119 N. C. 123, 25 S. E. 785; *Wilmington v. Atkinson*, 88 N. C. 54.

Same—Exception.—While the Supreme Court has no jurisdiction of a case submitted without action, under this section, where it does not appear by affidavit that a controversy is real, yet, where all the parties interested in the construction of a will (including the executor, who is a claimant and is in possession of the property concerning which the question arises) agree, as petitioners, to submit the question to the decision of a judge of the superior court, it was held, that this court will take cognizance of the case as an application by the executor for a construction of the will, so as to enable him to dispose of the fund in his hands. *Ruffin v. Ruffin*, 112 N. C. 102, 16 S. E. 1021.

Interests Must Be Antagonistic.—For the courts to pass upon a controversy submitted under the provisions of this section the interest of the parties must be antagonistic, and the case will be dismissed if it appears that the parties are one in interest, or desire the same relief. *Burton v. Durham, etc., Realty Co.*, 188 N. C. 473, 125 S. E. 3.

Where it appears that an action is instituted solely to obtain the advice and opinion of the Court as to the validity of a proposed county bond issue upon the facts agreed, and that the interest of both parties is the same and there is no "question of difference" between them, the proceeding will be dismissed for want of jurisdiction. *Moore v. Caldwell County*, 207 N. C. 311, 176 S. E. 580.

An agreement as to the facts and for the court to rule the law, in a suit to quiet title to lands, differs from a controversy submitted without action under the provisions of this section. *Dowling v. So. Ry. Co.*, 194 N. C. 488, 140 S. E. 333.

Section Contemplates the Rendition of a Judgment.—The true construction of this section is that it does not confer upon certain parties who differ as to their rights to propound to the court on a case agreed interrogatories in respect thereto, but that the purpose is simply to dispense with the formalities of a summons, complaint and answer, and upon an agreed state of facts to submit the case to the court for decision, and thereupon the judge shall hear and determine the case and "render judgment thereon as if an action were pending." *McKethan v. Ray*, 71 N. C. 165, 170; *Farthing v. Carrington*, 116 N. C. 315, 325, 22 S. E. 9; *Little v. Thorne*, 93 N. C. 69.

Same—Sufficiency of Facts Stated.—The statement of the facts agreed upon should contain sufficient averments to constitute a cause of action upon which the court could render judgment. *Farthing v. Carrington*, 116 N. C. 315, 335, 22 S. E. 9.

When a case is heard under this summary method authorized by the Code, the statement should embrace all the facts material to a final and complete determination, with nothing further to be done except to carry the judgment into effect. *Moore v. Hinnant*, 87 N. C. 506.

Same—Where Question of Great Public Concern Involved.—Where, under this section a controversy is submitted which involves matters of great public concern and which is supported by an affidavit that a real case exists, and that the controversy is submitted in good faith to determine the rights of the parties, the Supreme Court will, upon appeal, determine the question of law thus raised, it being stated with entire distinctness, although the statement of facts is not full enough to render a judgment commanding or prohibiting a thing to be done. *Farthing v. Carrington*, 116 N. C. 315, 22 S. E. 9.

Statement of Facts Should Include Only Pertinent Facts Agreed Upon.—In the submission of a controversy without action the statement of facts agreed should include only pertinent facts upon which the parties are in agreement, and evidence from which other facts may be found has no place therein, and since the procedure is statutory, compliance with the provisions of the statute is necessary and the statute must be strictly construed. *Consolidated Realty Corp. v. Koon*, 216 N. C. 295, 4 S. E. (2d) 850.

Administration Suit Distinguished from Submission of Controversy.—Where, in proceedings to sell lands to make assets, defendants pleaded the statute of limitations as to certain indebtedness alleged in petitioner's bill of particulars and asked for an accounting, and the parties thereupon agreed that the matters in controversy should be heard by the judge without a jury upon an agreed statement of facts, and that the judge might find such additional facts as he may consider necessary to complete determination of the matters in controversy, the proceeding is converted by consent into an administration suit, and petitioner is precluded by the agreement from objecting to an order requiring her to be made a party in her individual capacity, and to account for certain money paid to her either individually or as the widow of the deceased, the agreement not constituting the proceeding a controversy without action in which the authority of the court is limited to the matters submitted. *Edney v. Mathews*, 218 N. C. 171, 10 S. E. (2d) 619.

Record on Appeal.—Upon appeal from judgment entered in a submission of controversy without action, the agreed facts with the required affidavits, are necessary parts of the record proper. *Consolidated Realty Corp. v. Koon*, 215 N. C. 459, 2 S. E. (2d) 360.

No Prayer for Judgment Necessary.—In an action submitted without controversy no prayer for judgment is necessary. *Williams v. Commissioners*, 132 N. C. 300, 43 S. E. 896.

Exhibits Containing Facts Not Attached.—The summary method provided by this section for the submission of an action upon a case agreed, contemplates that all the facts necessary to a determination of the questions submitted shall be fully stated in the case agreed; and where it appeared that some of the facts were recited in exhibits which were not attached, and that leave was given the parties to add other matters, the cause was remanded to be perfected. *Piedmont R. Co. v. Reidsville*, 101 N. C. 404, 8 S. E. 124.

Plaintiff Permitted to File Affidavit after Case Docketed.—Where, when the case was docketed in the Supreme Court, no affidavit had been filed as required by this section, the plaintiff upon motion (the defendant being present and not objecting) was allowed to file the required affidavit. *Bank v. Trust Co.*, 119 N. C. 553, 554, 26 S. E. 131.

Parties.—All persons having an interest in the controversy must be parties, to the end that they may be concluded by the judgment, and the controversy be finally adjudicated as in

case of an action instituted in the same way. *McKethan v. Ray*, 71 N. C. 165, 170.

Facts Must Show Equitable Dealings When Wife is Party.—Where a controversy, properly constituted, is submitted without action under the provisions of this section, involving the question as to the necessity of the wife of a tenant in common to join in his deed voluntarily given to divide the lands between himself and the other tenants in common, on appeal the case will be remanded if it does not appear in the facts agreed that the division so made was a fair and equitable one. *Valentine v. Granite Corp.*, 193 N. C. 578, 137 S. E. 668.

Conflicting Claims to Money, in Sheriff's Hands.—Where a sheriff has money in his hands under executions in favor of different creditors, against the same defendant, and the creditors set up conflicting claims to the money, it is not such a case as may be submitted to a judge, without an action, under this section, by the adverse claimants. *Bates v. Lilly*, 65 N. C. 232.

Title to Office May Not Be Tried under Section.—A civil action in the nature of a writ of *quo warranto* is the proper mode of trying title to a public office; the submission of a controversy without action under this section for that purpose cannot be sustained. *Davis v. Moss*, 81 N. C. 303.

Where Controversy May Not Be Considered.—An action brought by the seller of a cotton-scale beam may not be maintained against the purchaser thereof in anticipation of the latter's claim for damages arising upon the breach of an implied warranty against defects that caused damages to the purchaser, and under this section upon demurrer the controversy may not be considered by the court as upon a case agreed. Equitable rights of bills of peace, quia timet, and to remove clouds on title to lands distinguished. *Jacobi Hdw. Co. v. Jones Cotton Co.*, 188 N. C. 442, 124 S. E. 756.

Jury Trial Not Contemplated by the Section.—This section does not contemplate a trial by jury. *Moore v. Hinnant*, 90 N. C. 163, 164. Whether or not the Supreme Court can remand the case and direct an issue of fact to be tried by a jury in the court below was left undecided, although inclination was shown that this might be done if the application therefor is made in apt time.

Illustrative Cases.—It is impossible in a work of this nature to collect all the cases bearing upon this section, and to state the facts found and the question involved therein. A few of the leading cases are given to show that where the essential requirements have been complied with, the courts have not confined the application of the method prescribed by the provisions of this section to any particular classes of questions. *Ed. Note.*

Case May Be Submitted after Issues Joined.—The parties may agree upon a state of facts and submit it to the judge for his decision, even after issues are joined. *Hervey v. Edmunds*, 68 N. C. 243, 247.

Same—Recovery of Specific Legacy.—A controversy, the purpose of which was to recover a specific legacy given by the terms of a will, and to determine the conditions on which it was to be received, was submitted to the court under this section. *University v. Gatling*, 81 N. C. 508, 509.

Same—Homestead and Personal Property Exemption.—The question whether or not minor children, whose mother and father died, neither of whom having applied for a homestead or personal property exemption, were entitled to claim such exemptions, was decided under the method prescribed by the provisions of this section. *Welch v. Welch*, 78 N. C. 240.

Same—Bank Deposit Applied on Matured Note.—The legality of the application by the banks of the balance of a bankrupt depositor on a note already matured, was the question submitted without action in *Trust Co. v. Spencer*, 193 N. C. 745, 138 S. E. 124.

Same—Sheriff's Right to Commission.—The facts agreed upon in the case of *Board v. Commissioners*, 137 N. C. 63, 49 S. E. 47, presented for determination the question whether or not a sheriff is allowed to retain a commission out of the school taxes collected by him.

Same—Specific Performance.—The question whether the plaintiff, who had contracted to convey certain land, could compel the defendant to fulfill the contract, when some doubt as to whether he (the plaintiff) could convey a good and indefeasible title arose by force of certain terms used in a will under which the plaintiff acquired the land, was submitted in *Watts v. Griffin*, 137 N. C. 572, 50 S. E. 218.

Same—Land Claimed under Conflicting Grants.—Where the parties claimed the same land under conflicting grants, the question as to the true owner was submitted without action in *Janney v. Blackwell*, 138 N. C. 437, 438, 50 S. E. 857.

Same—The recovery of advances of money to meet losses sustained by a broker, the advances being made at the request of his principal, was the purpose of the action in *Black & Co. v. Carr*, 80 N. C. 295.

Same—The determination of the owner of the legal title of

a safe sold upon a conditional sales contract, followed by the bankruptcy of the purchaser, was the question in *Brem v. Lockhardt*, 93 N. C. 191, 192.

Same—Duty of County Board of Health.—The superior court has jurisdiction of a controversy without action between the board of health of a county and the county commissioners in which the facts agreed present the question of the legal duties of the respective boards in regard to the appointment of a county health officer, which duties, according to how the controversy is determined, might be the subject of mandamus, notwithstanding that the provisions of the Declaratory Judgment Act, the next succeeding article, are not specifically referred to. *Board of Health v. Board of Com'rs*, 220 N. C. 140, 16 S. E. (2d) 677.

Taxes.—The section is applicable in the determination of the question whether a party is obligated for taxes demanded of him. *Pullen v. Commissioners*, 68 N. C. 451.

Same—Purchase of Municipal Bonds.—The determination of the liability of the defendants, under an agreement to purchase certain municipal bonds, was the question involved in the case submitted in *Charlotte v. Shepard*, 120 N. C. 411, 412, 27 S. E. 109.

Same—General Assignment.—The question submitted without action in *Winston v. Biggs*, 117 N. C. 206, 23 S. E. 316 was this: Is the assignee under a general assignment for the benefit of creditors required upon demand to pay a dividend out of funds in his hands for distribution upon the basis of the entire debt of one of the creditors secured in the deed, who has, and who had at the time of the execution of the assignment, a prior security upon a piece of property also conveyed in the assignment, or is the trustee to pay such creditor a dividend only on the balance due after the creditor has exhausted his prior security and applied the same to his debt?

Part Due Bonds as Counterclaim.—The question presented without action in *Bourne v. Board of Financial Control*, 207 N. C. 170, 176 S. E. 366, was this: Can past due county bonds owned at the commencement of the action, be used as a counterclaim against a promissory note belonging to said county?

Parity of Street Assessment with Tax Liens.—The question presented for determination under this section and § 1-252 in the case of *Saluda v. Polk County*, 207 N. C. 180, 176 S. E. 298, was whether a street assessment constitutes a lien on a parity and of equal dignity with tax lien.

Applied in *Webb v. Port Comm.*, 205 N. C. 663, 172 S. E. 377, with reference to the constitutionality of certain private corporate acts; in *Beaufort County v. Mayo*, 207 N. C. 211, 176 S. E. 753, with reference to determining title to land; *Powell v. Hood*, 211 N. C. 137, 189 S. E. 483; *Park View Hospital Ass'n v. Peoples Bank, etc., Co.*, 211 N. C. 244, 189 S. E. 766; *St. Louis Union Trust Co. v. Foster*, 211 N. C. 331, 190 S. E. 522; *High Point v. Clark*, 211 N. C. 607, 191 S. E. 318; *Hill v. Colie*, 214 N. C. 408, 199 S. E. 381; *Cartwright v. Jones*, 215 N. C. 108, 1 S. E. (2d) 359.

Cited in *Posey v. Board of Education*, 199 N. C. 306, 154 S. E. 593; *Zimmerman v. Board of Education*, 199 N. C. 259, 260, 154 S. E. 397; *De Laney v. Hart*, 198 N. C. 96, 150 S. E. 702; *Qualls v. Farmers', etc., Bank*, 197 N. C. 438, 439, 149 S. E. 546; *Wachovia Bank & Trust Co. v. Black*, 198 N. C. 219, 151 S. E. 269; *Commerce Union Trust Co. v. Thorner*, 198 N. C. 241, 151 S. E. 263; *New York Indemnity Co. v. Corporation Commission*, 197 N. C. 562, 150 S. E. 16; *Lowery v. Goldsboro Lumber Co.*, 197 N. C. 299, 148 S. E. 926; *Callahan v. Flack*, 205 N. C. 105, 170 S. E. 125; *Swain County v. Welch*, 208 N. C. 439, 181 S. E. 321; *North Carolina Mtg. Corp. v. Morgan*, 203 N. C. 743, 182 S. E. 450; *Benson v. Johnston County*, 209 N. C. 751, 185 S. E. 6; *Tucker v. Almond*, 209 N. C. 333, 183 S. E. 407; *Daly v. Pate*, 210 N. C. 222, 186 S. E. 348; *Lawrence v. Shaw*, 210 N. C. 352, 186 S. E. 504; *Braak v. Hobbs*, 210 N. C. 379, 186 S. E. 500; *Morrow v. Durham*, 210 N. C. 564, 187 S. E. 752; *Gurganus v. Bullock*, 210 N. C. 670, 188 S. E. 85; *Hartware Mut. Fire Ins. Co. v. Stinson*, 210 N. C. 69, 185 S. E. 449; *Mecklenburg County v. Sterchi Bros. Stores*, 210 N. C. 79, 185 S. E. 454; *General Realty Co. v. Lewis*, 212 N. C. 45, 192 S. E. 902; *Home Real Estate Loan, etc., Co. v. Parmele*, 214 N. C. 63, 197 S. E. 714; *Privott v. Graham*, 214 N. C. 199, 198 S. E. 635.

§ 1-251. Judgment roll.—Judgment shall be entered on the judgment docket, as in other cases, but without cost for any proceedings prior to trial. The case, the submission, and a copy of the judgment, constitute the judgment roll. (Rev., s. 804; Code, s. 568; C. C. P., s. 316; C. S. 627.)

Judge May Sign Judgment in Vacation.—A judge of the superior court has a right, with consent of parties, to sign

a judgment in vacation out of court, and to order the same to be entered of record at the ensuing term. *Hervey v. Edmunds*, 68 N. C. 243; but this does not apply to criminal cases. *State v. Alphin*, 81 N. C. 567.

§ 1-252. Judgment enforced; appeal.—The judgment may be enforced in the same manner as if it had been rendered in an action, and is subject to appeal in like manner. (Rev., s. 805; Code, s. 569; C. C. P., s. 317; C. S. 628.)

No particular assignment of error is necessary, when the appeal is taken from a judgment on an agreed statement of facts. *Davenport v. Leary*, 95 N. C. 203, 204.

Facts Showing No Cause of Action.—Where the facts agreed in a controversy without action show no cause of action, an appeal from a judgment thereon will be dismissed in the Supreme Court, as where the plaintiff claims title under a deed, avers that her purchaser was prevented from accepting her deed by the claims of the defendants, without allegation of the facts and circumstances or setting forth sufficiently the terms of the deeds, or making her purchaser and other necessary parties, parties to her action, thus presenting a moot question which the court will not decide. *Waters v. Boyd*, 179 N. C. 180, 102 S. E. 196.

Art. 26. Declaratory Judgments.

§ 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.—Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. (1931, c. 102, s. 1.)

Editor's Note.—See 12 N. C. Law Rev. 57, for note on this section.

Section 14 of the act from which this article is codified provides: "The several sections and provisions of this act, except sections one and two, are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not affect or render the remainder of the act invalid or inoperative."

This valuable legislation is passed in substantially the form of the Uniform Act recommended by the National Conference of Commissioners on Uniform State Laws, the variations from that standard being to adjust it more effectively to local procedure. See the explanation and comments in 9 N. C. Law Rev. 20-24.

One has only to look at the state of the law in North Carolina as disclosed in the case of *Hicks v. Greene County*, 200 N. C. 73, 156 S. E. 164, by way of contrast to appreciate the improvement which the Declaratory Judgment Act brings to procedure in this state. 9 N. C. Law Rev. 352, 353.

This and subsequent sections applied in *Edgerton v. Hood*, 205 N. C. 816, 172 S. E. 481, to determine the rights and duties of the parties with respect to the administration of assets of the Rutherford Bank under the provisions of Chapter 344, public local laws of North Carolina, 1933.

In General.—This article does not extend to the submission of the theoretical problem or a mere abstraction, and it is no part of the function of the courts, in the exercise of the judicial power vested in them by the constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter. *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27, citing *Poore v. Poore*, 201 N. C. 791, 161 S. E. 532; *Carolina Power, etc., Co. v. Iseley*, 203 N. C. 811, 167 S. E. 56.

This article affords a means of testing the validity of a statute requiring persons presenting themselves for registration to prove to the satisfaction of the registrar their ability to read or write any section of the Constitution (§ 163-28), plaintiffs and all the people of the state being vitally affected by the statute in controversy. *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27.

But an *ex parte* proceeding to determine petitioner's racial status is not within its scope. *Allison v. Sharp*, 209

N. C. 477, 184 S. E. 27, citing *In re Eubanks*, 202 N. C. 357, 162 S. E. 769.

The purpose of this article is to provide a speedy remedy for the determination of questions of law, and although questions of fact necessary to the adjudication of the legal questions involved may be determined, the remedy is not available to present for determination issues of fact alone. *Prudential Ins. Co. v. Powell*, 217 N. C. 495, 8 S. E. (2d) 619.

An action to determine whether salaries paid certain employees should be included in computing the contributions to be paid by an employer under the unemployment compensation act involves solely an issue of fact and does not involve any right, status or legal relation, and the employer may not maintain proceedings under this article to determine the question. *Id.*

Action to Determine Rights under Testamentary Trust.—An action to determine the rights of the parties under a charitable trust created by will, in which the trustees and all of the agencies who are beneficiaries of the trust are made parties, is justiciable under this article. *Johnson v. Wagner*, 219 N. C. 235, 13 S. E. (2d) 419.

Litigant May Not Receive Advice as to Procedure in a Pending Case from Another Judge.—This act does not confer upon one judge the authority to advise a litigant upon a matter of procedure in another trial before another judge. *Redmond v. Farthing*, 217 N. C. 678, 9 S. E. (2d) 405.

Necessity for a Controversy.—If it does not appear that any controversy exists between plaintiffs and defendants as to their respective rights, status, or legal relations, the action will be dismissed as not coming within the provisions of this and the following sections. *Wright v. McGee*, 206 N. C. 52, 173 S. E. 31.

The broad terms of this article do not confer upon the court an unlimited jurisdiction; and the court will not entertain an *ex parte* proceeding or a proceeding which, while adversary in form, yet lacks the essentials of genuine controversy. *Tryon v. Duke Power Co.*, 222 N. C. 200, 22 S. E. (2d) 450.

It need not be alleged and shown by plaintiff that the question is one which might be the subject of a civil action at the time, or that plaintiff's rights have been invaded or violated, or that defendant has incurred liability to plaintiff prior to the action. *Id.*

A mere difference of opinion between the parties as to whether plaintiff has the right to purchase or condemn, or otherwise acquire the utility of the defendant, without a declaration in the complaint of plaintiff's intent to exercise its rights under the franchise contract, does not constitute a controversy. *Id.*

Only civil rights, status and relations may be determined under the Declaratory Judgment Act, and when an action instituted thereunder involves both civil and criminal matters, the courts have jurisdiction to determine only the civil matters. *Calcutt v. McGeachy*, 213 N. C. 1, 195 S. E. 49.

Applied in *Farnell v. Dongan*, 207 N. C. 611, 178 S. E. 77, with reference to rights in the property of deceased; *Carr v. Jimmerson*, 210 N. C. 570, 187 S. E. 800; *Ficklen Tobacco Co. v. Maxwell*, 214 N. C. 367, 199 S. E. 405; *Branch Banking, etc., Co. v. Toney*, 215 N. C. 206, 1 S. E. (2d) 538; *Hilton Lbr. Co. v. Estate Corp.*, 215 N. C. 649, 2 S. E. (2d) 869; *Burcham v. Burcham*, 219 N. C. 357, 13 S. E. (2d) 615; *Moore v. Sampson County*, 220 N. C. 232, 17 S. E. (2d) 22.

Cited in *In re Reynolds*, 206 N. C. 276, 286, 173 S. E. 789; *Corl v. Corl*, 209 N. C. 7, 182 S. E. 725; *Peyton v. Smith*, 213 N. C. 155, 195 S. E. 379.

§ 1-254. Courts given power of construction of all instruments.—Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof. (1931, c. 102, s. 2.)

A paper writing in the handwriting of deceased, found among his valuable papers after his death, and bearing upon its face the *animus testandi*, will be declared his will

as a matter of law. *Rountree v. Rountree*, 213 N. C. 252, 195 S. E. 784.

§ 1-255. Who may apply for a declaration.—Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto: (a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or (b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or (c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings. (1931, c. 102, s. 3.)

An executor and trustee may institute an action in the superior court to obtain the advice of the court as to whether inheritance taxes should be paid from the corpus of the estate or deducted from annuities provided for in the will, and such action may be maintained under this section. *Wachovia Bank, etc., Co. v. Lambeth*, 213 N. C. 576, 197 S. E. 179, 117 A. L. R. 117.

Applied in *Rierson v. Hanson*, 211 N. C. 203, 189 S. E. 502.

§ 1-256. Enumeration of declarations not exclusive.—The enumeration in sections 1-254 and 1-255 does not limit or restrict the exercise of the general powers conferred in section 1-253 in any proceedings where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty. (1931, c. 102, s. 4.)

This section enlarges the specific categories mentioned elsewhere in the statute. *Tryon v. Duke Power Co.*, 222 N. C. 200, 205, 22 S. E. (2d) 450.

§ 1-257. Discretion of court.—The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. (1931, c. 102, s. 5.)

§ 1-258. Review.—All orders, judgments and decrees under this article may be reviewed as other orders, judgments and decrees. (1931, c. 102, s. 6.)

§ 1-259. Supplemental relief.—Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith. (1931, c. 102, s. 7.)

§ 1-260. Parties.—When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the State shall also be

served with a copy of the proceeding and be entitled to be heard. (1931, c. 102, s. 8.)

§ 1-261. Jury trial.—When a proceeding under this article involves the determination of an issue of fact, such issue may be determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. (1931, c. 102, s. 9.)

Cross Reference.—As to how issues are tried, see § 1-172 et seq.

§ 1-262. Hearing before judge where no issues of fact raised or jury trial waived; what judge may hear.—Proceedings under this article shall stand for trial at a term of court, as in other civil actions. If no issues of fact are raised, or if such issues are raised and the parties waive a jury trial, by agreement of the parties the proceedings may be heard before any judge of the Superior Court. If in such case the parties do not agree upon a judge for the hearing, then upon motion of the plaintiff the proceeding may be heard by the resident judge of the district, or the judge holding the courts of the district, or by any judge holding a term of the Superior Court within the district. Such motion shall be in writing, with ten days notice to the defendant, and the judge so designated shall fix a time and place for the hearing and notify the parties. Upon notice given, the Clerk of the Superior Court in which the action is pending shall forward the papers in the proceeding to the judge designated. The hearing by the judge shall be governed by the practice for hearing in other civil actions before a judge without a jury. The term "Superior Court Judge" used in this section shall include emergency and special judges of the Superior Court. (1931, c. 102, s. 10.)

Cross References.—As to trial generally, see § 1-170 et seq. As to waiver of jury trial and findings of fact by judge, see §§ 1-184, 1-185.

§ 1-263. Costs.—In any proceeding under this article the court may make such award of costs as may seem equitable and just. (1931, c. 102, s. 11.)

§ 1-264. Liberal construction and administration.—This article is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered. (1931, c. 102, s. 12.)

§ 1-265. Word "person" construed.—The word "person" wherever used in this article, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal corporation or other corporation of any character whatsoever. (1931, c. 102, s. 13.)

§ 1-266. Uniformity of interpretation.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with Federal laws and regulations on the subject of declaratory judgments and decrees. (1931, c. 102, s. 15.)

§ 1-267. Short title.—This article may be cited as the Uniform Declaratory Judgment Act. (1931, c. 102, s. 16.)

SUBCHAPTER IX. APPEAL.

Art. 27. Appeal.

§ 1-268. Writs of error abolished.—Writs of error in civil actions are abolished, and the only mode of reviewing a judgment, or order, in a civil action, is that prescribed by this chapter. (Rev., s. 583; Code, s. 544; C. C. P., s. 296; C. S. 629.)

Editor's Note. — Prior to the adoption of the Code of Civil Procedure writs of error were allowed in proper cases. But in *Smith v. Cheek*, 50 N. C. 213, it was held that the Supreme Court had no power to issue a writ of error. Section 296 of the Code of Civil Procedure [G. S., § 1-268] abolished writs of error and substituted appeals therefor. *Lynn v. Lowe*, 88 N. C. 478; *White v. Morris*, 107 N. C. 93, 12 S. E. 80.

Cited in *King v. Wilmington, etc., Ry.*, 112 N. C. 318, 16 S. E. 929.

§ 1-269. Certiorari, recordari, and supersedeas.—Writs of certiorari, recordari, and supersedeas are authorized as heretofore in use. The writs of certiorari and recordari, when used as substitutes for an appeal, may issue when ordered upon the applicant filing a written undertaking for the costs only; but the supersedeas, to suspend execution, shall not issue until an undertaking is filed or a deposit made to secure the judgment sought to be vacated, as in cases of appeal where execution is stayed. (Rev., s. 584; Code, s. 545; 1874-5, c. 109; C. S. 630.)

I. Editor's Note.

II. Certiorari.

- A. Editor's Note.
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As to writs of certiorari and supersedeas, when and how applied for and notice, see Rule 34 of Rules of Practice in the Supreme Court. As to cash deposit in lieu of bond, see § 109-32.

I. EDITOR'S NOTE.

The original Code of Civil Procedure of 1868, abolished writs of error and substituted appeals, but did not provide for writs of certiorari and recordari, as was pointed out by the Supreme Court in *Marsh v. Williams*, 63 N. C., 371. And thereupon this section was enacted, (Public Laws 1874-75, c. 109).

Whenever a substantial wrong has been done in judicial proceedings, giving a litigant legal right to redress, and no appeal has been provided by law, or the appeal that has been provided proves inadequate, the Supreme Court to all courts of the state and the superior courts to all subordinate courts, over which they exercise appellate power, may issue one or more of these writs and thereby see that the error is corrected and justice administered. *State v. Tripp*, 168 N. C. 150, 154, 83 S. E. 630.

II. CERTIORARI.

A. Editor's Note.

For regulations of the Supreme Court in regard to the writ of certiorari see Supreme Court rule 34. It is very important that appellant's petition should comply with these regulations as the writ will be dismissed for his failure to do so. Where petitioner failed to give the notice required by Supreme Court Rule 34 the writ will not issue. *Sanders v. Thompson*, 114 N. C. 282, 19 S. E. 225; *Keerans v. Keerans*, 109 N. C. 101, 13 S. E. 895. However notice may be waived. *Anonymous*, 2 N. C. 405.

The writ of certiorari is an extraordinary remedial writ and lies for two purposes: First, as a writ of false judgment to correct errors of law and, second, as a substitute

for an appeal. In either case it can issue only to the court where the judgment is. Therefore when the cause has been transferred by appeal the writ must be dismissed. *Williams v. Williams*, 71 N. C. 427. Its object is to prevent an improper deprivation of appeal.

Where a cause is removed from one superior court to another, the latter has the right to issue a writ of certiorari to the former, directing a more perfect transcript to be certified; for the right to issue writs of certiorari is not founded on the circumstance that the court from which the writ issues is superior to that to which it is directed; but upon the principal that all courts have the right to issue any writ necessary to the exercise of their powers. *State v. Reid*, 18 N. C. 377.

Where appellant has lost his right to appeal by the neglect of an officer of the law, the contrivance of the opposite party, or improper conduct in the inferior court, a certiorari will be granted without reference to the merits of the cause. *McConnell v. Caldwell*, 51 N. C. 469.

Where a statute authorizing a proceeding makes no provision for a review, certiorari may be maintained for that purpose. *Board of Comm'rs v. Smith*, 110 N. C. 417, 14 S. E. 972.

Where no appeal to the superior court from an inferior court is prescribed by the statute creating such court, and where an appeal would otherwise lie, a certiorari in lieu of appeal will issue from the superior court. *McPherson Drug Co. v. Norfolk, etc., R. Co.*, 173 N. C. 87, 91 S. E. 606.

It is the only method by which the Supreme Court can review the judgment in habeas corpus proceedings in matters not involving the custody of children. In *re Holley*, 154 N. C. 163, 69 S. E. 872. Certiorari may issue from the superior courts as well as the Supreme Court. *Rhyne v. Lipscombe*, 122 N. C. 650, 29 S. E. 57.

B. General Consideration.

Substitute for Appeal. — A writ of certiorari to bring up the record in a case is the proper substitute for an appeal. *State v. McGimsey*, 80 N. C. 377.

If an appeal is unavoidably lost, certiorari may be granted as a substitute. *Anonymous*, 2 N. C. 302; *Norwood v. Pratt*, 124 N. C. 745, 32 S. E. 979.

Discretion of Supreme Court. — The granting or refusing of a petition for a certiorari, is a matter within the discretion of the Supreme Court. *King v. Taylor*, 188 N. C. 450, 124 S. E. 751; *Waller v. Dudley*, 193 N. C. 354, 137 S. E. 149; *Peoples Bank, etc., Co. v. Parks*, 191 N. C. 263, 131 S. E. 637.

When Certiorari a Matter of Right. — Certiorari will be granted, as a matter of right, where it appears that appellant has been deprived of his appeal by the conduct of the opposing party. *Wiley v. Lineberry*, 88 N. C. 68; *State v. Bennett*, 93 N. C. 503; *State v. Bill*, 35 N. C. 373. Even though the conduct was unintentional. *Walton v. Pearson*, 83 N. C. 309.

If a party prays an appeal, and the court refuses to allow it, the certiorari is granted as "a matter of course." *Bledsoe v. Snow*, 48 N. C. 100.

Cannot Be Dispensed with. — Certiorari is a discretionary writ, and counsel may not dispense with it by agreement. In *re McCade*, 183 N. C. 242, 111 S. E. 3; *State v. Hooker*, 183 N. C. 763, 111 S. E. 351.

Persons Entitled. — To entitle one to a writ of certiorari he must have some interest in the proceeding sought to be reviewed, and sustain injury thereby. *Petty v. Jones*, 23 N. C. 408. See *Shober v. Wheeler*, 119 N. C. 471, 26 S. E. 26; *Otey v. Rogers*, 26 N. C. 534.

When Another Remedy Available. — Certiorari is not a proper remedy where another adequate remedy is available. *Petty v. Jones*, 23 N. C. 408; *Watson v. Shields*, 67 N. C. 235.

Finality of Determination. — Where the judgment against a party is retained for further orders, the judgment is interlocutory and certiorari will not be granted. *Smith v. Miller*, 155 N. C. 247, 71 S. E. 355.

Applicant Must Negative Laches. — He who seeks a certiorari must negative laches. *Peoples Bank, etc., Co. v. Parks*, 191 N. C. 263, 131 S. E. 637; *Cox v. Kinston Carolina, etc., R. Co.*, 177 N. C. 227, 98 S. E. 704; *Mitchell v. Baker*, 129 N. C. 63, 39 S. E. 633.

Negligent Delay. — One who negligently allows the time for bringing his appeal to expire without seeking such remedy is not entitled to the remedy by certiorari. *Suiter v. Brittle*, 92 N. C. 53, In *re Brittain*, 93 N. C. 587.

Necessity of Filing Record. — The appellant must aptly file a record proper in the case appealed from as a prerequisite for the Supreme Court to grant his motion for a certiorari to bring up the case for review. *Brock v.*

Ellis, 193 N. C. 540, 137 S. E. 585; *Lindsey v. Knights of Honor*, 172 N. C. 818, 90 S. E. 1013.

Necessity of Security. — Since certiorari is but a substitute for an appeal, it can only be allowed on the same security, and justification thereof, as in cases of appeal. *Chastain v. Chastain*, 87 N. C. 283.

But the Supreme Court has the power, in a proper case, to allow the writ to issue without such undertaking. *Brittain v. Mull*, 93 N. C. 490. The contrary is apparently held in *Weber v. Taylor*, 66 N. C. 412, but this was in reality not a "proper case."

Certiorari Denied When Appeal Waived. — A writ of certiorari will not issue where the right of appeal has been waived. *King v. Taylor*, 188 N. C. 450, 124 S. E. 751.

Imposition of Terms on Applicant. — When granted the appellant may be laid under terms not to avail himself of a technical advantage. *Collins v. Nall*, 14 N. C. 224.

Only Errors Apparent of Record. — Under a writ of certiorari, the object of which is only to bring up the record of an inferior court, only such errors or defects as appear on the face of such record can be considered. *Hartsfield v. Jones*, 49 N. C. 309; *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10.

When a criminal action has been brought from an inferior court to the superior court by means of a writ of certiorari, the superior court acts only as a court of review, and in all ordinary instances must act on the facts as they appear of record * * * and can only revise the proceedings as to regularity or on questions of law or legal inference. *State v. King*, 222 N. C. 137, 22 S. E. (2d) 241.

Case on Appeal Not Settled. — When for any sufficient cause the case on appeal is not settled in time to have the case docketed at the term of the Supreme Court to which the appeal should be brought, the appellant should in apt time file a transcript of the record proper and move for a certiorari. *Tripp v. Somerset*, 182 N. C. 767, 108 S. E. 633; *McNeil v. Virginia-Carolina R. Co.*, 173 N. C. 729, 92 S. E. 484. See *Walsh v. Burleson*, 154 N. C. 174, 69 S. E. 680.

In such a case if appellant does not apply for certiorari at the first term next after the trial, he is not entitled to certiorari at the next term. *Joyner v. Hines*, 108 N. C. 413, 12 S. E. 901; *Haynes v. Coward*, 116 N. C. 840, 21 S. E. 690.

Issuance of Successive Writs.—Although a certiorari has once been issued from the Supreme Court, upon a suggestion of a defect of the record, and has been returned, yet the court may, a second time or oftener direct writs of certiorari to issue if it sees reason to think the transcript defective. *State v. Munroe*, 30 N. C. 258.

But where the return of a certiorari, substituted for an appeal, shows an imperfect record, and no statement of the case, a new writ of certiorari will not be granted. *Skinner v. Badham*, 80 N. C. 14.

Effect of Certiorari. — Where a defendant has lost his appeal, but is granted a writ of certiorari in lieu thereof, the granting of the writ has the effect of an appeal as to stay of execution, and if the offense he bailable, he is entitled to bail. *State v. Walters*, 97 N. C. 489, 2 S. E. 539. See *Pender v. Mallett*, 122 N. C. 163, 30 S. E. 324.

Docketing as a Condition Precedent for Certiorari. — All of the transcript that can be obtained must be docketed at the first term and certiorari asked to complete the transcript. *Pittman v. Kimberly*, 92 N. C. 562; *Slocumb v. Construction Co.*, 142 N. C. 349, 55 S. E. 196; *Walsh v. Burleson*, 154 N. C. 174, 69 S. E. 680.

Same—Waiver. — Requirement of Supreme Court that on application for certiorari for case on appeal transcript of record proper must be docketed cannot be waived by appellee. *Murphy v. Carolina Elect. Co.*, 174 N. C. 782, 93 S. E. 456.

Same—When Transcript Cannot Be Docketed. — Where the papers constituting the record proper have been misplaced without any laches of an appellant, the proper practice is to file the case on appeal settled by the trial judge, and ask for certiorari for the record proper. *Slocumb v. Construction Co.*, 142 N. C. 349, 55 S. E. 196. See also *Burrell v. Hughes*, 120 N. C. 277, 26 S. E. 782; *Parker v. Southern R. Co.*, 121 N. C. 501, 504, 23 S. E. 347; *McMillan v. McMillan*, 122 N. C. 410, 29 S. E. 361.

When certiorari is addressed to boards of assessment or boards of assessment and equalization, where that practice is permitted, it is generally held that the power of review, as in other instances of its use under the common law, does not extend to questions of valuation, but only to jurisdictional or procedural irregularities or errors of law. *Belk's Dept. Store v. Guilford County*, 222 N. C. 441, 445, 23 S. E. (2d) 897, and cases cited therein.

Applied in *Hamilton v. Southern R. Co.*, 203 N. C. 468, 166 S. E. 392.

Cited in *In re Guerin*, 206 N. C. 824, 175 S. E. 181.

C. Illustrative Cases.

Failure to Serve Case on Appeal. — A petition for a writ of certiorari to bring up the case on appeal will not be granted where the appeal was lost by failure to serve the case on appeal. *Zell Guano Co. v. Hicks*, 120 N. C. 29, 26 S. E. 650.

Waiver of Statutory Requirements. — When there is an alleged waiver of the statutory requirements in settling case on appeal, a certiorari will issue if the allegations of petitioner's affidavit are not denied. *Holmes v. Holmes*, 84 N. C. 833, 834.

Delay of Judge. — Where the delay in prosecuting the appeal is owing to no fault of the appellant, but to the delay of the judge, certiorari, in lieu of an appeal may be granted. *Sparks v. Sparks*, 92 N. C. 359; *Haynes v. Coward*, 116 N. C. 840, 841, 21 S. E. 690.

Retirement of Judge before Preparing Case. — Where the trial judge goes out of office before preparing a case on appeal, held, that certiorari is proper as a substitute for appeal, if the parties can agree on a statement of the case. *Shelton v. Shelton*, 89 N. C. 185. But where the trial judge has died certiorari will not lie. *Taylor v. Simmons*, 116 N. C. 70, 20 S. E. 961.

Loss Caused by Mistake of Clerk. — After a party has prayed an appeal and offered his sureties, if he be defeated of the appeal by the neglect, omission or delay of the clerk, he shall have his cause carried up by a certiorari. *Chambers v. Smith*, 2 N. C. 366; *Graves v. Hines*, 106 N. C. 323, 327, 11 S. E. 362.

But not where the clerk fails to send up the transcript. *Pittman v. Kimberly*, 92 N. C. 562.

Neglect of Counsel.—Where the appellant's counsel told him that he would do everything necessary towards perfecting his appeal, but the counsel failed to file a proper appeal bond it was held, no ground for a certiorari. *Winborne v. Byrd*, 92 N. C. 7.

Sickness of Appellant. — Sickness of appellant is a sufficient excuse for failure to perfect an appeal so as to entitle him to certiorari as a substitute therefor. *Hewerton v. Henderson*, 86 N. C. 718.

Sickness of Applicant's Attorney. — The sickness of an attorney is a sufficient excuse for want of diligence in perfecting an appeal, and certiorari will lie. *Mott v. Ramsay*, 90 N. C. 372.

However the sickness of one of two attorneys is not sufficient although the other is absent from the county. *Boyer v. Garner*, 116 N. C. 125, 21 S. E. 80.

Error of counsel, whereby a party fails to appeal from a final judgment, is not ground for the certiorari, except under very exceptional circumstances. *Smith v. Miller*, 155 N. C. 247, 71 S. E. 355; *Barber v. Justice*, 138 N. C. 20, 50 S. E. 445.

Failure to File Appeal Bond. — The fact that the appeal was not perfected because of the failure of appellant's counsel to file a proper appeal bond is not ground for certiorari in lieu of appeal. *Winborne v. Byrd*, 92 N. C. 7; *Churchill v. Brooklyn Life Ins. Co.*, 92 N. C. 485. Nor for failure to file appeal bond in time. *Bowen v. Fox*, 99 N. C. 127, 5 S. E. 437. Nor when justification of sureties is omitted. *Turner v. Powell*, 93 N. C. 341.

For a contra case, see *Manning v. Sawyer*, 8 N. C. 37, where it was held that where the appellant has failed to bring up the appeal bond along with the transcript, and swears that neither he nor the clerk knew it was his duty to do so, and that he did not intend to abandon his appeal, he shall have a certiorari to bring it up. This case decided at an early day seems to be the only one where a certiorari was allowed because an appeal was lost through the applicant's ignorance as to the requirements of the appeal bond.

Inability to Give Bond. — A certiorari will not be granted where the petitioner is unable to give bond for his appeal, unless it be shown that the judge below refused to make an order allowing the appeal in forma pauperis. *Lindsay v. Moore*, 83 N. C. 444.

Failure to Pay Clerk's Fees. — Certiorari will not be granted where it appears that the petitioner lost his appeal owing to his failure to comply with a demand for the payment of clerk's fees for making out the transcript. *Smith v. Lynn*, 84 N. C. 837; *Sanders v. Thompson*, 114 N. C. 282, 19 S. E. 225. Even though the clerk's fees were exorbitant. *Brown v. House*, 119 N. C. 622, 26 S. E. 160.

Omission of Assignment of Errors. — If by accident or inadvertence, without appellant's negligence, an assignment of errors is omitted from the record on appeal appellant may apply to the Supreme Court for certiorari to have

such assignments sent up. *McDowell v. Kent Co.*, 153 N. C. 555, 69 S. E. 626, and for incorporation of exceptions. *Cameron v. Power Co.*, 137 N. C. 99, 49 S. E. 76.

Stenographer's Notes. — The mistake of appellant's counsel in sending up the stenographer's notes on appeal, instead of a properly settled case, does not entitle appellant to a certiorari. *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53.

D. Requirements of Application.

Editor's Note. — Under the analysis line "General Considerations," II, B, ante, this note, will be found many cases pertaining to, though not expressly referring to, the application. These cases considering the subject generally should be consulted with reference to the requisites of the application.

Affidavit Required. — The writ of certiorari or recordari to review the judgment of a lower court will be issued only on a proper showing of merits, on affidavit filed. *Taylor v. Johnson*, 171 N. C. 84, 87 S. E. 981.

Affidavit Must Show Merits. — An application for a writ of certiorari must show a prima facie case of merits. *March v. Thomas*, 63 N. C. 249; *Short v. Sparrow*, 96 N. C. 348, 349, 2 S. E. 233. For affidavit held sufficient see *Bayer v. Raleigh*, etc., R. Co., 125 N. C. 17, 34 S. E. 100.

When Merit in Appeal Need Not Be Shown. — Where defendant is not able, at the time, to procure sufficient sureties for an appeal, he is entitled to a certiorari, without showing any merits in fact, where the case discloses that there were questions of law which he had a right to have decided by the superior court. *Britt v. Patterson*, 31 N. C. 197.

Where an opportunity of appealing has been lost by the neglect of an officer of the law, the contrivance of the opposite party, or improper conduct in the inferior court, a certiorari will be granted, without reference to the merits. *Collins v. Nall*, 14 N. C. 224; *McConnell v. Caldwell*, 51 N. C. 469, 470.

Loss of Papers. — Where an application for certiorari states that the papers asked to be sent up were lost, but does not aver that steps have been taken to supply them, the writ will not issue. *Sanders v. Thompson*, 114 N. C. 282, 19 S. E. 225.

Failure to Show Reason for Neglect. — Where a petition for a writ of certiorari did not allege that the adverse party prevented defendants from taking an appeal, and it did not appear that an appeal was ever taken, and no reason was assigned for the neglect, it was held that the writ would not issue. *Cox v. Pruett*, 109 N. C. 487, 13 S. E. 917.

Case Inaccurately Made. — When it is suggested that the case on appeal is inaccurately made out, the Supreme Court will award a certiorari, in order that the judge, if he sees proper, may make correction. *State v. Gay*, 94 N. C. 821.

Must Show Judge Will Make Corrections. — Where it is sought to have the case as settled by the judge corrected by a certiorari, the petitioner should set out his grounds for believing that the judge would make the corrections if given an opportunity, and not merely that he believes that probably the judge would do so. *Porter v. Western*, etc., R. Co., 97 N. C. 63, 2 S. E. 580; *Allen v. McLendon*, 113 N. C. 319, 18 S. E. 205.

Ability and Willingness to Correct. — The Supreme Court will not, by certiorari, direct the trial court to make changes in the case on appeal where the letter of the trial judge states his opinion that the record is fair and correct; the relief being granted only when the judge by letter indicates that he is willing to make the corrections desired. *Slocumb v. Construction Co.*, 142 N. C. 349, 53 S. E. 196.

Omitted Matter Must Be Relevant. — A certiorari will be denied where it does not appear that the matter omitted from the case settled is relevant to the exceptions presented on appeal. *City Nat. Bank v. Bridgers*, 114 N. C. 107, 19 S. E. 276; *Clark v. Soco-Pettee Mach. Works*, 150 N. C. 88, 63 S. E. 153.

Mistake Must Be Apparent. — Certiorari to correct a mistake stated on appeal will not be granted unless it is probable that the judge below would make the desired correction, or unless it is apparent that there was a mistake. *Currie v. Clark*, 90 N. C. 17; *Cheek v. Watson*, 90 N. C. 302; *Ware v. Nisbet*, 92 N. C. 202; *Allen v. McLendon*, 113 N. C. 319, 18 S. E. 205.

E. Time of Application.

When Applied for. — Generally, the writ of certiorari, as a substitute for an appeal, must be applied for at the term of the Supreme Court to which the appeal ought to have been taken, or if no appeal lay, then before or to the term of court next after the judgment complained of

was entered in the superior court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown. *State v. Johnson*, 93 N. C. 559; *State v. Sloan*, 97 N. C. 499, 2 S. E. 666.

Application Must Be Timely. — An application for certiorari to supply omissions in the appellate record must be presented to the appellate court with proper diligence, and the result of any laches by the applicant will fall upon him. *Todd v. Mackie*, 160 N. C. 352, 76 S. E. 245.

Agreement to Waive Time. — To the rule that appeal will be dismissed on motion of the appellee if not perfected according to law, there are the following exceptions: First, where the record shows a written agreement of counsel waiving the lapse of time; and secondly, where the alleged agreement is oral and disputed, and such waiver can be shown by the affidavit of the appellee, rejecting that of the appellant. In either case certiorari is the proper substitute. *Walton v. Pearson*, 82 N. C. 464.

Tacit Agreement to Waive Delay. — Where there is an undenied tacit agreement to waive delay certiorari will issue. *Holmes v. Holmes*, 84 N. C. 833; *Willis v. Atlantic*, etc., R. Co., 119 N. C. 718, 25 S. E. 790.

Denial of Oral Agreement. — A certiorari will not be granted, where an alleged oral agreement between counsel to await the decision of a certain other case is denied. *Hutchinson v. Rumpfelt*, 83 N. C. 441; *Graves v. Hines*, 106 N. C. 323, 324, 11 S. E. 362; *Short v. Sparrow*, 96 N. C. 348, 349, 2 S. E. 233.

Time for Requesting Certiorari. — An appellant who has ground for a certiorari as a substitute for appeal must move for it before the cause is reached for argument. *State v. Harris*, 114 N. C. 830, 19 S. E. 154; *State v. Marsh*, 134 N. C. 184, 187, 47 S. E. 6. As to when allowed after argument, see *Boyer v. Teague*, 106 N. C. 571, 11 S. E. 330.

F. Issuance of Writ from Superior Court.

Review of Hearing on Lunacy Writ. — Where a writ of lunacy was issued by a county court, and the party found non compos, and a guardian appointed, in the absence of the said party, and without notice, it was held, that the petitioner was entitled to a certiorari, to have the case taken into a superior court. *Dowell v. Jacks*, 53 N. C. 387.

Action on Bond. — Where the principal obligor in a bond was called, and, failing to appear, judgment was rendered against his surety, it was held that the fact that the principal was sick, and unable to attend at the term for which he was bound, did not entitle the surety to a certiorari to have the case removed into the superior court. *Buis v. Arnold*, 53 N. C. 233.

Failure to Plead and Appeal. — Where a defendant fails to enter a plea and to take an appeal, he is not entitled to a certiorari to bring the case into the superior court. *Rule v. Council*, 48 N. C. 33.

Deprived of Defense by Fraud of Opposite Party. — Where a party is deprived, by the fraud of his opponent, of the opportunity of making a defense in the county court, which can be made in the superior court as well as in the county court, his proper remedy is by a writ of certiorari. *Lunceford v. McPherson*, 48 N. C. 174.

But a mere suggestion of fraud is insufficient. *McLaughlin v. McLaughlin*, 47 N. C. 319. See also *Haddock v. Stocks*, 167 N. C. 70, 83 S. E. 9.

III. RECORDARI.

A. Editor's Note.

"The writ of recordari under the former practice, and retained in the new, is used for two purposes; the one in order to have a new trial of the case upon its merits, and this is a substitute for an appeal from a judgment rendered before a justice; the other, for a reversal of an erroneous judgment, performing in this respect the office of a writ of false judgment." *King v. Wilmington*, etc., R. Co., 112 N. C. 318, 320, 16 S. E. 929.

The adoption of this section of the Code (Acts 1874-75 C. 109) seems to retain this practice. *King v. Wilmington*, etc., R. Co., *Ibid*, cites many cases in which the writ of recordari has been used as a writ of false judgment since the adoption of this section by the legislature. It has been said that the writ of recordari is used only in North Carolina, writs of error and certiorari being substituted for it elsewhere. *State v. Griffiths*, 117 N. C. 709, 23 S. E. 164.

B. General Consideration.

Scope of Recordari. — If a party has merits and desires a new trial in the superior court, upon a matter heard before a justice of the peace, he must, by a proper application, obtain a writ of recordari as a substitute for an appeal. *Ledbetter v. Osborne*, 66 N. C. 379. It is in the nature of an extension of the power of appeal. *Webb v. Durham*, 29 N. C. 130.

Writ of False Judgment or Substitute for Appeal. — The writ of recordari may be used, either as a substitute for an appeal from a justice's judgment to have a new trial on the merits, or as a writ of false judgment. *Marler-Dalton-Gilmer Co. v. Wadesboro Clothing, etc., Co.*, 150 N. C. 519, 64 S. E. 366; *Morton v. Rippey*, 84 N. C. 611; *Caldwell v. Beatty*, 69 N. C. 365.

The writ of recordari is authorized by this section and recognized by the decisions of this court, both as a substitute for an appeal from a judgment of a justice of the peace, in order to have a new trial on the merits, and as a writ of "false judgment," to obtain a reversal of an erroneous judgment. *King v. Wilmington & Weldon R. Co.*, 112 N. C. 318, 16 S. E. 929.

The writ of recordari may be used as a writ of false judgment. *Parker v. Gilreath*, 28 N. C. 221; *Kearney v. Jeffreys*, 30 N. C. 96. *Bailey v. Bryan*, 48 N. C. 357, 358.

Lies to Inferior Tribunal Whose Proceedings Are Not Recorded. — The writ of recordari lies to an inferior tribunal, whose proceedings are not recorded. *Hartsfield v. Jones*, 49 N. C. 309, 310.

Jurisdiction of Superior Courts. — The writs of certiorari and recordari are to be applied for in orderly procedure to the superior courts of general jurisdiction vested by the state constitution and statutes with appellate and supervisory powers over the judicial action of all the inferior courts of the state. *Taylor v. Johnson*, 171 N. C. 84, 87 S. E. 981.

Failure to Docket Appeal. — When an appeal from a justice's court has not been docketed within the time prescribed by section 1-300, the appellant should move for a recordari, at the first ensuing term of the superior court, that the appeal should be docketed. *Peltz v. Bailey*, 157 N. C. 166, 72 S. E. 978; *Abell v. Thornton Light, etc., Co.*, 159 N. C. 348, 349, 74 S. E. 881; *Powell & Co. v. Rogers*, 180 N. C. 657, 104 S. E. 70.

Right to Object to Petition for Recordari Not Waived. — An appellee who does not docket an appeal from justice court not docketed in time by appellant and move for affirmance, does not waive the right to object to appellant's petition to bring up the appeal by recordari. *Pickens v. Whitton*, 182 N. C. 779, 109 S. E. 836.

Dismissal for Failure to Docket. — A recordari granted defendant by the superior court as substitute for an appeal from a justice not being docketed at that or the succeeding term, plaintiff may at a subsequent term docket the case, and have it dismissed. *Johnson v. Reformers*, 135 N. C. 385, 47 S. E. 463.

Review of Judge's Decision. — The decision of the judge upon a petition for recordari as a substitute for an appeal, after proper notice to the adverse party, is final and can only be reviewed by appeal, or upon an application to vacate it for mistake, surprise or excusable negligence. *Barnes v. Easton*, 98 N. C. 116, 3 S. E. 744. See also *Stewart v. Craven*, 205 N. C. 439, 171 S. E. 609.

Where, upon application to the superior court for a writ of recordari, the judge finds as facts, upon evidence, that the appellant has been guilty of laches in not giving the legal notice of appeal and refuses to grant the writ, his judgment will not be disturbed in the Supreme Court; praying for the appeal and the payment of the fees in the justice's court by the appellant are not sufficient to entitle him to the order as a matter of right. *Tedder v. Deaton*, 167 N. C. 479, 83 S. E. 616.

No appeal lies from the refusal of the court below to grant a motion to dismiss a petition for a writ of recordari. An appeal lies from the order of the court either granting or refusing to grant such writ. *Perry v. Whitaker*, 77 N. C. 102.

C. Requirements for Writ.

Issued at Term Following Trial. — The writ of certiorari or recordari to review the judgment of a lower court will be issued only at the next term of the supervising court following trial in the lower court. *Taylor v. Johnson*, 171 N. C. 84, 87 S. E. 981; *Boing v. Raleigh, etc., R. Co.*, 88 N. C. 62.

At Earliest Possible Time. — The writ of recordari or of certiorari, as a substitute for an appeal, should be applied for without any unreasonable delay, and any delay, after the earliest moment in the party's power to make the application must be satisfactorily accounted for. *Todd v. Mackie*, 160 N. C. 352, 359, 76 S. E. 245.

See *Koonce v. Pelletier*, 82 N. C. 237, in which it was held that, under the circumstances, a delay of three months in applying for the writ was not unreasonable.

Necessity of Affidavit or Petition. — A recordari, granted upon the application of the plaintiff, without notice to the defendant, and without any petition or affidavit setting forth the grounds upon which it should be is-

sued, is irregular, and will be dismissed upon the hearing. *Wilcox v. Stephenson*, 71 N. C. 409.

Averment as to Payment of Costs. — Before an application for a writ of recordari can be entertained, the petitioner must aver that he has paid or offered to pay the justice's fees. *Steadman v. Jones*, 65 N. C. 388.

Excuse for Laches and Meritorious Grounds. — Recordari will not be issued unless party applying shows (1) excuse for laches and (2) meritorious grounds. *Pritchard v. Sanderson*, 92 N. C. 41.

Application Must Negative Laches. — An applicant for recordari must show that he has not been guilty of laches. *Marler-Dalton-Gilmer Co. v. Wadesboro Clothing, etc., Co.*, 150 N. C. 519, 64 S. E. 366. See also, *Pritchard v. Sanderson*, 92 N. C. 41; *March v. Thomas*, 63 N. C. 249; *In re Brittain*, 93 N. C. 587.

Sufficient Ground for Recordari Must Be Shown. — It was incumbent on one failing to docket his appeal from justice court in the time required by law to show sufficient ground for a recordari in lieu of the appeal. *Baltimore Bargain House v. Jefferson*, 180 N. C. 32, 103 S. E. 922.

Applicant Must Show Merits. — An applicant for a writ of recordari must show merit. *Marler-Dalton-Gilmer Co. v. Wadesboro Clothing, etc., Co.*, 150 N. C. 519, 64 S. E. 366.

Failure to Show Meritorious Defense. — It is error to issue a writ of recordari to a justice's court, requiring him to send up the cause for trial de novo after entry of default judgment against defendant, and loss of right to appeal, where there is no showing of a meritorious defense. *Hunter v. Atlantic Coast Line R. Co.*, 161 N. C. 503, 77 S. E. 678.

Effect of Failure to Assign Errors. — Where no error is assigned, or none appears, the proper course is to dismiss the recordari, and award a procedendo. *Leatherwood v. Moody*, 25 N. C. 129; *Sossamer v. Hinson*, 72 N. C. 578.

Supersedeas Should Accompany. — An order for a recordari should be accompanied with an order for a supersedeas, and suspension of execution until the hearing. *Steadman v. Jones*, 65 N. C. 388.

D. When Granted.

Loss of Appeal without Fault of Applicant. — A recordari is a substitute for an appeal, where the party has lost his right to appeal otherwise than by his own default. *Marsh v. Cohen*, 68 N. C. 283; *Pickens v. Whitton*, 182 N. C. 779, 109 S. E. 836.

Party Denied Right of Appeal. — If a party has been aggrieved in a trial before a justice of the peace and has been denied the right of appeal, he may obtain relief by a writ of recordari. *Birdsey v. Harris*, 68 N. C. 92; *Ledbetter v. Osborne*, 66 N. C. 379.

Refusal of Appeal on Frivolous Ground. — If an appeal be refused by a magistrate on frivolous ground, the remedy is by a writ of recordari. *Bailey v. Bryan*, 48 N. C. 357, 67 Am. Dec. 246.

Appeal Lost by Excusable Neglect. — Where a party has lost his appeal by excusable neglect he may have relief by a writ of recordari as a substitute for an appeal. *Navassa Guano Co. v. Bridgers*, 93 N. C. 439.

Loss by Technical Default. — Where a party has lost his appeal by a technical default the superior court judge can have it brought up by recordari. *Suttle v. Green*, 78 N. C. 76, 77.

Loss of Appeal by Misfortune. — The writ of recordari is not resorted to as a rule except in cases in which the party aggrieved has by his misfortune lost the opportunity of taking the ordinary statutory appeal. *State v. Griffis*, 117 N. C. 709, 23 S. E. 164. See also, *Boing v. Raleigh, etc., R. Co.*, 88 N. C. 62; *Davenport v. Grissom*, 113 N. C. 38, 41, 18 S. E. 78.

Erroneous Supposition as to Agreement. — A writ of recordari is properly granted, where the defendant had merits, and lost his right to appeal without fault, having erroneously supposed that relief had been arranged with the plaintiff's attorney. *Carmer v. Evers*, 80 N. C. 56.

Notice of Appeal Not Returned. — On appeal from a justice of the peace to the superior court, where justice did not make a return of the notice of appeal during the next term, it was appellant's duty, where superior court judge was absent from such next term, to file motion for a recordari during such next term to preserve his right to have the case tried at the next succeeding term of the superior court. *Barnes v. Saleeby*, 177 N. C. 256, 98 S. E. 708.

E. When Denied.

When Appeal Available. — Where a party has a remedy by appeal which he willfully or negligently fails to exercise he is not entitled to a writ of recordari. *State v.*

Griffis, 117 N. C. 709, 23 S. E. 164; Peltz v. Bailey, 157 N. C. 166, 72 S. E. 978.

Duty to See That Appeal Is Filed in Time. — It is not enough that parties to a suit should engage counsel and leave the matter of taking an appeal entirely in his charge, as they should, in addition to this, give to the matter that amount of attention which a man of ordinary prudence usually gives to his important business, and should to that extent see that the appeal was filed in time. *Baltimore Bargain House v. Jefferson*, 180 N. C. 32, 103 S. E. 922.

Not Deprived of Appeal by Fraud, Accident or Mistake. — Where a party is not deprived of his appeal by any fraud, accident, surprise, or denial by the court, he is not entitled to the aid of a writ of recordari. *Satchwell v. Rispees*, 32 N. C. 365; *Hare v. Parham*, 49 N. C. 412, 413.

When Appellant Has Not Perfected Appeal. — A motion for recordari made in the superior court several terms after the judgment has been entered in the justice's court for failure to send up the transcript, should be denied when the appellant has not paid the fees required or taken proper steps to perfect the appeal. *Helsabec v. Grubbs*, 171 N. C. 337, 88 S. E. 473.

Appeal Lost through Negligence of Applicant's Attorney. — A party is not entitled to a writ of recordari as a substitute for an appeal from a justice's court which was lost by delay through the negligence of his attorney. *Boing v. Raleigh, etc.*, R. Co., 88 N. C. 62.

Illness of One Member of Law Firm. — As every member of a law firm is charged with knowledge of all the business of the firm, the illness of one member of a law firm which prevented him from attending a trial in justice court, and thus caused defendant to suffer a default judgment and lose its right of appeal, is not a showing of excusable neglect which will warrant the issuance of a writ of recordari. *Hunter v. Atlantic Coast Line R. Co.*, 163 N. C. 281, 79 S. E. 610.

IV. SUPERSEDEAS.

Editor's Note. — See Supreme Court Rule 34 as to requirements of application for this writ.

An appeal duly taken and regularly prosecuted of itself operates as a stay of all proceedings in the trial court. Section 1-294. *Sykes v. Everett*, 167 N. C. 600, 83 S. E. 585.

For supersedeas bond, see sec. 1-289 et seq., and annotations thereunder.

Definition and Scope of Writ. — "Supersedeas" is a writ issuing from an appellate court to preserve the status quo pending exercise of that court's jurisdiction, and issues only to hold the matter in abeyance pending review, and is granted only by court ordering removal of cause, and is regulated by statute. *Seaboard Air Line R. Co. v. Horton*, 176 N. C. 115, 96 S. E. 954.

A writ of supersedeas may issue to vacate the order of the lower court. *Clegg v. Clegg*, 186 N. C. 28, 118 S. E. 824; *In re Blake*, 184 N. C. 278, 114 S. E. 294; *Page v. Page*, 166 N. C. 90, 80 S. E. 1060; *McArthur v. Timber Co.*, 164 N. C. 383, 80 S. E. 403; *Arey v. Williams*, 154 N. C. 610, 70 S. E. 931, 5 N. C. L. R. 26.

Authority of Court or Judge. — The superior court can not supersede the process of an inferior court, unless the writ of supersedeas be auxiliary to the appellate jurisdiction of the former. *Bank v. Stanley*, 13 N. C. 476.

A supersedeas is ancillary to a writ of error, and the former may be granted by the same judge who has granted the latter. *Seaboard Air Line Railway v. Horton*, 176 N. C. 115, 96 S. E. 954.

The Supreme Court of North Carolina has no power to grant a supersedeas pending a petition to the United States Supreme Court for certiorari. *Seaboard Air Line R. Co. v. Horton*, 176 N. C. 115, 96 S. E. 954.

When Granted—Case of Necessity. — A writ of supersedeas is only granted in case of necessity. *McArthur v. Commonwealth Land, etc., Co.*, 164 N. C. 383, 80 S. E. 403.

Where the rights of a party can be fully protected in other proceedings which he seeks to restrain, a writ of supersedeas will not be granted. *McArthur v. Commonwealth Land, etc., Co.*, 164 N. C. 383, 80 S. E. 403.

Appeal from Nonappealable Order. — Where an appeal is taken in a matter wherein no appeal lies, the court below need not stay proceedings, but may disregard the attempted appeal. *Dunn v. Marks*, 141 N. C. 232, 53 S. E. 845.

Review of Clerk's Decision. — A supersedeas is the proper remedy to stay proceedings in a cause, pending the review of a decision of the clerk in regard to the sufficiency or insufficiency of an undertaking for an appeal. *Saulsbury v. Cohen*, 68 N. C. 289.

Injunction. — An appeal from an order granting an injunction does not stay the operation of the injunction pend-

ing the appeal. *Green v. Griffin*, 95 N. C. 50; *Fleming v. Patterson*, 99 N. C. 404, 6 S. E. 396.

An appeal from an order dismissing a temporary injunction could not have the effect of continuing the injunction. *Reyburn v. Sawyer*, 128 N. C. 8, 37 S. E. 954.

It is not proper to allow a supersedeas for the purpose of continuing an injunction pending an appeal from an order dissolving it. *James v. Markham*, 125 N. C. 145, 34 S. E. 241.

Supersedeas upon Judgment. — An appeal from an order granting a supersedeas upon a judgment leaves the judgment creditor at liberty to enforce his judgment. *Bank v. Jones*, 17 N. C. 284.

Custody of Child. — Where, in divorce proceedings, the trial court granted custody of a child to a mother and the husband appealed, and the mother sued out habeas corpus for the custody of the child pending the appeal, the Supreme Court might supersede the order as to custody pending the appeal, by virtue of Const. art. 4, § 8, authorizing it to issue remedial writs. *Page v. Page*, 166 N. C. 90, 81 S. E. 1060.

§ 1-270. Appeal to supreme court; security on appeal; stay.—Cases shall be taken to the supreme court by appeal, as provided by law. All provisions in this article as to the security to be given upon appeals and as to the stay of proceedings apply to appeals taken to the supreme court. (Rev., ss. 595, 1540; Code, ss. 561, 946; C. C. P., s. 312; C. S. 631.)

§ 1-271. Who may appeal.—Any party aggrieved may appeal in the cases prescribed in this chapter. (Rev., s. 585; Code, s. 547; C. C. P., s. 298; C. S. 632.)

Cross Reference. — For cases in which an appeal lies, see annotations under section 1-277.

Some Party Must Be "Aggrieved."—No appeal lies from a judgment until somebody is hurt or "aggrieved" by it. *Yadkin County v. High Point*, 219 N. C. 94, 13 S. E. (2d) 71.

"Party Aggrieved" Defined.—A defendant in a negligent injury action may appeal from the denial of his motion to have a third person joined as a defendant upon allegation that such third person was a joint tort-feasor, since the denial of the motion directly affects a substantial right, and a "party aggrieved" is one whose right has been directly and injuriously affected by the action of the court. *Freeman v. Thompson*, 216 N. C. 484, 5 S. E. (2d) 434.

Interest in Subject-Matter. — A commissioner appointed to make a deed is not a "party to the action," and, having no personal interest in the subject of it can not appeal from an order of the court requiring him to correct his deed, and his attempted appeal will be dismissed. *Summerlin v. Morrissey*, 168 N. C. 409, 84 S. E. 689.

A creditor on rejection of his claim by the referee was such a "party aggrieved" as had a right of appeal under this section. *Irvin v. Harris*, 182 N. C. 647, 109 S. E. 867.

Parties Whose Only Interest Is Payment of Moneys Secured by Trust Deed. — In an action to restrain a trustee from selling lands under a trust deed, till the determination of plaintiff's interest in the premises, parties whose only interest in the suit is the payment of the moneys secured to them by the trust deed can not appeal from a judgment declaring a parol trust in the equity of redemption in favor of plaintiff. *Faison v. Hardy*, 118 N. C. 142, 23 S. E. 959.

Receivers of a corporation can not appeal from a judgment of instructions because the instructions are, as between two classes of stockholders, prejudicial to one of such classes. *Strauss v. Carolina Interstate, etc., Loan Ass'n*, 117 N. C. 308, 23 S. E. 450, affirmed in 118 N. C. 556, 24 S. E. 116.

Parties of Record. — One not a party or privy to the record can not appeal. *Siler v. Blake*, 20 N. C. 90, 93.

Administrators. — Where in proceedings by the administrator to sell lands of the estate to pay debts, the judge has ordered claimants to file original evidence of their indebtedness and then referred the matter, the proceedings assume the character of a creditor's bill in which a creditor whose claim has been disallowed, may appeal to the Supreme Court as a party aggrieved. *Irvin v. Harris*, 182 N. C. 647, 109 S. E. 867.

Propounders in Caveat Proceeding.—In a caveat proceeding where the jury found against propounder, and the trial court set aside the verdict as being against the weight of the evidence and ordered a new trial, it was held that the

propounders were not the "parties aggrieved" by the order setting aside the verdict and could not appeal. In re Hargrove, 207 N. C. 280, 176 S. E. 752.

A defendant, who asks for no affirmative relief, is not the "party aggrieved" by a judgment of nonsuit within the meaning of this section and cannot appeal. *Guy v. Aetna Life Ins. Co.*, 206 N. C. 118, 120, 172 S. E. 885.

But if defendants are not appealing from a nonsuit in their favor, but from a judgment upon the verdict which adversely affects their interest, they have the right to appeal under this section. *Hargett v. Lee*, 206 N. C. 536, 174 S. E. 498.

Application to Be Made a Party Denied.—If an application to be made a party defendant is denied, the applicant is a "party aggrieved" for all the purposes of an appeal, under this section. *Rollins v. Rollins*, 76 N. C. 264.

Person Denied Right to Intervene.—One whose claim to intervene in a suit has been rejected by the court can not appeal from the judgment rendered in the suit. *Phelps v. Long*, 31 N. C. 226; *Evans v. Governor's, etc., Min. Co.*, 50 N. C. 332; *Rollins v. Rollins*, 76 N. C. 264.

Interveners for Purpose of Appeal.—Where a judgment for costs is rendered in a claim and delivery proceeding against a person who is not a party thereto, and who does not appear on the record as a party, such person may appeal on a special appearance made for that purpose. *Loven v. Parson*, 127 N. C. 301, 37 S. E. 271.

Party Not Served with Process.—One not a party can not appeal and the entry of a special appearance for one not served with process, though named as a defendant, does not authorize counsel so appearing to appeal from a default judgment against his client. *Houston v. Lumber Co.*, 136 N. C. 328, 48 S. E. 738.

Submission of Controversy.—Parties to an equity suit, who agree that the judge should find the facts, are precluded from asking the Supreme Court, on appeal, to review the finding. *Runnion v. Ramsay*, 93 N. C. 410.

Joinder.—All parties against whom a joint judgment or decree is rendered must join in an appeal. *Mastin v. Porter*, 32 N. C. 1; *Kelly v. Muse*, 33 N. C. 182.

Appeal from Joint Verdict and Judgment.—One defendant can not sustain an appeal from a joint judgment against two or more, when all had joined in the pleadings, and the trial was joint. *Hicks v. Gilliam*, 15 N. C. 217.

Where there is a joint judgment against two defendants in the court below, and one only appeals, the appeal will be dismissed on motion, no matter what steps have been taken in the cause after the filing of the appeal. *Smith v. Cunningham*, 30 N. C. 460.

Judgment against One of Two Parties.—Where an action is brought in the county court against two defendants, who plead severally, and a verdict and judgment are rendered in favor of one and against the other, the latter may alone appeal from the judgment rendered against him. *Stephens v. Batchelor*, 23 N. C. 60.

In assumpsit against two, if the jury find against one and in favor of the other, the former may appeal alone to the Supreme Court. *Sharpe v. Jones*, 7 N. C. 306.

Appeal by Justices of County.—Where, in a proceeding against the justices of a county, in their official capacity as justices of the county court, a judgment is rendered against them, they may appeal, although a minority of the justices refuse to join in the appeal. *Kelly v. Justices*, 24 N. C. 430.

Appeal by Statutory Receiver.—Objection that the statutory receiver has no right of appeal without the approval of the court is untenable when it appears that the Superior Court judge gave at least implied authority for appeal by approving the agreement of the parties as to what should constitute the case on appeal after notice of appeal by the receiver. In re *Central Bank, etc., Co.*, 206 N. C. 251, 173 S. E. 340.

Cited in *Simmons v. Andrews*, 106 N. C. 201, 204, 10 S. E. 1052; *In re Adams*, 218 N. C. 379, 11 S. E. (2d) 163; *Yancey v. North Carolina State Highway, etc., Comm.*, 221 N. C. 185, 19 S. E. (2d) 489.

§ 1-272. Appeal from clerk to judge.—Appeals lie to the judge of the superior court having jurisdiction, either in term time or vacation, from judgments of the clerk of the superior court in all matters of law or legal inference. In case of such transfer or appeal neither party need give an undertaking for costs; and the clerk shall transmit, on the transfer or appeal, to the superior court, or to the judge thereof, the pleadings, or other papers, on which the issues of fact or of law arise. An appeal must be taken with-

in ten days after the entry of the order or judgment of the clerk upon due notice in writing to be served on the appellee and a copy of which shall be filed with the clerk of the superior court. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed, the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof. (Rev., ss. 586, 610, 611; Code, ss. 116, 252, 253; C. C. P., ss. 109, 492; 1927, c. 15; C. S. 633.)

Cross References.—As to powers of clerks, see § 2-16. As to powers of the judge on appeal, see § 1-276.

Editor's Note.—No notice was required by this section prior to 1927. At that time by Public Laws 1927, ch. 15 the portion relating to "due notice in writing" was added.

By this section any party may appeal from any decision of the clerk of the superior court, on an issue of law or legal inference, to the judge, without undertaking; but an appeal can only be taken by a party aggrieved, who appeared and moved for or opposed the order or judgment appealed from. *National Bank v. Burns*, 107 N. C. 465, 12 S. E. 252.

This section and sections 1-274 and 1-275, regulating appeals from the clerk to the judge, are applicable to appeals from orders and judgments made or rendered by the clerk in the exercise of jurisdiction conferred upon him by statute prior to chapter 92, Public Laws 1921, E. S. These sections do not apply to orders and judgments made or entered by the clerk as authorized by the latter statute. *Caldwell v. Caldwell*, 189 N. C. 805, 128 S. E. 329.

Clerk Acts for Court.—The exercise of judicial powers by the "clerk of the court" is the exercise of them by the "court" through the clerk; and the action of the clerk stands as that of the court, if not excepted to and reversed or modified on appeal. *Brittain v. Mull*, 91 N. C. 498.

The clerk is not a "lower court" to the superior court with respect to appeals. While he has original jurisdiction in some matters and in the decision thereof may be considered a separate tribunal, nevertheless, all his power is delegated by virtue of his office as clerk of the superior court. *Windsor v. McVay*, 206 N. C. 730, 175 S. E. 83.

Action of Clerk Not Conclusive.—The action of the clerk is not final and conclusive. In a proper case, on appeal it is the duty of the court to review the findings of fact by the clerk and correct his errors of law. He is no more than the servant of the court, and subject to its supervision. *Turner v. Holden*, 109 N. C. 182, 186, 13 S. E. 731.

Applies to Special Proceedings.—This section applies in special proceedings as well as in civil actions generally. *Welfare v. Welfare*, 108 N. C. 272, 276, 12 S. E. 1025.

Order to Sell Land for Debt.—This section applies to an appeal from an order of the clerk to sell lands of decedent to pay debts. *Perry v. Perry*, 179 N. C. 445, 448, 102 S. E. 772.

Docketing Tax Not Applicable.—Where an appeal is taken from an order of the clerk of the superior court to the judge thereof under this section, the judge has jurisdiction by mandate of section 1-276, and no "docketing" in a technical sense is involved, and section 105-93 requiring a tax of two dollars for "docketing" an appeal from a lower court in the superior court does not apply. *Windsor v. McVay*, 206 N. C. 730, 175 S. E. 83.

Sufficiency of Bonds.—The power to revise and control the action of a clerk of the superior court in passing upon the sufficiency or insufficiency of bonds to be taken by him, necessarily exists with the judge, whose minister and agent he is; and the proper mode of bringing the question before the judge is by an appeal from the ruling of the clerk. *Marsh & Co. v. Cohen*, 68 N. C. 283.

Setting Aside Commissioner's Report.—An order of the clerk, setting aside the report of commissioners making partition of land, and directing a redivision, is appealable to the judge, and if no error in law is committed, the decision of the judge cannot be reversed. *McMillan v. McMillan*, 123 N. C. 577, 31 S. E. 729.

Removal of Executors.—An appeal will lie to the judge in proceedings for the removal of executors and administrators. *Edwards v. Cobb*, 95 N. C. 4, 5.

Order Concerning Judgment Debtor.—An appeal lies from an order of the clerk requiring a judgment debtor to appear and answer concerning his property, where the affidavit for the order is objected to on the ground of its insufficiency. *Farmers Nat. Bank v. Burns*, 107 N. C. 465, 12 S. E. 252.

Refusal to Issue Execution.—Where a clerk of the Superior Court refuses to issue an execution against the person of a judgment debtor, an appeal therefrom may properly be taken

to the resident judge of the district. *Huntley v. Hasty*, 132 N. C. 279, 43 S. E. 844.

Proceedings Supplemental to Execution.—Where in proceedings supplemental to execution had before the clerk, he held that the affidavit was sufficient and made the order demanded, an appeal lay at once to the judge as a matter of right, and the clerk could not allow or disallow it. *Nat. Bank v. Burns*, 107 N. C. 465, 12 S. E. 252.

On appeal from the assessment of damages for lands taken by the State Highway Commission the clerk is required by this section to transmit the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. Where the clerk has failed to transmit the record the trial judge within his supervisory power may order that this be done. *Sneed v. State Highway Commission*, 194 N. C. 46, 138 S. E. 350.

Jurisdiction of Clerk.—Where an equitable proceeding brought before the clerk, who has no equity powers, is pending on appeal in a court having equity jurisdiction, the supreme court will permit the latter to retain control of the case, and make all necessary orders as though the case were regularly pending. *Smith v. Gudger*, 133 N. C. 627, 45 S. E. 955.

Laches.—An appeal from the clerk to the judge should be dismissed on the ground of inexcusable laches. *Hicks v. Wooten*, 175 N. C. 597, 96 S. E. 107.

Cited in *Daniel v. Bellamy*, 91 N. C. 78, 82; *Edwards v. Cobb*, 95 N. C. 4, 5, 8; *Chowan & Southern Ry. Co. v. Parker*, 105 N. C. 246, 249, 11 S. E. 328; *Adams v. Guy*, 106 N. C. 275, 278, 11 S. E. 535; *Holly Shelter Ry. Co. v. Newton*, 133 N. C. 136, 45 S. E. 549.

§ 1-273. Clerk to transfer issues of fact to civil issue docket.—If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing term of the superior court. (Rev., s. 588; Code, s. 256; C. C. P., s. 115; C. S. 634.)

Cross References.—As to issues of fact, see §§ 1-173, 1-174. As to definitions of issues, see §§ 1-196, 1-197, 1-198. As to form and preparation of issues, see § 1-200.

Rule Stated.—Where issues of fact are joined before the clerk in the exercise of his special jurisdictional powers as a distinct tribunal, the issues must be transferred to the superior court—another jurisdiction—to be tried. *Brittain v. Mull*, 91 N. C. 498.

Special Proceedings.—When an issue of fact is joined in a special proceeding, or issues of both fact and law, it is the duty of the Clerk to place the proceeding on the docket of the trial term, for trial. *Jones v. Desern*, 94 N. C. 32.

Partition Proceedings.—In an ex parte proceeding for partition, an appeal by some of the parties from the decision of the clerk, upon the report of commissioners, alleging inequality and unfairness in the allotment—involves questions of fact, properly determinable by the judge, under this section. *Beckwith et al. ex parte*, 124 N. C. 111, 32 S. E. 393.

Section Governs Appeals from Judgment of Clerk in Dower Proceedings.—In dower proceedings issues of law and of fact were raised on the pleadings which had been filed before the clerk. At the hearing of the proceeding by the clerk, the parties waived a trial by jury of the issues of fact, and filed with the clerk a statement on facts agreed. On these facts the clerk rendered a judgment adverse to the plaintiff. The plaintiff excepted to the judgment, and appealed to the Superior Court in term time. It was held that this section and not § 1-274, was applicable to plaintiff's appeal from the judgment of the clerk of the Superior Court, and there was error in the order of the judge dismissing plaintiff's appeal on his finding that plaintiff had failed to perfect her appeal, as required by § 1-274. *McLawnhorn v. Smith*, 211 N. C. 513, 518, 191 S. E. 35.

Right May Be Waived.—In special proceedings, pending before Clerks, the parties have the right to insist that any issue of fact raised by the pleadings shall be framed by the clerk and transmitted to the superior court in term for trial by jury, and where they fail, before an order appointing commissioners is made, to insist upon a verdict upon the controverted facts they waive the right of trial by jury, even if it be conceded that the statute gives them the right to demand it. *Chowan & Southern R. Co. v. Parker*, 105 N. C. 246, 11 S. E. 328.

Cited in *Vance v. Vance*, 118 N. C. 864, 867, 24 S. E. 768; *Sneed v. State Highway Commission*, 194 N. C. 46, 138 S. E. 350.

§ 1-274. Duty of clerk on appeal.—On such appeal the clerk, within three days thereafter, shall prepare and sign a statement of the case, of his decision and of the appeal, and exhibit such statement to the parties or their attorneys on request. If the statement is satisfactory, the parties or their attorneys must sign it. If either party objects to the statement as partial or erroneous, he may put his objections in writing, and the clerk shall attach the writing to his statement, and within two days thereafter he shall send such statement, together with the objections, and copies of all necessary papers, by mail or otherwise, to the judge residing in the district, or in his absence to the judge holding the courts of the district, for his decision. (Rev., s. 612; Code, s. 254; C. C. P., s. 110; C. S. 635.)

See annotations to sections 1-272, 1-273.

Absolute Duty of Clerk.—The clerk is required by this section to transmit the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. *Sneed v. State Highway Commission*, 194 N. C. 46, 138 S. E. 350.

But see *Hicks v. Wooten*, 175 N. C. 597, 96 S. E. 107, where it was held that the neglect of the clerk in sending up the appeal would not excuse gross laches of the appellant.

What Statement Should Contain.—This statement should embrace the material facts, copies of necessary paper writings, or such papers themselves so that the judge may review the decision of the clerk appealed from upon its full merits. *Brooks v. Austin*, 94 N. C. 222.

Partition Proceedings.—Under proceedings for the partition of lands, when an appeal is taken from the decision of the clerk, upon issues of law or legal inference, it is his duty to prepare and make a statement of the case and send it to the judge. *Little v. Duncan*, 149 N. C. 84, 62 S. E. 770.

When Clerk Does Not Act for Court.—In appeals from the clerk, in that class of cases of which he has jurisdiction, not as and for the court as in special proceedings, but in his capacity as clerk, such as the auditing the accounts of executors and administrators, it is not necessary that he should prepare and transmit to the judge any statement of the case on appeal. *Ex parte Spencer*, 95 N. C. 271.

Court May Order Statement.—The clerk has no authority to allow or disallow an appeal; and on his refusal to prepare a statement of the case as required by this section, the court in term, or a judge at chambers, may direct him to do so by simple order. *Nat. Bank v. Burns*, 107 N. C. 465, 12 S. E. 252.

Where the clerk has failed to transmit the record to the court on appeal, upon notice of appeal given in proceedings under the provisions of this section, the trial judge within his supervisory power may order that this be done. *Sneed v. State Highway Com.*, 194 N. C. 46, 138 S. E. 350.

No Appeal From Order to Send up Transcript.—No appeal lies to the Supreme Court from an order of the superior court directing the clerk, to send up to the next term a transcript of proceedings supplemental to execution had before him. *National Bank v. Burns*, 107 N. C. 465, 12 S. E. 252.

When Statement Not Required.—It is not necessary to make out a statement of the case on appeal when the record proper shows the grounds of appeal. *Cape Fear etc. R. Co. v. Stewart*, 132 N. C. 248, 43 S. E. 638.

Clerk Should Give Reasons.—Where the clerk refuses to allow an amendment affecting the substance of an affidavit in attachment proceedings he may, and should, state his reason for such refusal, even after appeal to the court in term. *Cushing v. Styron*, 104 N. C. 338, 10 S. E. 258.

After Retirement of Clerk.—Where a clerk has gone out of office, it is not proper to order him to file with the court, in writing, the evidence offered and admissions made in a proceeding pending before him while he was clerk. *Ex parte Spencer*, 95 N. C. 271.

Rendering Decision Out of District.—In *Byrd v. Nivens*, 189 N. C. 621, 127 S. E. 673, 674, the court said, "We do not think that the judge residing in the district or, in his absence, the judge holding the courts for the district, can hear the questions and render a decision out of the district."

Irregular for Judge to Order Docket of Issues.—It is irregular for the judge in making his decision to order the clerk to place the proceeding on the docket of the regular term for trial—it being the duty of the clerk to do this

without such order when an issue of fact is joined. *Jones v. Desern*, 94 N. C. 32.

Waiver.—Where an appeal from an order of the clerk is noted at the time and is heard without objection at the term of the superior court beginning two days thereafter, but upon failure of the judge to decide the appeal before leaving the district, is placed on the calendar and reached the second term following, at which time without objection the parties appear and argue the matter before the presiding judge, any irregularity in procedure is waived, and defendant's contention that the appeal from the clerk should have been dismissed for failure to comply with this section, is untenable. *Cody v. Hovey*, 219 N. C. 369, 14 S. E. (2d) 30.

Applied in *Windsor v. McVay*, 206 N. C. 730, 175 S. E. 83. Cited in *Loviniar v. Pearce*, 70 N. C. 168, 172.

§ 1-275. Duty of judge on appeal.—It is the duty of the judge on receiving a statement of appeal from the clerk, or the copy of the record of an issue of law, to decide the questions presented within ten days. But if he has been informed in writing, by the attorney of either party, that he desires to be heard on the questions, the judge shall fix a time and place for the hearing, and give the attorneys of both parties reasonable notice. He must transmit his decision in writing, endorsed on or attached to the record, to the clerk of the court, who shall immediately acknowledge its receipt, and within three days after such receipt notify the attorneys of the parties of the decision and, on request and the payment of his legal fees, give them a copy thereof, and the parties receiving such notice may proceed thereafter according to law. (Rev., s. 613; Code, s. 255; C. C. P., s. 113; C. S. 636.)

Full Jurisdiction of Case.—Under this section an appeal in partition action from order of the clerk overruling demurrer carried the entire case into the superior court, and vested it with full jurisdiction of the cause. *Thompson v. Rospigliosi*, 162 N. C. 145, 77 S. E. 113.

When Issues of Fact Tried.—When issues of fact are tried the court remands the same and the pleadings or papers with the findings of the jury upon them, and the clerk will then proceed with the matter according to law. This provision has reference to issues of fact. *Brittain v. Mull*, 91 N. C. 498, 500.

Appeal May Be Heard Outside County.—Appeals from the clerk of the superior court and special proceedings to the judge residing or presiding in the district may be heard and judgment rendered outside of the county where the proceeding is pending, and within the district. *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123.

Appeals from the clerk may be heard at chambers at any place in the district. *Monroe v. Lewald*, 107 N. C. 655, 12 S. E. 287.

When Notice Not Reasonable.—Where notice of appeal from action by the clerk is served on the day before the hearing, the notice is not reasonable within this section. *Byrd v. Nivens*, 189 N. C. 621, 127 S. E. 673.

Pending Appeal from Clerk.—A motion for a receiver to take possession of a debtor's property, in supplemental proceedings, may be made before a judge, pending an appeal to him from the ruling of the clerk upon other questions. *Coates Bros. v. Wilkes*, 92 N. C. 377.

Presumption as to Proceedings.—Where nothing in the record indicates that a judge, who rendered a judgment on an appeal from the clerk of the superior court, was requested in writing to fix a time for the hearing and to give the parties notice, it will be presumed that the proceeding was rightly and regularly conducted. *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123.

May Hear Any Evidence.—Upon an appeal from an order of the clerk to the judge, the latter may hear any evidence that would have been competent before the former, although in fact not introduced. *McAden v. Banister*, 63 N. C. 479.

Special Proceedings for Partition.—The controversy involved in a special proceeding for the partition of land, as to whether there shall be an actual partition or a sale for the purpose, is not an issue of fact which should be sent to a jury, but a question of fact to be decided by the clerk, or by the judge on appeal. *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123.

Proceedings to Sell Lands.—A proceeding to sell lands to make assets to pay debts of the deceased is appealable

from the clerk of the superior court, and open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and to be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. *Perry v. Perry*, 179 N. C. 445, 102 S. E. 772.

Appeal from Clerk's Decision upon Commissioners' Report.—In an ex parte proceeding for partition, an appeal by some of the parties from the decision of the clerk upon the report of commissioners, alleging inequality and unfairness in the allotment—involves questions of fact, properly determinable by the judge, under this section. *Ex parte Beckwith*, 124 N. C. 111, 32 S. E. 393.

Proceedings Dismissed by Clerk.—Where clerk of superior court, for want of jurisdiction, dismisses a proceeding for the appointment of a trustee, on appeal the judge of the superior court may make such appointment. *Roseman v. Roseman*, 127 N. C. 494, 37 S. E. 518.

Issue of Law Joined in Special Proceedings.—When an issue of law is joined in a special proceeding it is the duty of the judge to decide the question thus presented, and to transmit his decision in writing to the clerk, who will then proceed with the special proceeding according to law. *Jones v. Desern*, 94 N. C. 32.

When Clerk Does Not Act for Court.—In appeals in cases in which the clerk does not act for the court, it is the duty of the judges to determine the questions of fact and law raised, and, for this purpose, if the evidence accompanying the papers is not satisfactory, he can require the production of other evidence. The judge can decide the questions of fact in such cases himself, or if he see fit, he can submit issues for his better information to the jury. *Ex parte Spencer*, 95 N. C. 271.

§ 1-276. Judge determines entire controversy; may recommit.—Whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so. (Rev., s. 614; 1887, c. 276; C. S. 637.)

Cross Reference.—See note under sec. 1-152.

Editor's Note.—By passing this section in 1887, Acts 1887, ch 276, the legislature considerably widened the power of judges on appeal. This section was enacted to remedy the inconvenience caused by the decision in *Brittain v. Mull*, 91 N. C. 498. In that case it was held that when the appeal was taken from the clerk the judge should hear the appeal and decide the questions of law present, and then remand the matter, including his decision, to the clerk.

Because of its beneficial results this section has always received a liberal interpretation. *Williams v. Dunn*, 158 N. C. 399, 74 S. E. 99.

It was not contemplated by the legislature that by the provisions of this section a party who should be coram non iudice before the clerk could take advantage of his own mistake or purposely make it in order to obviate a well grounded objection to the jurisdiction, and secure by indirection what he could not obtain directly. *Nash v. Sutton*, 109 N. C. 550, 14 S. E. 77.

Judge May Determine Entire Controversy.—Under this section, the judge now has final jurisdiction to determine the whole matter in controversy. *Lietie v. Chappell*, 111 N. C. 347, 353, 16 S. E. 171. *Faison v. Williams*, 121 N. C. 152, 28 S. E. 188; *Oldham v. Rieger*, 145 N. C. 254, 58 S. E. 1091; *Hall v. Artis*, 186 N. C. 105, 118 S. E. 901.

The clerk is but a part of the superior court, and when a proceeding before the clerk in any manner is brought before the judge, the superior court's jurisdiction is not derivative, but it has jurisdiction to hear and determine all matters in controversy in the proceeding. *Perry v. Bassenger*, 219 N. C. 838, 15 S. E. (2d) 365. See also, *Ex parte Wilson*, 222 N. C. 99, 22 S. E. (2d) 262.

After a motion is made before the clerk, the judge is not required to remand the cause to the clerk for the determination of the motion made before him. *Wynne v. Conrad*, 220 N. C. 355, 17 S. E. (2d) 514.

Court May Remand.—The court has the right in its discretion to remand the cause to the clerk for further proceedings. *York v. McCall*, 160 N. C. 276, 280, 76 S. E. 84.

Appointment of Administrator.—On appeal from the order of a clerk appointing an administrator the Superior Court may reverse the order but the case should then be remanded. *In re Styers*, 202 N. C. 715, 164 S. E. 123.

Upon appeal from an order of the clerk removing certain executors and administrators, c. t. a., and appointing others in their place, by virtue of this section, the Superior Court judge may, in the exercise of his discretionary powers, retain the cause, reverse the order of the clerk and appoint other administrators or a receiver to administer the estate subject to the orders of the court, the entire matter being before the Superior Court on appeal. *Wright v. Ball*, 200 N. C. 620, 621, 158 S. E. 192.

When Judge Cannot Merely Remand.—Where special partition proceedings were begun before the clerk, and he transferred the case to the judge in term, the judge was required to dispose of it on the merits, and had no power to merely reverse the clerk's action and remand the case to him, though there may have been irregularities in the proceedings before the clerk. *Little v. Duncan*, 149 N. C. 84, 62 S. E. 770.

Judge May Make Amendments.—The judge has power to make amendments to give jurisdiction. *Ewbank v. Turner*, 134 N. C. 77, 46 S. E. 508; *Elliott v. Tyson*, 117 N. C. 114, 23 S. E. 102. He may strike out an answer that is irrelevant. *Commissioners v. Piercy*, 72 N. C. 181.

Judge May Add Issues.—The number and form of issues is in the discretion of the court, and if every phase of the contention could have been and was presented under the issues submitted they will be sustained on appeal; and when the judge accordingly adds other issues tending to elucidate the case after it has been submitted, in addition to the usual issue, it is not error, but in the line of his duty. *In re Herring*, 152 N. C. 258, 67 S. E. 570.

Judge May Set Aside Order.—The superior court acquired jurisdiction of the entire controversy upon appeal from the clerk, and has the power to hear and determine all matters involved therein, and may set aside a previous order of the clerk and substitute therefor an order of its own without finding that the clerk had abused his discretion or committed error of law in signing the order, the clerk being but a part of the superior court. *Bynum v. Fidelity Bank*, 219 N. C. 109, 12 S. E. (2d) 898.

Judge May Set Aside Judgment.—The judge has power to set aside a judgment for newly discovered testimony and to permit an amendment in the complaint. *Faison v. Williams*, 121 N. C. 152, 28 S. E. 188.

Clerk without Equity Jurisdiction.—The clerk of the superior court, having no equity jurisdiction, cannot issue a writ of assistance to enforce its order in proceedings to partition lands among tenants in common, nor can jurisdiction be conferred on the superior court on appeal, the latter having no concurrent or original jurisdiction. *South-east State Bank v. Leverette*, 187 N. C. 743, 123 S. E. 68.

Proceedings Improperly Brought Before Clerk.—When a case properly cognizable in the superior court, but which is erroneously brought before a clerk, gets in the superior court on any ground the judge has jurisdiction to retain and hear the cause as if originally instituted in the superior court. *Hall v. Artis*, 186 N. C. 105, 118 S. E. 901; *Robeson v. Hodges*, 105 N. C. 49, 11 S. E. 263. See also *Ryder v. Oates*, 173 N. C. 569, 92 S. E. 508; *Spence v. Granger*, 207 N. C. 19, 175 S. E. 824.

Where the clerk of the superior court erroneously hears a proceeding over which he does not have jurisdiction, an appeal to the superior court confers jurisdiction upon it to hear and determine the whole matter. *Bradshaw v. Warren*, 216 N. C. 354, 4 S. E. (2d) 883.

Establishment of Private Cartway.—See *Dailey v. Bay*, 215 N. C. 652, 3 S. E. (2d) 14.

Agreement That Judge Shall Hear Appeal.—Where the parties agree that the judge shall hear an appeal in term, he acquires jurisdiction of the whole case, and should finally dispose of it on its merits, without remanding it to the clerk. *Cushing v. Styron*, 104 N. C. 338, 10 S. E. 258.

Such agreement cures all irregularities. *Foreman v. Hough*, 98 N. C. 386, 3 S. E. 912.

Judge Must Hear Controversy Although Clerk without Jurisdiction.—Where a motion to quash an execution and sale of real estate was submitted to the clerk of the superior court who granted the relief, and an appeal was taken to the judge of the court, it was improper for the judge to refuse to hear the controversy on the ground that the clerk was without jurisdiction to entertain the motion. *Williams v. Dunn*, 158 N. C. 399, 74 S. E. 99.

Clerk Erroneously Transfers Issues.—Where the clerk of the superior court has erroneously at once transferred the proceedings in condemnation to the superior court on issue joined between the parties, and an appeal therefrom has been taken to the superior court, the judge

thereof acquires jurisdiction for the hearing and determination of the controversy under the provisions of this section, and may order other proper or necessary parties to be made for the further determination of the cause. *Selma v. Nobles*, 183 N. C. 322, 111 S. E. 543.

Question of Price of Land.—The discretion vested in the superior court judge on appeal from the clerk, by this section, cannot confer jurisdiction on the judge to pass upon the reasonableness of the price of land sold under the power of sale in a mortgage, wherein the clerk has no authority under § 45-28 to further pass thereon in the absence of an increased bid. *In re Mortgage Sale of Ware Property*, 187 N. C. 693, 122 S. E. 660.

Where a commissioner, appointed to hold a foreclosure sale, advertises and sells the property in conformity with the order, but reports that the last and highest bid is less than the value of the property and recommends a resale, and the clerk orders a resale, the judge of the superior court, upon the appeal of one of the trustees from the order of the clerk, has jurisdiction to hear and determine the matter and order a resale at chambers while holding a criminal term of court in the county. *Harriss v. Hughes*, 220 N. C. 473, 17 S. E. (2d) 679.

Proceedings to Sell Land.—A proceeding to sell lands to make assets to pay the debts of the deceased is appealable from the clerk of the superior court, and open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and to be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. *Perry v. Perry*, 179 N. C. 445, 102 S. E. 772; *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123. See *Harrington v. Hatton*, 129 N. C. 146, 39 S. E. 780.

In a suit for partition of land the jurisdiction acquired by appeal includes the right of the court to accept a private bid through its commissioner. When the bid is accepted, whether it was made at public or private sale, the court has jurisdiction over the purchaser for the purpose of enforcing compliance with it. *Wooten v. Cunningham*, 171 N. C. 123, 126, 88 S. E. 1.

Proceedings to Subject Lands to Dower.—An ex parte proceeding by a widow to subject land in the hands of heirs to the payment of dower charges thereon cannot be had before the clerk and on appeal may be dismissed by the judge for want of jurisdiction. *In re Hybart's Estate*, 129 N. C. 130, 39 S. E. 779.

Drainage Assessment Proceedings.—Under this section giving the superior court jurisdiction to hear and determine all matters in controversy upon appeal from the clerk in special proceedings, and section 156-29, providing that appeals from the clerk in drainage assessment proceedings should be the same as in special proceedings, an appeal may be taken from an order of the clerk to the superior court. *Spence v. Granger*, 207 N. C. 19, 175 S. E. 824.

Motion to Retax Bill of Costs.—When a motion, to retax a bill of costs in a case which originated before the clerk but was appealed to the superior court is made at the next term after judgment is entered, it is error for the judge to hold that he has no power to entertain it. *In re Smith*, 105 N. C. 167, 10 S. E. 982.

Conflicting Rulings.—Where the superior court ruled that a clerk had no authority under § 28-111 to appoint a referee to hear claim against the estate of a deceased, a further ruling that the referee's report was binding on other grounds is a nullity notwithstanding the broad jurisdiction of the superior court under this section. *In re Shutt*, 214 N. C. 684, 200 S. E. 372.

Applied in Wynne v. Conrad, 220 N. C. 355, 17 S. E. (2d) 514.

Quoted in Sharpe v. Sharpe, 210 N. C. 92, 185 S. E. 634. **Cited in Skinner v. Carter**, 108 N. C. 106, 12 S. E. 908; **Fowler v. Fowler**, 131 N. C. 169, 42 S. E. 563; **Settle v. Settle**, 141 N. C. 553, 569, 54 S. E. 445; **Carolina Power & Light Co. v. Reeves**, 198 N. C. 404, 409, 151 S. E. 871; **Vann v. Coleman**, 206 N. C. 451, 174 S. E. 301; **Buncombe County v. Arbogast**, 205 N. C. 745, 172 S. E. 354; *In re Reynold's Estate*, 221 N. C. 449, 20 S. E. (2d) 348.

§ 1-277. Appeal from superior court judge.—An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or

grants or refuses a new trial. (Rev., s. 587; Code, s. 548; C. C. P., s. 299; 1818, c. 962, s. 4; C. S. 638.)

I. Editor's Note.

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Cross References.

As to appellate jurisdiction of supreme court, see § 7-10; Constitution, Art. IV, sec. 8. As to who may appeal, see § 1-271. As to power of supreme court on appeal, see §§ 1-297, 7-11. As to appeals in criminal cases, see §§ 15-179 et seq., and annotations.

I. EDITOR'S NOTE.

Editor's Note. — The appellant should be very careful to conform with the rules of the Supreme Court regarding appeals. The penalty for failure to comply with these rules is the dismissal of the appeal. Exceptions which are not brought forth among the assignments of error, are deemed abandoned under Supreme Court Rule 21.

At common law there was no appeal from the decision of any court, and a decision could only be reviewed by a writ of error or writ of false judgment. By our law appeals are used as a substitute for those writs. Previous to the adoption of the Code of Civil Procedure an appeal was allowed by the court and the preparation and perfection of it was the act of the court. But the Code of Civil Procedure made a notable change in that particular. Appeals were no longer prayed for but were taken. As said in *Campbell v. Allison*, 63 N. C. 568, "The judge below has nothing to do with the granting of an appeal; it is the act of the appellant alone."

Under the provisions of our state constitution, Article IV, section 8, the Supreme Court is confined on appeal to alleged errors of law or legal inference arising in the conduct of the trial in the superior court. See *Robinson v. Ivy & Co.*, 193 N. C. 805, 138 S. E. 173.

Although under this section the right of appeal is very broad, the Supreme Court is inclined to think that much inconvenience and delay is occasioned by the practice of appealing from orders, at every stage of the case, on objections which the party aggrieved could avail himself of after issue, as well as at the first steps in the proceedings.

Certiorari is the proper substitute for an appeal where the appellant has failed to perfect his appeal through no fault or negligence of his own. See section 1-269 and notes thereunder.

II. APPEAL IN GENERAL.

A. General Considerations.

Purpose of Appeal. — "The purpose of an appeal is to submit to the decision of a superior court a cause which has been tried in an inferior tribunal. Its object is to review the whole case and secure a just judgment upon the merits." *Rush v. Halcyon Steamboat Co.*, 67 N. C. 47, 49.

Method of Correcting Errors. — Where an adjudication is based on the erroneous application of legal principles the proper remedy to correct the error is by a proceeding in appeal. *Stafford v. Gallops*, 123 N. C. 19, 21, 31 S. E. 265; *McLeod v. Graham*, 132 N. C. 473, 475, 43 S. E. 935; *Rawls v. Mayo*, 163 N. C. 177, 180, 79 S. E. 298.

Jurisdiction Properly Acquired. — As appellate jurisdiction is derived from that previously acquired in the court from which the cause is removed, the record must show the possession of that jurisdiction, and that the cause was then properly constituted. *Gordon v. Sanderson*, 83 N. C. 1.

Jurisdiction Not Conferred by Consent. — Jurisdiction of an appeal can not be given by consent of parties. *Cary Co. v. Allegood*, 121 N. C. 54, 28 S. E. 61; *Rodman v. Davis*, 53 N. C. 134, 135.

Appeal as a Matter of Right. — An appeal is not a matter of absolute right; but appellant must comply with the statutes and rules of court as to the time and manner of taking and perfecting it. *Caudle v. Morris*, 153 N. C. 594, 74 S. E. 98; *Byrd v. Southerland*, 186 N. C. 384, 119 S. E. 2.

An appellant's right of appeal to the Supreme Court is dependent upon his observance of the rules regulating ap-

peals. *State v. Butner*, 185 N. C. 731, 117 S. E. 163; *Kerr v. Drake*, 182 N. C. 764, 108 S. E. 393; *Lindsey v. Knights of Honor*, 172 N. C. 818, 90 S. E. 1013.

Neither the parties in litigation nor their attorneys have authority, by agreement among themselves, to disregard the rules regulating appeals and where the appellant has failed to comply with these rules the appeal will be dismissed. *Rose v. Rocky Mount*, 184 N. C. 609, 113 S. E. 506.

Failure to Transmit Record. — An appellant who merely prays an appeal in open court, and files a bond with the clerk, without settling and transmitting the record, does not "take" an appeal within the meaning of this section. *Wilson v. Seagle*, 84 N. C. 110.

Both Parties Interested on Same Side of Case. — The Supreme Court will dismiss an appeal from a judgment in an action brought to obtain a construction of such act where it is apparent that both parties are interested on the same side of the case. *Kistler v. Southern R. Co.*, 170 N. C. 566, 79 S. E. 676.

Party Not Appealing. — A party not appealing or assigning any errors is not in position to complain of a ruling. *Hannah v. Hyatt*, 170 N. C. 634, 87 S. E. 517.

Separate Appeals in Related Causes. — Where causes of action which could not be merged were tried together merely for convenience, and were not united or consolidated by order of the court into one action, there should be separate appeals. *Williams v. Carolina, etc., R. Co.*, 144 N. C. 498, 57 S. E. 216.

Cited in State v. Williams, 209 N. C. 57, 182 S. E. 711; *In re Estate of Suskin*, 214 N. C. 218, 198 S. E. 661.

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

For particular orders, decisions, etc., see post this note, "Appeal as to Particular Subjects," III.

Judicial Order or Determination. — The right of appeal conferred by this section is from a judicial order or determination and not from the extrajudicial decision of private persons to whom the parties have agreed to submit their dispute. *In re Reynold's Estate*, 221 N. C. 449, 20 S. E. (2d) 348.

Cause Directly Affected. — An appeal lies from an order or determination in an action which affects the right litigated — the cause of action in controversy therein — in respects and ways specified; but it does not lie from an order or determination that is merely incidental, and not affecting directly the cause of action litigated. *Bynum v. Comm'rs* 101 N. C. 412, 418, 8 S. E. 136.

An order directing reference to ascertain certain alleged expenditures by guardian is not appealable, it not affecting any substantial rights. *Sutton v. Schonwald*, 80 N. C. 20.

It was formerly held that every order of a court of equity by which the rights of the parties may be affected may be reviewed in the Supreme Court. *Graham v. Skinner*, 57 N. C. 94.

Final Judgment. — Except where statute otherwise expressly provides, appeal to Supreme Court lies only from final judgment or one in its nature final. *McIntosh Grocery Co. v. Newman*, 184 N. C. 370, 114 S. E. 535; *Gilbert v. Waccamaw Shingle Co.*, 167 N. C. 286, 83 S. E. 337, 338. See *Thomas v. Carteret*, 180 N. C. 109, 104 S. E. 75, 76.

As a general rule, an appeal will not lie until there is a final disposition of the whole case. *Moore v. Hinnant*, 87 N. C. 505; *State v. Keeter*, 80 N. C. 472, 473; *Norfolk, etc., R. Co. v. Warren*, 92 N. C. 620; *Hailey v. Gray*, 93 N. C. 195.

All issues should be determined, and a final judgment rendered, before an appeal to the Supreme Court should be permitted. *Yates v. Dixie Fire Ins. Co.*, 176 N. C. 401, 97 S. E. 209.

Any decision, order, or decree of the circuit court, which puts an end to the proceedings, between the parties to a cause in that court, is final, and may be reviewed upon appeal. *Ex parte Spencer*, 95 N. C. 271; *Bain v. Bain*, 106 N. C. 239, 11 S. E. 327. For further consideration of what constitutes a final judgment, see § 1-208 and the notes thereto.

Same—Premature Appeal. — See post, this note, "What Supreme Court Will Consider," II, C.

Interlocutory Orders. — In order to present the subject of appeals in a logical manner as a whole, interlocutory orders are discussed here. It must be noted, however, that these orders are specifically provided for, in appeals after judgment, by section 1-278. As to what constitutes an interlocutory order, see section 1-208 and the notes thereto. *Ed. Note.*

An appeal lies from an interlocutory order when it puts an end to the action, or where it may destroy or impair a substantial right of the complaining party to delay his appeal. *Skinner v. Carter*, 108 N. C. 106, 12 S. E. 908; *Warren v. Stancill*, 117 N. C. 112, 23 S. E. 216.

Appeals to the Supreme Court will be entertained from interlocutory orders or decrees that put an end to the ac-

tion or seriously imperil some substantial right of the appellant. *Martin v. Flippin*, 101 N. C. 452, 8 S. E. 345.

By special act the legislature may provide that no appeal lies from an interlocutory order in a specific proceedings. *Norfolk & Southern R. Co. v. Warren*, 92 N. C. 620.

An appeal from an interlocutory order brings up only such order, and no order in the main case can be made. *Perry v. Tupper*, 71 N. C. 380.

Where a party appeals from an interlocutory order, and proceeds to trial, without waiting for a decision upon the matter appealed from, the appeal will be dismissed with costs. *Love v. Johnston*, 34 N. C. 367.

Defendant's appeal from an order continuing its motion to dismiss is premature, since the order disposes of no substantial right. *Sanderson v. Aetna Life Ins. Co.*, 218 N. C. 270, 10 S. E. (2d) 802.

An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from the final judgment. *Cole v. Farmers Bank, etc., Co.*, 221 N. C. 249, 20 S. E. (2d) 54.

Judgments of Superior Court Final as to Matters of Fact.—The superior court is the court of final jurisdiction and has power to completely determine a controversy properly before it, and its judgment is final as to all matters of fact established in accordance with procedure and is subject to appeal and review only on matters of law. *State v. Carolina Scenic Coach Co.*, 213 N. C. 233, 10 S. E. (2d) 824.

Appeal from Order Allowing Amendment to Pleadings.—Where an order of court allowing amendments to pleadings does not affect a substantial right, an appeal therefrom is fragmentary and premature, and the appeal will be dismissed. *Nissen Company v. Nissen*, 198 N. C. 808, 153 S. E. 450.

Judicial Nature of Decision.—An appeal lies in all cases from the judgment applying the law to the facts found. *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269; *Ladd v. Teague*, 126 N. C. 544, 36 S. E. 45; *Stokes v. Cogdell*, 153 N. C. 184, 69 S. E. 65.

Where there is legal evidence submitted to the jury, under correct instructions from the trial judge, no appeal lies from the verdict and judgment to review the findings of fact. *Pender v. North State Life Ins. Co.*, 163 N. C. 98, 79 S. E. 293.

Refusal to Dismiss Action.—An appeal does not lie from the refusal to dismiss an action. *Goldsboro v. Holmes*, 183 N. C. 203, 111 S. E. 1; *Capps v. Atlantic, etc., R. Co.*, 182 N. C. 758, 108 S. E. 300; *Winder v. Renniman*, 181 N. C. 7, 105 S. E. 884, 886; *Johnson v. Pilot Life Ins. Co.*, 215 N. C. 120, 122, 1 S. E. (2d) 381.

Appeal taken from an order denying a motion to dismiss a special proceeding is premature. After denying such motion, the judge should proceed with the hearing, and the appeal should be from the final decision. *Mitchell v. Kilburn*, 74 N. C. 483; *Mitchell v. Hubbs*, 74 N. C. 484; *Mitchell v. West*, 74 N. C. 485.

Dismissal of Appeal.—A party who loses on appeal to the Supreme Court can not review its decision by second appeal, but the only way is by petition to rehear. *Holland v. Railroad*, 143 N. C. 435, 55 S. E. 835; *Carter v. White*, 134 N. C. 466, 46 S. E. 983.

Refusal of Motion for Judgment upon Special Verdict.—An order by the trial court, denying defendants' motions for judgment on the special verdict, setting aside the verdict on one issue, and continuing the cause for the trial of such further issue as may be necessary to determine the rights of the parties, with leave to file amended pleadings, is not a final judgment. *Thomas v. Carteret*, 180 N. C. 109, 104 S. E. 75.

Application for Citizenship.—Under this section an alien may appeal from decree of superior court denying application for citizenship. *United States v. Owens*, 13 F. (2d) 376.

Judgment Confessed.—One who confesses judgment has no right of appeal from such judgment; but where an appeal was allowed, and the plaintiff failed to move to dismiss, the Supreme Court may pass by the irregularities and consider the errors. *Rush v. Halcyon Steamboat Co.*, 67 N. C. 47.

Decisions of Intermediate Courts.—An appeal lies from the dismissal of an action, or of an appeal from justice court; but it does not lie from a refusal to dismiss, for an exception should be noted, and an appeal lies from the final judgment. *Bargain House v. Jefferson*, 180 N. C. 32, 103 S. E. 922.

Decisions and Orders Favorable to Appellant.—See post, this note, "Estoppel to Allege Error," II, D.

Matters in Discretion of the Trial Court.—The discretion of the trial court will not be reviewed, unless it appears that such discretion was abused or that the ruling was based upon a matter of law. *Fayetteville Light, etc., Co. v. Les-*

sem Co., 174 N. C. 358, 93 S. E. 836; *Gordon v. Pintsch Gas Co.*, 178 N. C. 435, 100 S. E. 878. See 5 N. C. Law Rev. 14.

This section applies only to "matters of law or legal inferences," and not to an order involving a mere discretion. *Jenkins v. N. C. Ore Dressing Co.*, 65 N. C. 563.

If, in the trial court, the verdict of the jury is, in the opinion of the presiding judge, contrary to the weight of the evidence, he has a discretion to set such verdict aside, which discretion cannot be reviewed in an appellate court. *Watts v. Bell*, 71 N. C. 405.

When a motion on which an order is based is made as a matter of right and is not addressed to the court's discretion, upon its denial the movent may appeal immediately to the supreme court and have his motion decided there on its merits. *Parrish v. Atlantic Coast Line R. Co.*, 221 N. C. 292, 296, 20 S. E. (2d) 299.

Appeals from Subsidiary Proceedings.—Where, after the issuing of an injunction from which an appeal is taken, it appears that the case has been tried, and the issues found, and judgment rendered against appellant, the appeal will be dismissed. *Pritchard v. Baxter*, 108 N. C. 129, 12 S. E. 906.

Detached Rulings.—The Supreme Court will not entertain appeals from detached rulings upon some of the matters in dispute; but all matters necessary to a disposition of the case should be passed on and settled in a single trial, and the whole case brought up on appeal. *Arrington v. Arrington*, 91 N. C. 301.

Removal of Public Officer.—An appeal from proceedings in superior court to remove a public officer for willful misconduct or maladministration in office, is allowed by this section. *State v. Hamme*, 180 N. C. 684, 104 S. E. 174.

C. What Supreme Court Will Consider.

See post, this note, "Presumption on Appeal—Burden of Proof," II, E.

Record Discloses no Error.—Where the record discloses no error of law or legal inference made upon the trial, the Supreme Court on appeal cannot consider whether a miscarriage of justice has resulted in the case appealed. *Rawls v. Lupton*, 193 N. C. 428, 137 S. E. 175.

Exception Not Considered by Trial Court.—An exception which the trial court, through inadvertence, did not consider, can not be reviewed on appeal, but the case will be remanded that such exception may be passed on. *Scroggs v. Stevenson*, 100 N. C. 354, 6 S. E. 11.

Points Reviewed Must Have Been Passed on.—In case of an appeal, from the probate court to the judge, if there be a further appeal from the judge to the Supreme Court, the latter tribunal can review no point before the probate court that was not passed upon by the judge. *Rowland v. Thompson*, 64 N. C. 714.

Error Not Based on Exceptions.—An assignment of error not based on any exception in the record can not be considered. *Morse v. Freeman*, 157 N. C. 385, 72 S. E. 1056; *Thompson v. Seaboard, etc., R. Co.*, 147 N. C. 412, 61 S. E. 286.

Will Not Go Behind Judge's Finding of Fact.—A finding by the trial judge as a fact that plaintiff moved to set aside a judgment only upon ground of excusable neglect prevents supreme court from considering any other ground. *Shepherd v. Shepherd*, 180 N. C. 494, 105 S. E. 4.

Questions Decisive of Appeal.—The supreme court will pass only on the questions decisive of the appeal. *Richardson v. Southern Exp. Co.*, 151 N. C. 60, 65 S. E. 616.

Where there is not enough evidence to take case to the jury, it will not be decided whether defendant would be liable to plaintiff if allegations of complaint had been established. *Pegram v. Canton*, 179 N. C. 700, 103 S. E. 371.

Questions Which May Not Arise on New Trial.—Where a new trial must be granted for certain reasons, questions in controversy, which may not arise again in the case, need not be decided. *Supervisor & Commrs v. Jennings*, 181 N. C. 393, 107 S. E. 312; *Moore v. Chicago Bridge, etc., Works*, 183 N. C. 438, 111 S. E. 776.

Appellant Not Entitled to Favorable Decision in Any Event.—Plaintiff can not complain of technical error of the court in the exclusion of evidence offered, where the whole case shows that he could not recover in any event. *Wilcox v. McLeod*, 182 N. C. 637, 109 S. E. 875; *Rankin v. Oates*, 183 N. C. 517, 112 S. E. 32.

Defendant's Appeal.—Where, on plaintiff's appeal, it was decided that plaintiff could not maintain his action, defendants' appeal need not be considered. *Beard v. Sovereign Lodge, W. O. W.*, 184 N. C. 154, 113 S. E. 661.

Verdict Bars Right of Action.—Where jury's answer to one issue is a complete bar to plaintiff's right of action, and no error is alleged in determination of that issue, it is unnecessary to consider exceptions relating to other issues. *Lamm v. Holloman*, 176 N. C. 686, 97 S. E. 161.

Error Must Be Prejudicial.—Error to warrant reversal

must be prejudicial. *McKeel v. Holloman*, 163 N. C. 132, 79 S. E. 445; *Steeley v. Dare Lumber Co.*, 165 N. C. 27, 80 S. E. 963; *Brogden v. Gibson*, 165 N. C. 16, 80 S. E. 966.

"Error alone is not sufficient to reverse, but there must be harm to the party who excepts, by reason thereof; not that he must affirmatively show injury, but if it appears that there is none, his exception fails." *Carter v. Seaboard, etc., R. Co.*, 165 N. C. 244, 249, 81 S. E. 321.

Errors Not Affecting Result.—The finding for defendant upon one issue renders harmless any error in regard to that issue, and judgment for plaintiff is not reversible therefor. *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308; *Perry v. Insurance Co.*, 137 N. C. 402, 49 S. E. 889.

Error Must Be Material.—Mere error in the trial of a cause is not sufficient grounds for reversal but it should be made to appear that the ruling was material and prejudicial to appellant's rights. *Shaw Cotton Mills v. Acme Hosiery Mills*, 181 N. C. 33, 106 S. E. 24; *Schas v. Equitable Life Assur. Soc.*, 170 N. C. 420, 87 S. E. 222.

Trivial Errors.—Courts do not lightly grant reversals or set aside verdicts, and a motion for such to be meritorious should not be based on any merely trivial errors committed manifestly without prejudice. *Rierson v. Carolina Steel, etc., Co.*, 184 N. C. 363, 114 S. E. 467.

Technical Errors.—Verdicts and judgments will not be set aside and new trial granted for a technical or formal error, but to accomplish this result it must appear not only that the ruling was erroneous, but that it amounted to a denial of some substantial right, and this rule applies especially where the trial was a long drawn out and vigorous contest. *In re Will of Ross*, 182 N. C. 477, 109 S. E. 365.

Error Cured by Verdict or Judgment.—Exceptions to a portion of a charge on an issue which was immaterial under the special verdict, can not be sustained. *Fourth Nat. Bank v. Wilson*, 168 N. C. 557, 84 S. E. 866; *Gambier v. Kimball*, 168 N. C. 642, 85 S. E. 3.

Error Cured by Withdrawal.—An exception has no point on appeal, where the testimony objected to was stricken on the appellant's motion. *In re Will of Staub*, 172 N. C. 138, 90 S. E. 119; *Raulf v. Elizabeth City Light, etc., Co.*, 176 N. C. 691, 97 S. E. 236.

Error Not Involved on Appeal.—Any error in instructions, which were expressly confined to other issues than the one involved on appeal, is harmless. *In re Rawlings' Will*, 179 N. C. 58, 86 S. E. 794.

Opinion in Case Not Properly Before Court.—The supreme court will sometimes express its opinion on a question involved in an appeal not properly before it where the matter is of moment and the decision may serve to save the parties cost and harassment of further litigation. *Taylor v. Johnson*, 171 N. C. 84, 87 S. E. 981; *Bargain House v. Jefferson*, 180 N. C. 32, 103 S. E. 922.

On dismissal of a fragmentary appeal, the supreme court may in its discretion express its opinion upon the merits so far as it may be a guide in further proceedings in the court below. *Penn-Allen Cement Co. v. Phillips*, 182 N. C. 437, 109 S. E. 257.

Where supreme court, on premature appeal, rendered opinion on the merits, though dismissing the appeal, its opinion is authoritative on subsequent appeal. *Yates v. Dixie Fire Ins. Co.*, 176 N. C. 401, 97 S. E. 209; *North Carolina Public Service Co. v. Southern Power Co.*, 181 N. C. 356, 107 S. E. 226.

When Court Gave Wrong Reason for Judgment.—A correct judgment will not be disturbed on writ of error because the trial court gave a wrong reason therefor. *Burns v. McFarland*, 146 N. C. 382, 59 S. E. 1011; *Brown v. Elm City Lumber Co.*, 167 N. C. 9, 82 S. E. 961; *King v. McRacken*, 171 N. C. 752, 88 S. E. 226.

Errors in Case of Decisions Correct on Merits.—A judgment will be affirmed, though irregularly rendered, where the correct result was accomplished. *Rankin v. Oates*, 183 N. C. 517, 112 S. E. 32.

Moot Question.—Where the record on appeal presents only a moot question, the court will not express an opinion concerning it. *Greenleaf Johnson Lumber Co. v. Valentine*, 179 N. C. 423, 102 S. E. 774; *Waters v. Boyd*, 179 N. C. 180, 102 S. E. 196; *Kistler v. Southern R. R.*, 170 N. C. 666, 79 S. E. 676.

Proceedings Frivolous or for Delay.—Where it appears upon record that no serious assignment of error is made and that appeal is frivolous and taken solely for delay, appeal will be dismissed. *Blount v. Jones*, 175 N. C. 708, 95 S. E. 541; *Barnes v. Saleeby*, 177 N. C. 256, 98 S. E. 708.

An appeal by defendant from . . . order denying a change of venue made at a term subsequent to denial of a motion for change of venue on another ground will be dismissed as made for delay. *Ludwick v. Uwarra Min. Co.*, 171 N. C. 60, 87 S. E. 949.

Premature Appeal.—The supreme court will not entertain premature or fragmentary appeals. *Thomas v. Carteret*, 180 N. C. 109, 104 S. E. 75, 76. See *Farr v. Babcock Lumber Co.*, 182 N. C. 725, 109 S. E. 833; *Joyner v. Reflector Co.*, 176 N. C. 274, 97 S. E. 44, 45.

A premature or fragmentary appeal will not be considered. *Railway v. King*, 125 N. C. 454, 34 S. E. 541; *Farr v. Babcock Lumber Co.*, 182 N. C. 725, 109 S. E. 833.

Fragmentary appeals will not be entertained when no substantial right is put in jeopardy by such refusal. *Brown v. Nimocks*, 126 N. C. 808, 36 S. E. 278.

Where no final judgment was given, nor was there any interlocutory order or determination that put an end to the proceeding, or that could destroy or seriously impair some substantial right of the appellants, if the appeal should be delayed until the final judgment, an appeal will not lie. Fragmentary appeals are not allowed. *Leak v. Covington*, 95 N. C. 193, and cases there cited; *Martin v. Flippin*, 101 N. C. 452, 8 S. E. 345.

When Appeal Is Premature.—Where the pleadings present issues of fact that have not been tried below, an appeal is premature. *Goode v. Rogers*, 126 N. C. 62, 35 S. E. 185.

Though exceptions are noted, an appeal before a final judgment is rendered is premature, and will be dismissed. *Graded School Trustees v. Hinton*, 156 N. C. 586, 71 S. E. 1087.

Same—Effect of Dismissal.—Though an appeal is dismissed as premature, its entry is equivalent to "noting an exception." *Gray v. James*, 147 N. C. 139, 60 S. E. 906; *Alexander v. Alexander*, 120 N. C. 472, 27 S. E. 121; *Kerr v. Hicks*, 154 N. C. 265, 70 S. E. 468; *Bernard v. Shemwell*, 139 N. C. 446, 52 S. E. 64.

Fictitious Action.—The supreme court will not hear an appeal in a fictitious action. *Blake v. Askew*, 76 N. C. 325.

Abstract Propositions.—The supreme court will not entertain a cause to settle abstract propositions no longer at issue. *Reid v. Norfolk, etc., R. Co.*, 162 N. C. 355, 78 S. E. 306; *Davis v. Pierce*, 167 N. C. 135, 83 S. E. 182.

Admission Rendering Question Academic.—That in a referendum election, to amend city charter pursuant to a legislative enactment, no booth was provided, etc., becomes academic upon express admission that no person was interfered with or prevented from casting free ballot. *Taylor v. Greensboro*, 175 N. C. 423, 95 S. E. 771.

Where Appeal Becomes Irrelevant.—Where an appeal becomes irrelevant and improvident through a decision of the material questions in another appeal taken in the same case, it will be dismissed. *Page v. Page*, 167 N. C. 350, 83 S. E. 627; *Cannon v. Commissioners*, 170 N. C. 677, 87 S. E. 31.

Case Not before Appellate Court.—An agreement that other pending causes shall abide the determination in the one in question is a matter between the parties, and does not authorize the supreme court to assume jurisdiction in cases not before it, or warrant the expression of a purely speculative opinion. *Belden v. Snead*, 84 N. C. 243.

D. Estoppel to Allege Error.

In General.—A defendant can not ask that a party be brought in, and when it is so ordered object because he is an improper party. *Armfield Co. v. Saleeby*, 178 N. C. 298, 100 S. E. 611.

A party to an action can not except to an instruction which was given by the trial court at his request. *Washington Horse Exch. Co. v. Bonner*, 180 N. C. 20, 103 S. E. 907; *Bell v. Harrison*, 179 N. C. 190, 102 S. E. 200.

The defendant can not object on appeal to evidence to the same effect as that elicited by his cross-examination of the witness. *Jenkins v. Long*, 170 N. C. 269, 87 S. E. 47.

Prevailing Parties.—A plaintiff has no right to appeal or bring error from a judgment in his own favor, particularly if he is not injured by it. *Hoke v. Carter*, 34 N. C. 327; *Lenoir v. South*, 32 N. C. 237.

If a judgment is only partly in favor of a party, or is less favorable than he thinks it should be, he may appeal to correct the judgment or to obtain a more favorable verdict and judgment on a new trial; but where the judgment is entirely in his favor, so that he does not desire a new trial his appeal must be dismissed. *McCullock v. North Carolina R. Co.*, 146 N. C. 316, 59 S. E. 882.

Errors Favorable to Party Complaining.—A party can not complain of error in his favor. *Shaw v. North Carolina Public Service Corp.*, 168 N. C. 611, 84 S. E. 1010; *Gaston Farmers Warehouse Co. v. American Agr., etc., Co.*, 176 N. C. 509, 97 S. E. 472; *Nance v. King*, 178 N. C. 574, 101 S. E. 212.

A ruling in appellant's favor is not reviewable, where appellee does not complain of it. *Miller v. Curl*, 162 N. C. 1, 77 S. E. 952; *Hendon v. North Carolina R. Co.*, 127 N. C. 110, 37 S. E. 155.

Favorable Instructions.—A party can not complain of

charges favorable to himself. *Lupton v. Southern Exp. Co.*, 169 N. C. 671, 86 S. E. 614; *Belk v. Belk*, 175 N. C. 69, 94 S. E. 726; *Borden v. Carolina Power, etc., Co.*, 174 N. C. 72, 93 S. E. 442.

Acceptance of Benefits.—Where plaintiff recovered judgment on two of the causes of action alleged in the complaint, and no exception was taken to the ruling of the court, the plaintiff by the payment of the judgment was not estopped from complaining on appeal of exclusion of evidence as to other causes of action pleaded in the complaint. *Garland v. Linville Improv. Co.*, 184 N. C. 551, 115 S. E. 164.

Party Who Acquires in Judgment.—Where, after judgment sustaining a demurrer to the complaint, plaintiff did not except, but amended his complaint in accordance with the views of the trial court, he acquiesced in the judgment, and can not assign it as error. *Rice v. McAdams*, 149 N. C. 29, 62 S. E. 774.

Consent Judgment.—No appeal lies from a consent judgment. *Overman v. Lanier*, 156 N. C. 537, 72 S. E. 575; *Union Bank v. Commissioners*, 119 N. C. 214, 226, 25 S. E. 966; *Hartsoe v. Southern R. Co.*, 161 N. C. 215, 76 S. E. 684.

Order in Furtherance of Parties' Own Demand.—A party has no right of appeal from an order which does not affect a substantial right claimed in the action and which is in furtherance of his own demand. *Leak v. Covington*, 87 N. C. 501; *Hocutt v. Wilmington, etc., R. Co.*, 124 N. C. 214, 32 S. E. 681.

E. Presumptions on Appeal—Burden of Proof.

Presumption against Error.—On appeal there is a presumption against error. *Mason v. Andrews*, 193 N. C. 854, 138 S. E. 341; *Carstarphen v. Carstarphen*, 193 N. C. 541, 137 S. E. 658; *In re Will of Ross*, 182 N. C. 477, 109 S. E. 365; *Fellows v. Dowd*, 182 N. C. 776, 109 S. E. 69.

The presumptions are in favor of the correctness of the rulings of law of the superior court, with the burden upon appellant to show error. *Rawls v. Lupton*, 193 N. C. 428, 137 S. E. 175.

Prejudicial error will not be presumed. *Blevins v. Norfolk, etc., R. Co.*, 184 N. C. 324, 114 S. E. 298.

Burden on Appellant to Show Error.—The burden is on the party alleging error to show it affirmatively by the record. *Rawls v. Lupton*, 193 N. C. 428, 137 S. E. 175; *Baggett v. Lanier*, 178 N. C. 129, 100 S. E. 254; *Quelch v. Futch*, 175 N. C. 694, 94 S. E. 713.

Facts Not Shown by Record.—Where the testimony on which the trial court based its findings is not in the record, the findings must be accepted on appeal as final, as it is presumed that they are supported by the evidence. *Caldwell v. Robinson*, 179 N. C. 518, 103 S. E. 75.

In the absence of a statement of facts, it will be presumed that the trial court found such facts as would support its judgment. *Bowers v. Bryan Lumber Co.*, 152 N. C. 604, 68 S. E. 19.

Where the charge is not in the record, it will be presumed that it correctly stated the law. *Ellison v. Western Union Tel. Co.*, 163 N. C. 5, 79 S. E. 277; *Harrison v. Western Union Tel. Co.*, 163 N. C. 18, 79 S. E. 281.

Burden to Show Prejudice from Error.—The burden is on the appellant to show clearly that error was prejudicial. *Quelch v. Futch*, 175 N. C. 694, 94 S. E. 713; *Mercer v. Hitch Lumber Co.*, 173 N. C. 49, 91 S. E. 588; *Universal Oil, etc., Co. v. Burney*, 174 N. C. 382, 93 S. E. 912.

But the immateriality of an error must clearly appear to warrant the court to treat it as surplusage. *McLenan v. Chisholm*, 64 N. C. 323.

Admission of Evidence.—Evidence improperly admitted will be presumed to be prejudicial. *Johnson v. Railroad Co.*, 140 N. C. 574, 581, 53 S. E. 362; *Patton v. Porter*, 48 N. C. 539.

F. Effect of Appeal on Proceedings in Lower Court.

See section 1-294 and annotations thereunder. For undertaking to stay execution on appeal, see section 1-289.

III. APPEAL AS TO PARTICULAR SUBJECTS.

A. Costs.

As to costs on appeal, see §§ 6-23 et seq., and the notes thereto.

Costs Alone Involved.—An appeal will be dismissed where it satisfactorily appears that the question of costs is the only matter involved. *Hasty v. Funderburk*, 89 N. C. 93; *Martin v. Sloan*, 69 N. C. 128; *State v. Richmond, etc., R. Co.*, 74 N. C. 287; *Russell v. Campbell*, 112 N. C. 404, 17 S. E. 149.

Where, pending an appeal, the subject-matter of an action, or the cause of action, is destroyed, in any matter whatever, the supreme court will not go into a consideration of the abstract question which party should rightly have won, merely in order to adjudicate the costs, but the judg-

ment below as to the costs will stand. *Wikel v. Board*, 120 N. C. 451, 27 S. E. 117; *Herring v. Pugh*, 125 N. C. 437, 34 S. E. 538.

When Appeal Lies for Costs.—The exceptions to the general rule that the supreme court will not decide upon a mere question of costs are: (1) Where the very question at issue is the legality of a particular item of costs (*Elliott v. Tyson*, 117 N. C. 114, 23 S. E. 102; *Blount v. Simmons*, 120 N. C. 19, 26 S. E. 649); or (2) the liability of a prosecutor for costs in a criminal action (*State v. Byrd*, 93 N. C. 624); or, (3) taking the case below as properly decided, whether the costs of that court were adjudicated against the proper party (*State v. Horne*, 119 N. C. 853, 26 S. E. 36). *Herring v. Pugh*, 125 N. C. 437, 34 S. E. 538.

If some important substantial right be involved an exception will be made and an opinion given. *Martin v. Sloan*, 69 N. C. 128.

An order taxing defendant with the entire cost of copying the transcript on plaintiffs' appeal, it having been adjudged that unnecessary matter was sent up at the instance of plaintiff, is appealable. *Waldo v. Wilson*, 177 N. C. 461, 100 S. E. 182.

Fiduciaries.—Although the general rule is that no appeal lies from a judgment for costs only, yet there is an exception in favor of fiduciaries from the statutes which makes the decision in those cases "one affecting substantial rights." *May v. Darden*, 83 N. C. 237.

Denial of Motion to Retax Costs.—Denial of party's motion to retax costs is reviewable on questions as to what are the costs, how much is due from party taxed, or whether one or more items have been erroneously inserted in bills of costs. *Vandyke v. Aetna Life Ins. Co.*, 174 N. C. 78, 93 S. E. 444.

Rulings Founded upon Lack of Power.—A ruling of the court below on a motion to allow and apportion costs founded upon a lack of power is reviewable. *Horner v. Oxford Water, etc., Co.*, 156 N. C. 494, 72 S. E. 624; *Martin v. Bank*, 131 N. C. 121, 42 S. E. 558.

B. Demurrer.

Demurrer to Whole Cause.—An appeal lies from an order sustaining or overruling a demurrer to a whole cause of action or defense. *Shelby v. Charlotte Elect. R., etc., Co.*, 147 N. C. 537, 61 S. E. 377; *Pender v. Maliett*, 122 N. C. 163, 30 S. E. 324; *Abbott v. Hancock*, 123 N. C. 89, 31 S. E. 271.

Demurrer Sustained but No Verdict Rendered.—The supreme court will not entertain an appeal from an order sustaining a demurrer to a counterclaim where no verdict or judgment was rendered. *Teal v. Liles*, 183 N. C. 678, 111 S. E. 617; *Bazemore v. Bridges*, 105 N. C. 191, 10 S. E. 888.

Overruling Demurrer.—On an overruling of its demurrer a party made a defendant is entitled to appeal, unless the demurrer has been held frivolous. *Joyner v. Champion Fibre Co.*, 178 N. C. 634, 101 S. E. 373.

An appeal lies to the Supreme Court from an order of the court below overruling a demurrer. *Commissioners v. Magnin*, 78 N. C. 181.

An order overruling demurrer to part of answer with leave to reply is not a final order and an appeal therefrom will be dismissed. *Chambers v. Seaboard Air Line R. Co.*, 172 N. C. 555, 90 S. E. 590.

Court, on appeal having considered those grounds of demurrer to complaint which may finally dispose of action, will not review the overruling of demurrer to allegation embracing only part of cause of action, and which, if sustained, will not dismiss it. *Headman v. Board*, 177 N. C. 261, 98 S. E. 776.

Refusal to Hold Demurrer or Answer Frivolous.—The refusal to hold a demurrer or answer frivolous, and to render judgment thereon is not appealable. *Walters v. Starness*, 118 N. C. 842, 24 S. E. 713; *Morgan v. Harris*, 141 N. C. 358, 54 S. E. 381.

Withdrawal of Matter Demurred to.—An appeal cannot be taken from a refusal of the court to proceed to try the action on the demurrer, after the withdrawal of the subject-matter to which it relates and the consequent order of continuance. *Gay v. Brookshire*, 82 N. C. 409, 411.

C. Granting or Denying New Trial.

In General.—An appeal from an order granting or refusing a new trial, only lies from some order or judgment involving a matter of law or legal inference; that is, the order or judgment must be one that involves the question, whether or not a party to the action is entitled to a new trial as of right, and as a matter of law. *Braid v. Lukins*, 95 N. C. 123.

An application for a new trial, except for error of law in its conduct, is addressed solely to the discretion of the presiding judge, whose decision is not reviewable on appeal.

Carson v. Dellinger, 90 N. C. 226; Thomas v. Myers, 87 N. C. 31.

The Supreme Court has jurisdiction to review, upon appeal, the decision of the court below, granting, or refusing to grant, a new trial, where a matter of law or legal inference is involved. Johnson v. Bell, 74 N. C. 355.

Setting Aside Verdict and Granting New Trial.—The determination of a motion to set aside the verdict and grant a new trial is a matter within the sound discretion of the trial judge, and is not reviewable, except where there has been an abuse of discretion. Coats v. Norris, 180 N. C. 77, 104 S. E. 71; Harrill v. Seaboard Air Line R. Co., 181 N. C. 315, 107 S. E. 136.

An appeal from an order setting aside the award of damages as excessive is premature. Billings v. Observer, 150 N. C. 540, 64 S. E. 435. Rogerson v. Lumber Co., 136 N. C. 266, 48 S. E. 647.

Order setting aside verdict, as matter of law is appealable. Tuthill v. Norfolk, etc., R. Co., 174 N. C. 77, 93 S. E. 446.

Grant of Partial New Trial.—An appeal from refusal of motion for judgment upon verdict and a grant of partial new trial, which has been granted as matter of law and not of discretion is not fragmentary and premature. Grove v. Baker, 174 N. C. 745, 94 S. E. 528.

Contents of Record when New Trial Granted or Refused.—To give parties the benefit of the provision of this section allowing an appeal from an order granting or refusing a new trial, the presiding judge should put upon the record the matters inducing the order, so that the appellate court can see whether the order presents a matter of law which is a subject of review, or matter of discretion which is not. Carson v. Dellinger, 90 N. C. 226.

D. Injunction.

Order Refusing Injunction.—A plaintiff can appeal from a decision of a judge at chambers refusing an injunction. First National Bank v. Jenkins, 64 N. C. 719.

Interlocutory Injunction.—An appeal from an injunction pendente lite against counting and certifying the result of a special election granted on the ground that women, infants, and nonresidents, though freeholders, were not counted in determining the necessary number of the signers, is not subject to dismissal as fragmentary and premature. Gill v. Board, 160 N. C. 176, 76 S. E. 203.

Order Continuing Injunction.—Overruling a motion to dismiss is not ordinarily an appealable order, as no substantial right of the litigant is thereby affected; but, when an injunction has been issued, an order continuing the same affects a substantial right, and an appeal may be taken from an order entered on a motion to dismiss. Warlick v. Reynolds & Co., 151 N. C. 606, 66 S. E. 657.

Finding of Fact Reviewable in Injunction Cases.—While the Supreme Court may review findings of fact in an action for injunction, it will not, where no special findings are set out in the case, reverse what were apparently the judge's findings necessary to sustain his judgment unless such findings are clearly wrong. Davenport v. Board, 133 N. C. 570, 112 S. E. 246.

Overruling Demurrer to Complaint for Injunction.—An appeal taken from a judgment overruling demurrers to the complaint and allowing defendants to answer for the purposes of a motion to restrain one of defendants from suing plaintiff in the federal court, remains in the court below, and he must obtain relief there and not by appeal. Worth v. Knickerbocker Trust Co., 152 N. C. 242, 67 S. E. 590.

Seeking to Restrain Act Already Committed.—The correctness of a ruling dissolving a restraining order will not be considered on appeal, when it is made to appear that the act sought to be restrained has been committed. Kilpatrick v. Harvey, 170 N. C. 668, 86 S. E. 596; Moore v. Cooper Monument Co., 166 N. C. 211, 81 S. E. 170; Wallace v. North Wilkesboro, 151 N. C. 614, 66 S. E. 657; Galloway v. Board, 184 N. C. 245, 114 S. E. 165.

E. Nonsuit.

In General.—If, as a matter of law, plaintiff was not entitled to a verdict, he could not take a voluntary nonsuit, and have the decision reviewed, as the setting aside of a verdict for such reason is not reviewable; being controlled by the sound discretion of the court. McKinney v. Patterson, 174 N. C. 483, 93 S. E. 967.

No appeal lies to set aside a voluntary nonsuit. White v. Harris, 166 N. C. 227, 81 S. E. 687; Gilbert v. Waccamaw Shingle Co., 167 N. C. 286, 83 S. E. 337.

An order sustaining a motion for nonsuit as to one cause of action and overruling it as to other causes of action is not appealable by defendant. Farr v. Babcock Lumber Co., 182 N. C. 725, 109 S. E. 833.

An appeal will lie from the judgment of the superior court

reversing the clerk's order permitting the plaintiff to take a voluntary nonsuit. Caldwell v. Caldwell, 189 N. C. 805, 128 S. E. 329; Goldsboro v. Holmes, 183 N. C. 203, 111 S. E. 1.

An appeal can not be taken from a nonsuit to test an adverse ruling of the judge, leaving issuable matter presented and undetermined. Gilbert v. Waccamaw Shingle Co., 167 N. C. 286, 83 S. E. 337.

Where Court Intimates Opinion.—Where the court on the trial intimates an opinion that plaintiff can not maintain his action, he may take a judgment of nonsuit and appeal; and the appeal will not be dismissed on the ground that plaintiff voluntarily took a nonsuit. Morton v. Blades Lumber Co., 144 N. C. 31, 56 S. E. 551; Wharton v. Commissioners, 82 N. C. 12; Hedrick v. Pratt, 94 N. C. 101, 103; Midgett v. Manufacturing Co., 140 N. C. 361, 364, 53 S. E. 178.

A plaintiff may, in deference to an intimation from the court that he can not maintain his action, submit to a nonsuit and have the questions of law reviewed upon appeal. Hedrick v. Pratt, 94 N. C. 101; Warner v. Western, etc., R. Co., 94 N. C. 250.

Where court intimated that he would charge jury that certain deed did not convey land described in complaint, which was vital to plaintiff's recovery, plaintiff had the right to submit to a nonsuit and appeal. Quelch v. Futch, 172 N. C. 316, 90 S. E. 239.

But where the court intimated that the complaint stated a cause of action for rescission of a contract, but not for reformation; whereupon plaintiff suffered nonsuit, and appealed. Held that, as the intimation by the court was open to reconsideration, an appeal was error. Davis v. Ely, 100 N. C. 283, 5 S. E. 239. See also, Hayes v. Railroad, 140 N. C. 131, 52 S. E. 416; Tiddy v. Harris, 101 N. C. 589, 8 S. E. 227.

Construction of Evidence in Nonsuit Cases.—Where the Supreme Court passes on a motion to nonsuit, the plaintiff is entitled to have the evidence considered as true and construed most favorably for him, and he must also have the benefit of every inference that may reasonably be drawn therefrom. Munick v. Durham, 181 N. C. 188, 106 S. E. 665; Allen v. Gardner, 182 N. C. 425, 109 S. E. 260.

The court is not limited to a consideration of the evidence of defendant, but must examine all the evidence. Ridge v. Norfolk Southern R. Co., 167 N. C. 510, 83 S. E. 762.

F. Order of Reference and Referee's Report.

As to reference generally, see §§ 1-188 et seq. and the notes thereto.

Motion to Refer.—Where the answer in a proceeding to compel an accounting did not constitute a valid plea in bar, the denial of a motion to refer on the ground that such answer did not set up a valid plea in bar affected a substantial right, and was appealable. Jones v. Sugg, 136 N. C. 143, 48 S. E. 575.

Appointing Referee.—An appeal from a judgment adjudging that plaintiff recover nothing on account of certain items, and referring all matters in controversy as to other items to a referee to take and state an account, is premature. International Waste Co. v. Bloomfield Mfg. Co., 168 N. C. 92, 83 S. E. 609.

An appeal will not lie from an interlocutory judgment adjudging plaintiff entitled to recover damages and appointing a referee to hear evidence as to the amount. Richardson v. Southern Exp. Co., 151 N. C. 60, 65 S. E. 616.

Relating to Reference of Cause.—Where the court ordered a reference to take an account of partnership receipts and expenses, an appeal from such order before judgment on the report thereon is premature. Leroy v. Saliba, 182 N. C. 757, 108 S. E. 303.

Plea in Bar.—When there is a plea in bar, a party to the action may except to an order of reference made by the trial judge and appeal at once, or wait until there is a final judgment and then appeal. Pritchett v. Greensboro Supply Co., 153 N. C. 344, 69 S. E. 249.

An appeal lies from a judgment sustaining or overruling a plea in bar, and no reference should be ordered until the plea is finally determined. Royster v. Wright, 118 N. C. 152, 24 S. E. 746; Jones v. Beaman, 117 N. C. 259, 23 S. E. 248. Where a matter pleaded in bar is an estoppel was discussed in Rogers v. Ratcliffe, 48 N. C. 225.

Order of Reference Made before Disposition of Plea in Bar.—An order of reference made before disposition of a plea in bar of an action is one from which an appeal can be immediately taken. Jones v. Wooten, 137 N. C. 421, 49 S. E. 915; Austin v. Stewart, 126 N. C. 525, 36 S. E. 37; Duckworth v. Duckworth, 144 N. C. 620, 57 S. E. 396.

Submitting Issue on Plea in Bar.—An action on the part of the court submitting to the jury an issue on a plea in bar before ordering a reference decides no substantial right,

and is not the subject of an appeal. *Sloan v. McMahon*, 85 N. C. 296.

Setting Aside Judgment.—The supreme court can review the ruling of the judge below on a motion to set aside a judgment. *Clegg v. New York White Soapstone Co.*, 67 N. C. 302.

Order to Show Cause.—An order of a judge for the defendant to appear at a subsequent time and show cause why a receiver should not be appointed is not such an order as can be appealed from. *Gray v. Gaither*, 71 N. C. 55.

Exceptions Must Be Passed on by Judge.—The Supreme Court will not review exceptions of law to a referee's report, unless they are passed upon by the judge. *John Church Co. v. Dawson*, 157 N. C. 566, 72 S. E. 1009.

Exceptions Overruled.—Where some of the exceptions to a referee's report were overruled, and the case retained by the court to try the other issues raised by the pleadings, it was held that this was an interlocutory order and not appealable. *Leak v. Covington*, 95 N. C. 193.

Exception to Partial Report of Referee.—A judgment passing on exceptions to a referee's report, distributing part of the fund, and sending the case back for further report as to certain claims, is not final so as to support an appeal. *Pritchard v. Panacea Spring Co.*, 151 N. C. 249, 65 S. E. 968; *Smith v. Miller*, 155 N. C. 242, 71 S. E. 353.

Sustaining Exceptions.—An appeal from an order sustaining an exception to a referee's report, and recommitting the case to the referee to take further evidence, is premature. *Wallace Bros. v. Douglas*, 105 N. C. 42, 10 S. E. 1043; *Grant v. Reese*, 90 N. C. 3.

Where the rulings on exceptions to a referee's report and an order of recommitment do not affect the substantial rights of either party, no appeal will lie. *Lutz v. Cline*, 89 N. C. 186; *Jones v. Call*, 89 N. C. 188.

Approval of Findings Supported by Evidence.—Where a referee's finding of fact is supported by evidence and approved by the judge on exception to the report, it will not be reviewed by the Supreme Court. *Marler-Dalton-Gilmer Co. v. Golden*, 172 N. C. 823, 90 S. E. 909; *Lewis v. May*, 173 N. C. 100, 91 S. E. 691.

Necessity for Further Action.—Where an order based on the report of a receiver as to claims establishes the priority of a claim, but continues the proceeding for further consideration of the report except as to matters "adjudicated herein," an appeal from such order as to the claim mentioned is premature. *Corporation Comm. v. Farmers Bank, etc.*, Co., 183 N. C. 170, 110 S. E. 839. See *Beck & Co. v. Bank*, 157 N. C. 105, 72 S. E. 632.

Setting Aside Referee's Report and Ordering a Trial by Jury.—An order setting aside a report of a referee, and ordering a jury trial, is appealable, as it affects the substantial rights of the parties. *Stevenson v. Felton*, 99 N. C. 58, 5 S. E. 399.

Report Set Aside for Newly Discovered Evidence.—The discretion of a Superior Court Judge to set aside a report of a referee, on the ground of newly discovered testimony, can not be reviewed in the Supreme Court. *Vest v. Cooper*, 68 N. C. 131, *Braid v. Lukins*, 95 N. C. 123.

G. Appeals as to Miscellaneous Subject.

Editor's Note.—In the foregoing note most of the salient rules controlling the subject of appeals have been discussed. The cases illustrating these principles are legion in number and in a work of this nature it is impossible to give all the citations. Many of the subjects are treated under the particular sections of the General Statutes relating to them; for example under section 1-176 the appealability of a decision as to continuances is treated.

§ 1-278. Interlocutory orders reviewed on appeal from judgment.—Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment. (Rev., s. 589; Code, s. 562; C. C. P., s. 313; C. S. 640.)

As to appeals from interlocutory orders, see section 1-277. As to effect of appeal from interlocutory orders on proceeding in lower court, see section 1-277—analysis line "Effect of Appeal on Proceedings in Lower Court."

Applied in *Patterson v. Durham Hosiery Mills*, 214 N. C. 806, 200 S. E. 906.

§ 1-279. When appeal taken.—The appeal must be taken from a judgment rendered out of term within ten days after notice thereof, and from a judgment rendered in term within ten days after its rendition, unless the record shows an appeal

taken at the trial, which is sufficient, but execution shall not be suspended until the giving by the appellant of the undertakings hereinafter required. (Rev., s. 590; Code, s. 549; 1889, c. 161; C. C. P., s. 300; C. S. 641.)

Intimation of Intent to Appeal.—Under this section it is not necessary that there should be at the time of the trial an intimation by the dissatisfied party that he desires to appeal, it being a sufficient indication of his desire at the time of the trial if he fulfills the requirements of the statute within the time prescribed by law. *Russell v. Hearne*, 113 N. C. 361, 18 S. E. 711.

Appeal by Serving Notice.—A party to an action may appeal by serving notice thereof within ten days after the adjournment of court. *Houston v. Lumber Co.*, 136 N. C. 328, 48 S. E. 738.

Computation of Time.—Within ten days notice thereof, means ten days after notice of the rendition thereof. *Fisher v. Fisher*, 164 N. C. 105, 109, 80 S. E. 395. See *DeLafield v. Lewis Mercer Constr. Co.*, 115 N. C. 21, 20 S. E. 167.

Cited in *Brantley v. Jordan*, 90 N. C. 25; *Jones v. Asheville*, 114 N. C. 620, 19 S. E. 631; *Seaboard Air Line R. Co. v. Brunswick County*, 198 N. C. 549, 152 S. E. 627.

§ 1-280. Entry and notice of appeal.—Within the time prescribed in § 1-279, the appellant shall cause his appeal to be entered by the clerk on the judgment docket, and notice thereof to be given to the adverse party unless the record shows an appeal taken or prayed at the trial, which is sufficient. (Rev., s. 591; Code, s. 550; C. C. P., s. 301; C. S. 642.)

Former Rule.—Under the statute in force before the adoption of the Code, a notice of appeal filed in the clerk's office was sufficient to charge the appellee with notice, he having failed to designate a person to receive notices in the case. *Brantley v. Jordan*, 90 N. C. 25.

Appellee Entitled to Notice.—In all cases the appellee is entitled to notice of an appeal as provided by statute. *Marion v. Tilley*, 119 N. C. 473, 474, 26 S. E. 26.

Effect of Failure to Give Notice.—Where the notice of appeal is not given in the prescribed time, the appeal will be dismissed. *Campbell v. Allison*, 63 N. C. 568; *Bryan v. Hubbs*, 69 N. C. 423; *Applewhite v. Fort*, 85 N. C. 596; *Brantley v. Jordan*, 90 N. C. 25, 26.

No Presumption of Notice.—Notice must be given in case of appeal; it will not be presumed, merely because the appeal was taken during a term of the court from which it was taken. *Campbell v. Allison*, 63 N. C. 568.

Record Must Show Notice.—The appeal will be dismissed, where the record does not show service of notice of appeal. *Howell v. Jones*, 109 N. C. 102, 13 S. E. 889.

When Record Need Not Show Notice.—The record need not show service of notice of appeal, where the findings of fact and the judgment thereon, constituting the case on appeal, state that appeal was taken. *Delozier v. Bird*, 123 N. C. 689, 31 S. E. 834.

Filing of Bond as Notice.—The filing of an appeal bond and its approval in open court afford notice to the appellee of the appeal. *Capheart v. Biggs & Co.*, 90 N. C. 373.

Codefendant.—Where one appeals from so much of a judgment as is in favor of his codefendant, he must give such codefendant notice of his appeal. *Rose v. Baker*, 99 N. C. 323, 5 S. E. 919.

When Party Resides Out of State.—A writ of error may be granted upon notice to the attorney at law who obtained the judgment when the party resides out of the state. *Leake v. Murchie*, 1 N. C. 258.

Notice Held to Be in Proper Time.—Where appellant's counsel, five days after the adjournment of court, mails notice of appeal to the sheriff at the county seat, so as to leave ample time for the latter to serve it on appellee's counsel, laches is not imputable to appellant because the sheriff does not take it from the post office till after the ten days allowed for service. *Arrington v. Arrington*, 114 N. C. 113, 19 S. E. 105.

Notice to a Co-party.—Notice must be given to the real party in interest, notice to a co-party, not a real party in interest, is insufficient. *Barden v. Pugh*, 129 N. C. 60, 39 S. E. 724.

Waiver of Notice.—Agreements of counsel, to waive notice of appeal, to be recognized in the appellate court, must appear upon the record. *Wade v. New Bern*, 72 N. C. 498.

Disagreement as to Waiver of Notice.—Notice of appeal will not be considered when filed after the statutory time, where one counsel swears that consent to an extension was

given, and the other denies such statement. *Pipkin v. McArtan*, 122 N. C. 194, 29 S. E. 334.

A statement in the case on appeal, that notice of appeal was waived, can not be contradicted for the first time on argument in the appellate court. *Atkinson v. Asheville St. R. Co.*, 113 N. C. 581, 18 S. E. 254.

Notice as a Waiver of Objection.—The fact that a notice of appeal served after the expiration of the term at which judgment was rendered, stated only that the appeal was "on account of the erroneous rulings of the judge on motion for a new trial," did not constitute a waiver of an exception to the judgment. *Ferrell v. Thompson*, 107 N. C. 420, 12 S. E. 109.

Entry of Appeal Not Absolutely Necessary.—That an appeal was not entered of record as required was not material, where the fact of the appeal having been taken was not denied, and notice had been served. *Barden v. Stickney*, 130 N. C. 62, 40 S. E. 842.

The record need not show that an appeal was duly entered, when it affirmatively appears from the case on appeal, which bears date within the time within which an appeal could be taken, that the appeal was taken, and notice thereof waived. *Atkinson v. Asheville St. R. Co.*, 113 N. C. 581, 18 S. E. 254.

Effect of Failure to Enter.—Failure of the clerk to enter the appeal is not ground for dismissal. *Simmons v. Allison*, 119 N. C. 556, 26 S. E. 171. *Allison v. Whittier*, 101 N. C. 490, 8 S. E. 338. But see *Moore v. Vanderburg*, 90 N. C. 10 and *Bryan v. Hubbs*, 69 N. C. 423.

Cited in *Seaboard Air Line R. Co. v. Brunswick County*, 198 N. C. 549, 152 S. E. 627.

§ 1-281. Appeals from judgments not in term time.—When appeals are taken from judgments of the clerk or judge not made in term time, the clerk is authorized to make any and all necessary orders for the perfecting of such appeals. (Ex. Sess. 1921, c. 92, s. 19a; C. S. 642(a).)

§ 1-282. Case on appeal; statement, service, and return.—The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the request of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within fifteen days from the entry of the appeal taken; within ten days after such service the respondent shall return the copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case. (Rev., s. 591; Code, s. 550; C. C. P., s. 301; 1905, c. 448; 1921, c. 97; C. S. 643.)

I. Editor's Note.

II. General Considerations—Counter-Case.

III. Requisites of Case on Appeal—Exceptions.

IV. Appeal from Instructions.

V. Service of Case and Counter-Case.

A. Necessity and Mode of Service.

B. Time of Service.

1. In General.

2. Computation of Time.

3. Effect of Failure to Serve in Time.

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Cross References.

As to necessity and requisites of exceptions, see § 1-206 and annotations thereunder. As to settlement of case on appeal, see § 1-283. As to transcript, see § 1-284.

I. EDITOR'S NOTE.

Prior to the adoption of the Reformed Procedure in 1863, all cases on appeal were settled by the judges, whose prac-

tice was to perform this duty before leaving the court at which the case was tried. It was thought that their duty in this respect might be lightened by changing the statute, so as to permit counsel to agree upon settlement of the case on appeal and to call in the aid of the judge only where counsel failed to agree. The time originally allowed for this purpose was five days for the appellant to serve case on appeal and three days for the appellee to serve a counter case. This was lengthened from time to time until by this section it is now fifteen days to serve case on appeal and ten days to serve counter case, except where the parties consent to extend the time. The result has not been beneficial. There has been an increasing tendency to postpone and put off the settlement of cases on appeal by lengthening the time, and the legislature in 1921, Act 1921, ch. 97 added the portion of the section which permitted the judges to extend the time even when counsel do not agree. But the Supreme Court has never changed its rule, of which it is sole judge, that in every instance when the case on appeal is not docketed in the time required, at the term, the appellant must docket the record proper and ask for a certiorari. Whenever this is not done the case not docketed until the next succeeding term will be dismissed. See *State v. Johnson*, 183 N. C. 730, 110 S. E. 782.

This section and Supreme Court Rule 19(3) require the assignment of errors relied on to be tabulated and inserted in the case on appeal or record, preferably at the end.

Formerly when two or more appeals were taken in the same case separate transcripts were required but the Supreme Court Rules adopted in 1926 changed this. Now only one transcript is required but it shall contain separate statements of the cases on appeal. See Supreme Court Rule 19 (2).

II. GENERAL CONSIDERATIONS—COUNTER-CASE.

Strict Observance Required.—The statutory requirements as to making up cases on appeal to the Supreme Court and docketing them are conditions precedent which must be complied with, or the appeal will be dismissed. *Lindsey v. Knights of Honor*, 172 N. C. 818, 90 S. E. 1013.

Record Imports Verity.—The record on appeal imports verity and the Supreme Court is bound thereby. *State v. Brown*, 207 N. C. 156, 176 S. E. 260; *Abernethy v. Burns*, 210 N. C. 636, 188 S. E. 97; *State v. Stiwwinter*, 211 N. C. 278, 189 S. E. 868.

Distinction between Record and Case on Appeal.—The record on appeal consists of the "record proper," i. e., the summons, pleadings, and judgment and the case on appeal which is the exceptions taken and such of the evidence, charge, prayers, and other matters occurring at the trial as are necessary to present the matters excepted to. *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53.

The trial judge is without authority to change appellant's case on appeal, though regarded by him as erroneous, when that case has become the case on appeal. *State v. Dee*, 214 N. C. 509, 512, 199 S. E. 730.

Certiorari to Correct Record Refused.—Under this section, if the case on appeal as served by the appellant be approved by the respondent or appellee, it becomes the case and a part of the record on appeal, and in connection with the record, may alone be considered in determining the rights of the parties interested in the appeal, and the state's motion for certiorari for correction of the record may not be allowed. *State v. Dee*, 214 N. C. 509, 512, 199 S. E. 730.

No Presumption of Regularity.—An appeal being now the act of the appellant alone, no presumption of regularity arises because of its having been taken during a term of the Court from which it comes. *Campbell v. Allison*, 63 N. C. 568.

Necessity for Taking Appeal.—An appeal will be dismissed if the record fails to show affirmatively that an appeal was taken. *Randleman Mfg. Co. v. Simmons*, 97 N. C. 89, 1 S. E. 923; *Howell v. Jones*, 109 N. C. 102, 13 S. E. 889.

When Grouping of Exceptions Unnecessary.—Where the exceptions are separately stated and numbered, but are not brought together at the end of the case, a motion by the appellee to affirm will be denied, if the error intended to be assigned is plainly apparent. *Hicks v. Kenan*, 139 N. C. 337, 51 S. E. 941.

Duty When Case on Appeal not Settled.—Where an appeal is taken, the record should be transmitted to the supreme court and the appeal docketed, whether the case is settled or not, so that all proper action can at once be taken to perfect it for hearing. *Owens v. Phelps*, 91 N. C. 253.

When Case on Appeal Dispensed with.—A "case on appeal" can be dispensed with only when the errors are presented by the record proper. Errors occurring during the trial can be presented only by case on appeal. *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53.

Same—Order Entered at Chambers.—On appeal from an order of court entered by the judge at chambers no case is necessary. *North Carolina Bessemer Co. v. Piedmont Hdw. Co.*, 171 N. C. 728, 88 S. E. 867.

Same—Appeal from Judgment.—An appeal from a judgment alone is maintainable without any case on appeal. *American Soda Fountain Co. v. Schell*, 160 N. C. 529, 76 S. E. 631.

Same—Case Tried on Agreed Statement of Facts.—On appeal from the judgment in a case tried on an agreed statement of facts, no separate "case" is necessary. *Chamblee v. Baker*, 95 N. C. 98; *Davenport v. Leary*, 95 N. C. 203.

Same—Granting or Refusing Injunction.—On appeal from an order granting or refusing an injunction, no case on appeal is necessary, as the pleadings and affidavits constitute the record proper. *Wallace v. Salisbury*, 147 N. C. 58, 60 S. E. 713; *Hamilton v. Icard*, 112 N. C. 589, 17 S. E. 519.

Same—Order of Reference.—It is not necessary to make a statement of the case on appeal from an order of reference, where the appeal itself and the exception noted in the record sufficiently raises the question of the validity of the order. *Duckworth v. Duckworth*, 144 N. C. 620, 57 S. E. 396; *Cape Fear, etc., R. Co. v. Stewart*, 132 N. C. 248, 43 S. E. 638.

On appeal to the Supreme Court from the action of the superior court judge in passing upon the report of a referee, the facts found and the conclusions of law by the lower court must be regularly stated with the exceptions thereto in the record of the case on appeal. *Wilson v. Beasley*, 192 N. C. 231, 134 S. E. 485.

Appeal from Construction of Will.—On an appeal involving the construction of a will in which it is essential, for a determination, to know whether or not a certain person died without issue, a statement in the case made up by counsel, that "plaintiffs claim that he died without issue," is not sufficient. *Arnold v. Hardy*, 131 N. C. 113, 42 S. E. 553.

Appellee May Prepare Counter Case.—It is no objection to the objections filed by the appellee to the appellant's case that it is in the form of a counter-case, and not of specific objections. *State v. Gooch*, 94 N. C. 982.

Where the exceptions to appellant's case on appeal are served within the required time, appellant can not complain that the statement of his case on appeal was not returned to him, but must have the case on appeal settled. *Stevens v. Smathers*, 123 N. C. 497, 31 S. E. 721.

Appellee May Make Specific Objections.—Upon the appellant's serving of his case on appeal, the appellee may file specific objections. *Holloman v. Holloman*, 172 N. C. 835, 90 S. E. 10.

Request for Substitution.—Where the appellee makes his objections to the appellant's statement of the case on appeal by asking that a statement prepared by him be substituted, it is a sufficient compliance with the section. *Horne v. Smith*, 105 N. C. 322, 11 S. E. 373.

Counter Case May Become Case on Appeal.—Where appellee returned a counter case as a statement of his exceptions to appellant's case, and such counter case was adopted by the court, it constitutes the "case on appeal." *Harris v. Carrington*, 115 N. C. 187, 20 S. E. 452; *McDaniel v. Scurluck*, 115 N. C. 295, 20 S. E. 451.

Effect of Failure to Serve Counter Case.—Where the appellant's case on appeal is served in time, and no exceptions are taken thereto, nor any counter case served, it stands as the case on appeal. *State v. Carlton*, 107 N. C. 956, 12 S. E. 44; *Abernethy v. Burns*, 210 N. C. 636, 188 S. E. 97.

Counter Case Not Considered.—When counter case of the state has not been served or service acknowledged thereon or filed for more than a month after the state has accepted service of case of defendants, in an appeal by the defendant the counter case will not be considered. *State v. Freeman*, 127 N. C. 544, 37 S. E. 206.

Clerk Authorized to Complete Case.—A mere outline of the case incorporating instructions to the clerk to fill in certain portions of the evidence stenographically taken and transcribed, the charge of the court, etc., is not sufficient compliance with this section, it being the duty of the appellant to make out his case and fully perfect it before serving it upon the appellee, and no part of the duty of the clerk to do so. *Sloan v. Equitable Lf. Assur. Soc.*, 169 N. C. 257, 85 S. E. 216.

No Return of Appellant's Case.—If the appellant's case on appeal is not returned by appellee in ten days with objections, it shall be deemed approved. *Barber v. Justice*, 138 N. C. 20, 50 S. E. 445; *Coral Gables v. Ayres*, 208 N. C. 426, 181 S. E. 263.

Conflict between Statements of Judge and Counsel.—Where the case on appeal prepared by counsel conflicts with a statement of a fact found by the judge, the latter must control. *Blair v. Coakley*, 136 N. C. 405, 48 S. E. 804.

Service of Counter Case.—See post, this note, "Service of Case and Counter Case," V.

Cited in *Carter v. Bryant*, 199 N. C. 704, 155 S. E. 602; *McMahan v. Southern R. Co.*, 203 N. C. 805, 167 S. E. 225; *State v. Barnett*, 218 N. C. 454, 11 S. E. (2d) 303.

III. REQUISITES OF CASE ON APPEAL—EXCEPTIONS.

See Supreme Court Rule 19(1) and (3), 21.

Concise Statement of Case.—One of the essential requisites of an appeal to the Supreme Court is that a "concise statement of the case" shall be made and filed with the Clerk, to be transmitted to this Court as part of the record, for the want of which the judgment will be affirmed unless there is error apparent in the record, in which case it would be the duty of the Judge to arrest the judgment or award a venire de novo. *State v. Thompson*, 83 N. C. 595, 597.

The appellant is required, in stating his case on appeal, to make a concise statement of the entire case necessary to present the assignments of error relied upon, and set out the necessary and pertinent evidence in narrative form, together with the charge of the court necessary to be considered; and when this is not done the appellee may move before the trial judge to dismiss the appeal. *Thompson v. Williams*, 175 N. C. 696, 95 S. E. 100.

Only enough of the record should be included to show that the case is properly constituted; and this, with the summons, pleadings, verdict and judgment and the case on appeal, setting out so much of the proceedings at the trial as will throw light upon the exceptions taken, is all that is necessary. *Sigman v. Southern R. Co.*, 135 N. C. 181, 47 S. E. 420.

And the statement should only contain matter explanatory of exceptions taken. *Surratt v. Crawford*, 87 N. C. 372.

Although case on appeal was not a concise statement of case it was held that the appeal would be allowed as a dismissal would have been a denial of justice. *Messick v. Hickory*, 211 N. C. 531, 191 S. E. 43.

Narrowed to Matters of Substance and Moment.—When counsel come to prepare the statement of case on appeal, both record and briefs should be narrowed to matters of substance and moment. *State v. Davis*, 203 N. C. 13, 34, 164 S. E. 737.

Testimony Should Be in Narrative Form.—Testimony reported by the stenographer should be sent up on appeal in narrative form, instead of in questions and answers. *Overman v. Lanier*, 157 N. C. 544, 73 S. E. 192. The sending up of the stenographer's notes is a failure to prepare "a concise statement of the case." *Skipper v. Kingsdale Lbr. Co.*, 158 N. C. 322, 74 S. E. 342.

This rule must be observed, though the case on appeal is settled by agreement of counsel. *Boggs v. Cullowhee Min., etc., Co.*, (N. C.) 76 S. E. 717.

When the stenographer's full notes of the evidence taken on the trial of a case on appeal are transcribed in the record, immediately followed by an unsigned entry, repudiated by appellee's counsel, that "the record, stenographer's notes, the judgment, and the exception to the nonsuit shall constitute the case on appeal to the Supreme Court," the case on appeal is not properly constituted. *Brewer v. Mineola Mfg. Co.*, 161 N. C. 211, 76 S. E. 237.

This requirement can not be waived by the parties. *First Nat. Bank v. Fries*, 162 N. C. 516, 77 S. E. 678.

Appellant must make concise statement necessary to present assignments of error, and should set out all pertinent evidence in narrative form, with the charge, and the judge must correct the narrative. *Thompson v. Williams*, 175 N. C. 696, 95 S. E. 100.

For penalty for violation of this rule see *Fisher v. Montvale Lumber Co.*, 162 N. C. 531, 78 S. E. 286.

Evidence to Present Questions of Law.—The appeal should only state so much of the evidence as raised a question of law at the trial, and then the opinion prayed and given thereon, with simplicity and precision. *Green v. Collins*, 28 N. C. 139; *Durham v. Richmond, etc., R. Co.*, 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1.

Sufficiency of Evidence Brought up.—Only so much of the evidence as is needed to show the questions raised by the exceptions should be made a part of the case on appeal. *Durham v. Richmond, etc., R. Co.*, 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1; *Surratt v. Crawford*, 87 N. C. 372.

Evidence Unnecessary.—Where the findings of the court below are admitted by both parties to be true, it is unnecessary that the case contain the evidence. *Taylor v. Taylor*, 108 N. C. 69, 12 S. E. 836.

Necessity of Setting Forth Evidence Excluded.—A judgment will not be reversed because of the exclusion of evidence, where such evidence is not set out in the record. *Elm City Lumber Co. v. Childerhose*, 167 N. C. 34, 83 S. E. 22.

The exclusion of evidence can not be reviewed where the record does not disclose what the witness would have testi-

fied to, or what was proposed to be proven. In *re Will of Smith*, 163 N. C. 464, 79 S. E. 977.

Omission of Matter Not Pertinent to Issue.—Matter not pertinent to the points raised should be omitted. *Hilton v. McDowell*, 87 N. C. 364; *Sampson v. Atlantic*, etc., R. Co., 70 N. C. 404; *Surratt v. Crawford*, 87 N. C. 372.

Exhibits Should Accompany Case.—Where deeds, records etc., are referred to, and make a necessary part of the case transmitted to the supreme court, it is the duty of the appellant to see that they accompany the case. *Waugh v. Andrews*, 24 N. C. 75.

Surveys.—In an action for the diversion of surface water by the construction of a railway, surveys of the locality, made under order of the court, must accompany the record on appeal, or showing be made by appellant that he was prevented by the court or the opposite party from so doing. *Whichard v. Wilmington*, etc., R. Co., 117 N. C. 614, 23 S. E. 437.

Exceptions—Case Must Show Exceptions.—If the case on appeal does not show that exceptions were taken to the ruling of the court below, the appellate court will not review the same on appeal. *Power v. Wilmington*, 177 N. C. 361, 99 S. E. 102. See § 1-206 and the notes thereto.

Questions can not be considered on appeal which are not presented by motion or exception in the case on appeal. *Trimmer v. Gorman*, 129 N. C. 161, 39 S. E. 804.

The presentation of matters for the first time in the assignments of error on appeal is too late. *Bloxham v. Stave*, etc., Corp., 172 N. C. 37, 89 S. E. 1013.

Assignments of error must be based upon exceptions duly taken in apt time during the trial and preserved as required by this section and the rules of the supreme court. *State v. Moore*, 222 N. C. 356, 357, 23 S. E. (2d) 31.

Same—Broadside Exceptions.—As a general rule a broadside exception to the judge's charge is inadmissible. In *favorem vitæ*, in a capital case, the attorney-general will readily assent to the assertion of proper exceptions, *nunc pro tunc*. *State v. Kinsauls*, 126 N. C. 1095, 36 S. E. 31.

An "unpointed broadside" exception to the court's instructions to the jury will not be considered. Exception to the charge of the court in general terms, not sufficiently specific to call the attention of the court to the particular point claimed to be erroneous, cannot be considered by an appellate court. *Lambert v. Caronna*, 206 N. C. 616, 621, 175 S. E. 303; *Arnold v. State Bank*, etc., Co., 218 N. C. 433, 11 S. E. (2d) 307.

What Need Not Be Set Out.—The Court will not consider any exceptions not set out in the "case on appeal," other than exception to the jurisdiction or because complaint does not state a cause of action, or to the sufficiency of an indictment. *Walker v. Scott*, 106 N. C. 56, 11 S. E. 364; *Taylor v. Plummer*, 105 N. C. 56, 11 S. E. 266.

The object of the "case on appeal" is to set forth the alleged errors appealed from, and, if it sufficiently discloses these, the appeal will not be dismissed, though the record does not show formal exceptions. *Singer Mfg. Co. v. Barrett*, 95 N. C. 36.

Same—Must Point out Error.—The Supreme Court will not consider exceptions, unless they point out in terms, or by reasonable implication, the error intended to be reviewed. So where the record showed that the appellant excepted generally to the entire charge, the exception was not considered. *Clements v. Rogers*, 95 N. C. 247.

Same—Judge May Pass on Exceptions.—When exceptions are filed the recitals contained therein are not conclusive, but it is open to the appellee to controvert them, and to have the Judge pass upon their correctness in "settling the case on appeal." *Walker v. Scott*, 106 N. C. 56, 11 S. E. 364.

The object of an assignment of error is not to create a new exception, which was not taken at the hearing, but to select from those which were taken such as the appellant then relies on after he has given more deliberate consideration to them than may have been possible during the progress of the trial or hearing. *State v. Bittings*, 206 N. C. 798, 801, 175 S. E. 299.

What Assignments of Error Considered.—The Supreme Court will not consider any assignments of error except those appearing in the record proper and in the case settled on appeal. *Rodman v. Harvey*, 102 N. C. 1, 8 S. E. 838; *State v. Campbell*, 184 N. C. 765, 114 S. E. 927.

The assignment of error must be based upon the exception duly taken at the time it was due in the orderly course of procedure, and should coincide with and not be more extensive than the exception itself. In other words, no assignment of error will be entertained which has not for its basis an exception taken in apt time. *State v. Bittings*, 206 N. C. 798, 801, 175 S. E. 299.

Requirements Mandatory.—The requirements that assignments of error must be based upon exceptions duly taken during the trial to be considered on appeal are statutory,

as well as mandatory under numerous decisions of the court. The supreme court on appeal exercises only appellate jurisdiction, and it is necessary that the errors alleged should be presented as the law directs. *State v. Bittings*, 206 N. C. 798, 801, 175 S. E. 299.

When Assignment of Error Unnecessary.—No assignment of error is necessary where there is but a single exception and this is presented by the record, nor where the case is heard below on an agreed statement of facts, nor when the exception to the judgment is the only one taken and the appeal itself is an exception thereto. *North Carolina Bessemer Co. v. Piedmont Hdw. Co.*, 171 N. C. 723, 83 S. E. 867; *Walace v. Salisbury*, 147 N. C. 58, 60 S. E. 713.

No Error Assigned.—Where no errors were assigned in the case, and none appeared in the record proper, but it appeared that counsel for both sides had agreed that all the papers in the cause should constitute the case on appeal, the case was remanded, in order that error might be properly assigned. *Holly v. Holly*, 94 N. C. 639.

Affirmance.—On appeal from conviction of a capital crime, the "case on appeal" was served on the solicitor and then filed in the supreme court without agreement of the solicitor or settlement by the judge, before expiration of the time allowed for filing exceptions or countercharge under this and § 1-283, and before the lapse of sufficient time for it to have been deemed approved under this section. Assignments of error were attached to the "case on appeal" but were not supported by exceptions. The supreme court considered the "case on appeal" as "deemed approved" at the time of hearing the appeal, and considered the assignments of error, since the life of defendant is involved. Held: The assignments of error being without merit, and the case appearing to have been tried in strict conformity to the law appertaining to the evidence and the charge, the attorney-general's motion to affirm is allowed. *State v. Parnell*, 214 N. C. 467, 199 S. E. 601.

IV. APPEALS FROM INSTRUCTIONS.

Exception to Instruction.—If there is an error in the instruction given, an exception thereto is valid if entered within ten days after adjournment for the term. *Williams v. Harris*, 137 N. C. 460, 49 S. E. 954. And the appellant is entitled to have his exceptions to the charge included in his statement of the case on appeal. *Paul v. Burton*, 180 N. C. 45, 104 S. E. 37.

The requests to charge being "separately stated and numbered" an exception for giving them is equally specific and not "broadside" since it gives the judge and the appellee specific information of each instruction excepted to, what evidence should be sent up to throw light thereon, and what propositions of law the appellee should be prepared to discuss on appeal. *Coley v. Statesville*, 121 N. C. 301, 316, 28 S. E. 482.

Exception Taken after Trial.—Exceptions to the judge's charge taken for the first time after the trial, but set out in the appellant's case on appeal duly tendered or served, are aptly taken under the provisions of our statute, this section and § 1-206, par. 2. *Cherry v. Atlantic Coast Line R. Co.*, 186 N. C. 263, 119 S. E. 361.

Error in Instructions Must Be Assigned.—The refusal to give instructions, if asked in writing and in apt time, like the charge as given, is deemed excepted to but none the less it is the duty of the appellant to assign such as error in making up his statement of case on appeal and if this is not done, the exception is deemed waived. *Taylor v. Plummer*, 105 N. C. 56, 11 S. E. 266.

Assignment of Error Must Be Fully Presented.—Exceptions to the charge of the court must specifically relate to the complete portions upon which the appellant bases his exceptions, with each separately numbered in relation to the distinct principle upon which exception is taken, and it must be made to appear in some appropriate and recognized way that the point is fully presented by the exception, or it will be ineffectual as being a broadside exception. *Rawls v. Lupton*, 193 N. C. 423, 137 S. E. 175.

Necessity of Case on Appeal.—The instructions cannot be reviewed in the absence of a case on appeal. *Oak Hall Clothing Co. v. Bagley*, 147 N. C. 37, 60 S. E. 648.

Where the case settled does not state that the judge charged as recited in the exceptions, the matter is not before the court on appeal. *Hart v. Cannon*, 133 N. C. 10, 45 S. E. 351.

Instruction Not in Record.—Where the instructions are not in the record, the supreme court cannot judicially determine whether they were as stated in exceptions thereto. *Todd v. Mackie*, 160 N. C. 352, 76 S. E. 245; *Jenkins v. Carson*, 173 N. C. 725, 92 S. E. 328.

Where the settled "case" does not show the giving of instructions requested by a party, exceptions to the giving

of such instructions will not be considered. *McCord v. Southern R. Co.*, 130 N. C. 491, 41 S. E. 886.

A statement in the case on appeal that appellant's requests to charge were given "in substance" is insufficient to show what was given, and hence, where the requests are in conflict with the general charge, a new trial will be granted. *Wilson v. Winston-Salem R., etc., Co.*, 120 N. C. 531, 27 S. E. 46.

Requests for Instructions.—Where the record contains no prayers for instructions, assignments of error in refusing to give defendant's prayers will not be considered. *Davis v. Seaboard, etc., Railway*, 132 N. C. 291, 43 S. E. 840. As to requests for instructions generally, see section 1-181 and notes thereto.

Setting Out of Instructions.—Appellant is entitled to have the judge set out what he charged in lieu of the prayer, that the appellate court might see that it "fully" covered the prayer asked. *Bennett v. Telegraph Co.*, 128 N. C. 103, 38 S. E. 294.

Application of Instruction to Evidence.—An objection to a certain instruction on the ground that there was no evidence to sustain it cannot be reviewed unless all of the evidence is contained in the record. *Atwell v. Shook*, 133 N. C. 387, 45 S. E. 777.

V. SERVICE OF CASE AND COUNTERCASE.

As to counter case in general, see ante, this note "General Consideration—Counter case" II.

A. Necessity and Mode of Service.

Necessity for Serving.—A case on appeal signed only by appellant's counsel, and not showing that it had been served on appellee or his counsel, cannot be considered. *Walker v. Scott*, 102 N. C. 487, 9 S. E. 488; *Peebles v. Brasswell*, 107 N. C. 68, 12 S. E. 44; *Howell v. Jones*, 109 N. C. 102, 13 S. E. 889.

Necessity for Serving Codefendant.—Where one appeals from so much of the judgment as is in favor of his codefendant, he must serve on such codefendant his statement of the case. *Rose v. Baker*, 99 N. C. 323, 5 S. E. 919.

Each Appellee Must Be Served.—Where the interests of different appellees are not identical, and they are represented by different counsel, only as to such appellees as have been served with the appellant's "case" in due time, will the appeal be considered. *Shober v. Wheeler*, 119 N. C. 261, 26 S. E. 26.

Service of Original Instead of Copy.—This section is complied with by a service of the original instead of a copy. *McDaniel v. Scurlock*, 115 N. C. 295, 20 S. E. 451.

Necessity for Service by Officer.—A case on appeal must be served by an officer, unless appellee's attorneys accept service otherwise. *Cummings v. Hoffman*, 113 N. C. 267, 18 S. E. 170.

Service by Counsel.—A service of the case on appeal by counsel is a nullity unless accepted by appellee. *Roberts v. Partridge*, 118 N. C. 355, 24 S. E. 15.

Service by Improper Officer.—The case on appeal cannot be considered when it was served by an improper officer during, and by a proper officer after the time limited for service thereof. *McNeill v. Raleigh, etc., R. Co.*, 117 N. C. 642, 23 S. E. 268, and cases there cited.

Service by Constable.—A constable is not such an officer as can serve on appellee appellant's case on appeal. *Forte v. Boone*, 114 N. C. 176, 19 S. E. 632.

Service by Mail.—Where service of case on appeal is made by mail, on the last day on which service could have been made, instead of by officer, the failure to promptly return the case does not estop respondent to deny the legality of the service, as, if the case had been promptly returned, it would have been too late for legal service. *Smith v. Smith*, 119 N. C. 311, 25 S. E. 877.

Service Where Parties Make Common Cause.—When it appears of record that several cases on appeal to the supreme court were consolidated by consent and duly served in that form, and the parties made common cause in its prosecution, a motion to dismiss made by one of the appellees on the ground that appellant had not served the case on him individually will be denied. *Roper v. National Fire Ins. Co.*, 161 N. C. 151, 76 S. E. 869.

Service by Officer May Be Waived.—The improper service of a case on appeal is cured by the appellee's acceptance of the case and filing exceptions thereto, without objection to the mode of service, *Asheville Woodworking Co. v. Southwick*, 119 N. C. 611, 26 S. E. 253. See also *Willis v. Atlantic, etc., R. Co.*, 119 N. C. 718, 25 S. E. 790.

Effect of Failure to Serve Counter case or Exceptions.—Where the appellant prepares his statement of case on appeal and service thereof is accepted by the appellee within the time allowed by the judge, and is certified by the clerk as a part of the record, in the absence of service of

exceptions or counter case it is deemed approved by the appellee, and will stand in the Supreme Court as the case on appeal. *Texas Co. v. Beaufort Oil & Fuel Co.*, 199 N. C. 492, 154 S. E. 829.

Settlement as Curing Failure to Serve Legally.—Failure to serve appellant's case on appeal legally on appellee cannot be cured by the judge's subsequent settlement of the case. *Forte v. Boone*, 114 N. C. 176, 19 S. E. 632.

Order Allowing Time for Serving Counter case Does Not Affect Rule Prescribing Time of Appeal.—An order of the superior court enlarging the time for serving statement of case on appeal and exceptions thereto or counter case, does not affect the rules of court prescribing the term to which the appeal must be taken and the time within which the appeal must be docketed. *State v. Moore*, 210 N. C. 459, 187 S. E. 586.

B. Time of Service.

1. In General.

Strict Compliance Required.—The statutory requirements as to making up cases on appeal must be strictly complied with except when there is an agreement to extend the time, in which case the proceeding must be taken within the time so extended. *Kerr v. Drake*, 128 N. C. 764, 108 S. E. 393.

Waiver of Time.—A motion to dismiss an appeal, because case was not served within time, was fully met by statements in supplemental transcript that appellees accepted service of notice of appeal, and agreed to extend time for serving case, and accepted service of case within extended time. *Sanford v. Junior Order of United American Mechanics*, 176 N. C. 443, 97 S. E. 384.

Where the appellant in apt time submitted the case on appeal to the appellee's counsel, who declined to sign it, but suggested that he would prepare another and get the judge to settle the case, and agreed that no advantage would be taken of the delay, but failed to prepare a case, the appellee waived the code-time and cannot take advantage of his own negligence. *Mott v. Ramsay*, 91 N. C. 249.

Where there is a controversy as to whether the exceptions were served within the time fixed or allowed, or service within such time waived, it is the duty of the trial court to find the facts, hear motions and enter appropriate orders thereon. *State v. Ray*, 206 N. C. 736, 737, 175 S. E. 109.

Same—Promise to Accept Service.—Where appellant's counsel telegraphs, within the time appellee is required to serve his counter case, that he will, on his return home, accept service, he is estopped to claim that the counter case was not served in time. *Watkins v. Raleigh, etc., R. Co.*, 116 N. C. 961, 21 S. E. 409.

Same—Acceptance of Service Conditionally.—In accepting service of a case on appeal, after time limited by statute, it was competent for counsel to add to the indorsement the date, and that he did not waive the objection that the case was not presented in time. *Barrus v. Wilmington, etc., R. Co.*, 121 N. C. 504, 28 S. E. 187.

Same—Necessity for Waiver Appearing of Record.—Within certain limits the parties may by consent waive the time of complying with the rules for perfecting an appeal, and the supreme court will respect such agreements between counsel if they appear upon the record. If such agreement does not so appear, the supreme court will adhere to and enforce the rules prescribed in the Code. *Wade v. New Bern*, 72 N. C. 498.

Failure of Sheriff to Take Copy from Post Office.—Where appellee mailed his counter case, with fees, to the sheriff of the county in which appellant's counsel resided, and the sheriff, in due course of mail, should have received it in time to serve, but did not take it from the post office till too late, there was no laches on appellee's part. *Arrington v. Arrington*, 114 N. C. 115, 19 S. E. 145. See also *Arrington v. Arrington*, 114 N. C. 113, 19 S. E. 105.

Agreement Misunderstood.—When counsel misunderstand terms of written agreement as to time of settling case on appeal, and there is reasonable ground for being misled thereby, and the case, as served by appellant, is lost, the case will be remanded with leave to parties to serve case and counter case de novo. *Mitchell v. Haggard*, 105 N. C. 173, 10 S. E. 856.

Illness of Counsel.—Illness of counsel is no excuse for failing to settle the case on appeal in time, where such counsel is not the only counsel for appellant, and, even if he is, it is the duty of the party to obtain other counsel. *Tripp v. Somersett*, 182 N. C. 767, 108 S. E. 633.

Negligence of Counsel.—That appellant's failure to serve his case in time was the result of negligence of his counsel was no excuse; his remedy being an action against the counsel for damages sustained. *Cozart v. Assurance Co.*, 142 N. C. 522, 55 S. E. 411.

Stenographer Too Busy to Transcribe Note.—When coun-

sel for appellee consented to an extension of time in which to serve case on appeal, the Supreme Court will not relieve appellant, on an excuse that stenographer was busy and could not transcribe her notes within that time, since the stenographer's notes are not the supreme authority as to what occurred at the trial. *Rogers v. Asheville*, 182 N. C. 596, 109 S. E. 865.

Illness of Reporter.—The preparation and settlement of cases on appeal belong to the parties and to the judge of the superior court under this and the following section, and while a stenographic report of the trial may be of great assistance, the stenographic notes of the reporter are not conclusive, and the inability of the reporter to transcribe his notes due to continued illness does not excuse defendant from making out and serving his statement of case on appeal within the time allowed. *State v. Wescott*, 220 N. C. 439, 17 S. E. (2d) 507.

Transcript of Evidence Not Obtained in Time.—It was negligence on part of defendant appellants, not to have had any arrangement with clerk of court to let them have copy of transcript of testimony when filed, and not to have requested him to notify them when transcript was filed, and to have failed to inquire of him thereafter. *Murphy v. Carolina Elect. Co.*, 174 N. C. 782, 93 S. E. 456.

No Certiorari Until Time is Up.—Where the parties to an action have agreed to an extension of time for service of case and counterclaim, that will prevent its being docketed in the time prescribed by Supreme Court Rule 5, and consequently no case has been yet settled by the trial judge, appellant's motion in the Supreme Court for a writ of certiorari will be denied. *Waller v. Dudley*, 193 N. C. 354, 137 S. E. 149.

When Appellant Guilty of Laches.—A motion for a certiorari will not be considered in the Supreme Court when it appears that appellant has been guilty of laches in respect to serving his case. *Peoples Bank, etc., Co. v. Parks*, 191 N. C. 263, 131 S. E. 637.

2. Computation of Time.

The term ends when the judge leaves, and the time within which a case on appeal can be served must be computed from the day he leaves. *Delafield v. Lewis Mercer Constr. Co.*, 115 N. C. 21, 20 S. E. 167.

The time for service of a case on appeal must be computed from the day of the actual adjournment of the court, and not from the last day to which a term of court could be extended. *Rosenthal v. Roberson*, 114 N. C. 594, 19 S. E. 667.

An agreement "plaintiff may have thirty days to file his case on appeal from adjournment of court, and defendant thirty days thereafter," entitled defendant to thirty days after service of appellant's case. *Mitchell v. Haggard*, 105 N. C. 173, 10 S. E. 856.

When Appeal Taken after Adjournment.—When an appeal is taken at the trial, the case on appeal must be served within ten days from adjournment of the court, but the appellant has the right to reserve taking his appeal and enter it within ten days after adjournment of the court, in which case he has ten days after entry of the appeal to serve the case on appeal. The same applies to appeal from judgment taken out of term. *Mecke v. Valletown Mineral Co.*, 122 N. C. 790, 29 S. E. 781.

When Judgment Becomes Final.—Until the term expires there is no final determination of the cause, so that the case on appeal need only be filed within fifteen days after the end of the term at which judgment is rendered. *Turrentine v. Richmond, etc., R. Co.*, 92 N. C. 642.

Time Computed from Judgment.—Where, on judgment rendered during the term, it was agreed that entry should be made thereafter, the appellant being allowed 90 days to complete the appeal, he was entitled to 90 days from the judgment, and not from the judgment entry. *Caldwell Land, etc., Co. v. Chester*, 170 N. C. 399, 87 S. E. 111.

Judgment Rendered during Vacation.—Where judgment is rendered during vacation by a consent of parties, the time in which to appeal is counted from the filing of the judgment in the clerk's office. *Caldwell Land, etc., Co. v. Chester*, 170 N. C. 399, 87 S. E. 111; *Fisher v. Fisher*, 164 N. C. 105, 80 S. E. 395.

First and Last Day Counted.—Under an agreement extending the time as to the service of the case or counterclaim, in computing the time, the first day allowed in the time extended is counted as well as the last, allowing the full number of days agreed upon. *Board v. Orr*, 161 N. C. 218, 76 S. E. 693.

3. Effect of Failure to Serve in Time.

Appeal Dismissed.—Where the statement was not made or served in time, the appeal will be dismissed. *Twitty v. Logan*, 85 N. C. 592.

Service a Nullity.—Service after the expiration of the time granted is a nullity. *Hardee v. Timberlake*, 159 N. C. 552, 75 S. E. 799; *Rosenthal v. Roberson*, 114 N. C. 594, 19 S. E. 667. See *Barber v. Justice*, 138 N. C. 20, 50 S. E. 445.

Service by the solicitor of exceptions and objections after the expiration of ten days renders the service of such exceptions and objections nugatory in the absence of an extension of time or waiver, and defendant's statement becomes the statement of case on appeal. *State v. Ray*, 206 N. C. 736, 715 S. E. 109.

Same—Trial Court May Strike Case.—Where a dispute arises in a trial court as to whether there has been service on appellee of appellant's case on appeal within the statutory time, and the court finds that there has not, it may direct appellant's case to be stricken from the files. *Hicks v. Westbrook*, 121 N. C. 131, 28 S. E. 188.

Agreement to Waive Time.—Where appellant fails to prepare a statement of the case in time, the judgment should be affirmed, unless the record shows a written agreement of counsel waiving the lapse of time, or it appears that the alleged agreement is oral and disputed, and such waiver shown by the affidavit of the appellee. *Twitty v. Logan*, 85 N. C. 592.

The statute has fixed the time for the settlement of cases on appeal, and this should be strictly observed, unless there is a mutual agreement which is either in writing or admitted. *Tripp v. Somerset*, 182 N. C. 767, 108 S. E. 633. As to sufficiency of waiver, see *Graham v. Edwards*, 114 N. C. 228, 19 S. E. 150.

Oral Agreement to Extend Time.—A parol agreement to waive an oral agreement made between the parties as to the time of serving a counter case to an appeal will not be considered by the Supreme Court if denied. *Board v. Orr*, 161 N. C. 218, 76 S. E. 693.

Where the appellant alleges in an affidavit, or duly verified statement, that there was an agreement for an extension of time and this affidavit is not disputed by the oath of the appellee, a certiorari, upon proper application, will issue if the court deems it proper. *Justice v. Boone Fork Lumber Co.*, 181 N. C. 390, 107 S. E. 232.

When Exceptions Returned Alone.—An appellant cannot complain that his original statement of case on appeal was not returned to him within ten days, when in fact the appellee's exceptions thereto were duly filed with him within the ten days. *McDaniel v. Scurlock*, 115 N. C. 295, 20 S. E. 451.

Failure to Serve Objections in Time.—An appellant has a right to disregard an objection to the case on appeal, not served on him within ten days. *Cummings v. Hoffman*, 113 N. C. 267, 18 S. E. 170.

VI. RELIEF GRANTED.

When no Case on Appeal.—An appeal will not be dismissed simply because there is no case on appeal before the Supreme Court, but the judgment will be affirmed, unless error appears on the face of the record proper. *Hamilton v. Icard*, 112 N. C. 589, 17 S. E. 519; *Cummings v. Hoffman*, 113 N. C. 267, 18 S. E. 170.

When Judgment Affirmed.—Where there is no case on appeal, and no error on the face of the record proper, the judgment will be affirmed. *Table Rock Lumber Co. v. Branch*, 150 N. C. 110, 63 S. E. 171; *State v. Foster*, 110 N. C. 510, 14 S. E. 966.

Where there is no "case agreed" on appeal and none "settled" by the judge, and no error upon the face of the record proper, the judgment must be affirmed. *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53.

The absence of a case on appeal does not entitle appellee to a dismissal. *Hicks v. Westbrook*, 121 N. C. 131, 28 S. E. 188. *Rosenthal v. Roberson*, 114 N. C. 594, 19 S. E. 667.

See *Royster v. Burwell*, 90 N. C. 24, where it was held that an appeal will be dismissed where there is no statement of the case and no bond with proper justification filed within the time allowed by law.

Case Affirmed in Absence of Exception.—In the absence of exceptions in the record as a basis for the assignments of error, appellee's motion to affirm must be allowed. *Boyer v. Jarrell*, 180 N. C. 479, 105 S. E. 9.

In Absence of Motion to Affirm.—Where a case on appeal is required, but none is filed, respondents' remedy is by motion to affirm, and not to dismiss the appeal, since, if the motion to affirm is not made, it is the duty of the court of its own motion to inspect the record proper for errors appearing on the face thereof. *Wallace v. Salisbury*, 147 N. C. 58, 60 S. E. 713; *Hicks v. Westbrook*, 121 N. C. 131, 28 S. E. 188; *Barrus v. Wilmington, etc., R. Co.*, 121 N. C. 504, 28 S. E. 187.

Appeal Not Dismissed for Absence of Statement of Facts.

—An appeal will not be dismissed for failure to furnish a statement of facts signed by the judge or by both counsel, as required by rule, where everything necessary to a consideration of the case appears from the record. *Clark v. Peebles*, 120 N. C. 31, 26 S. E. 924.

Oath of Counsel.—A motion to dismiss an appeal because it does not appear that a case had been made and served as prescribed by the code will not be granted when an opposing counsel states on oath, in this court, that all the requirements of the code were complied with in the court below. *Kirk v. Barnhart*, 74 N. C. 653.

Appeal a Nullity.—Where a case on appeal is signed only by appellant's counsel, and it does not appear that it was served on appellee, it must be treated as a nullity; but the appeal will not be dismissed on that ground, since there may be errors on the face of the record proper. *Walker v. Scott*, 102 N. C. 487, 9 S. E. 488; *Howell v. Jones*, 109 N. C. 102, 13 S. E. 889.

When New Trial Granted.—Where appellant has been guilty of no laches or fraud and the trial judge certifies, after an appeal, that his notes of the trial have been lost, that he is unwilling to trust to memory to set forth the evidence in detail, as should be done in fairness to both parties, and requests that a new trial be ordered, a new trial will be granted. *McGowan v. Harris*, 120 N. C. 139, 26 S. E. 690. *Ritter v. Grimm*, 114 N. C. 373, 19 S. E. 239.

A new trial will be granted, when, from no default of the appellant, no assignment of errors accompanies the record, and the omission can not be supplied by reason of the retirement from office of the presiding judge. *Nichols v. Dunning*, 91 N. C. 4, 6.

But a new trial will not be granted where it appears that the papers constituting the record of a case in the court below were carried off by the judge and mislaid, and the judge has gone out of office. The appellant should first make an effort to have the papers returned to the court below, for until the filing of a transcript of the record here, the application for a new trial cannot be entertained. *Nichols v. Dunning*, 91 N. C. 4.

Certiorari to Bring up Case for Review Denied.—*State v. Angel*, 194 N. C. 715, 140 S. E. 727; *Womble v. Moncure Mill, etc., Co.*, 194 N. C. 577, 140 S. E. 230.

§ 1-283. Settlement of case on appeal.—If the case on appeal is returned by the respondent with objections as prescribed, the appellant shall immediately request the judge to fix a time and place for settling the case before him. If the appellant delays longer than fifteen days after the respondent serves his counter case, or exceptions, to request the judge to settle the case on appeal, and delays for such period to mail the case and counter case or exceptions to the judge, then the exceptions filed by the respondent shall be allowed, or the counter case served by him shall constitute the case on appeal; but the time may be extended by agreement.

The judge shall forthwith notify the attorneys of the parties to appear before him for that purpose at a certain time and place, within the judicial district, which time shall not be more than twenty days from the receipt of the request. At the time and place stated, the judge shall settle and sign the case, and deliver a copy to the attorney of each party, or, if the attorneys are not present, file a copy in the office of the clerk of the court. If the judge has left the district before the notice of disagreement, he may settle the case without returning to the district.

In settling the case, the written instructions signed by the judge, and the written request for instructions signed by the counsel, and the written exceptions, are deemed conclusive as to what these instructions, requests, and exceptions were. If a copy of the case settled was delivered to the appellant, he shall within five days thereafter file it with the clerk, and if he fails to do so, the respondent may file his copy.

The judge shall settle the case on appeal within sixty days after the termination of a special

term or after the courts of the districts have ended, and if the judge in the meantime has gone out of office, he shall settle the case as if he were still in office. Any judge failing to comply with this section is liable to a penalty of five hundred dollars, for the use of any person who sues for it. (Rev., s. 591; Code, s. 550; C. C. P., s. 301; 1889, c. 161; 1907, c. 312; C. S. 644.)

Cross Reference.—As to contents of case on appeal, see § 1-282 and annotations thereunder.

Intent of Section.—Appellants are too often prone to forget that appellees have rights. The intent of this section is to safeguard them. *Board v. Chapman*, 151 N. C. 327, 66 S. E. 221.

When Settlement Necessary.—It is necessary that the trial judge settle the case on appeal when the parties do not agree. *Queen v. Snowbird Valley R. Co.*, 161 N. C. 217, 76 S. E. 682.

Appellant Must Request Notice.—An appellant cannot complain that he was not notified of the time and place of settlement of the case when he did not request to be so notified. *State v. Williams*, 109 N. C. 846, 13 S. E. 880; *Walker v. Scott*, 106 N. C. 56, 11 S. E. 364.

When Appellant Fails to Request Settlement.—Upon the service of a counter case on appeal it is the duty of the appellant to immediately request the judge to appoint a time and place to settle the case, and upon his failure to do so the case of the appellee becomes the case on appeal. *Burlingham v. Canady*, 156 N. C. 177, 72 S. E. 324; *Booth v. Ratcliffe*, 107 N. C. 6, 12 S. E. 112.

Same—Case May Be Remanded.—Where an appellant, after exceptions filed to his "case on appeal," fails to apply to the judge to settle the case, this court may consider the appellant's "statement" and the appellee's exceptions as the case on appeal, or in case of any complications, the case will be remanded in order that the judge may settle the case. *McDaniel v. Scurlock*, 115 N. C. 295, 20 S. E. 451.

Same—Judgment Affirmed.—A judgment will be affirmed, on error being assigned on the record, where the statement has been returned with objections, and appellant has failed to apply to the court below to settle the case. *Kirkman v. Dixon*, 66 N. C. 406.

Where appellant, after a failure to agree on the case on appeal, does not "immediately" request the trial judge to settle the same, but delays for several weeks, and in the meantime the judge dies, and no excuse is shown for the appellant's laches, the judgment below will be affirmed. *Heath v. Lancaster*, 116 N. C. 69, 20 S. E. 962.

Same—Excuse Shown.—Where appellant's failure to send appellee's counter case to the judge to settle was caused by his bona fide contention that it was served too late, the case will be remanded for settlement. *Arrington v. Arrington*, 114 N. C. 115, 19 S. E. 145.

Time Limitation.—The effect of the time limitation in this section is to substitute "fifteen days" in lieu of "immediately" as the time in which appellant, after receipt of respondent's exceptions or counter case, can make his request of the judge. *Chozon Confections v. Johnson*, 220 N. C. 432, 434, 17 S. E. (2d) 505, citing *Chauncey v. Chauncey*, 153 N. C. 12, 68 S. E. 906.

When Statements Not Submitted to Judge.—When counsel disagree as to the statement of the case on appeal, and instead of submitting the two variant statements to the judge, they are both sent to the Supreme Court, that court will not dismiss the appeal, but will presume that the appellant agrees to the amendments contained in the case of the appellee, which will be taken as the case on appeal. *Owens v. Phelps*, 92 N. C. 231.

Appellant's Duty When Case Settled.—It is required of the appellant to redraft the case on appeal when the judge in settling it has modified his case by adopting portions of the exceptions or counter case of the appellee, etc., and have the judge to sign the case so redrafted and incorporate it in the record. *Waller v. Dudley*, 193 N. C. 749, 138 S. E. 128.

Same—When Appellant Fails in This Regard.—Where, after the court had adopted "appellant's case as amended by appellee's exceptions," appellant submitted the record in that shape without redrafting and incorporating the amendments and having the same signed by the trial judge there was no "case settled." *Gaither v. Carpenter*, 143 N. C. 240, 55 S. E. 625; *State v. King*, 119 N. C. 910, 26 S. E. 261.

Duty of Judge.—If counsel agree, the judge has nothing to do with making up the "case on appeal"; but when they differ, he sets a time and place for settling the case,

after notice that counsel of both parties may appear before him. He then "settles" the case. In so doing he does not merely adjust the differences between the two cases, but may disregard both cases, and should do so, if he finds that the facts of the trial were different. *Slocumb v. Construction Co.*, 142 N. C. 349, 55 S. E. 196; *State v. Gooch*, 94 N. C. 982.

Upon exception, when the appellant has set out the evidence in narrative form, it is the duty of the trial judge to supervise and correct it, where correction is required. *Thompson v. Williams*, 175 N. C. 696, 95 S. E. 100.

Where appellant serves his statement of case on appeal and appellee returns same with objections and appellant requests the judge to fix a time and place for settling the case, all within the time allowed by the court or by statute, it is the duty of the judge to settle the case on appeal and the judge may not strike appellant's statement of case on appeal from the record upon appellee's motion on the ground that appellant's statement of case was insufficient to meet the requirements of this section and the rules of practice of the court. *Choen Confections v. Johnson*, 220 N. C. 432, 17 S. E. (2d) 505.

Judge's Action Conclusive.—The action of the Judge in settling the case on appeal, when the parties cannot agree, is final, and cannot be reviewed by the Supreme Court. *State v. Gooch*, 94 N. C. 982.

Where the trial judge has certified that the parties have been unable to agree upon the case on appeal, and that he has settled the case on appeal, it is binding upon the Supreme Court and it will not be dismissed on the ground that no case on appeal had been stated and settled. *Thompson v. Williams*, 175 N. C. 696, 95 S. E. 100.

Statement in Record Considered True.—Any statement in the record is taken as true, and the Supreme Court will act on it, until it shall be modified in some proper way by the judge who made it. *McCoy v. Lassiter*, 94 N. C. 131.

Conflict between Record and Case.—Where the "case" on appeal prepared by counsel conflicts with a record statement of a fact found by the judge, the latter must control. *Blair v. Coakley*, 136 N. C. 405, 48 S. E. 804.

Making and Filing Agreed Case.—The case stated by the judge, having been filed with the transcript of the record, and treated by the parties and the court as a part of it, though not so certified, can not be displaced by another paper, purporting to be a case agreed on, signed by the counsel. *Walton v. McKesson*, 101 N. C. 428, 7 S. E. 566.

Supplemental Statement.—The appellate court will not consider assignments of error filed as a "supplemental statement," which the court below declined to make a part of the case settled for appeal. *Rodman v. Harvey*, 102 N. C. 1, 8 S. E. 888.

Case Not Signed by Judge.—Where the case as settled by the trial judge is not signed by him, and there is no agreed statement of the case, the record contains no proper statement of the case on appeal. *Ingram v. Yadkin River Power Co.*, 181 N. C. 359, 107 S. E. 209.

Right of Judge to Make Stenographer's Notes Part of Record.—While a stenographer's notes are material for the consultation of the trial judge in making up the case, he may not send them up as a part of the record of his own motion. *Green v. Dunn*, 162 N. C. 340, 78 S. E. 211.

Failure of Judge to Settle Case.—Where appellant's timely request, for settlement of his case on appeal is denied, he is entitled to certiorari to procure settlement. *Chauncey v. Chauncey*, 153 N. C. 12, 68 S. E. 906.

The remedy for a refusal to settle a case on appeal, when judgment has been entered by consent, is a motion to set aside the judgment. *King v. Taylor*, 188 N. C. 450, 124 S. E. 751.

Where the trial court at the time and place fixed for settlement of case on appeal fails to settle the case and erroneously grants appellee's motion that appellant's case should be struck from the record, the supreme court will grant appellant's motion for certiorari to the end that the judge, after notice, may settle the case as provided in this section, since appellant's failure to perfect the appeal is due to error of the court and not to any fault or neglect of appellant or his agent. *Choen Confections v. Johnson*, 220 N. C. 432, 434, 17 S. E. (2d) 505.

Failure to Send up Correct Statement.—The failure of a judge to send up a correct statement is not sufficient ground for mandamus, but the mistake may be corrected by certiorari. *McDaniel v. King*, 89 N. C. 29.

Prerequisites for Application for Certiorari.—If for any reason the judge fails to settle the case on appeal, in time for the appeal to be docketed in the supreme court, the appellant must bring up the record in its imperfect state and have it docketed, and then move for the proper orders to get the case on appeal before the Supreme Court. *Way-*

nesville Transp. Co. v. Waynesville Lbr. Co., 168 N. C. 60, 84 S. E. 54.

Laches of Appellant.—An application for a certiorari to a judge to settle a case on appeal, made seven months after the appeal was taken, will be denied in the absence of an affidavit to negative laches. *Peebles v. Braswell*, 107 N. C. 68, 12 S. E. 44. A delay of two months, without excuse, is too long. *Stroud v. Western, U. Tel. Co.*, 133 N. C. 253, 45 S. E. 592.

Delay of Appellee's Counsel.—Where appellant in apt time submitted the case on appeal to appellee, who declined to sign it, but suggested that he would prepare another, and get the judge to settle the case, and promised that no advantage should be taken, it was held, that he was bound by his promise. *Mott v. Ramsay*, 91 N. C. 249.

Authority of Judge after Settling Case.—Having "settled" the case, at the time and place of which counsel had notice, the judge is functus officio unless, by agreement of parties, or by certiorari from supreme court upon proof of his readiness to make correction, opportunity is given him of correcting such errors as have occurred by inadvertence, mistake, misapprehension and the like. *Slocumb v. Construction Co.*, 142 N. C. 349, 55 S. E. 196.

Authority of Supreme Court Over Settled Case.—The supreme court has no power to amend a settled case. *Walker v. Scott*, 102 N. C. 487, 9 S. E. 488.

Authority of Clerk.—The clerk has no authority to find the fact of such delay as provided by this section, nor to settle the case on appeal upon the admission of such fact, it being required that the case on appeal in such instance be settled in an approved manner by agreement of counsel or by the judge. *Weaver v. Hampton*, 206 N. C. 741, 175 S. E. 110.

Modification of Settled Case.—Where it is made to appear to the supreme court by proper evidence, that the Judge has made an omission or mistake in the settlement of the case on appeal, the Supreme Court will give him an opportunity to correct it, or to modify an inaccurate statement. *State v. Gooch*, 94 N. C. 982.

It is only when the trial judge has settled the case on appeal, in the exercise of his proper jurisdiction, that the Supreme Court, upon affidavit of error therein, and a letter from the judge that he wishes to make the correction, will give him such opportunity. *Barber v. Justice*, 138 N. C. 20, 50 S. E. 445.

A judge can not resettle a case on appeal; he can only correct such errors as have resulted from inadvertence, mistake, misapprehension, or the like. *Boyer v. Teague*, 106 N. C. 571, 11 S. E. 330.

Judge's Duty in Modifying Case.—Where a certiorari is ordered to correct a case on appeal, the trial judge should be given an opportunity to consider the case with reference to the corrections, and counsel should be present at the settlement thereof. *Cameron v. Power Co.*, 137 N. C. 99, 49 S. E. 76.

Place of Settlement.—The requirement that the place appointed for the settlement of the case on appeal shall be within the district, if the judge has not left, is mandatory. *Cameron v. Power Co.*, 137 N. C. 99, 49 S. E. 76.

An appeal will not be dismissed because the statement of the Judge below was made out of the district in which the suit was tried, unless the record shows that the appellee demanded to be present and that by reason of his absence he was prejudiced, especially when the error consists in the rejection of material and competent evidence. *Whitesides v. Williams*, 66 N. C. 141.

The trial judge has no absolute authority to settle a case on appeal outside of the county or district in which it was tried, except by agreement of the parties, or when the counterclaim or exception had been served, respectively, within the time prescribed by the statute. *State v. Humphrey*, 186 N. C. 533, 120 S. E. 85.

Effect of Absence of Judge from District.—The absence of the judge from the district does not dispense with the requirements that he should settle the case on appeal upon disagreement of counsel. *Owens v. Phelps*, 92 N. C. 231. When he has so left he may settle case upon notice without returning to the district. *Cameron v. Power Co.*, 137 N. C. 99, 49 S. E. 76.

While it is provided by this section that when the judge from whose ruling appeal is taken to supreme court, has left the district before notice of disagreement as to case on appeal, he may settle the case on appeal without returning to the district, he has no authority to do more, except by consent. *White Way Laundry v. Underwood*, 220 N. C. 152, 154, 16 S. E. (2d) 703.

Case May Be Settled After Expiration of Sixty Days.—Although the failure of the Judge to settle a case on appeal within sixty days after the courts of the district closed, might subject him to a civil action for the penalty prescribed

in the statute, he may, after that time, make up the case. *State v. Williams*, 109 N. C. 846, 13 S. E. 880.

Retirement of Judge.—The mere fact that a judge who tried a cause has gone out of office will not prevent his settling the case on appeal. *Ritter v. Grimm*, 114 N. C. 373, 19 S. E. 239.

Where the Judge who presided at a trial goes out of the office without making up a case of appeal, and the appellant is in no default, a new trial will be awarded. *Simonton v. Simonton*, 80 N. C. 7.

Illness of Judge.—Where the judge is unable to settle the case on appeal on account of sickness and appellee, to expedite matters, agrees to a new trial, and it appears that the judge will not be able to settle the case within a reasonable time, a new trial will be granted even though appellant opposes one. *Turner v. Southern Gas Improv. Co.*, 171 N. C. 750, 87 S. E. 970.

Impossible to Settle Case on Appeal.—Where it appeared by affidavits that the statement of a case upon appeal had been lost by no fault of the attorneys for appellant, and that, by reason of lapse of time, the judge had forgotten the exceptions, and a new case could not be prepared, a new trial will be granted. *Board v. Old Dominion Steamship Co.*, 98 N. C. 163, 3 S. E. 505; *Isler v. Haddock*, 72 N. C. 119; *Adams v. Reeves*, 74 N. C. 106.

Affirmance.—On appeal from conviction of a capital crime, the "case on appeal" was served on the solicitor and then filed in the supreme court without agreement of the solicitor or settlement by the judge, before expiration of the time allowed for filing exceptions or counterclaim, under this and § 1-282, and before the lapse of sufficient time for it to have been deemed approved under § 1-282. Assignments of error were attached to the "case on appeal" but were not supported by exceptions. The supreme court considered the "case on appeal" as "deemed approved" at the time of hearing the appeal, and considered the assignments of error, since the life of defendant is involved. Held: The assignments of error being without merit, and the case appearing to have been tried in strict conformity to the law appertaining to the evidence and the charge, the attorney-general's motion to affirm is allowed. *State v. Parnell*, 214 N. C. 467, 199 S. E. 601.

Applied in *Messick v. Hickory*, 211 N. C. 531, 191 S. E. 43. **Cited in** *State v. Angel*, 194 N. C. 715, 140 S. E. 727; *Metropolitan Life Insurance Company v. Boddie*, 196 N. C. 666, 667, 146 S. E. 598; *Penland v. French Broad Hospital*, 199 N. C. 314, 317, 154 S. E. 406; *McMahan v. Southern R. Co.*, 203 N. C. 805, 167 S. E. 225.

§ 1-284. Clerk to prepare transcript.—The clerk on receiving a copy of the case settled, as required in the preceding sections, shall make a copy of the judgment roll and of the case, and within twenty days transmit the same, duly certified, to the clerk of the supreme court. The clerk, except in cases where parties are allowed to appeal without giving an undertaking on appeal, shall not be required to make the copy of the record in the case for the supreme court until the appellant has given the undertaking on appeal or made the deposit required. (Rev., s. 592; Code, s. 551; 1889, c. 135; C. C. P., s. 302; C. S. 645.)

I. Editor's Note.

II. General Considerations.

III. Contents of Transcript.

IV. Effect on Appeal of Improper Transcript.

- A. When Appeal Remanded.
- B. When Appeal Dismissed.

Cross References.

As to the distinction between the record and the case on appeal and the requisites of the latter, see § 1-282 and annotations thereunder. As to the settlement of case on appeal, see § 1-283. As to the jurisdiction acquired by the supreme court, see § 7-10 et seq.

I. EDITOR'S NOTE.

The transcript of record is necessary to give the Supreme Court jurisdiction of the case. The transcript is prepared by the clerk of the court, but it is the appellant's duty to see that this is properly done. The appellant should comply with the rules of the Supreme Court in regard to the transcript. The penalty for a failure to so comply is the dismissal of the appeal. For regulations as to the arrangement of matter in the transcript, see Supreme Court Rule 19; as to printing, see Supreme Court Rule 22, 23 and 24. See also

Supreme Court Rule 5 in regard to docketing the transcript.

II. GENERAL CONSIDERATIONS.

Section is Directory.—This section is directory merely, and where a party has duly perfected his appeal, and tendered the necessary fees, the clerk must forthwith transmit a transcript of the record, notwithstanding the attorneys have not settled a case. *Russell v. Davis*, 99 N. C. 115, 5 S. E. 895.

Matter Not Contained in Transcript.—The Supreme Court will not consider matters not contained in the transcript of the record on appeal. *Presnell v. Garrison*, 122 N. C. 595, 29 S. E. 839.

How Transcript Drawn.—The transcript of record on appeal should be drawn in accordance with Eaton's Forms. *State v. Butts*, 91 N. C. 524.

Original Papers.—The requirement that appellant file a transcript on appeal is not complied with by filing the original papers from the court below. *Lindsey v. Knights of Honor*, 172 N. C. 818, 90 S. E. 1013. *Emmons v. McKesson*, 58 N. C. 92.

Duty to Transmit.—On the taking of an appeal, the record should be transmitted to the appellate court, and the appeal docketed, whether the statement of the case on appeal is settled or not. *Owens v. Phelps*, 91 N. C. 253.

When Appeal Not Properly Constituted.—Where an appeal is not prosecuted according to law, the appellee has the right to have a transcript of the record sent up, or a certificate of the clerk that an appeal was taken, and the case docketed and the appeal dismissed. *Cross v. Williams*, 91 N. C. 496.

Costs of Irrelevant Matter.—The costs of unnecessary and irrelevant matter, accompanying a transcript, in regard to which no exception is taken below, will be taxed against the appellant, whether he succeeds or not. *Clayton v. Johnson*, 82 N. C. 423.

Commission of Evidence and Charge.—The evidence and the charge of the court are properly omitted from the appeal record where there is no exception involving the same. *Parker v. Southern Exp. Co.*, 132 N. C. 128, 43 S. E. 603.

Contradictory Records.—Where two transcripts are sent, contradictory to each other, and the parties do not agree which is correct, the court will direct the proper officer to attend with the original record. *State v. Reid*, 18 N. C. 377.

Failure to Tender Required Fees.—Failure of the clerk of the court below to send up a transcript after the case on appeal had been filed by appellant in his office does not excuse appellant's failure to file the transcript or the case on appeal where he does not show that he has tendered the required fees and is otherwise free from laches. *Critz v. Sparger*, 121 N. C. 283, 28 S. E. 365.

Stenographer's Notes.—A statute authorizing the employment of an official stenographer and providing that the stenographer's notes shall be typewritten, and filed with the clerk of said court, and become a part of the records, does not make those notes a part of the record proper on appeal, or of the case on appeal. *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53.

Bill of Exceptions Unnecessary.—Errors apparent on the record may be reviewed though there is no bill of exceptions. *Cape Fear, etc., R. Co. v. Stewart*, 132 N. C. 248, 43 S. E. 638.

Demurrer.—A demurrer and the action of the court thereon are part of the record, and no bill of exceptions or case is necessary. *Chamblee v. Baker*, 95 N. C. 98.

Refusal to Sign Judgment.—The fact that a form of judgment offered by plaintiff, and which the court declined to sign, recited that plaintiff was refused leave to take a nonsuit as to certain defendants, did not make such recital a part of the record; it not being stated in the case by the judge, and nowhere appearing in the record proper. *Tennessee River Land, etc., Co. v. Butler*, 134 N. C. 50, 45 S. E. 956.

Binding Effect of Record.—The Supreme Court is bound by the record, even though it seems improbable that it can be true. *Davidson v. Southern R. Co.*, 156 N. C. 578, 72 S. E. 622; *McDaniel v. King*, 89 N. C. 29, 30.

Amendment of Record.—The appellate court has no authority to allow an amendment of the record. *Neal v. Cowles*, 71 N. C. 266.

Showing Additional Facts.—Where the findings of fact made the basis of a judgment denying a motion for vacation of a judgment are not in the record, the record can not be amended so as to show the facts on the request of a single party. *Smith v. Whitten*, 117 N. C. 389, 390, 23 S. E. 320.

How Errors in Record Corrected.—Errors in the record should be corrected by means of certiorari, and not by having the amendment made by the clerk below while the

transcript is on file in the appellate court. *State v. Jackson*, 112 N. C. 849, 16 S. E. 906.

Response to Issue.—An appeal will not be dismissed because the response to the issue was omitted in printing the record, where the omission was palpably a printer's error; the response being recited and printed in the judgment. *Baker v. Hobgood*, 126 N. C. 149, 35 S. E. 253.

Failure of Judge to Return Papers.—Where the trial judge takes the papers and does not return them in time for the seasonable preparation of appellant's transcript, a dismissal for failure to file will be vacated, and a certiorari issued to bring up the appeal. *Seay v. Yarborough*, 94 N. C. 291; *Roulhac v. Miller*, 89 N. C. 190.

Proper Transcript Obtainable.—An appeal will not be dismissed because the clerk of the lower court fails to transmit a proper transcript, especially when a proper transcript is obtainable before the case will stand for argument. *Bryan v. Moring*, 99 N. C. 16, 5 S. E. 739.

Cited in *Carter v. Bryant*, 199 N. C. 704, 706, 155 S. E. 602.

III. CONTENTS OF TRANSCRIPT.

Transcript Essential.—Before the Supreme Court will entertain an appeal the appellant must cause to be properly filed and docketed therein a duly certified transcript of the record of the action in the court where the judgment sought to be reviewed was rendered. *State v. Preston*, 104 N. C. 733, 734, 10 S. E. 84.

In General.—It must appear in the record, with reasonable certainty, that a court was held by a judge authorized by law to hold it, and at the place and time prescribed by law. In all cases, it must appear that the court had jurisdiction of the parties and of the subject matter; and so much, not more, of the record in every case, ought to be sent up as will properly present the exceptions taken, that is, as will show that they were taken, the rulings of the court to which they apply, and how they bear upon the action. The Supreme Court must be able to see that a court was held and that the action was properly constituted before it. This requirement is not a mere matter of form that may be dispensed with. It is an essential part of procedure in every action. And however informal a record may be, these essential requisites must appear in it, else the court cannot proceed to examine the alleged errors, and decide the questions of law sought to be presented. *State v. Butts*, 91 N. C. 524.

In order for the Supreme Court to acquire jurisdiction, it must appear in the transcript of the record that an action was instituted, that proceedings were had and a judgment rendered from which an appeal could be taken, and that an appeal was taken from such judgment. *Spence v. Tapscott*, 92 N. C. 576, 577.

And that the action was properly constituted in the court below. *Markham v. Hicks & Co.*, 90 N. C. 1.

Only enough of the record should be included to show that the case is properly constituted; and this, with the summons, pleadings, verdict, and judgment, and the case on appeal setting out so much of the proceedings at the trial as will throw light upon the exceptions taken, is all that is necessary. *Sigman v. Railroad Co.*, 135 N. C. 181, 47 S. E. 420.

Jurisdiction of Action.—It is the appeal that puts the Supreme Court in relation with the case in the court below, and that court in respect to the judgment appealed from; and the Supreme Court must be able to see, from the record, the relation thus established. *Moore v. Vanderburg*, 90 N. C. 10.

Essential Part of Record.—The transcript or record on appeal consists of the record proper (that is, summons, pleadings, and judgment) and the case on appeal, which is the exceptions taken, and such of the evidence, charge, prayers and other matters occurring at the trial as are necessary to present the matters excepted to for review. *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53.

Taking of Appeal.—Where the record on appeal does not show that any appeal was taken, the appellate court has no jurisdiction. *Randleman Mfg. Co. v. Simmons*, 97 N. C. 89, 1 S. E. 923; *Howell v. Jones*, 109 N. C. 102, 13 S. E. 889.

Authority of Court or Judge.—Every transcript or record, to be authoritative must set forth before what person or persons the proceedings were had, or by whose authority the record was made, so that it may appear that such proceedings were not coram non iudice. *Howell v. Ray*, 83 N. C. 558.

A transcript on appeal, which contains a copy of a commission to a judge other than the one regularly designated by statute, to hold a term in the county whence it comes, and of a judgment certified to have been signed by him, does not show, "with reasonable certainty, that a court was held by a judge authorized by law to hold it, and at the time

and place prescribed by law," and hence it is insufficient. *Jones v. Hoggard*, 107 N. C. 349, 12 S. E. 286.

Opening of Court.—The record on appeal from the superior court of a county is fatally defective if it does not show that a superior court was opened and held for such county at all. *High v. Carolina Cent. R. Co.*, 112 N. C. 385, 17 S. E. 79.

When the transcript does not show that any court was held, or that any judge was present or gave judgment, it is so defective that the Supreme Court has no jurisdiction to act upon it. *Broadfoot v. McKeithan*, 92 N. C. 561.

Jurisdiction of Parties.—The transcript is imperfect if it does not appear therefrom, with reasonable certainty, that the court was duly held, and that it had obtained jurisdiction of the parties by service or waiver of process. *Daniel v. Rogers*, 95 N. C. 134; *Jones v. Hoggard*, 107 N. C. 349, 12 S. E. 286.

Agreed Case.—Where a matter is before the Supreme Court on a case agreed, the whole of that paper is an essential part of the record. *Upper Appomattox Co. v. Buffalo*, 121 N. C. 37, 27 S. E. 999.

Incidental Matters.—Entries of continuances, and other docket entries, interlocutory judgments, and incidental matters, such as judgments nisi against witnesses, as well as the evidence, prayers for instructions, and charge of the court, are not part of the record on appeal unless there is some exception presenting them for review. *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53.

Second Appeal.—On second appeal, the formal recitals and the proceedings subsequent to the filing of the opinion on reversal and the exceptions only need appear in the record. *Simmons v. Allison*, 119 N. C. 556, 26 S. E. 171. *Smith v. Miller*, 155 N. C. 247, 71 S. E. 355.

Special Orders as to Contents.—The clerk of the superior court, in sending up the transcript to the Supreme Court, should be guided solely by the order of the superior judge, and should send no other papers than those directed. *Clark v. Saco-Petee Mach. Works*, 150 N. C. 88, 63 S. E. 153.

Appeals from Interlocutory Judgments.—Upon appeals from interlocutory judgments nothing should be certified except so much of the case below as is necessary to present the point to be reviewed. *Smith v. Collier*, 20 N. C. 60.

IV. EFFECT ON APPEAL OF IMPROPER TRANSCRIPT.

A. When Appeal Remanded.

Imperfect Transcript.—Where the transcript of the record sent to the supreme court is imperfect, the appeal will not be dismissed, but the papers will be remanded, in order that a proper transcript may be sent up. *Spence v. Tapscott*, 92 N. C. 576.

Fragmentary Record.—Where the transcript did not contain the record, and it was ordered sent up on certiorari, to which the clerk returned fragmentary parts of the record, certifying that these were all he could by diligent search find, it was held, that the case must be remanded to the court below to supply the necessary record, and to make all necessary amendments thereto to perfect the appeal. *Cox v. Jones*, 110 N. C. 909, 14 S. E. 782.

Remand for Proper Transcript.—A transcript which fails to show any process, or waiver thereof, or any pleading, by which defendant was brought into court, or any agreement for the submission of the controversy without action, is insufficient, and the cause will be remanded for a proper transcript. *Jones v. Hoggard*, 107 N. C. 349, 12 S. E. 286.

Proper Proceedings below.—An appeal will be remanded where the transcript does not show that the action was properly constituted in the court below. *Markham v. Hicks & Co.*, 90 N. C. 1.

Failure to Show Process and Pleading.—Where the transcript on appeal contains only the judgment of the court below, and shows no process or pleading, the cause will be remanded. *Rowland Bros. v. Mitchell, & Son*, 90 N. C. 649; *Bethua v. Byrd*, 93 N. C. 141.

Failure to Show Contention of Parties.—Where the transcript on appeal merely shows process, a reference to arbitration, an award, exception thereto, the action of the court below thereon, and an appeal, but there are no pleadings, nor an agreed statement of facts, so that the Supreme Court can see the contention of the parties, and that the court below had jurisdiction, and where both parties are not able to file the pleadings *nunc pro tunc* in the Supreme Court, the cause will be remanded. *Wyatt v. Lynchburg, etc., R. Co.*, 109 N. C. 306, 13 S. E. 779.

Failure to Show Entry of Judgment.—Where the record on appeal contains no judgment entry, the appeal or writ of error cannot be considered. *Logan v. Harris*, 90 N. C. 7; *Harvey v. Rich (N. C.)*, 1 S. E. 647. See *Vann v. Winders*, 184 N. C. 629, 113 S. E. 927.

B. When Appeal Dismissed.

Absence of All Essential Matters.—An appeal will be dismissed on motion when, in the transcript sent up, there is no record of any trial, verdict or judgment, no errors assigned or statement of the case for appeal, and no appeal bond or order dispensing with one. *State v. Gaylord*, 85 N. C. 551.

Where there is no case on appeal settled by the judge or by counsel, the evidence is in the record by question and answer, there is no leave to appeal as a pauper, although the action was brought as a pauper, and no appeal bond, printed record, or printed brief for plaintiff, the appeal will be dismissed. *Queen v. Snowbird Valley R. Co.*, 161 N. C. 217, 76 S. E. 682.

Failure to Make Transcript.—Where appellant failed to file a transcript, but filed a certificate by the clerk that such a case had been tried, the appellee could docket and dismiss without filing additional certificate of his own. *Lindsey v. Knights of Honor*, 172 N. C. 818, 90 S. E. 1013.

Incomplete Transcript.—Where the transcript is incomplete, and not such as will enable the appellate court to examine the case on its merits, the appeal will be dismissed. *Mitchell v. Moore*, 62 N. C. 281.

Omission of Affidavits.—Where, in settling the case on appeal, the judge directed the clerk to include certain affidavits in the transcript, after which the appellant directed the clerk to omit them, the appeal will be dismissed. *Finch v. Strickland*, 130 N. C. 44, 40 S. E. 841.

Omission of Complaint.—Appeal will be dismissed when the consideration of the complaint is essential to determination of the question involved, it not being in the record, and appellant having made no motion for certiorari to perfect the record. *Allen v. Hammond*, 122 N. C. 754, 30 S. E. 16.

Record Consists Only of Case on Appeal.—Where the record consists only of the case on appeal, without the summons or pleadings, and no excuse is offered for the defective record, nor application for a certiorari, nor that the case be remanded, the appeal will be dismissed. *Rice v. Guthrie*, 114 N. C. 589, 19 S. E. 636.

Failure to Pay Fees.—Where a certiorari has been granted to an appellant to complete the record by supplying material evidence that had been omitted from the case as settled, but the clerk of the superior court returns that defendant failed to perfect his appeal, or to pay fees for a transcript of the record, though demanded, the appeal will be dismissed. *Broadwell v. Ray*, 112 N. C. 191, 16 S. E. 1009.

§ 1-285. Undertaking on appeal; filing; waiver.

—To render an appeal effectual for any purpose in a civil cause or special proceeding, a written undertaking must be executed on the part of the appellant, with good and sufficient surety, in such sum as may be ordered by the court, not exceeding two hundred and fifty dollars, to the effect that the appellant will pay all costs awarded against him on the appeal, and this undertaking must be filed with the clerk by whom the judgment or order was entered; or such sum as is ordered by the court must be deposited with the clerk by whom the judgment or order was entered, to abide the event of the appeal. The undertaking or deposit may be waived by a written consent on the part of the respondent. No appeal shall be dismissed in the supreme court on the ground that the undertaking on appeal was not filed, or deposit made, earlier, if the undertaking is filed or the deposit made before the record of the case is transmitted by the clerk of the superior court to the supreme court. When no undertaking on appeal has been filed, or deposit made before the record of the case is transmitted to the supreme court, the supreme court shall, upon good cause shown, on such terms as may be just, allow the appellant to file an undertaking or make the deposit. (Rev., ss. 593, 595; Code, ss. 552, 561; C. C. P., ss. 303, 312; 1889, c. 135, s. 2; 1871-2, c. 31; C. S. 646.)

- I. General Considerations.
- II. Time of Filing.
- III. Waiver.
- IV. Parties.

Cross References.

As to undertaking to stay execution, see § 1-289 et seq. See also, annotations under § 1-277. As to costs on appeal, see § 6-33 and annotations thereunder.

I. GENERAL CONSIDERATIONS.

Compliance with This Section or Section 1-288.—As to the necessity, for those desiring an appeal, of complying with either the provisions of this section or those of § 1-288, see annotations under the latter section.

Necessity of Security to Perfect Appeal.—An appeal bond or undertaking is necessary to the perfection of an appeal. *Ex parte Berry*, 107 N. C. 326, 12 S. E. 125; *Hinton v. Pritchard*, 107 N. C. 128, 12 S. E. 242.

The Supreme Court has no power to order a certiorari without requiring bond and security thereon. *Weber v. Taylor*, 66 N. C. 412.

See also, *Walsh v. Burleson*, 154 N. C. 174, 69 S. E. 680.

Duty to Provide Bond.—Providing an appeal bond is the duty of the appellant and not of his attorney, and when the latter is authorized to act therein, he does so as the agent of the party appealing, who is, in the relation of principal, responsible for his laches. *Lunsford v. Alexander*, 162 N. C. 528, 78 S. E. 275.

After Perfecting of Appeal.—When an appeal is perfected, the trial court has no longer any jurisdiction of the cause, and can not require an additional bond. *McRae v. Board*, 74 N. C. 415.

New Security on Second Appeal.—After a cause has been remanded because the record is imperfect, the trial court may order that an appeal bond be filed to perfect the appeal, an undertaking previously filed having been defective. *Spence v. Tapscott*, 93 N. C. 250.

Deposit as Security.—Under this section the clerk may accept a deposit of such sum of money as may be ordered by the court in lieu of an undertaking on appeal. *Graves v. Hines*, 106 N. C. 323, 11 S. E. 362; *State v. Parish*, 151 N. C. 659, 65 S. E. 762.

No Substitute for Undertaking or Deposit.—The clerk has no authority to accept any substitute for the undertaking on appeal, or deposit of money in lieu thereof, provided by the statute. *Eshon v. Board*, 95 N. C. 75.

Surety Misinformed Concerning Legal Effect of Bond.—One who has signed a bond given to stay execution pending an appeal can not defend on the ground that he was misinformed concerning the legal effect of the bond. *McMinn v. Patton*, 92 N. C. 371.

See *Oakley v. Van Noppen*, 100 N. C. 287, 5 S. E. 1.

Extent of Liability.—An appeal bond given under this section to secure "all" costs, means the appellee's costs. *Morris v. Morris*, 92 N. C. 142.

When there is judgment in the Supreme Court in favor of the appellant, his sureties are not liable on their undertaking for his costs, when such costs cannot be made out of the appellee, or their principal. *Clerk's Office v. Huffstetter*, 67 N. C. 449.

See also, *Kenney v. Seaboard Air Line R. Co.*, 166 N. C. 566, 82 S. E. 849.

Attempt to Cure Defects in Bond.—An uncompleted undertaking on appeal, filed on the last day on which by statute it could be filed, and then immediately withdrawn to be completed by obtaining the signatures of other parties, is ineffectual. *Smith v. Reeves*, 85 N. C. 594.

Misrecital of Judgment.—A misrecital in the appeal bond of the date of the judgment or order appealed from is not fatal error, if the judgment or order is otherwise correctly and sufficiently described. *Lackey v. Pearson*, 101 N. C. 651, 8 S. E. 121.

Effect of Failure to Give Undertaking.—In the absence of an affidavit for leave to appeal without bond, an appeal must be dismissed where a party neither gives the appeal bond nor makes a deposit in lieu thereof. *Lunsford v. Alexander*, 162 N. C. 528, 78 S. E. 275.

Giving bond on appeal or the granting leave to appeal without bond are jurisdictional, and, unless the statute is complied with, the appeal will be dismissed. *Honeycutt v. Watkins*, 151 N. C. 652, 65 S. E. 762; *Smith v. Reeves*, 85 N. C. 594. See also *Brown v. Kress & Co.*, 207 N. C. 722, 178 S. E. 248.

Effect of Failure to File Bond within Statutory Time.—Appeals will be dismissed if the bond on appeal is not given within the time required by law. *McCanless v. Reynolds*, 90 N. C. 648; *Appelwhite v. Fort*, 85 N. C. 596.

II. TIME OF FILING.

Presumption of Timely Filing.—Where an appeal bond

has no date it will be presumed to have been filed on the day it is justified. *Boyden v. Williams*, 92 N. C. 546.

Computation of Time.—The ten days within which the undertaking on appeal must be filed are not counted from the day on which the judgment is rendered, but from that on which the court adjourned. *Chamblee v. Baker*, 95 N. C. 98.

Ten Days after Rendition of Judgment.—The undertaking on appeal must be filed within ten days after the rendition of the judgment. *Boyden v. Williams*, 92 N. C. 546; *Wade v. New Bern*, 72 N. C. 498; *Sever v. McLaughlin*, 82 N. C. 332.

Ten Days after Trial.—Where an undertaking on appeal recited that the judgment appealed from was rendered on the first day of the term (following the fiction that all the business of a term is done on its first day), but it appeared that the trial took place during the second week, and the justification was dated within ten days after the trial, it was held that the bond was filed in time. *Worthy v. Brady*, 91 N. C. 265.

Day Facts Were Found.—Where the record does not show on what day the judgment appealed from was rendered, it having been rendered out of term by consent, an appeal bond filed on the same day that the facts were found, the case on appeal filed, and the amount of the bond fixed, is given in time. *Gwathney v. Savage*, 101 N. C. 103, 7 S. E. 661.

Delay in Filing Caused by Clerk.—An undertaking filed within a few days after the time agreed on will be treated as valid where it appears that the appeal was in good faith, that appellant made diligent effort from time to time to give the undertaking, but was prevented by the absence of the clerk, and that the delay was without prejudice to appellee. *Harrison v. Hoff*, 102 N. C. 25, 8 S. E. 887; *Jones v. Wilson*, 103 N. C. 13, 9 S. E. 580.

Before Transmission of Record to Appellate Court.—An appeal bond, filed and sent up with the record, is in time, provided it should be given before the record of the case is transmitted to the Supreme Court. In *re Snow's Will*, 128 N. C. 100, 38 S. E. 295; *Howerton v. Sexton*, 104 N. C. 75, 10 S. E. 148.

Reasonable Excuse Must Be Shown.—While the Supreme Court may allow an undertaking on appeal to be filed in that Court, the power thus conferred will not be exercised unless the appellant shows a reasonable excuse for his failure to give the undertaking within the time prescribed by this section. *Harrison v. Hoff*, 102 N. C. 25, 8 S. E. 887; *Jones v. Asheville*, 114 N. C. 620, 19 S. E. 631.

The same cause that excused failure to perfect the appeal excuses the failure to file appeal bond. *Graves v. Hines*, 106 N. C. 323, 11 S. E. 362.

Before or after Motion to Dismiss.—The Supreme Court may allow an appellant to substitute a sufficient for an insufficient appeal bond, after a motion by the appellant to dismiss the appeal for such defect. *Robeson v. Lewis*, 64 N. C. 734.

III. WAIVER.

Waiver as to Costs.—Parties to a suit have no right to waive an appeal bond so far as costs are concerned. *Cape Fear*, etc., *Nav. Co. v. Costen*, 63 N. C. 264.

Waiver of Timely Filing.—The necessity of filing the appeal bond within the prescribed time may be waived by agreement. *Wade v. New Bern*, 72 N. C. 498.

Same—Must Appear of Record.—No agreement of parties waiving the necessity of timely filing of appeal bond will be respected by the appellate court unless it appears on the record. *Wade v. New Bern*, 72 N. C. 498.

Same—Verbal Agreements Disregarded.—Verbal agreements to waive the statutory requirements will not be regarded. *McCanless v. Reynolds*, 91 N. C. 244. See also *Skinner v. Bland*, 91 N. C. 1.

Same—Delay in Making Objection.—Where the absence of a bond on appeal is not objected to for two years, and in the meantime the cause has been continued, and witnesses summoned, respondent will be deemed to have waived objection to the defect. *Arrington v. Smith*, 26 N. C. 59.

Same—By Failure to Object.—Where the appellant is in court and the bond is offered and accepted without objection, and this is noted in the record, this is construed to be a sufficient waiver in writing under the statute. *Harshaw v. McDowell*, 89 N. C. 181, 183; *Howerton v. Henderson*, 86 N. C. 718.

Same—By Proceeding with Trial.—If the appellee let the cause go to the jury in the appellate court, he thereby waives objections to defects in the appeal bond, but the court, in its discretion, may require further security. *Ferguson v. McCarter*, 4 N. C. 544.

IV. PARTIES.

Obligee.—An undertaking on appeal, though not so expressed, is, by implication, taken to be made with the appellee. *Clerk's Office v. Huffstetter*, 67 N. C. 449.

Omission of Obligor's Name.—The omission of the name of an obligor in the body of an appeal bond or undertaking is no substantial objection to it. *Chamblee v. Baker*, 95 N. C. 98.

Operates Favorably to Respondent.—The undertaking for costs and damages on appeal, operates in favor of the respondent, although he is not required to be named in it as a party. *Clerk's Office v. Huffstetter*, 67 N. C. 449.

Made Payable to State.—An appeal bond made payable to the state is void. The state will not become a trustee for a citizen in the pursuit of his personal rights, except in cases specially provided by law—as guardian bonds, etc. *Dorsey v. Raleigh*, etc., R. Co., 91 N. C. 201.

Necessity for Obligor's Signature.—The signature of the appellant is not essential to a bond or undertaking on appeal or error. *Cohoon v. Morton*, 49 N. C. 256; *Walker v. Williams*, 88 N. C. 7.

Party Acting as Surety.—An undertaking on appeal may be good although signed by one of the parties defendant as surety, if the record shows that he is not affected by the appeal. *Syme v. Badger*, 91 N. C. 272.

Opposite Party.—A plaintiff can not be principal obligor on a bond where an appeal is taken by defendant. *Speed v. Harris*, 4 N. C. 317.

Signature by Mark.—An appeal bond may be executed by the surety making his mark. *State v. Byrd*, 93 N. C. 624.

Name Signed by Magistrate.—A magistrate, who has rendered a judgment on a warrant, is not a fit person to sign the name of another as obligor on the appeal bond. *Weaver v. Parish*, 8 N. C. 319.

§ 1-286. Justification of sureties.—The undertaking on appeal must be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. The respondent may except to the sufficiency of the sureties within ten days after the notice of appeal; and unless they or other sureties justify within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification must be upon a notice of not less than five days. (Rev., s. 594; Code, s. 560; C. C. P., s. 310; 1887, c. 121; C. S. 647.)

Editor's Note.—The purpose of this section is to protect the appellee in respect to costs. He has a substantial interest in the undertaking, upon appeal, and it cannot be dispensed with without his consent in writing, unless a sum of money be deposited with the clerk by order of the court in lieu of the undertaking. The statute is careful to provide, in strong, peremptory and exacting terms, that the appeal shall be ineffectual for any purpose unless perfected in the way prescribed in it. The language is plain and mandatory, and very little is left to construction. The appellee has the substantial right under the statute to insist upon a substantial compliance with it in all respects.

Necessity of Justification.—An appeal bond is of no effect unless it be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. *Singer Mfg. Co. v. Barrett*, 94 N. C. 219; *Greenlee v. McCelvey*, 92 N. C. 530.

Dismissal of Appeal.—An appeal will be dismissed when the surety on the undertaking does not justify in double the amount thereof. *McCanless v. Reynolds*, 91 N. C. 244; *State v. Roper*, 94 N. C. 859.

Justification Must Be by Surety.—The justification of a surety to an undertaking on appeal, must be made by the surety himself. The affidavit of another as to the pecuniary reputation of the surety will not answer the demands of the law. *Morphew v. Tatem*, 89 N. C. 183.

Failure to Show Proper Amount.—A justification of two sureties that each is worth the amount of the bond, is not a sufficient compliance with this section. *Anthony v. Carter*, 91 N. C. 229.

Need Not Mention Liabilities.—The justification of a surety on an appeal bond is sufficient under this section where it states that the surety is worth double the amount therein specified, without stating that it is above his liabilities and homestead and exemption allowed by law. *Witt v. Long*, 93 N. C. 388.

Justification Held Insufficient.—Where the approval of an

unjustified bond is the act of the clerk, there is no waiver, unless the appellee is present, or afterwards assents. *Gruber v. Washington, etc., R. Co., 92 N. C. 1.*

Indorsement of Clerk Not a Substitute for Justification.—An indorsement on the back of an appeal bond by the clerk, "The within bond is good," is not a sufficient compliance within the statutory requirement that the bond must be accompanied by an affidavit of the sureties showing their justification. *Bryson v. Lucas, 85 N. C. 397.*

Justification May Be Waived.—While this section seems to require that bond shall be justified in the first instance by at least one of the sureties swearing that he is worth double the amount therein specified, a failure to do this does not necessarily avoid the bond. It is a defect which may be cured by waiver. *Becton v. Dunn, 137 N. C. 559, 563, 50 S. E. 289. McMillan v. Baker, 92 N. C. 111.*

Necessity of Written Waiver.—Where the record fails to show that appellee in writing waived an appeal bond, the appeal will be dismissed if such bond is not justified. *Lytle v. Lytle, 90 N. C. 647.*

When Waiver Sufficient.—Where the record stated, "Plaintiff appealed. Notice waived. Bond filed," which was signed by the judge, it is a sufficient waiver in writing of a formal justification of the bond, and the appeal will not be dismissed because the sureties do not justify in double the amount. *Singer Mfg. Co. v. Barrett, 94 N. C. 219.*

An acceptance by the appellee of the surety tendered on an appeal bond, constitutes a waiver of the justification required by statute. *Greenlee v. McCelvey, 92 N. C. 530.*

Same—Appellee Present When Bond Taken.—When it appears by the case settled that the appellees were present when the appeal bond was taken, and made no objection to the sufficiency of the sureties, such objection will be deemed waived. *Gruber v. Washington, etc., R. Co., 92 N. C. 1; Moring v. Little, 95 N. C. 87.*

Same—Acceptance in Open Court.—The acceptance in court of an appeal bond not justified is a waiver of justification, and a subsequent motion to dismiss the appeal on the ground that the bond is not justified can not be sustained. *Jones v. Potter, 89 N. C. 220.*

Same—Signing Case on Appeal.—An objection to an appeal bond on the ground that the sureties failed to justify is not waived when the counsel for the adverse party agrees to and signs the statement of the case on appeal. *McMillan v. Nye, 90 N. C. 11, distinguishing Howerton v. Henderson, 86 N. C. 718, distinguished in Gruber v. Washington, etc., R. Co., 92 N. C. 1.*

Same—Entry on Record.—An entry on the record, "bond fixed at \$25; filed and approved," was held a sufficient waiver in writing. *Hancock v. Bramlett, 85 N. C. 393. See also State v. Wagner, 91 N. C. 521.*

§ 1-287. Notice of motion to dismiss; new bond or deposit.—Before the appellee is permitted to move to dismiss an appeal, either for any irregularity in the undertaking on appeal or for failure of sureties to justify, he must give written notice to the appellant of such motion at least twenty days before the district from which the cause is sent up is called, and this notice must state the grounds upon which the motion is based. At least five days before the district from which the cause is sent up is called, the appellant may file with the clerk of the supreme court a new bond justified according to law and containing a penalty the same in amount as the penalty in the original bond, or he may deposit with the said clerk a sum of money equal to the penalty in the original bond. When a new bond has been thus filed or deposit made the cause stands as if the bond had been duly given or deposit duly made in the court below. (Rev., s. 596; 1887, c. 121; C. S. 648.)

As to the time of the motion to dismiss, see Supreme Court Rule 16.

Section is Mandatory.—A motion to dismiss because of imperfections in the undertaking on appeal, will not be entertained, unless the provisions of this section are complied with. *Jones v. Slaughter, 96 N. C. 541, 2 S. E. 681.*

Section Does Not Apply When no Bond Filed.—No notice is required to be given of a motion to dismiss an appeal when no appeal bond has been filed; the twenty

days required for a motion to dismiss by the section applies only when there is an irregularity in the bond or in the justification of sureties. *Jones v. Asheville, 114 N. C. 620, 19 S. E. 631.*

Nor When Not Filed in Time.—A failure to execute and file an undertaking on appeal within the time prescribed by law is not a mere "irregularity," and hence a motion to dismiss the appeal for such failure does not require the twenty days notice, as provided by this section. *Bowen v. Fox, 98 N. C. 396, 4 S. E. 200.*

Necessity of Written Notice.—A motion to dismiss appeal for insufficient bond will not be entertained, unless after written notice, as required by this section. *McGee v. Fox, 107 N. C. 766, 12 S. E. 369.*

At Hearing of Motion.—Though a void bond has been given on appeal from the county to the Superior Court, the appeal should not be dismissed where the appellant offers to file a good bond at the hearing of the motion to dismiss. *March v. Griffith, 53 N. C. 264.*

Failure to File New Bond.—Where, in response to appellee's motion to dismiss for failure to file the bond at least five days before the call of the district, the appellant fails to file a new bond according to law, or make a deposit, etc., appellee's motion to dismiss will be allowed. *Goodman v. Call, 185 N. C. 607, 116 S. E. 724.*

Effect of Appearance.—The failure to state, from inadvertence, that counsel appeared specially in the court above to move to dismiss the appeal for failure to docket it in time, should not be deemed a waiver of the grounds of the motion. *Suiter v. Brittle, 90 N. C. 19.*

§ 1-288. Appeals in forma pauperis; clerk's fees.—When any party to a civil action tried and determined in the superior court at the time of trial desires an appeal from the judgment rendered in the action to the supreme court, and is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, it shall be the duty of the judge or clerk of said superior court to make an order allowing said party to appeal from the judgment to the supreme court as in other cases of appeal, without giving security therefor. The party desiring to appeal from said judgment shall within five days make affidavit that he is unable by reason of his poverty to give the security required by law, and that he is advised by counsel learned in the law that there is error in matter of law in the decision of the superior court in said action. The affidavit must be accompanied by a written statement from a practicing attorney of said superior court that he has examined the affiant's case, and is of opinion that the decision of the superior court, in said action, is contrary to law. The appeal when passed upon and granted by the clerk shall be within ten days from the expiration by law of said term of court. The clerk of the superior court cannot demand his fees for the transcript of the record for the supreme court of a party appealing in forma pauperis, in case such appellant furnishes to the clerk two true and correctly typewritten copies of such records on appeal. Nothing contained in this section deprives the clerk of the superior court of his right to demand his fees for his certificate and seal as now allowed by law in such cases. Provided, that where the judge of the superior court or the clerk of the superior court has made an order allowing the appellant to appeal as a pauper and the appeal has been filed in the supreme court, and an error or omission has been made in the affidavit or certificate of counsel, and the error is called to the attention of the court before the hearing of the argument of the case, the court shall permit an amended affidavit or certificate to be filed correcting the error or

omission. (Rev., s. 597; Code, s. 553; 1889, c. 161; 1873-4, c. 60; 1907, c. 878; 1937, c. 89; C. S. 649.)

Cross Reference.—As to appeal in forma pauperis in criminal actions, see § 15-181.

Editor's Note.—Appeals in forma pauperis were not originally allowed in civil cases at all, but were first provided for in ch. 60, Laws 1873-74, under which they could only be allowed, as in criminal cases, by the judge, and during the term. But in 1889, Laws 1889, ch. 161, this section was amended and appeals in forma pauperis were allowed by the judge either at term or on affidavit filed within five days after court, or the clerk might pass upon and allow such application during term, or within ten days after its expiration.

Formerly the clerk of the Superior Court was not bound to render his services gratuitously but in 1907, Acts 1907, ch. 878, this section was again amended and the clerk of the Superior Court is not now allowed to demand his fees for making the transcript in appeals in forma pauperis.

The 1937 amendment added the proviso at the end of this section. As to effect of amendment, see 15 N. C. Law Rev. 332.

Supreme Court Rule 22 offers appellants in forma pauperis the option of filing nine typewritten copies of the record, rather than having the same printed.

Section Mandatory.—Where a party to a civil action which has been tried in the Superior Court, desires to appeal from a judgment rendered at such trial to this court, without giving security as required by this section, he must comply strictly with the provisions of this section, which are mandatory. *McIntire v. McIntire*, 203 N. C. 631, 632, 166 S. E. 732.

Necessity of Affidavit.—In pauper appeals it is required by this section that appellant file the statutory affidavit in order to confer jurisdiction on the supreme court, and a provision in the judgment allowing plaintiff to appeal in forma pauperis does not relieve plaintiff of the necessity of filing the jurisdictional affidavit or the twenty-five printed or mimeographed copies of the brief required by rule 22 of the supreme court. *Brown v. Kress & Co.*, 207 N. C. 722, 178 S. E. 248.

There is no authority for granting an appeal in forma pauperis without proper, supporting affidavit, and an affidavit which fails to aver that appellant is advised by counsel learned in the law that there is error of law in the judgment appealed from, is fatally defective by virtue of this section. *Gilmore v. Imperial Life Ins. Co.*, 214 N. C. 674, 200 S. E. 407.

Statement of Attorney.—On an appeal in forma pauperis, an affidavit not containing the averment that appellant "is advised by counsel learned in the law that there is error in matter of law in the decision of the superior court," is fatally defective. *Honeycutt v. Watkins*, 151 N. C. 652, 65 S. E. 762; *Russell v. Hearne*, 113 N. C. 361, 18 S. E. 711. See also *Hanna v. Timberlake*, 203 N. C. 556, 166 S. E. 733; *Lupton v. Hawkins*, 210 N. C. 658, 188 S. E. 110.

The amendment permitting corrections of errors or omissions in the affidavit or certificate of counsel at any time prior to the hearing of the argument of the case on appeal applies only to this section pertaining to appeals in civil actions. *State v. Mitchell*, 221 N. C. 460, 461, 20 S. E. (2d) 292.

An affidavit which is defective in that it fails to aver that appellant is advised by counsel learned in the law that there is error of law in the judgment may not be cured by an additional affidavit filed after the expiration of the five days prescribed by the statute, or one filed after the date for docketing the appeal. *Berwer v. Union Cent. Life Ins. Co.*, 210 N. C. 814, 188 S. E. 618. Note that this case was decided prior to the 1937 amendment.—Ed. note.

Order Allowing Appeal.—To appeal as a pauper, the statutory leave must be obtained, and the mere leave to sue as a pauper is not sufficient. *Queen v. Snowbird Valley R. Co.*, 161 N. C. 217, 76 S. E. 682.

Order Must Be Obtained within Statutory Time.—An order allowing an appeal in forma pauperis entered by the clerk after the expiration of the statutory time is beyond the clerk's authority and the Supreme Court is without jurisdiction to entertain the appeal and it will be dismissed, the provisions of this section being mandatory and not directory. *Powell v. Moore*, 204 N. C. 654, 169 S. E. 281; *Franklin v. Centry*, 222 N. C. 41, 21 S. E. (2d) 828.

Applies to Administrators, etc.—Administrators and all other parties to the record, prosecuting or defending, are permitted to appeal to the Supreme Court without giving security therefor. *Mason v. Osgood*, 71 N. C. 212.

Intention to Appeal Need Not Be Intimated at Trial.—The appellant in such case need not intimate his desire to appeal at the time of trial, his timely compliance with the

statute being sufficient indication of his desire at the time of trial. *Russell v. Hearne*, 113 N. C. 361, 18 S. E. 711.

Other Proceedings Not Stayed.—An order allowing a party to appeal in forma pauperis dispenses with the security for costs, but does not operate to stay further proceedings upon the judgment appealed from. *Leach v. Jones*, 86 N. C. 404.

Stenographer's Note.—In view of section 1-282, requiring appellant to prepare a concise statement of the case on appeal, it is improper to submit as a prepared case the stenographer's notes in the form of question and answer, though plaintiff sued in forma pauperis. *Skipper v. Kingsdale Lumber Co.*, 158 N. C. 322, 74 S. E. 342.

Appellant Must Pay for Transcript.—An order granted under this section permitting an appeal without giving bond or making a deposit, does not relieve the appellant in civil actions from the payment of cost of transcript in advance. *Speller v. Speller*, 119 N. C. 356, 26 S. E. 160; *Martin v. Chasteen*, 75 N. C. 96.

§ 1-289. Undertaking to stay execution on money judgment.—If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. Whenever it is satisfactorily made to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring it, the appeal may, on motion to the court, be dismissed with costs. Whenever it is necessary for a party to an action or proceeding to give a bond or an undertaking with surety or sureties, he may, in lieu thereof, deposit with the officer into court money to the amount of the bond or undertaking to be given. The court in which the action or proceeding is pending may direct what disposition shall be made of such money pending the action or proceeding. In a case where, by this section, the money is to be deposited with an officer, a judge of the court, upon the application of either party, may, at any time before the deposit is made, order the money deposited in court instead of with the officer; and a deposit made pursuant to such order is of the same effect as if made with the officer. The perfecting of an appeal by giving the undertaking mentioned in this section stays proceedings in the court below upon the judgment appealed from; except when the sale of perishable property is directed, the court below may order the property to be sold and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court. (Rev., s. 598; Code, s. 554; C. C. P., ss. 304, 311; C. S. 650.)

Undertaking Not Necessary to Appeal.—But security for payment of the judgment, in addition to the security for costs, is not necessary to bring up the appeal if a stay of execution is not desired. *Bledsoe v. Nixon*, 69 N. C. 82.

No Particular Form Required.—No particular form is required for an undertaking to stay execution upon appeal; and if words are inserted in such undertaking repugnant to

its intent, they will be rejected as surplusage. *Oakley v. Van Noppen*, 100 N. C. 287, 5 S. E. 1.

Bond Given to Mortgagee.—This section does not apply to a bond by a mortgagor to the mortgagee stipulating that the mortgagor will not commit waste on the premises, and, if the judgment shall be affirmed, that he will pay for the use and occupation. *Alderman v. Rivenbark*, 96 N. C. 134, 1 S. E. 644.

Security Operates as Stay.—Upon compliance with this section there will be a stay of execution as to parties appealing from a final judgment. *Smith v. Miller*, 155 N. C. 247, 71 S. E. 355; *Bryan v. Hubbs*, 69 N. C. 423, 432.

Where First Bond Insufficient.—The trial court's order that appellant file supersedeas bond with another surety upon its finding that the surety upon the first bond was not sufficient is not error, as such matter rests within the sound discretion of the court. *Love v. Queen City Lines*, 206 N. C. 575, 174 S. E. 514.

When Surety Bound.—Where the trial judge, upon sufficient findings, has properly adjudged that the defendant has abandoned his appeal to the Supreme Court, it is not required that the appeal should have been docketed and dismissed in the Supreme Court in order to bind the surety on his bond given to stay execution in accordance with the terms of this section. *Murray v. Bass*, 184 N. C. 318, 114 S. E. 303.

Judgment against Surety.—Where an undertaking to stay execution on appeal has been given by the defendant against whom judgment has been rendered, and pending appeal he has been adjudicated a bankrupt in the Federal Court, an order properly entered dismissing the appeal with judgment against the surety on the undertaking rendered in the State court before the bankrupt's discharge, without suggestion of the pendency of the bankrupt proceedings, the judgment against the surety becomes fixed and absolute. *Laffoon v. Kerner*, 138 N. C. 281, 50 S. E. 654, cited and distinguished. *Murray v. Bass*, 184 N. C. 318, 114 S. E. 303.

Effect of Appeal.—Where from an order of the Superior Court requiring plaintiff to pay alimony pendente lite and counsel fees, plaintiff appeals to the Supreme Court and the cause is thereto removed, the Superior Court is thereafter without jurisdiction to order the sale of plaintiff's land to satisfy the judgment or the execution of a stay bond. *Vaughan v. Vaughan*, 211 N. C. 354, 190 S. E. 492.

Applied in Hamilton v. Southern R. Co., 203 N. C. 136, 164 S. E. 834; *Hamilton v. Southern R. Co.*, 203 N. C. 468, 166 S. E. 392.

Cited in Adams v. Guy, 106 N. C. 275, 278, 11 S. E. 535; *Hinson v. Adrian*, 91 N. C. 372, 374; *State v. Goff*, 205 N. C. 545, 172 S. E. 407; *Current v. Church*, 207 N. C. 658, 178 S. E. 82.

§ 1-290. How judgment for personal property stayed.—If the judgment appealed from directs the assignment or delivery of documents or personal property, the execution of the judgment is not stayed by appeal, unless the things required to be assigned or delivered are brought into court, or placed in the custody of such officer or receiver as the court appoints, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court or a judge thereof directs, to the effect that the appellant will obey the order of the appellate court upon the appeal. (Rev., s. 599; Code, s. 555; C. C. P., s. 305; C. S. 651.)

Cited in Adams v. Guy, 106 N. C. 275, 278, 11 S. E. 535; *State v. Goff*, 205 N. C. 545, 172 S. E. 407.

§ 1-291. How judgment directing conveyance stayed.—If the judgment appealed from directs the execution of a conveyance or other instrument, the execution of the judgment is not stayed by the appeal until the instrument has been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court. (Rev., s. 600; Code, s. 556; C. C. P., s. 306; C. S. 652.)

Duty of Clerk.—After the undertaking has been given it is the duty of the clerk to give notice thereof to the sheriff, in order that any execution which may have issued may be superseded. *Bryan v. Hubbs*, 69 N. C. 423.

Cited in Hancock v. Bramlett, 85 N. C. 393, 394; *Hannon v. Commissioners*, 89 N. C. 123, 124; *State v. Goff*, 205 N. C. 545, 172 S. E. 407.

§ 1-292. How judgment for real property stayed.—If the judgment appealed from directs the sale or delivery of possession of real property, the execution is not stayed, unless a bond is executed on the part of the appellant, with one or more sureties, to the effect that, during his possession of such property, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment is affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of this deficiency. (Rev., s. 601; Code, s. 557; C. C. P., s. 307; C. S. 653.)

Effect on Purchaser at Sale.—Where an appeal is taken from the order of confirmation of a sale under decree of a foreclosure of a deed of trust and an appeal bond is filed to stay execution, under this section and sections 1-293, 1-294, and the judgment of the lower court is reversed on appeal, the purchaser at the sale may be held liable to the mortgagor for the former's taking of immediate possession of the property after the confirmation appealed from. *Dixon v. Smith*, 204 N. C. 480, 168 S. E. 683.

Cited in Hancock v. Bramlett, 85 N. C. 393, 394; *Cox v. Hamilton*, 69 N. C. 30; *State v. Goff*, 205 N. C. 545, 172 S. E. 407.

§ 1-293. Docket entry of stay.—When an appeal from a judgment is pending, and the undertaking requisite to stay execution on the judgment has been given, and the appeal perfected, the court in which the judgment was recovered may, on special motion, after notice to the person owning the judgment, on such terms as it sees fit, direct an entry to be made by the clerk on the docket of such judgment, that the same is secured on appeal, and no execution can issue upon such judgment during the pendency of the appeal. (Rev., s. 621; Code, s. 435; 1887, c. 192; C. C. P., s. 254; C. S. 654.)

Cited in Alderman v. Rivenbark, 96 N. C. 134, 138, 1 S. E. 644; *State v. Goff*, 205 N. C. 545, 172 S. E. 407; *Queen v. DeHart*, 209 N. C. 414, 184 S. E. 7.

§ 1-294. Scope of stay; security limited for fiduciaries.—When an appeal is perfected as provided by this article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. The court below may, in its discretion, dispense with or limit the security required, when the appellant is an executor, administrator, trustee, or other person acting in a fiduciary capacity. It may also limit such security to an amount not more than fifty thousand dollars, where it would otherwise exceed that sum. (Rev., s. 602; Code, s. 558; C. C. P., s. 308; C. S. 655.)

Cross Reference.—As to effect of stay on judgment, see § 1-296.

Entire Cause Transferred to Appellate Court.—Under the North Carolina practice, an appeal carries the whole cause up to the Supreme Court, equally whether security is given

to stay proceedings, or for costs only. *Bledsoe v. Nixon*, 69 N. C. 82; *Isler v. Brown*, 69 N. C. 125.

Appeal Must Be Perfected.—An appeal does not take the case beyond the control of the superior court, until it is perfected. *Coates Bros. v. Wilkes*, 94 N. C. 174.

Authority of Lower Court Terminated.—The perfection of an appeal terminates the authority of the inferior court. *State Bank v. Twitty*, 13 N. C. 386.

An appeal duly taken and regularly prosecuted operates as a stay of all proceedings in the trial court, relating to the issues included therein, until the matters are determined in the Supreme Court. *Pruett v. Charlotte Power Co.*, 167 N. C. 598, 83 S. E. 830.

Upon appeal from an interlocutory order the lower court has no power to proceed further with the case, and a motion to set aside a restraining order because of newly-discovered evidence cannot be entertained. *Combes v. Adams*, 150 N. C. 64, 63 S. E. 186.

An appeal, docketed within the time and regularly prosecuted, relates back to the time of trial; that is, it operates as a stay of proceedings within the meaning of the statute, and brings the cause within the principle of the cases which hold that the court below is without power to hear and determine questions involved in an appeal pending in the Supreme Court. *Combes v. Adams*, 150 N. C. 64, 70, 63 S. E. 186; *Sykes v. Everett*, 167 N. C. 600, 83 S. E. 585.

Where after appeal from a formal judgment overruling a demurrer the trial court proceeds to hear exceptions to the report of the referee, the supreme court, upon affirming the judgment overruling the demurrer, will order the judgment confirming the report of the referee stricken out because the parties were entitled to have the appeal from the judgment overruling the demurrer heard and determined before the exceptions to the referee's report were passed upon. *Griffin v. Bank of Coleridge*, 205 N. C. 253, 171 S. E. 71.

When Proceedings not Stayed by Interlocutory Appeal.—When an appeal is taken from an interlocutory order from which no appeal is allowed by the Code, not upon any matter of law and which affects no substantial right of the parties, it is the duty of the judge to proceed as if no such appeal had been taken. All the inconveniences of unnecessary delay and expense attend the course of suspending proceedings and none attend the other course. Such an appeal is evidently frivolous and dilatory, and can have but one end, to increase the expense and procrastinate a final judgment. *Carleton v. Byers*, 71 N. C. 331, 334.

Subsequent Proceedings in Lower Court.—Where a cause has been ordered to the Supreme Court, no subsequent action of the court below can affect it. *Murry v. Smith*, 8 N. C. 41.

Allowing Proceedings by Lower Court.—Ordinarily an appeal stops all proceedings in the lower court, including proceedings under an order from which, if considered alone, an appeal would be premature. But the Supreme Court may direct that certain matters should not be suspended. *Pender v. Mallett*, 123 N. C. 57, 31 S. E. 351.

Orders Not Affected by Judgment.—During the pendency of an appeal, the court below still retains jurisdiction to hear motions and grant orders, not affected by the judgment appealed from. *Herring v. Pugh*, 126 N. C. 852, 36 S. E. 287.

Disposition of Collateral Matter.—Pending an appeal, the lower court, in its discretion, may refuse to dispose of a collateral matter which the decision on the appeal may render unimportant. *Penniman v. Daniel*, 91 N. C. 431.

Motion for New Trial.—The fact that an appeal is pending does not prevent a motion in the trial court for a new trial on the ground of newly-discovered evidence. *Bledsoe v. Nixon*, 69 N. C. 82; but see *Skinner v. Bland*, 87 N. C. 168, where it was held that a judge of the superior court has no power to entertain a motion in a cause, which by appeal is in the supreme court. See also, *Isler v. Brown*, 69 N. C. 125.

On appeal to the supreme court the case remains alive in the superior court until the case is certified back and final judgment entered in accordance with the certificate, and the superior court may entertain motion for a new trial for newly discovered evidence at the next term prior to such final judgment. *Allen v. Gooding*, 174 N. C. 271, 93 S. E. 740.

Second Trial Pending Appeal Unlawful.—Where the cause has been tried at a previous term of the court, and the judge has set aside the verdict under the appellants' exception, and, pending his due prosecution of his appeal, without laches on his part, the judge has forced him into another trial under his exception that the case was pending on appeal, resulting adversely to him, the action of the judge in overruling the exception and proceeding with the second trial is contrary to this section and a new trial

will be ordered on appeal. *Likas v. Lackey*, 186 N. C. 398, 119 S. E. 763.

Motion to Set Aside Verdict.—An appeal, perfected pending a motion to set aside a verdict, the time for the hearing of which has been extended by consent, does not divest the trial court of jurisdiction to determine the motion. *Myers v. Stafford*, 114 N. C. 231, 19 S. E. 232.

Order Refusing to Discharge Attachment.—An appeal from an order refusing to discharge an attachment takes the case out of the jurisdiction of the court whose order is appealed from, and an order can not subsequently be made by that court discharging the attachment. *Pasour v. Lineberger*, 90 N. C. 159.

Appeal Does Not Carry up Fund.—An appeal from a decree of distribution does not bring up the fund, the court below retaining charge of its safe-keeping and investment pending the appeal. *Hinson v. Adrian*, 91 N. C. 372.

Cited in *Bohannon v. Virginia Trust Co.*, 198 N. C. 702, 153 S. E. 263.

§ 1-295. Undertaking in one or more instruments; served on appellee.—The undertakings may be in one instrument or several, at the option of the appellant; and a copy, including the names and residences of the sureties, must be served on the adverse party, with the notice of appeal, unless the required deposit is made and notice thereof given. (Rev., s. 603; Code, s. 559; C. C. P., s. 309; C. S. 656.)

Cross References.—As to undertaking for costs, see § 1-285. As to undertaking to stay executions, see § 1-289 et seq.

Surety Insolvent.—Where the undertaking on appeal for the costs and the undertaking to stay execution are in one instrument, the appellee, upon filing the proper proofs of the insolvency of the surety, is entitled to have the appeal dismissed, but where the two undertakings are separate and distinct, the appellant has a right to have his appeal heard, although the surety to the undertaking to stay execution is insolvent. *Alderman v. Rivenbark*, 96 N. C. 134, 1 S. E. 644.

Cited in *State v. Goff*, 205 N. C. 545, 172 S. E. 407.

§ 1-296. Judgment not vacated by stay.—The stay of proceedings provided for in this article shall not be construed to vacate the judgment appealed from, but in all cases such judgment remains in full force and effect, and its lien remains unimpaired, notwithstanding the giving of the undertaking or making the deposit required in this chapter, until such judgment is reversed or modified by the supreme court. (Rev., s. 604; 1887, c. 192; C. S. 657.)

Cross Reference.—As to effect of appeal on proceedings in lower court generally, see § 1-294 and annotations thereunder.

Editor's Note.—This section was added to the code in 1887, Laws 1887, c. 192.

In *Black v. Black*, 111 N. C. 300, 16 S. E. 412, it was held that this section required that a motion for a new trial upon newly discovered evidence, made after appeal and final decree in Supreme Court, should be made in the superior court. Pending the appeal the practice remains the same as it was before this act.

Does Not Annul Judgment.—A judgment is not annulled by an appeal therefrom. *State v. Mizell*, 32 N. C. 279.

An appeal from an order to vacate a judgment, leaves such judgment, and any execution issued under it, in full force. *Murphy v. Merritt*, 63 N. C. 502.

Cited in *Dixon v. Smith*, 204 N. C. 480, 168 S. E. 683; *State v. Goff*, 205 N. C. 545, 172 S. E. 407.

§ 1-297. Judgment on appeal and on undertakings; restitution.—Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make com-

plete restitution of all property and rights lost by the erroneous judgment. Undertakings for the prosecution of appeals and on writs of certiorari shall make a part of the record sent up to the supreme court on which judgment may be entered against the appellant or person prosecuting the writ of certiorari and his sureties, in all cases where judgment is rendered against the appellant or person prosecuting the writ. (Rev., s. 605; Code, s. 563; C. C. P., s. 314; R. C., c. 4, s. 10; 1785, c. 233, s. 2; 1810, c. 793; 1831, c. 46, s. 2; C. S. 658.)

Cross References.—As to jurisdiction of supreme court to review issues of fact, see § 7-11. As to jurisdiction of supreme court on appeal, see § 7-10 and Const. Art. IV, sec. 8.

Whole Case Taken Up.—Under the provisions of this section an appeal on the trial and determination of the cause in the inferior court carries the whole case to the Supreme Court for review, and such court has plenary jurisdiction to reverse, affirm, or modify the judgment. *Hudson v. Charleston, etc., R. Co., 55 Fed. 252.*

Power to Direct Judgment in Lower Court.—A party litigant has a substantial right in a verdict obtained in his favor, and where one has been rendered on issues which are determinative, and is set aside as matter of law, and such ruling is held to be erroneous on appeal, the Supreme Court will direct that judgment be entered on the verdict as rendered. *Ferrall v. Ferrall, 153 N. C. 174, 69 S. E. 60; Wilson v. Rankin, 129 N. C. 447, 40 S. E. 310.*

Judgment on Compromise.—As the Supreme Court may enter final judgment if proper, a judgment so entered on a compromise by parties pending appeal will be treated as a final judgment by consent. *Chavis v. Brown, 174 N. C. 122, 93 S. E. 471.*

Where the parties' respective counsel on appeal agreed to modification and amendment of the judgment, the cause will be remanded to the trial court, with directions to carry out the agreement. *Stokes-Grimes Grocery Co. v. Hill, 176 N. C. 697, 97 S. E. 468.*

Any Relief Consistent with Pleadings.—On appeal a case is heard on the facts alleged in the pleadings, and where the plaintiffs have set forth such facts as entitled them to relief they will not be restricted to that demanded in their prayer for judgment, but may have any additional relief not inconsistent with the pleadings and the facts proved. *Voorhees v. Porter, 134 N. C. 591, 47 S. E. 31.*

Separate Judgments for Separate Parties.—Where two parties have been joined as parties defendant in an action, and issues have been submitted as to each, and adverse verdict rendered as to each, under this section the action may be dismissed as to one party and affirmed as to the other. *Kimbrough v. Hines, 182 N. C. 234, 109 S. E. 11.*

Setting Aside of Erroneous Part Only.—Where a judgment appealed from consists of independent matters, so that the erroneous part thereof can be segregated, the court will only set aside the erroneous part. *Newberry v. Seaboard, etc., R. Co., 160 N. C. 156, 76 S. E. 238.*

Parties Not Appealing.—Where but one of a number of judgment defendants appeal from the judgment of the superior court, the Supreme Court, in affirming the judgment, will remand the case, that the judgment of affirmance may be enforced against all such defendants. *Baxter v. Wilson, 95 N. C. 137.*

But the Supreme Court will not determine the rights of persons represented in the trial but who do not appeal. *Van Dyke v. Aetna Life Ins. Co., 173 N. C. 700, 91 S. E. 600.*

Same—Determining Interest in Land.—In this action the verdict of the jury established certain interests in defendant's favor in the lands in controversy which were not adjudicated in the judgment rendered; and, as the plaintiff did not appeal, the judgment is accordingly modified and affirmed. *Johnson v. Whilden, 166 N. C. 104, 81 S. E. 1057.*

When Judgment Reversed.—When, upon the inspection of the whole record, it appears that the judgment was unwarranted upon the facts, the Supreme Court will, ex mero motu, reverse it. *Everett v. Raby, 104 N. C. 479, 10 S. E. 526.*

Reversal as to Certain Issues.—Ordinarily, for error in the charge, or the reception or rejection of evidence, the verdict is set aside entirely, but it may be set aside in part, and as to certain issues only, when it plainly appears that the erroneous ruling would not and did not affect the findings upon the other issues. *Burton v. Wilmington, etc., R. Co., 84 N. C. 193.*

Judgment Reversed for Substantial Cause Only.—Courts

will not order reversals upon grounds which do not affect real merits and where no substantial prejudice will result. *Ball-Thrash Co. v. McCormack, 172 N. C. 677, 90 S. E. 916.*

Where appellant has had a fair submission of the real issues, the substantial benefit of all prayers for instructions, and determinative facts have been found against him, a reversal will not be granted for technical errors. *Smith v. Hancock, 172 N. C. 150, 90 S. E. 127.*

Modifying Provisions of Judgment.—Where defendants were joint tortfeasors, error in submitting to the jury the issue as to which was primarily liable, and rendering a judgment based on a finding of primary liability by one, does not require a reversal, but the judgment can be modified to impose a joint and several liability. *Hodgin v. North Carolina Public Service Corp., 179 N. C. 449, 102 S. E. 748.*

Same—Omission of Parties.—In suit to foreclose deed of trust, executed by husband and wife, securing note executed by husband, against trustee and wife, where there was doubt whether personal representative of deceased husband was necessary party, Supreme Court will modify judgment dismissing action for failure to join him, and direct that plaintiff executors may bring him in. *Geitner v. Jones, 173 N. C. 591, 92 S. E. 493.*

Modification as to Amount of Recovery.—Although on appeal an issue involving several items can not be amended where one item is erroneous, and appeal is on that item, the court can allow appellee to deduct that much, or stand a new trial. *Ragland v. Lassiter-Ragland, 174 N. C. 579, 94 S. E. 100.*

Where judgment has been rendered, in an action upon the note and mortgage, subjecting the collateral in part to the payment for the supplies for the preceding year, and error has been committed as shown by the facts and figures ascertained, the judgment appealed from will be reformed accordingly. *Planters Stores Co. v. Bullock, 180 N. C. 656, 104 S. E. 65.*

Judgment Affirmed.—The Supreme Court may affirm the judgment of the trial court. *Selwyn Hotel Co. v. Griffin, 182 N. C. 539, 109 S. E. 371; Wilson v. Jones, 176 N. C. 205, 97 S. E. 18.*

New Trial May Be Granted.—The Supreme Court has power to grant a new trial. *Hall v. Hall, 131 N. C. 185, 42 S. E. 562; Hawk v. Pine Lumber Co., 149 N. C. 10, 62 S. E. 752.*

The Supreme Court may order a new trial and direct further proceedings in lower court. *Williams v. Kearney, 177 N. C. 531, 98 S. E. 705.*

Same—For Newly Discovered Evidence.—The Supreme Court may, in its discretion order a new trial for newly-discovered evidence, on motion in that court. *Clark v. Riddle, 118 N. C. 692, 24 S. E. 492.*

The Supreme Court, in its discretion, may refuse to grant a new trial for newly discovered evidence. *Brown v. Mitchell, 102 N. C. 347, 9 S. E. 702; Sledge v. Elliott, 116 N. C. 712, 21 S. E. 797.*

Same—To Introduce New Evidence.—After appeal, the cause may be remanded to the court below, upon petition of the plaintiff, to enable him to take further proofs, upon terms. *Springs v. Wilson, 17 N. C. 385.*

Same—When Necessary Party Absent.—Where it appears that a necessary party is missing from the case, or that the issues are not determinative of the cause of action, the court, on its own motion, may remand the cause, with orders for a new trial. *Vaughan v. Davenport, 159 N. C. 369, 74 S. E. 967, modifying opinion on rehearing s. c., 157 N. C. 156, 72 S. E. 842.*

When New Trial Granted.—When the judgment is not supported by the record (as where the record shows that there was no verdict), or is rendered upon an inconsistent or unsatisfactory verdict, a new trial must be awarded. *McCanless v. Flinchum, 98 N. C. 358, 362, 4 S. E. 359.*

Ordering New Trial of Certain Issues Only.—The court on appeal, upon ordering a new trial, may confine the issues to those which it deems necessary to a proper determination of the cause. *Davis v. Southern R. Co., 176 N. C. 186, 96 S. E. 945, denying motion to recall mandate, 175 N. C. 648, 96 S. E. 41.*

On appeal, it is in the discretion of the court whether to restrict a new trial to the issues affected by the error; wherever the error is confined to one or more issues separable from others, and it appears to the court that no prejudice will result from such course, a new trial as restricted to such issues is usually granted. *Huffman v. Ingold, 181 N. C. 426, 107 S. E. 453.*

All Issues.—When the Supreme Court grants a new trial generally without further disposition, the new trial is upon all of the issues, though it has power to grant either a general or partial new trial. *Table Rock Lumber Co. v. Branch, 158 N. C. 251, 73 S. E. 164.*

Technical, Formal, or Trivial Defects.—The Supreme Court will not grant a new trial except to subserve the real ends of substantial justice, and unless there is a prospect of ultimate benefit to the appellant. *Cauble v. Southern Exp. Co.*, 182 N. C. 448, 109 S. E. 267.

To Amend Verdict, Findings or Judgment.—The Supreme Court has power to remand a cause, so that there may be fuller finding of facts by the trial judge, in order that the appeal may be more intelligently considered. *Gulf Refin. Co. v. McKernan*, 178 N. C. 82, 100 S. E. 121.

Findings as to Costs.—On appeal, a cause may be remanded for a special finding as to the right to costs. *Smith v. Smith*, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113.

To Find Additional Facts.—Where the pleadings and affidavits in an injunction suit are conflicting, and there is no finding of facts, the case will be remanded, that the facts may be found by the trial court or by a jury upon proper issues submitted to it. *Kitchen v. Troy*, 72 N. C. 50.

In a proceeding before a township board of supervisors to lay out a cartway, where an appeal was taken to the county board of commissioners and from there to the superior court, and the superior court exceeded its jurisdiction and amended the petition to one for the laying out of a public road, the Supreme Court on appeal will not dismiss the case, but will direct the superior court to strike out the void order and proceedings thereunder and to proceed according to law. *Holmes v. Bullock*, 178 N. C. 376, 100 S. E. 530.

A necessary finding in an action to recover money from an express company, alleged to have been lost from a valise which had been intrusted to the defendant for shipment, in that the money was taken while the valise was in the defendant's care or control, and such finding being omitted from an agreed case submitted to the superior court, it is remanded so that the omission may be supplied. *Sedbury v. Southern Exp. Co.*, 164 N. C. 363, 79 S. E. 286.

Plaintiff Entitled to Judgment against Sureties on Undertaking.—Upon the affirmation by the Supreme Court of a judgment of the superior court, in favor of the plaintiff, he is entitled, upon motion, to judgment against the sureties upon an undertaking to stay execution pending appeal, and such affirmation is conclusive of the liability of the sureties. *Oakley v. Van Noppen*, 100 N. C. 287, 5 S. E. 1.

§ 1-298. Procedure after determination of appeal.—In civil cases, at the first term of the superior court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause stands in its regular order on the docket for trial at such first term after the receipt of the certificate from the supreme court. (Rev., s. 1526; 1887, c. 192, s. 2; C. S. 659.)

Jurisdiction of Appellate Court after Remand.—The Supreme Court, having certified its opinion and remanded the case to the court below, is without jurisdiction to make any orders therein. *Seaboard Air Line R. Co. v. Horton*, 176 N. C. 115, 96 S. E. 954; *Davis v. Southern R. Co.*, 176 N. C. 186, 96 S. E. 945.

Jurisdiction of Lower Court after Affirmation.—After a judgment of a subordinate court imposing a punishment for contempt for disobedience of its order has been affirmed by the Supreme Court it becomes final, and the court below has no power to remit or modify it. *In re Griffin*, 98 N. C. 225, 3 S. E. 515.

Final Assessment Invalid before Opinion Certified.—In *Atlantic Coast Line R. Co. v. Sanford*, 188 N. C. 218, 219, 124 S. E. 308, the Court said: "The defendants seem to have proceeded upon the assumption that it was not necessary to await the certification of the opinion rendered on appeal, but in this respect they were in error. They had no legal right to make a final assessment against the plaintiff's property before the opinion had been certified to the superior court and while the questions presented on the appeal were yet in fieri."

Proceedings in Trial Court, after Affirmation, Simply Formal.—When a judgment of the superior court was affirmed on appeal, an entry on the docket of the superior court, "Judgment as per transcript filed from the Supreme Court," was sufficient and a termination of the action. The former judgment having been merely suspended, and not

vacated by the appeal, the affirmation by the Supreme Court ended the suspension, and the office of the last judgment was simply formal, to direct the execution to proceed and to carry the costs subsequently accrued. *Bond v. Wool*, 113 N. C. 20, 18 S. E. 77.

Effect in Lower Court of Decision of Appellate Court.—Where a judgment has been affirmed or reversed, but no final judgment entered by the Supreme Court, the case is a live one until judgment has been entered in the court below in conformity with the certificate from the Supreme Court. *Lancaster v. Bland*, 168 N. C. 377, 84 S. E. 529.

Procedure When Lower Court Contravenes Judgment of Supreme Court.—A judgment in appellant's favor taxing the costs of action at variance with the decision of the Supreme Court rendered on appeal, signed upon appellant's motion in the superior court, after examination had been afforded to the appellee's attorney, is not irregular, and when not thus taken through mistake, inadvertence, surprise or excusable neglect, the procedure is by exception and appeal, and not by motion in the cause at a subsequent term of the trial court. *Phillips v. Ray*, 190 N. C. 152, 129 S. E. 177.

Pro Forma Order.—An order "that execution of said judgment do proceed" was pro forma under this section. *North Carolina R. Co. v. Story*, 193 N. C. 362, 366, 137 S. E. 166.

Applied in *Hamilton v. Southern R. Co.*, 203 N. C. 136, 164 S. E. 834.

§ 1-299. Appeal from justice heard de novo; judgment by default; appeal dismissed.—When an appeal is taken from the judgment of a justice of the peace to a superior court, it shall be therein reheard, on the original papers, and no copy thereof need be furnished for the use of the appellate court. An issue shall be made up and tried by a jury at the first term to which the case is returned, unless continued, and judgment shall be given against the party cast and his sureties. When the defendant defaults, the plaintiff in actions instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, shall have judgment, and in other cases may have his inquiry of damages executed forthwith by a jury. If the appellant fails to have his appeal docketed as required by law, the appellee may, at the term of court next succeeding the term to which the appeal is taken, have the case placed upon the docket, and upon motion the judgment of the justice shall be affirmed and judgment rendered against the appellant, and for the costs of appeal and against his sureties upon the undertaking, if there are any, according to the conditions thereof. Nothing herein prevents the granting the writ of recordari in cases now allowed by law. (Rev., ss. 607; 609; Code, ss. 565, 881; C. C. P., s. 540; 1889, c. 443; R. C., c. 31, s. 105; 1777, c. 115, s. 63; 1794, c. 414; C. S. 660.)

Local Modification.—*Transylvania*: 1935, c. 32.

I. Editor's Note.

II. General Considerations.

III. When Appeal Lies.

IV. Power of Superior Court on Appeal.

V. Dismissal for Failure to Docket—Recordari.

Cross References.

As to manner of taking appeal, see § 7-179. As to effect of appeal, see § 7-178.

I. EDITOR'S NOTE.

The plain purpose of the legislature, as manifested in this section, was to expedite the disposition of appeals from the courts of justices of the peace by providing that they should stand for trial de novo on the dockets of the superior courts at the first term after the appeal should be taken; that if both parties should appear, judgment should be tendered against the party cast, and that where the defendants should make default the judgment in certain classes of cases should be final, and in other actions by default and inquiry "to be executed forthwith by a jury." This section was subsequently amended (Laws of 1889, ch. 443) so that where the party appealing should fail to cause

his appeal to be docketed before the next term of the superior court, the opposing party should have the right to procure a transcript of the justice's record, docket it and move to dismiss the appeal at said term. The amendment seems to have been enacted in furtherance of the same purpose to prevent unnecessary delay in disposing of those causes involving small amounts.

A justice's court is an inferior court of limited jurisdiction, not proceeding according to the course of common law, and although a justice is required to keep a docket and enter his proceedings, this does not constitute his court a court of record. Accordingly, when an appeal is taken from his judgment he does not send up a duly certified transcript of record as the foundation of the action of the appellate court, but he is required to file the original papers in the cause.

II. GENERAL CONSIDERATIONS.

Jurisdiction Dependent on Jurisdiction of Lower Court.—The jurisdiction of the superior court on appeal from justice court is entirely derivative, and, if the justice had no jurisdiction of the action, the superior court acquires none by the appeal. *Lower Creek Drainage Com'rs v. Sparks*, 179 N. C. 581, 103 S. E. 142.

Derivative Jurisdiction.—The jurisdiction of the superior court on appeals from a justice of the peace is entirely derivative, so that, if the justice had no jurisdiction in an action as it was before him, the superior court can derive none by amendment. *Stacey Cheese Co. v. Pipkin*, 155 N. C. 394, 71 S. E. 442; *McLaurin v. McIntyre*, 167 N. C. 350, 83 S. E. 627.

Where the justice did not have jurisdiction of a party, the superior court can not obtain it on appeal from the justice court, by ordering a summons to issue to bring the party before it. *Durham Fertilizer Co. v. Marshburn*, 122 N. C. 411, 29 S. E. 411, 65 Am. St. Rep. 408.

Jurisdiction Can Not Be Conferred by Consent.—Where the superior court acquired no jurisdiction of a case on appeal from justice's court without jurisdiction, the parties can not by consent waive the want of jurisdiction. *Love v. Hufines*, 151 N. C. 378, 66 S. E. 304.

Plaintiff Must Prove Case.—As on appeal from a justice the whole case must be tried de novo in the superior court, the mere absence of the defendant, who has answered, and raised a material issue, does not relieve plaintiff from the necessity of establishing his cause of action, and it is error, because of such absence, to dismiss the appeal. *Barnes v. Southern R. Co.*, 135 N. C. 130, 45 S. E. 531.

Appeal Waives Objections to Proceedings before Justice.—Where a party appealed from the judgment of a magistrate to the county court, and a trial was had by jury, the matter being gone through with de novo, the defects in the proceedings before the magistrate are not material, as they are vacated by the appeal. *Kearney v. Jeffreys*, 30 N. C. 96.

Where it did not appear in the summons, and there was no complaint that the amount sued for was over the jurisdictional amount limited to justice courts, the objection as to the court's jurisdiction can not be raised for the first time on appeal to the superior court. *Cromer Bros. v. Marsha*, 122 N. C. 563, 29 S. E. 836.

Trial De Novo.—On appeal from a judgment of a justice of the peace to the superior court, the judgment appealed from is vacated, and a trial de novo had in the superior court. *Carolina Bagging Co. v. United States Railroad Administration*, 184 N. C. 73, 113 S. E. 595. See also *State v. Goff*, 205 N. C. 545, 172 S. E. 407; *Pridgen v. Lynch*, 215 N. C. 672, 2 S. E. (2d) 849.

New Trial of All Litigated Matters.—On appeal to the superior court from the judgment of a justice, all litigated matters in the action are to be tried de novo. *Falkner v. Pilcher*, 137 N. C. 449, 49 S. E. 945.

Trial upon Original Papers.—The appeal takes the whole action into the Superior Court, where it is to be tried de novo, not upon a transcript of the record in the justice's court, but upon the original papers, which must be sent up with the appeal. *Phelps v. Worthington*, 92 N. C. 270, 271.

Can Not Change Nature of Action.—Defendant, on appeal from a justice of the peace in an action for rent, can not amend so as to change the nature of the action, and make it one of which a justice's court has no jurisdiction. *Shell v. West*, 130 N. C. 171, 41 S. E. 65.

Right to Remit Claim.—Where plaintiff brought suit in the court of a justice of the peace claiming a debt, and also possession of a horse and wagon, under mortgage, on appeal from the justice's judgment to the Superior Court, he had a right to remit his claim for the personal property and declare only for the debt. *Jones v. Palmer*, 83 N. C. 303.

Party Cannot Answer and Demur.—In an action in justice's court where defendant pleaded to the merits and went to trial, and was cast and appealed, his answer, not withdrawn, waived his demurrer subsequently filed in the Superior Court. *Rosenbacher & Bros. v. Martin*, 170 N. C. 236, 86 S. E. 785.

Cited in *Sneed v. State Highway Commission*, 194 N. C. 46, 47, 138 S. E. 350; *Drafts v. Summey*, 198 N. C. 69, 150 S. E. 631.

III. WHEN APPEAL LIES.

Judgment Must Put an End to Action.—This section implies a final judgment—that is, one that in some way puts an end to the action. *Phelps v. Worthington*, 92 N. C. 270, 271.

No Appeal from Interlocutory Judgment.—Appeals can not be taken from justices of the peace to the Superior Courts from interlocutory judgments; therefore, where a justice dismissed a warrant of attachment, the judgment of the Superior Court on appeal dismissing the plaintiff's action on the ground that no service of process had ever been made was erroneous, as no appeal lay from the order of the justice and the Superior Court should only have dismissed the appeal. *Phelps v. Worthington*, 92 N. C. 270.

Appeal from County Commissioner.—An appeal from the board of county commissioners in establishing a public road should be taken in accordance with this section. *Blair v. Coakley*, 136 N. C. 405, 48 S. E. 804.

Taxing Prosecutor with Costs of Criminal Prosecution.—An appeal lies from the judgment of a justice of the peace taxing the prosecutor with costs, such taxing being in the nature of a civil judgment. *State v. Morgan*, 120 N. C. 563, 26 S. E. 634; *State v. Cole*, 180 N. C. 682, 104 S. E. 136.

Motion To Set Aside Judgment.—If a motion to set aside a judgment in the court of a justice of the peace should be allowed or denied improperly, the complaining party may appeal to the superior court. *Whitehurst v. Merchants, etc.*, *Transp. Co.*, 109 N. C. 342, 13 S. E. 937.

Waiver of Right of Appeal.—A defendant by voluntarily paying a judgment taken against him before a justice of the peace waives his right of appeal. *Cowell v. Gregory*, 130 N. C. 80, 40 S. E. 849.

Appeal and Not Motion to Set Aside Judgment Proper Remedy.—Where a defendant relied on the assurance of a justice of the peace, that his cause would not be tried, after which the justice rendered a judgment against him in his absence, the remedy is by an appeal or a recordari as a substitute therefor, and not by a motion to set aside the judgment. *Navassa Guano Co. v. Bridgers*, 93 N. C. 439.

IV. POWER OF SUPERIOR COURT ON APPEAL.

Limiting Trial to Particular Issues.—The Superior Court may limit the trial on appeal to particular issues, where there is no evidence to support those excluded. *Smith v. Newberry*, 140 N. C. 385, 53 S. E. 234.

Incidental Questions.—An appeal from a court of a justice of the peace comprehends in its scope a new trial of the whole subject matter of the action, and any determination by the magistrate of an incidental question involved therein, though not directly appealed from, is, when relevant and necessary, to be considered and determined by the appellate court. *White v. American Peanut Co.*, 165 N. C. 132, 81 S. E. 134.

Amount Claimed Limited to Jurisdictional Amount of Justice's Court.—Where the Superior Court acquires jurisdiction on appeal from justice's court upon law and fact, the trial proceeds de novo, the appellate court can not allow an amendment of the complaint increasing the amount of plaintiff's claim beyond that to which the jurisdiction of the justice is limited. *Meneely & Co. v. Craven*, 86 N. C. 364. See, as to applicability of section, *Cowles v. Hayes*, 67 N. C. 128.

May Disregard Finding of Facts.—On appeal to the Superior Court from an order of a justice denying a motion to open a default judgment the court may disregard the justice's finding of fact, and proceed to hear the matter anew. *Turner v. Threshing Mach. Co.*, 133 N. C. 381, 45 S. E. 781. *Finlayson v. American Acci. Co.*, 109 N. C. 196, 13 S. E. 739.

Same—But Not in Summary Proceedings.—Where on a trial in summary proceedings before a justice, there is evidence to establish equitable title in defendant, and the court finds from such evidence in favor of defendant, and dismisses the action, his judgment can not be reviewed; but, where there is no evidence, his decision becomes a question of law, and reviewable. *McDonald v. Ingram*, 124 N. C. 272, 32 S. E. 677.

Power to Allow New or Amended Pleadings.—Upon an appeal in a civil action from the court of a justice of the peace to the Superior Court, the latter has power to amend the pleadings and allow new pleas or matters of de-

fense to be set up. *Moore v. Garner*, 109 N. C. 157, 13 S. E. 768.

Same—Discretion of Court.—The trial on appeal in the superior court from a justice's judgment is de novo, and the judge may, in his discretion, allow pleadings to be filed. *Teal v. Templeton*, 149 N. C. 32, 62 S. E. 737.

Same—Plea of Statute of Limitations.—The plea of the statute of limitations, not relied on before a justice, can not be set up on appeal in the superior court without leave. Amendment of pleadings in such case is matter of discretion. *Poston v. Rose*, 87 N. C. 279.

Same—Error in Amount of Summons.—Where a summons issued by a justice failed to show the amount claimed, the insertion of such amount was properly permitted upon appeal to the superior court, and such amendment was retroactive. *McPhail Bros. v. Johnson*, 115 N. C. 298, 20 S. E. 373.

Same—Error in Initials of Party.—Error in one of the initials of defendant's name in a justice's summons, if the right man is served, and is not misled, does not vitiate judgment by default, and may be amended on an appeal. *Clawson v. Wolfe*, 77 N. C. 100.

May Allow Counterclaim.—The superior court may on appeal from justice court allow the defendant to set up a counterclaim not urged in justice court. *Norfolk, etc., R. Co. v. Dill*, 171 N. C. 176, 88 S. E. 144. See, also, *Thomas v. Simpson*, 80 N. C. 4.

Same—Refusal to Allow Counterclaim.—Where it appeared that a defendant made no defense to the action, but suffered judgment to be entered against him in a justice's court and appealed to the superior court, but failed to answer or ask for leave to do so until the trial three years later, the court properly refused to allow a plea of counterclaim then to be set up. *Johnson v. Rowland*, 80 N. C. 1.

Court Cannot Set Aside Judgment and Docket Case.—Where a judgment was obtained before a justice of the peace and docketed in the office of the Superior Court Clerk, the court has no power upon motion to set aside said judgment and enter the cause upon the civil issue docket. *Ledbetter v. Osborne*, 66 N. C. 379.

May Make Additional Parties.—Under this section the superior court, on appeal from justice's judgment is authorized to bring in an additional defendant, though less than \$200 might be recoverable against such defendant. *Sellers Hosiery Mills v. Southern R. Co.*, 174 N. C. 449, 93 S. E. 952. But not where the presence of the co-defendant is unnecessary. *Morgan v. Royal Ben. Soc.*, 167 N. C. 262, 83 S. E. 479.

V. DISMISSAL FOR FAILURE TO DOCKET—RECORDARI.

Effect of Failure to Docket in Time.—An appeal from justice court not docketed at the first term to which it was returnable is properly dismissed. *Tedder v. Deaton*, 167 N. C. 479, 83 S. E. 616; *Peltz v. Bailey*, 157 N. C. 166, 72 S. E. 978.

If appellant fails to docket his appeal by the next succeeding term of the superior court, the appellee may have the case placed on docket, and have the judgment affirmed. *Simonds v. Carson*, 182 N. C. 82, 108 S. E. 353.

Under this section the judgment of affirmance is, in substance, equivalent to a judgment dismissing the action, and the appellate court is not required to look into the record for the purpose of passing upon the merits of the exceptions. *Blair v. Coakley*, 136 N. C. 405, 48 S. E. 804.

Failure to Pay Clerk's Fees.—When the justice of the peace was paid for transcript of appeal, made it out the day of the trial and handed it to the clerk of the superior court, but the appellant neither tendered nor paid the clerk his fees nor requested that it be docketed, a motion to dismiss the appeal will be granted. *Lentz v. Hinson*, 146 N. C. 31, 59 S. E. 144; *Ballard v. Gay*, 108 N. C. 544, 13 S. E. 207.

Dismissal for Failure to Docket Not Reviewable.—The action of the lower Court is not reviewable in allowing the motion of the appellee, from a judgment rendered in a court of the Justice of the Peace, to docket and dismiss an appeal when the appellant had neither paid the Clerk's fees nor requested him to docket the appeal. *McClintock v. Life Ins. Co.*, 149 N. C. 35, 62 S. E. 775.

When Appeal Not Dismissed.—Where an appellant pays the fees for the return and docketing of an appeal from a justice of the peace, the appeal will not be dismissed for the failure of the clerk of the superior court to docket the same. *Johnson v. Andrews*, 132 N. C. 376, 43 S. E. 926.

Where, on appeal from a justice of the peace, the case was not docketed, because the fees for this service were not tendered or paid to the clerk, but the clerk did not demand his fees or notify the appellant that the appeal would not be docketed unless they were paid, it was no error

for the judge to allow the appeal to be docketed two terms after the regular time, and as soon as the appellant was notified that this had not been done. *West v. Reynolds*, 94 N. C. 333.

Waiver of Right to Object to Failure to Docket in Time.—Where defendant failed to see that his appeal from judgment of a justice of the peace was docketed at next term of superior court, but appeal was on docket 1½ years without notice from plaintiff that he intended to take advantage of irregularity, it was held that plaintiff waived his right to object. *Rawls, etc., Co. v. Norfolk Southern R. Co.*, 172 N. C. 211, 90 S. E. 116.

Same—Agreement of Attorneys as Waiving Requirement.—Where the opposing attorneys agree that plaintiff's attorney shall make up the transcript of appeal with the justice of the peace, and submit it to defendant's attorney, and plaintiff's attorney failed to conform to the agreement, the appeal will not be dismissed at his instance on the ground that the case was not docketed at the term next ensuing after the appeal was taken. *Jerman v. Gullede*, 129 N. C. 242, 39 S. E. 835.

Same—Agreement That Defendant Should Hold the Property.—An agreement made after judgment by a justice for plaintiff that defendant should hold the property until the cases should be determined by the higher court did not waive plaintiff's right to have the appeal dismissed because not docketed in time. *Jones v. Fowler*, 161 N. C. 354, 77 S. E. 415.

Effect of Not Moving to Dismiss for Failure to Docket in Time.—Upon appellant's failure to docket appeal from justice of the peace to superior court at the next term, appellee can move to dismiss at such term, but his failure to do so does not estop him from asserting appellant's failure to docket appeal at the next term as a bar to the trial of the case in the superior court. *Barnes v. Saleeby*, 177 N. C. 256, 98 S. E. 708. See, also, *Love v. Huffines*, 151 N. C. 378, 66 S. E. 304.

Privilege of Appellee Only.—The power given by this section to the appellee to docket a case at the first term of the superior court, if the appellant does not, and to have the judgment affirmed, is a privilege granted to the appellee only, and the appellant can draw no argument against appellee from his failure to use it. *Davenport v. Grissom*, 113 N. C. 38, 39, 18 S. E. 78.

Laches in Applying for Recordari.—When an appeal from a justice's court has not been docketed within the time prescribed by section 1-300, the appellant should move for a recordari, at the first ensuing term of the superior court, that the appeal should be docketed; and though appeal had been prayed in open court and the fee of the justice paid, the failure to move for a recordari and to make proper inquiry of the clerk of the superior court as to whether the case has been docketed is such laches as will, in the absence of agreement of the parties, entitle the appellee to have the case dismissed upon his motion; and the fact that appellant has employed an attorney to look after the appeal will not excuse him. *Peltz v. Bailey*, 157 N. C. 166, 72 S. E. 978.

Appeal Lost through Default of Appellant.—The provisions of this section, as to the writ of recordari, have no application where an appeal from the justice's court has been lost through the default of the appellant, and the failure of the appellee to docket and dismiss is no waiver of the appellee's rights upon appellant's motion for a recordari. *Pickens v. Whitton*, 182 N. C. 779, 109 S. E. 836; see, also, *Helsabeck v. Grubbs*, 171 N. C. 337, 88 S. E. 473.

No Recordari after Removal.—A plaintiff who appealed from the judgment of a justice for less than \$25, in his favor, he claiming more, and the judge having affirmed the judgment on the papers sent up to him, under this sec., is not entitled to a recordari to the justice, as the case has already been removed from his court. *Cowles v. Hayes*, 67 N. C. 128.

Liability of Justice for Negligent Failure to Docket Appeal.—A justice who is paid the appeal fee and the fee for docketing the appeal, and yet who negligently fails to docket the appeal, so that the right of appeal is thereby lost, is not liable therefor in a civil suit. *Simonds v. Carson*, 182 N. C. 82, 108 S. E. 353. See 1 N. C. L. Rev. 55.

§ 1-300. Appeal from justice docketed for trial de novo.—When the return is made from the justice's court the clerk of the appellate court shall docket the case on his trial docket for a new trial of the whole matter at the ensuing term of said court. (Rev., s. 608; Code, s. 880; C. C. P., s. 539; 1876-7, c. 251, s. 8; C. S. 661.)

Cross Reference.—As to notice of appeal, see §§ 7-179, 7-180.

Docketed at Next Ensuing Term.—An appeal from the court of a justice of the peace should be docketed at the next ensuing term of the superior court if the judgment appealed from has been rendered more than ten days before that term, without the discretion of the trial judge to grant indulgence or extension of time. *Peltz v. Bailey*, 157 N. C. 166, 72 S. E. 978; *Southern Pants Co. v. Smith*, 125 N. C. 588, 34 S. E. 552.

Same—Judge Cannot Docketing Later.—Under this section an appeal from justice court must be docketed at that term of the superior court which begins more than ten days after judgment in justice court, and the superior court has no right to dispense with such requirement. *Helsabeck v. Grubbs*, 171 N. C. 337, 88 S. E. 473; *Barnes v. Saleeby*, 177 N. C. 256, 98 S. E. 708. Formerly the rule was different. See *West v. Reynolds*, 94 N. C. 333.

Term to Which Appeal Is Taken.—An appeal must be taken to the next term of the appellate court; and it is therefore error to proceed in a case on appeal from a justice's court taken after that time, in the absence of notice to the appellee, that he may show cause against it. *Hahn v. Guilford*, 87 N. C. 172.

See *State v. Edwards*, 110 N. C. 511, 14 S. E. 741.
The "next term" of the court means that term which shall begin next after the expiration of the ten days allowed for service of notice of appeal. *Sondley v. Asheville*, 110 N. C. 84, 14 S. E. 514.

Same—Whether Civil or Criminal.—The phrase "next term," within rule requiring appeals from justice's judgments to be docketed at the next term, means any term, whether civil or criminal, that begins next after the expiration of the ten days allowed for service of notice of appeal. *Barnes v. Saleeby*, 177 N. C. 256, 98 S. E. 708; *Johnson v. Andrews*, 132 N. C. 376, 43 S. E. 926; *Jerman v. Gulleddge*, 129 N. C. 242, 39 S. E. 835.

An appeal from the action of the county commissioners in altering a public road should be taken to the next term of the superior court, though it was a criminal term. *Blair v. Coakley*, 136 N. C. 405, 48 S. E. 804.

Same—Judge Cannot Allow Docketing Later.—Under this section an appeal from justice court must be tried at that term of the superior court which begins more than ten days after judgment in justice court, and the superior court has no right to dispense with such requirement. *Helsabeck v. Grubbs*, 171 N. C. 37, 88 S. E. 473; *Barnes v. Saleeby*, 177 N. C. 256, 98 S. E. 708. Formerly the rule was different. See *West v. Reynolds*, 94 N. C. 333.

Subsequent Term.—When the term of the appellate court begins within ten days allowed by section 7-179 to perfect an appeal, the appeal is taken to the next term. *Gregory v. Hobbs*, 92 N. C. 39; *Sondley v. Asheville*, 110 N. C. 84, 14 S. E. 514.

When Judge Does Not Attend Next Term.—When the judge does not attend the next term of court at which an appeal from a judgment of a justice of the peace should have been docketed, the appellant should see that the appeal is docketed in time, all matters then pending being carried over in the same plight and condition, to the subsequent term. *Barnes v. Saleeby*, 177 N. C. 256, 98 S. E. 708.

Duty of Appellant to See Case Properly Docketed.—One appealing to the superior court from a judgment of a justice of the peace must see that the case is properly docketed, or he loses his appeal. *Abell v. Thornton Light, etc., Co.*, 159 N. C. 348, 74 S. E. 881.

Failure of Appellant to Docket Appeal in Apt Time.—Under this section it is appellant's duty to docket his appeal in the superior court in time, and his failure to have done so by the next succeeding term of the superior court, wherein the motion of appellee to dismiss has been properly allowed, or to apply for a recordari, in apt time, is his own laches, which will prevent his recovering damages of the justice of the peace for his failure to send up the case according to his promise, after having accepted his fee therefor, in the absence of a fraudulent intent. *Simonds v. Carson*, 182 N. C. 82, 108 S. E. 353.

Docketing at Subsequent Term as Entitling Appellant to Nonsuit.—Under this section a docketing at a subsequent term is a nullity, and does not entitle the plaintiff appellant to take a nonsuit. *Davenport v. Grissom*, 113 N. C. 38, 18 S. E. 78.

Finality of Judgment.—Where a justice of the peace has taken a case under advisement and later renders judgment against the defendant without notice to him, and the defendant does all that the law requires of him, after he had notice of the judgment, to perfect his appeal to the Superior Court within the time required by statute, and later has recordari issued from the latter court, the judgment

appealed from will not be held as final. *Blacker v. Bulard*, 196 N. C. 696, 146 S. E. 807.

Plea of Limitations.—An appeal from a court of a justice of the peace is tried de novo in the Superior Court, under this section, and when the account sued on is admitted in the former court; it is discretionary with the trial judge to permit the plea of the statute of limitations which is necessary to defendant's right to set it up. *Fochtman v. Greer*, 194 N. C. 674, 140 S. E. 442.

Effect of Dismissal.—The dismissal of an appeal from a court of a justice of the peace, when not docketed by the appellant at the term of the superior court prescribed by this section, has the same effect as an affirmation of a judgment thereof under section 1-299. *McClintock v. Life Ins. Co.*, 149 N. C. 35, 62 S. E. 775.

§ 1-301. Plaintiff's cost bond on appeal from justice.—When a defendant appeals from the judgment of a justice of the peace to the superior court, or when the judgment of the justice is removed by the defendant, by recordari or otherwise, to a superior court, the court having cognizance of the appeal or recordari may, upon sufficient cause shown by affidavit, compel the plaintiff to give an undertaking, with sufficient surety, for payment of the costs of the suit, in the event of his failing to prosecute the same with effect. (Rev., s. 606; Code, s. 564; R. C., c. 31, s. 104; 1831, c. 29; C. S. 662.)

Cross References.—As to costs on appeal, see § 6-33 and annotations thereunder. As to undertaking to stay execution, see § 7-175.

Necessity for Surety.—The Code requires no surety on an appeal from a justice's judgment. *Steadman v. Jones*, 65 N. C. 388.

Discretion of Judge as to Requiring of Security.—In an appeal by a defendant to the superior court from a judgment of a justice of the peace, it lies within the discretion of the presiding judge to require the plaintiff to give security for the further prosecution of the suit, or not. *Smith v. Richmond, etc., R. Co.*, 72 N. C. 62.

SUBCHAPTER X. EXECUTION.

Art. 28. Execution.

§ 1-302. Judgment enforced by execution.—Where a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution, as provided in this article. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt. (Rev., s. 615; Code, s. 441; C. C. P., s. 257; C. S. 663.)

Cross Reference.—As to provisions for punishment for contempt generally, see sections 5-1 to 5-9.

In General.—An execution is a writ, issuing from a court, and is an authority to the sheriff or other officer to do what it commands. *Wayman v. Southard*, 10 Wheat. 1, 32 L. Ed. 253.

Every execution presupposes a judgment, and the right to issue the one implies the existence of the other. *Sheppard v. Bland*, 87 N. C. 163. The general rule is that the power to issue an execution is a necessary consequence to the power to render judgment. *Bank v. Halstead*, 10 Wheat. 51, 64, 6 L. Ed. 264.

A judgment creditor is entitled to have his judgment satisfied, if need be, by a sale of his debtor's property, except such parts thereof as may be exempt from execution. The ordinary process to enforce such a judgment is that of execution against the property of the debtor, and this process the creditor may have from time to time while the judgment continues in force, until it shall be discharged. *Vegeahn v. Smith*, 95 N. C. 254, 255.

Where the land of a judgment debtor is subjected to a specific lien for its payment, the judgment creditor may

proceed against the debtor in personam, may compel payment by proceeding in rem, or pursue both remedies at the same time. *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10.

Purpose of Execution.—An execution is the end and life of the law, and is indispensably necessary to the beneficial exercise of the jurisdiction of a court. *Bank v. Halstead*, 10 Wheat. 51, 55, 6 L. Ed. 264. The purpose of an execution is to give effect to the judgment on which issued. *Harshman v. Knox County*, 122 U. S. 306, 319, 7 S. Ct. 1171, 30 L. Ed. 1152.

Property Subject to Execution.—An execution may ordinarily be levied upon all property that has a visible, tangible existence, within the jurisdiction of the courts and the precinct of the officer; and all rents, profits and rights, arising from or appurtenant or appendant thereto. *Ager v. Murray*, 105 U. S. 126, 130, 26 L. Ed. 942; *Stevens v. Gladding*, 17 How. 447, 453, 15 L. Ed. 155.

The property need not be the subject of sale. It is the title of the defendant, and not the property itself, which is subject to execution. *Turner v. Fendall*, 1 Cranch 117, 134, 2 L. Ed. 53; *The Moses Taylor*, 4 Wall. 411, 427, 18 L. Ed. 397.

What Law Governs.—Liability of property to be subjected to execution is in the case of real estate, to be determined by the law of the jurisdiction of the situs. *Spindle v. Shreve*, 111 U. S. 542, 4 S. Ct. 522, 28 L. Ed. 512.

Liability in the case of personal property is determined by the law of the state where the property actually is, regardless of the domicile of the owner. *Harvey v. R. I. Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003.

And in the case of choses in action and trusts, liability is determined by the place where created or found. *Spindle v. Shreve*, 111 U. S. 542, 547, 4 S. Ct. 522, 28 L. Ed. 512.

Debtor's Funds in Hands of Third Person.—Where it appears, in proceedings supplementary to execution, that a third person has funds of the defendant available for the judgment debt, etc., an order may be made by the court forbidding such third persons to dispose of the fund. *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10. As to garnishment, see §§ 1-440 et seq., and the notes thereto.

An order taxing the cost of action against a party, is in effect a judgment, upon which an execution may be issued under the provisions of this section. *Sheppard v. Bland*, 87 N. C. 163.

After Death of Defendant.—But an execution issued on a judgment after the death of the defendant is void. *Williams v. Weaver*, 94 N. C. 34; *Sawyers v. Sawyers*, 93 N. C. 321. For new execution against the property after defendant dying in execution, see section 1-312.

Execution against Counties Not Authorized.—A plaintiff who has obtained a judgment against a county is not entitled to an execution against it. His remedy is by a writ of mandamus against the board of commissioners of the county to compel them to levy a tax for the satisfaction of the judgment. *Gooch v. Gregory*, 65 N. C. 142.

Remedy for Refusal of Clerk to Issue Execution.—Should the clerk refuse to issue the execution to which the plaintiff is entitled on his judgment, he has two remedies for enforcing his rights: (1) he may obtain a rule on the clerk as an officer of the court to compel him to perform his duty, or be subject to an attachment for a contempt; or (2) he may sue the clerk on his official bond. He is not entitled to a writ of mandamus against the clerk. *Gooch v. Gregory*, 65 N. C. 142; *Electric Co. v. Engineering Co.*, 128 N. C. 199, 201, 38 S. E. 831.

Justice's Judgments Enforceable by Execution.—For the purposes of its enforcement by execution the judgment of a justice's court is given the same effect and force as the judgments of the superior courts. *Broyles v. Young*, 81 N. C. 315.

Cited in *Lupton v. Edmundson*, 220 N. C. 188, 191, 16 S. E. (2d) 840.

§ 1-303. Kinds of; signed by clerk; when sealed.—There are three kinds of execution: one against the property of the judgment debtor, another against his person, and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the court, and shall be subscribed by the clerk, and when to run out of his county, must be sealed with the seal of his court. (Rev., s. 616; Code, s. 442; C. C. P., s. 258; C. S. 664.)

Cross Reference.—As to forms of executions, see section 1-313; for execution against the person, see sections 1-311 and 1-313.

Sealing Execution Issued to Another County.—Sealing is necessary to the validity of all executions issuing to another county; and a sheriff, by acting under an unsealed writ, does not render it valid. *Seawell v. Bank*, 14 N. C. 279; *Finley v. Smith*, 15 N. C. 95; *Shackelford v. M'Rea*, 10 N. C. 226; *Freeman v. Lewis*, 27 N. C. 91; *Taylor v. Taylor*, 83 N. C. 116.

Without a seal it confers no power on the sheriff, and his acting under it can not give it validity. *Shackelford v. M'Rea*, 10 N. C. 226; *Shepherd v. Lane*, 13 N. C. 148, 154.

§ 1-304. Against married woman.—An execution may issue against a married woman, and it must direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise. (Rev., s. 617; Code, s. 443; C. C. P., s. 259; C. S. 665.)

Effect of the Restriction.—The provision of this section that the execution shall be levied only upon her separate property can give no effect other than to exempt what she holds *ex jure mariti*, i. e., her contingent right of dower. There is nothing else to which the restriction could possibly apply. *Harvey v. Johnson*, 133 N. C. 352, 366, 45 S. E. 644. See *McLeod v. Williams*, 122 N. C. 451, 30 S. E. 129.

Execution on All Separate Property Except Exemptions.—Under this section execution can be levied on all the separate property owned by a married woman, with the same exceptions allowed to men or a feme sole. *Harvey v. Johnson*, 133 N. C. 352, 367, 45 S. E. 644.

Claiming Exemptions.—In an action on a note to charge the separate estate of a married woman, she cannot set up her personal property exemptions against the action, but may claim the same upon issuance of execution. *Harvey v. Johnson*, 133 N. C. 352, 45 S. E. 644.

Application of Restriction as to Property Charged with Debt.—This section does not restrict the issue of execution against "the property she had charged with the debt." The words, "her separate property," evidently mean that an execution against her cannot be collected, as formerly out of the husband, though he is still a necessary party defendant with her. *McLeod v. Williams*, 122 N. C. 451, 462, 30 S. E. 129. *Lipinsky v. Revell*, 167 N. C. 508, 83 S. E. 820; *Thrash v. Ould*, 172 N. C. 730, 90 S. E. 915.

Requisites Should Appear on Record.—The mandate of this section that whenever an execution may issue against a married woman it shall direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise, presupposes that all these requisites appear of record, and that the existence of such separate property is fixed by the judgment. *Dougherty v. Sprinkle*, 88 N. C. 300, 304.

§ 1-305. Clerk to issue, in six weeks; penalty.—The clerks of the superior court shall issue executions on all judgments rendered in their respective courts, unless otherwise directed by the plaintiff, within six weeks of the rendition of the judgment, and must endorse upon the record the date of such issue. If the executions issued are not returned satisfied to the courts to which they are made returnable, the clerks must issue alias executions, within six weeks thereafter, unless otherwise instructed as aforesaid. Every clerk who fails to comply with the requirements of this section is liable to be amerced in the sum of one hundred dollars for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs, and is further liable to the party injured by suit upon his bond. (Rev., s. 618; Code, s. 470; R. C., c. 45, s. 29; 1850, c. 17, ss. 1, 2, 3; C. S. 666.)

Cross Reference.—As to issuance of execution in garnishment proceedings, see section 1-461.

Clerk to Issue.—The clerk of the superior court, not the judge, is the proper officer to issue execution. *McKethan v. McNeill*, 74 N. C. 663.

It is the duty of a clerk, as a ministerial officer of the court, to issue execution. *Gooch v. Gregory*, 65 N. C. 142. See also, *Spencer v. Hawkins*, 39 N. C. 288.

A deputy clerk has power to issue execution in the name of the clerk. *Miller v. Miller*, 89 N. C. 402.

Suspension of Section by Ordinance of 1866.—In 1866 a temporary ordinance entitled "an ordinance to change the jurisdiction of the courts" forbade any execution to be issued from the spring term of 1867 without the permission of the court. This for the time being repealed the requirement making it a duty of the clerk to issue execution of his own motion within six weeks. And consequently under this ordinance the clerk was held not liable for the penalty imposed upon him in the event of his default to issue execution. See *Badham v. Jones*, 64 N. C. 655; *Richardson v. Wicken*, 80 N. C. 172, 176.

But this ordinance did not relieve clerks whose liability under this section had accrued prior to the passage of the ordinance. *McIntyre v. Merritt*, 65 N. C. 558; nor did it apply, by its express terms, to "any debts or demands contracted or penalties incurred since the first day of May 1865." *Williamson v. Kerr*, 88 N. C. 11, 12.

What Constitutes "Issuing" of Execution.—It is settled by the decisions of the Supreme Court that a writ of execution is not issued, within the meaning of this section, until the clerk hands it to the sheriff, or to the party or his agent. The mere filing and retaining it, where it does not leave the office of the clerk is not sufficient. *State v. McLeod*, 50 N. C. 318, 321.

It is necessary for the issuance of an execution that it be actually or constructively delivered to the sheriff, and when it is made out, but not sent out of or issued from the clerk's office, and memorandum of "execution" is entered on the docket, it is not sufficient, under this section, and does not prevent the judgment from becoming dormant. *McKeithen v. Blue*, 149 N. C. 95, 62 S. E. 769.

The signature of the clerk is an absolute necessity to the validity of the writ and this is all the more so since the Legislature dispensed with the other indicium of the writ's authenticity, that is, a seal when the writ was to be executed within the county in which it issued. *Shepherd v. Lane*, 13 N. C. 148.

The signature of a justice is absolutely necessary to an alias, as well as to an original execution on a justice's judgment. Hence an entry of "execution renewed" without the signature of a justice, at the foot of a dormant justice's execution, gives no authority to the acts of an officer under it. *Huggins v. Ketchum*, 20 N. C. 550.

A writ signed by an attorney under a verbal deputation of the clerk to all the members of the bar is a nullity, and the sheriff is not liable for not acting under it. *Shepherd v. Lane*, 13 N. C. 148.

Endorsement on Execution Docket.—The requirement to "endorse on the record the date of the issuing" means that the entry should be made on an "execution docket," and is not complied with by an entry on the execution. *Bank v. Stafford*, 47 N. C. 98, 100.

Option to Issue to One of Two Counties—Amerecement.—An allegation that the clerk failed to issue an execution to one county when he had an option to issue to one of two counties will not justify an amerecement under this section. *Bank v. Stafford*, 47 N. C. 98.

Liability in Damages of Clerk for Failure to Issue.—Under this section a clerk and master, who failed to issue an execution based upon a decree obtained when the defendant had become insolvent, were held liable in damages for whatever sum the plaintiff can show he has sustained by such non-feasance. *McIntyre v. Merritt*, 65 N. C. 558.

Payment of Fees Condition to Clerk's Liability.—This section and section 138-2, providing that the clerk shall not be compelled to perform any services unless his fees be paid or tendered, must be construed together. It follows that clerks of the superior court will not incur the penalty prescribed by this section for failure to issue execution within six weeks, unless the plaintiff pays or tenders him his fees for that service. *Bank v. Bobbitt*, 111 N. C. 194, 16 S. E. 169.

Penalty to Whose Benefit.—This section gives the penalty to the party aggrieved; hence the plaintiff must show himself to be the party aggrieved by the default of the clerk. *Simpson v. Simpson*, 63 N. C. 534, 535.

Remedy for Refusal of Clerk to Issue.—See *Gooch v. Gregory*, 65 N. C. 142, in annotations to section 1-302.

Applied in Newberry v. Meadows Fertilizer Co., 206 N. C. 182, 173 S. E. 67.

§ 1-306. Enforcement as of course.—The party in whose favor judgment is given, and in case of his death, his personal representatives duly appointed, may at any time after the entry of judgment proceed to enforce it by execution,

as provided in this article; Provided, however, that no execution upon any judgment which requires the payment of money or the recovery of personal property may be issued at any time after ten years from the date of the rendition thereof; but this proviso shall not apply to any execution issued solely for the purpose of enforcing the lien of a judgment upon any homestead, which has or shall hereafter be allotted within the ten years from the date of rendition of judgment, or any judgment directing the payment of alimony. (Rev., s. 619; Code, s. 437; C. C. P., s. 255; 1927, c. 24; 1935, c. 98; C. S. 667.)

Editor's Note.—The amendment of 1935 added the proviso relating to time for issuing execution on judgments, and also provided that the validity or force of any execution issued prior to March 15, 1935, should not be affected.

Preserving Vitality of Judgment by Successive Executions.—Where under this section the vitality of the judgment has been preserved by the issuance of executions within each successive period of three years (that being the limitation prior to 1927 amendment) after its rendition, the statutory bar of ten years which is the time prescribed for bringing actions on judgments, does not prevent an execution from being issued, and the seizure and sale of personal property thereunder, after the expiration of the limited period. *Williams v. Mullis*, 87 N. C. 159, 160.

Homestead.—The allotment of homestead suspends the running of the statute of limitations. *Cleve v. Adams*, 222 N. C. 211, 22 S. E. (2d) 567.

Cited in Exum v. Carolina R. Co., 222 N. C. 222, 22 S. E. (2d) 424.

§ 1-307. Issued from and returned to court of rendition.—Executions and other process for the enforcement of judgments can issue only from the court in which the judgment for the enforcement of the execution or other final process was rendered; and the returns of executions or other final process shall be made to the court of the county from which it issued. (Rev., s. 623; Code, s. 444; 1871-2, c. 74; 1881, c. 75; C. S. 669.)

Cross Reference.—As to penalty for false return by sheriff, see section 162-14.

Return to Another County not Authorized.—Since the passage of the act of 1870-'71, ch. 42, the clerk of the superior court of one county cannot issue a summons returnable in the superior court of another. *Howerton v. Tate*, 66 N. C. 431.

May Issue Only from Court Rendering Judgment.—Under the original code, executions might be issued from any county where the judgments had been docketed, and were returnable to the court from which they issued; but since the act of 1871-'72, Chap. 74, Sec. 1, executions shall issue only from the court in which the judgment was rendered. *Hasty v. Simpson*, 77 N. C. 69, 71.

This section and § 1-352 must be construed in pari materia with other statutes relating to the same matter. *Essex Inv. Co. v. Pickelsimer*, 210 N. C. 541, 187 S. E. 813. See §§ 1-493, 1-499, 1-501 and 7-286.

§ 1-308. To what counties issued.—When the execution is against the property of the judgment debtor it may be issued to the sheriff of any county where the judgment is docketed. No execution may issue from the superior court of any county upon a judgment until it is docketed in that county. When it requires the delivery of real or personal property it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties. (Rev., s. 622; Code, s. 443; C. C. P., s. 259; 1871-2, c. 74; 1881, c. 75; 1905, c. 412; C. S. 670.)

Editor's Note.—Formerly this section did not require as a condition precedent to the issuance of the execution that the judgment be already docketed in such other county at the time the execution was issued. The execution and the

transcript of judgment for docketing were allowed to be sent to such other county at the same time, and the execution was nonetheless valid. *Bernhardt v. Brown*, 122 N. C. 587, 592, 29 S. E. 884. This rule was changed by the insertion, in 1905, of the second sentence of the section. It was held in *Cox v. Boyden*, 153 N. C. 522, 69 S. E. 504, that this amendment was not retroactive and did not apply to executions issued prior to its passage.

Several Defendants.—A writ was issued against three defendants, two of whom were in one county and the other in another county, in which the judgment was rendered. Held, that in the absence of special instructions, the clerk might issue an execution to either county. *Bank v. Stafford*, 47 N. C. 98.

§ 1-309. Sale of land under execution.—Real property adjudged to be sold must be sold in the county where it lies, by the sheriff of the county or by a referee appointed by the court for that purpose; and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold. (Rev., s. 622; Code, s. 443; C. C. P., s. 259; C. S. 671.)

Cross Reference.—As to provisions requiring the sheriff to execute a deed, see section 1-339.

Foreclosure Sales Not Affected.—The provisions of this section relative to judicial sales are intended to apply to proceedings in the nature of execution sales of property in the hands of others charged with the payment of the judgment, and have no application to foreclosure proceedings, which are left to be governed by the old equity practice. *Kidder v. McLhenny*, 81 N. C. 123.

Sale by Successor in Office.—Where a fi. fa. was levied by one sheriff before his death, his successor had no authority to sell the property under a venditioni exponas, since an execution is an entire thing, and must be completed by the hand which commenced it. *Sanderson v. Rogers*, 14 N. C. 38.

A writ directed to the sheriff for the sale of land levied on by a sheriff who had gone out of office will not authorize a sale of land by the late sheriff. *Tarkinton v. Alexander*, 19 N. C. 87.

Where a sheriff has levied on lands and goods, and gone out of office, a general venditioni may issue to the new sheriff, where the goods have been delivered over to him. *Tarkinton v. Alexander*, 19 N. C. 87, explaining and reconciling the cases of *Holliday v. Eastwood*, 12 N. C. 157, and *Sanderson v. Rogers*, 14 N. C. 38, with those of *Barden v. McKinne*, 11 N. C. 279, and *Seawell v. Bank*, 14 N. C. 279, and approving them all.

Upset Bid—Setting Aside Sale.—An execution sale, when closed, is not subject to an upset bid—§§ 1-326, 45-28 and 46-32 not being applicable—and, when regularly made, such sale is not to be set aside, except for some trick, artifice, fraud, oppression or undue advantage, which must be alleged and proved, with each case to be judged by its own facts. *Weir v. Weir*, 196 N. C. 268, 269, 145 S. E. 281.

§ 1-310. When dated and returnable.—Executions shall be dated as of the day on which they were issued, and shall be returnable to the court from which they were issued not less than forty nor more than ninety days from said date, and no executions against property shall issue until the end of the term during which judgment was rendered. (Rev., s. 624; Code, s. 449; 1903, c. 544; 1870-1, c. 42, s. 7; 1873-4, c. 7; 1927, c. 110; 1931, c. 172; C. S. 672.)

Editor's Note.—The amendment of 1927, (Pub. Laws, ch. 110) materially changed the provisions of this section. Formerly, in lieu of the present provision relative to the dating of the execution, the section had provided for the attestation thereof as of the term next before the day on which it was issued. Then the execution was returnable to the next term of the court beginning not less than forty days after the issuance thereof.

The amendment of 1931 substituted ninety days for sixty days in this section as formerly amended, and inserted the words "to the court from which they were issued" in the third and fourth lines.

Computation of First and Last Day.—In computing the number of days within which the writ of execution must be

returned, the day of the issuance of execution must be included and the day of its return must be excluded. This is by analogy to the rule applied to the return of a process. *Taylor v. Harris*, 82 N. C. 25.

Attestation and Dating Directory.—This section which formerly required the attestation of the execution is merely directory, and the omission of such attestation does not vitiate the process. *Bryan v. Hubbs*, 69 N. C. 423; *Williams v. Weaver*, 94 N. C. 134, 135. This rule would now be equally applicable to the provision requiring the dating of the execution. Ed. Note.

The Return Day Formerly.—Formerly, when the section required that the execution be returned to the next term of the court, it was held that the sheriff was not compelled to make his return of an execution on the first day of the term, though it was more regular, and for many reasons desirable that he should do so, and that it was sufficient if he makes the return during the term, unless ruled to make it on an earlier day of the term. *Boyd v. Teague*, 111 N. C. 246, 247, 16 S. E. 338.

§ 1-311. Against the person.—If the action is one in which the defendant might have been arrested, an execution against the person of the judgment debtor may be issued to any county within the state, after the return of an execution against his property wholly or partly unsatisfied. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as provided in the article Arrest and Bail, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by law, whether such statement of facts is necessary to the cause of action or not. (Rev., s. 625; Code, s. 447; 1891, c. 541, s. 2; C. C. P., s. 260; C. S. 673.)

Cross Reference.—As to provisional remedies by arrest and bail, see section 1-409 et seq.

General Doctrine.—Where the complaint alleges a cause of arrest, whether the same be necessary to the cause of action or not, an execution against the person of the debtor may issue upon a finding of the cause, after an unsatisfied execution under a judgment against his property has been returned. *Ledford v. Emerson*, 143 N. C. 527, 55 S. E. 969, cited and applied. *Turlington v. Aman*, 163 N. C. 555, 79 S. E. 1102.

Three Classes of Cases Contemplated.—This section providing for execution against the person of the defendant, taken in connection with section 1-411, contemplates three classes of cases: (1) Where the cause of arrest is not set forth in the complaint; (2) where the cause is set forth in the complaint, but only collateral and extrinsic to the plaintiff's cause of action; (3) where the cause set forth in the complaint is essential to the plaintiff's claim. State ex rel. *Peebles v. Foote*, 83 N. C. 102.

Same—The First Class.—In cases within the first class, the defendant can only be arrested by an order founded upon a sufficient affidavit setting forth the sources of information, when it is based upon information and belief. And in such cases no execution can be issued against the person without such order previously had and served. State ex rel. *Peebles v. Foote*, 83 N. C. 102.

Same—The Second Class.—In cases of the second class, the statement of the cause of arrest in the complaint will answer in place of an affidavit, but the statement must be as explicit as if set forth in an affidavit and properly verified. In such cases there must be an order of arrest before execution against the person of the debtor. State ex rel. *Peebles v. Foote*, 83 N. C. 102.

Same—The Third Class.—In the last class of cases, where the facts stated in the complaint as causes of arrest are essential to or constitute plaintiff's cause of action, no affidavit for the order of arrest is needed, and no such order is required before execution may be issued against the person of the defendant, provided the complaint has been duly verified. But a verification on information and belief will not answer, unless it gives the sources of information, etc. State ex rel. *Peebles v. Foote*, 83 N. C. 102.

Upon Docketed Judgment of Justice.—An execution against the person can only issue upon a docketed judgment of a justice of the peace when it is authorized by this section, or when it appears to the clerk that the defendant had been arrested before judgment. *McAden v. Banister*, 63 N. C. 479, 481.

Necessity of Recovery of Judgment.—No execution can issue against the person of the defendant, even though the

complaint alleges facts to justify an arrest, unless the plaintiff has recovered a judgment against the defendant. Thus in *Stewart v. Bryan*, 121 N. C. 46, 50, 28 S. E. 18, the court expounding this doctrine, said: It will not do to carry the doctrine of *State ex rel. Peebles v. Foote*, under this section, to the extent contended for in the argument for plaintiff—that, because there is an allegation in the complaint, this fact entitles the plaintiff to an execution against the body of the defendant, whether the plaintiff recovered a judgment against the defendant or not. To sustain this position would be in effect to nullify the constitution.

Two Alternative Conditions Prerequisite.—There are two alternative essential conditions upon which depends the issuance of an execution against the person of the defendant. They are: (a) a lawful arrest before judgment, or (b) a complaint averring such facts as would have justified an order for an arrest. *Houston v. Walsh*, 79 N. C. 36, 39.

Facts Must Enter into Judgment.—An execution against the person can issue only when the facts alleged entitling the plaintiff thereto have been passed upon and entered into the judgment. *Doyle v. Bush*, 171 N. C. 10, 86 S. E. 165.

Facts Pleaded and Proved and Issue Determined.—In order to issue an execution against the person of the defendant in cases where it is permissible, the cause of arrest must be pleaded and proved, the issue affirmatively determined by the jury and judgment rendered. *Turlington v. Aman*, 163 N. C. 555, 79 S. E. 1102.

In the Absence of Order for Arrest, or Complaint.—Where there is no order of arrest before judgment nor any complaint filed averring such facts as would have justified such order, a defendant cannot be arrested after judgment under an execution against the person under this section. *Houston v. Walsh*, 79 N. C. 36.

It is the duty of the clerk of the court, upon the application of the plaintiff, to issue, in proper cases, the execution against the person of the defendant. *Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43.

Motion before the Clerk—Appeal to Superior Court.—Where a personal execution against a debtor is allowed by the statute, it must be by motion before the clerk after an unsatisfied return of the execution against his property, and from any adverse ruling his decision is subject to review on appeal to the superior court; and if a judgment in the superior court may permit an execution against the person of the debtor, should the execution against his property thereafter be returned unsatisfied, the court is not required to order in the judgment that execution issue against the person of the debtor in anticipation of such a return on the execution. *Turlington v. Aman*, 163 N. C. 555, 79 S. E. 1102.

Execution for Conversion.—Under this section and section 1-410, providing that a defendant may be arrested when the action is for wrongfully taking, detaining or converting personal property, where the defendant, cotenant of a race horse, converted it by selling the horse while in his (defendant's) possession, such defendant was subject to execution against the person. *Doyle v. Bush*, 171 N. C. 10, 86 S. E. 165.

Under this section an affirmative answer to an issue establishing that defendant had retained and converted to his own use, in violation of the terms of the contract of assignment with plaintiff, property belonging to plaintiff, is sufficient to support a judgment that execution against the person of defendant issue upon application of plaintiff upon return of execution against the property unsatisfied, intent of defendant in doing the acts constituting a breach of trust being immaterial, and a specific finding of fraud being unnecessary. *East Coast Fertilizer Co. v. Hardee*, 211 N. C. 653, 191 S. E. 725.

For Injury Committed to Plaintiff's Person—Stay of Execution.—Where judgment was rendered by a court of competent jurisdiction against the defendant in a certain sum for an injury committed to the person of the plaintiff who appealed without giving bond to stay execution, it was held, (1) upon the return of execution against defendant's property unsatisfied an execution upon the person may issue; (2) filing an inventory of his property, etc., will not exempt the defendant from arrest; (3) the execution can only be stayed by giving a bond securing the judgment. *Howie v. Spittle*, 156 N. C. 180, 72 S. E. 207.

Injury Wilfully Inflicted.—Where the pleadings, evidence, and verdict are that an injury was wilfully inflicted, an order for execution against the person of the defendant upon the return of execution against his property unsatisfied is proper under this section and § 1-410. *Foster v. Hyman*, 197 N. C. 189, 148 S. E. 36.

Allegations and evidence tending to show that the defendant, while drunk, drove his automobile on the wrong side of a street of a city where traffic was heavy at a rate of forty-five or fifty miles an hour, under circumstances

which should have convinced him, as a man of ordinary prudence, that he incurred the risk of imminent peril to human life, and that the plaintiff was injured thereby: Held, sufficient to sustain the jury's verdict that the injury was inflicted wilfully and wantonly, and an order for execution against the person of defendant upon return of execution against his property unsatisfied was proper under such sections. *Foster v. Hyman*, 197 N. C. 189, 148 S. E. 36.

Liability in Damages for Malicious Prosecution.—Where a trial court of competent jurisdiction has regularly determined that the plaintiff in the action had the right to arrest the defendant on personal execution, and accordingly the defendant has been taken into custody under this section, the plaintiff in said action is not liable in damages in defendant's subsequent action for malicious prosecution, though the verdict and finding of the jury or finding for plaintiff in the former suit is thereafter set aside or reversed on appeal or other ruling in the orderly progress of the cause. *Overton v. Combs*, 182 N. C. 4, 108 S. E. 357.

Allegation of Malice.—In an action to recover for malpractice of defendant, execution against the person of defendant may not issue in the absence of allegation and evidence of actual malice. *Olinger v. Camp*, 215 N. C. 340, 1 S. E. (2d) 870.

Discharge of Person Under Execution.—The person arrested may be discharged, after judgment and without payment, only by surrendering all of his property in excess of \$50. *Fertilizer Co. v. Grubbs*, 114 N. C. 470, 19 S. E. 597. The effect of an execution against the person of the judgment debtor, therefore, is to deprive the defendant in the execution of his homestead exemption and of any personal property exemption over and above \$50.

Allegation and Proof.—Where plaintiff suggests fraud in defendant's affidavit of insolvency he must sufficiently allege and prove fraud or proceeding will be dismissed. *Hayes v. Lancaster*, 202 N. C. 515, 163 S. E. 602.

Cited in *Foster v. Hyman*, 197 N. C. 189, 148 S. E. 36.

§ 1-312. Rights against property of defendant dying in execution.—Parties at whose suit the body of a person is taken in execution for a judgment recovered, their executors or administrators, may, after the death of the person so taken and dying in execution, have the same rights against the property of the person deceased, as they might have had if that person had never been in execution. (Rev., s. 626; Code, s. 469; R. C., c. 45, s. 28; 21 James I, s. 24; C. S. 674.)

Cross Reference.—As to payment of judgments in settlement of a decedent's estate, see § 28-105.

§ 1-313. Form of execution.—The execution must be directed to the sheriff, or coroner when the sheriff is a party or interested, subscribed by the clerk of the court, and must intelligibly refer to the judgment, stating the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it is for money, the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

Cross Reference.—As to subscribing and sealing the execution by the clerk, see section 1-303 and annotations thereto.

1. Against property—no lien on personal property until levy.—If it is against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of his personal property; and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter; but no execution against the property of a judgment debtor is a lien on his personal property, as against any bona fide purchaser from him for value, or as against any other execution, except from the levy thereof.

Refusal to Produce Personalty Warrants Sale of Realty.—The provision requiring that the officer satisfy the judg-

ment first out of the personality, is solely for the debtor's benefit, and if he refuses to produce his personality his lands may be sold. *McCoy v. Beard*, 9 N. C. 377, 379.

Lien as of What Time against Purchasers.—Under this section the lien of execution against the personal property of the defendant, as against bona fide purchasers, does not date from the date of such execution, but from the time of levy thereunder. *Weinsenfield v. McLean*, 96 N. C. 248, 2 S. E. 56.

The lien of an execution against the realty dates from the time of the rendition of judgment, provided it is docketed. See section 1-234.

Sale of Realty Without Levy.—A sale of real estate under an execution issued on a judgment, which is a lien thereon, is valid without a levy. All that is essential to a valid sale of real estate under execution is that the requirements of the law be observed and that it be fully made known at the sale what property is being sold. *Farrior v. Houston*, 100 N. C. 369, 6 S. E. 72.

Cited in *Southern Dairies v. Banks*, 92 F. (2d) 282.

2. Against property in hands of personal representative.—If it is against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees it shall require the officer to satisfy the judgment out of such property.

3. Against the person.—If it is against the person of the judgment debtor, it shall require the officer to arrest him, and commit him to the jail of the county until he pays the judgment or is discharged according to law.

When Irregular.—An execution is irregular if it does not run in the name of the state and convey its authority to the officers to arrest the defendant. *Houston v. Walsh*, 79 N. C. 36.

Should Command the Sheriff.—Executions issued under this section should command the sheriff to arrest the defendant and commit him to the jail of the county from which it issued, until he shall pay the judgment or be discharged according to law. *Kinney v. Jaughenour*, 97 N. C. 325, 2 S. E. 43.

4. For delivery of specific property.—If it is for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery cannot be had; and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and in that respect is deemed an execution against property.

5. For purchase money of land.—If the answer in an action for recovery of a debt contracted for the purchase of land does not deny, or if the jury finds, that the debt was so contracted, it is the duty of the court to have embodied in the judgment that the debt sued on was contracted for the purchase money of the land, describing it briefly; and it is also the duty of the clerk to set forth in the execution that the said debt was contracted for the purchase of the land, the description of which must be set out briefly as in the complaint. (Rev., s. 627; Code, ss. 234-236, 448; C. C. P., s. 261; 1868-9, c. 148; 1879, c. 217; C. S. 675.)

Recital in Judgment Conclusive.—If the judgment of the court recites the fact that the debt was contracted for the purchase of land, as prescribed by this clause of this section, such recital is conclusive as between the parties to the record. *Durham v. Wilson*, 104 N. C. 595, 10 S. E. 683.

Reason of Recital as to Homestead Interest.—The homestead interest of a defendant is subject to execution issued upon a judgment recovered for the purchase money of the land sold. *Toms v. Fite*, 93 N. C. 274. Hence the requirement that it shall be set forth in the judgment and execution that the debt sued on was contracted for the purchase money of land, so that the sheriff may sell the land without regard to the homestead. *Id.*

Same—Sale Not Void.—Land purchased but not yet paid for is not exempt from execution as a homestead under a judgment for the purchase money of such land. And the execution sale under which it is sold is valid even though there was no evidence of record that the judgment was for the purchase money of the land. *Durham v. Bostick*, 72 N. C. 353.

§ 1-314. Variance between judgment and execution.—When property has been sold by an officer by virtue of an execution or other process commanding sale, no variance between the execution and the judgment whereon it was issued, in the sum due, in the manner in which it is due, or in the time when it is due, invalidates or affects the title of the purchaser of such property. (Rev., s. 628; Code, s. 1347; R. C., c. 44, s. 13; 1848, c. 53; C. S. 676.)

Liberal Construction.—This section is to be liberally construed. *Wilson v. Taylor*, 98 N. C. 275, 280, 3 S. E. 492.

Execution for Less Amount than Judgment.—The fact that the execution varied from the judgment in being for a less amount is expressly cured by this section. *Maynard v. Moore*, 76 N. C. 158, 161.

Execution for Larger Amount than Judgment.—In the case of *Hinton v. Roach*, 95 N. C. 106, 110, the docket showed a judgment in favor of Hinton against Roach for \$28; while the execution recited also other judgments and called for a larger sum than \$28. It was held that the irregularity was cured by this section.

Technical Variance Immaterial.—Where a judgment was rendered against H for \$182.20 and against other defendants, separately mentioned, for various amounts and an execution was issued reciting only the judgment against H for \$182.20, and commanding the sheriff to satisfy it out of H's property, it was held, that the execution sufficiently conformed to the judgment and the variance was technical and immaterial. *Marshburn v. Lashlie*, 122 N. C. 237, 29 S. E. 371.

§ 1-315. Property liable to sale under execution.—The property of the judgment debtor, not exempted from sale under the constitution and laws of this state, may be levied on and sold under execution as hereinafter prescribed:

1. Goods, chattels, and real property belonging to him.

Common Law, and Historical Legislation.—For an excellent exposition of the historical development of legislation by which the lands of debtors became subject to execution, thus changing the common law rule, see *Jones v. Edmonds*, 7 N. C. 43, 45.

Public Property and Institutions.—Property held for necessary public uses and purposes, such as court-houses, jails, schoolhouses, etc., can not be sold under execution. *Morganton Hardware Co. v. Morganton Graded Schools*, 151 N. C. 507, 66 S. E. 583; *Gooch v. Gregory*, 65 N. C. 142; *Vaughan v. Commissioners*, 118 N. C. 636, 24 S. E. 425.

Life Estate.—Where a life estate is devised to the testator's son and changed by codicil to appoint a trustee to hold the title and to give him the full rights of enjoyment of a life tenant in the event a creditor should bring action against him for a debt: Held, the condition upon which the title is to be held in trust is void and his title as tenant for life will continue for the duration of his life, and under this section may be sold under execution on a judgment against him. *Mizell v. Bazemore*, 194 N. C. 324, 139 S. E. 453.

Vested Remainders.—The vested remainder of a devisee in lands is subject to sale under execution during the term of the life tenant. *Ellwood v. Plummer*, 78 N. C. 392; *Bristol v. Hallyburton*, 93 N. C. 384.

Contingent remainders are not subject to execution while they remain contingent. *Watson v. Dodd*, 68 N. C. 533, affirmed on rehearing, 72 N. C. 240. See also, *Watson v. Watson*, 56 N. C. 400; *Bristol v. Hallyburton*, 93 N. C. 384.

Reversions.—A reversion in fee is liable to be taken and sold under execution. *Murrell v. Roberts*, 33 N. C. 424.

Standing matured crops are subject to execution. *Shannon v. Jones*, 34 N. C. 206. See last paragraph of this section.

2. All leasehold estates of three years duration or more, owned by him.

3. Equitable and legal rights of redemption in personal and real property pledged or mortgaged by him. But when the equity of redemption in personal property is sold under execution, notice of the time and place of said sale shall be given the mortgagee.

At common law an equity of redemption in land was not subject to levy and sale under execution, and was first made so in this State by Acts of 1812, ch. 4, section 2, and this was true also as to the trusts mentioned in Acts of 1812, ch. 4, sec. 1, which changed the law in this respect (see subsection 4). *Rowland Hardware, etc., Co. v. Lewis*, 173 N. C. 290, 296, 92 S. E. 13.

General Doctrine.—An equity of redemption whether created by a mortgage deed made to the creditor or to the third person, with or without power of sale, may be sold under execution according to this subsection. *Mayo v. Staton*, 137 N. C. 670, 50 S. E. 331. *Whiteside v. Williams*, 22 N. C. 153.

Mortgage Subjecting Mortgagor's Equity of Redemption.—A sale of the equity of redemption under an execution at law, at the instance of the mortgagee, for his mortgage debt, is not sanctioned by this section. The words of the section are general, but this exception arises necessarily out of the subject and the spirit of the act. *Camp v. Cox*, 18 N. C. 52, in which *Ruffin, C. J.*, points out with great clearness the reasons upon which this exception to this section is based. *McPeters v. English*, 141 N. C. 491, 494, 54 S. E. 417.

The interest of a vendee, who holds a bond for the title to land, cannot be subjected to sale under execution upon a judgment rendered for the purchase money. *McPeters v. English*, 141 N. C. 491, 54 S. E. 417.

Interest of Cestui Que Trust.—Under this subsection and the one immediately following an execution will not lie against the interest of a cestui que trust in real property held by trustee in active trust. *Patrick v. Beatty*, 202 N. C. 454, 163 S. E. 572.

Rule Prior to Statute.—In *Allison v. Gregory & Sons*, 5 N. C. 333, the court held that an equity of redemption in real property was not liable to be sold on execution. This was prior to the act of 1812.

4. Real property or goods and chattels of which any person is seized or possessed in trust for him.

But no execution shall be levied on growing crops until they are matured. (Rev., ss. 629, 632; Code, ss. 450, 453; R. C., c. 45, ss. 1-5, 11; 5 Geo. II, c. 7, s. 4; 1777, c. 115, s. 29; 1812, c. 830, ss. 1, 2; 1822, c. 1172; 1844, c. 35; 1919, c. 30; C. S. 677.)

At Common Law.—An equitable right in land can not be levied upon and sold under an execution at common law. *Payne v. Hubbard*, 4 N. C. 195.

Must Be Equitable Estate and Not Mere Right.—By this section an equitable estate but not a mere right is subject to execution. *Nelson v. Hughes*, 55 N. C. 33. But see *Deaton v. Gaines*, 4 N. C. 424.

"A right" to have one declared a trustee is not subject to execution. *Nelson v. Hughes*, 55 N. C. 33.

Purpose of Subsection—Did not Change Nature of Trusts.—This subsection did not mean to change the nature of trusts, the relation between the trustee and cestui que trust, or the rights of the latter against the former. The sole purpose of it was to render the interest of the cestui que trust liable at law, as it was before in equity, for the debts of the cestui que trust in certain cases by transferring by a sale on execution against the cestui que trust the legal estate of the trustee, as well as the trust estate of the debtor. *Rowland Hardware, etc., Co. v. Lewis*, 173 N. C. 290, 297, 92 S. E. 13.

Nature of Trustees Interest as Affecting Salability under Execution.—When land is conveyed to a trustee upon a declaration of trust (and there is no clause of defeasance in the deed) to sell for the payment of a debt or to discharge any other duty, in which persons other than the judgment debtor have an interest, or when for any other reason the judgment debtor may not call for an immediate transfer of the

legal title, the interest, estate, or right of the judgment debtor, although subject to the lien of the docketed judgment, cannot be sold under execution. The lien can be enforced only by judgment rendered in a civil action. *Mayo v. Staton*, 137 N. C. 670, 50 S. E. 331. In other words the subsection does not apply when the trustee holds under a mixed trust, as where the instrument is existent and the debt it secures remains unpaid; but only where the naked title is outstanding with the right of the cestui que trust to demand it as a matter of right under the Statute of Uses. *Rowland Hardware, etc., Co. v. Lewis*, 173 N. C. 290, 92 S. E. 13. It is a passive instead of an active trust, in which the trustee has nothing to do, or no duty to perform except to hold the legal title as already stated. It, therefore, excludes an equity of redemption, and a contract to convey land, where anything remains due upon the debt, because the trust is a mixed one in these cases, as the mortgagee in the one case and the vendor in the other holds in trust for the purpose of securing the money due, but when this is paid he holds nothing but the naked legal title. *Rowland Hardware, etc., Co. v. Lewis*, 173 N. C. 290, 296, 92 S. E. 13.

Residue of Property Conveyed in Trust for Payment of Debt.—Where real estate is conveyed in trust for the payment of certain debts of the grantor, the interest of the grantor, after the payment of such debts, is subject to sale under execution against him. *Harrison v. Battle*, 16 N. C. 537. *Pool v. Glover*, 24 N. C. 129.

Prior to 1884 and at Common Law, growing crops were the subject of levy and sale under execution as personal property, but now under this section, they are not subject to levy till matured. *Kesler v. Cornelison*, 98 N. C. 383, 385, 3 S. E. 839. *Shannon v. Jones*, 34 N. C. 206.

§ 1-316. Sale of trust estates; purchaser's title.

—Upon the sale under execution of trust estates whereof the judgment debtor is beneficiary the sheriff shall execute a deed to the purchaser, and the purchaser thereof shall hold and enjoy the same freed and discharged from all encumbrances of the trustee. (Rev., s. 630; Code, s. 452; R. C., c. 45, s. 4; 1812, c. 830; C. S. 678.)

Application to Certain Trusts Only.—This section, as has been repeatedly decided, comprehends those cases only where the whole beneficial estate is in the debtor, and nothing remains in the trustee but a naked legal estate. *Deaver v. Parker*, 37 N. C. 40, 45. See also, *Mayo v. Staton*, 137 N. C. 670, 50 S. E. 331; *Chinnis v. Cobb*, 210 N. C. 104, 185 S. E. 638.

§ 1-317. Sheriff's deed on sale of equity of redemption.—The sheriff selling equitable and legal rights of redemption shall set forth in the deed to the purchaser thereof that the said estates were under mortgage at the time of judgment, or levy in the case of personal property and sale. (Rev., s. 631; Code, s. 451; R. C., c. 45, s. 5; 1812, c. 830, s. 2; 1822, c. 1172; C. S. 679.)

Provisions Not Mandatory.—The provisions of this section are not mandatory. *Mayo v. Staton*, 137 N. C. 670, 50 S. E. 331.

§ 1-318. Forthcoming bond for personal property.—If a sheriff or other officer who has levied an execution or other process upon personal property permits it to remain with the possessor, the officer may take a bond, attested by a credible witness, for the forthcoming thereof to answer the execution or process; but the officer remains, nevertheless, in all respects liable as heretofore to the plaintiff's claim. (Rev., 633; Code, 463; R. C., c. 45, s. 21; 1807, c. 731, s. 3; 1828, c. 12, s. 2; C. S. 680.)

Definition.—A forthcoming and delivery bond is a bond given for the security of an officer, conditioned to produce the property levied on when required. *Bouvier's Law Dict.*, Vol. 1, P. 834.

Jurisdiction.—It has been held, that a motion upon a forthcoming bond given to secure possession of property taken under an execution, will not be allowed other than in the same court from which the execution issued. *Stuart v. Laird*, 1 Cranch 299, 302, 2 L. Ed. 115.

Nature and Purpose.—The forthcoming bond is regarded as part of the process of execution; but it cannot be considered

as a substitute for the property, as a condition requires its return to the sheriff. *Amis v. Smith*, 16 Pet. 303, 313, 10 L. Ed. 973; *Hagan v. Lucas*, 10 Pet. 400, 404, 9 L. Ed. 314.

On the giving of a forthcoming bond, the property is placed in the possession of the claimant; his custody is substituted for the custody of the sheriff, but the property is not withdrawn from the custody of the law. The property in the hands of the claimant, under the bond for its delivery, is as free from the reach of other process as it would be in the hands of the sheriff. *Hagan v. Lucas*, 10 Pet. 400, 404, 9 L. Ed. 470.

According to the law of Indiana, the giving of the bond does not release the lien upon the property; the property, in contemplation of law, remains in possession of the officer. *Krippendorf v. Hyde*, 110 U. S. 276, 279, 4 S. Ct. 27, 28 L. Ed. 145.

By the law of Mississippi, the debtor is at liberty to deal with the property as his own. *Brown v. Clarke*, 4 How. 4, 14, 11 L. Ed. 850. So a second judgment is a lien thereon, and the lien thus acquired by the second judgment is not destroyed by subsequently quashing the forthcoming bond. *Id.*

Failure to Deliver Property.—On failure to deliver property held under a forthcoming bond, the bond, on being returned into the clerk's office, will have the effect of a judgment. *Gwin v. Breedlove*, 2 How. 29, 36, 11 L. Ed. 167.

Estopped to Deny.—A person by executing a forthcoming bond thereby recognizes and is estopped to deny a claim and the validity of a judgment against him rendered upon such claim; the execution of the bond is tantamount to a confession of judgment for the demand. *Sample v. Barnes*, 14 How. 70, 75, 14 L. Ed. 330.

Judgment Reversed.—If the original judgment be reversed the reversal of the dependent judgment on the forthcoming bond follows of course. *Bartow v. Petit*, 7 Cranch 288, 3 L. Ed. 348.

The obligation of a bond for the forthcoming of property is only that the property shall be delivered to the officer at the time designated, and not that the execution shall be satisfied. *Gray v. Bowls*, 18 N. C. 437.

Peaceable Production, etc., of the Property.—Where a forthcoming bond is given for the delivery of property levied on by a constable, it is the duty of the obligors to put the officer in the quiet and peaceable possession of the property at the time and place specified—otherwise their bond will be forfeited. *Poteet v. Bryson*, 29 N. C. 337.

§ 1-319. Procedure on giving bond; subsequent levies.—When the forthcoming bond is taken the officer must specify therein the property levied upon and furnish to the surety a list of the property in writing under his hand, attested by at least one credible witness, and stating therein the day of sale. The property levied upon is deemed in the custody of the surety, as the bailee of the officer. All other executions thereafter levied on this property create a lien on the same from and after the respective levies, and shall be satisfied accordingly out of the proceeds of the sale of the property; but the officer thereafter levying shall not take the property out of the custody of the surety. But in all such cases sales of chattels shall take place within thirty days after the first levy; and if sale is not made within that time any other officer who has levied upon the property may seize and sell it. (Rev., 634; Code, s. 464; R. C., c. 45, s. 22; 1844, c. 34; 1846, c. 50; C. S. 682.)

§ 1-320. Summary remedy on forthcoming bond.—If the condition of such bond be broken, the sheriff or other officer, on giving ten days previous notice in writing to any obligor therein, may on motion have judgment against him in a summary manner, before the superior court or before a justice of the peace, as the case may be, of the county in which the officer resides, for all damages which the officer has sustained, or may be adjudged liable to sustain, not exceeding the penalty of the bond, to be ascertained by a jury, under the direction of the court or justice.

(Rev., 635; Code, s. 465; R. C., c. 45, s. 23; 1822, c. 1141; C. S. 681.)

§ 1-321. Entry of returns on judgment docket; penalty.—When an execution is returned, the return of the sheriff or other officer must be noted by the clerk on the judgment docket; and when it is returned wholly or partially satisfied, it is the duty of the clerk of the court to which it is returned to send a copy of such last mentioned return, under his hand, to the clerk of the superior court of each county in which such judgment is docketed, who must note such copy in his judgment docket, opposite the judgment, and file the copy with the transcript of the docket of the judgment in his office. A clerk failing to send a copy of the payments on the execution or judgment to the clerks of the superior court of the counties wherein a transcript of the judgment has been docketed, and a clerk failing to note said payment on the judgment docket of his court, shall, on motion, be fined one hundred dollars nisi, and the judgment shall be made absolute upon notice to show cause at the succeeding term of the superior court of his county. (Rev., s. 636; Code, s. 445; 1871-2, c. 74, s. 2; 1881, c. 75; C. S. 683.)

Execution Returned Becomes Part of Record.—An execution returned into court with an entry of satisfaction endorsed, in whole or in part, extinguishes so much of the debt and becomes a part of the record in the case. *Walters v. Moore*, 90 N. C. 41.

§ 1-322. Cost of keeping livestock; officer's account.—The court or justice shall make a reasonable allowance to officers for keeping and maintaining horses, cattle, hogs, or sheep, and all other property taken into their custody under legal process, the keeping of which is chargeable to them; and this allowance may be retained by the officers out of the sales of the property, in preference to the satisfaction of the process under which the property was seized or sold. The officer must make out his account and, if required, give the debtor or his agent a copy of it, signed by his own hand, and must return the account with the execution or other process, under which the property has been seized or sold, to the justice or court to whom the execution or process is returnable, and shall swear to the correctness of the several items set forth; otherwise he shall not be permitted to retain the allowance. (Rev., ss. 637, 638; Code, ss. 466, 467; R. C., c. 45, ss. 25, 26; 1807, c. 731; C. S. 684.)

§ 1-323. Purchaser of defective title; remedy against defendant.—Where real or personal property is sold on any execution or decree, by any officer authorized to make the sale, and the sale is made legally and in good faith, and the property did not belong to the person against whose estate the execution or decree was issued, by reason of which the purchaser has been deprived of the property, or been compelled to pay damages in lieu thereof to the owner, the purchaser, his executors or administrators, may sue the person against whom such execution or decree was issued, or the person legally representing him, in a civil action, and recover such sum as he may have paid for the property, with interest from the time of payment; but the property, if per-

sonal, must be present at the sale and actually delivered to the purchaser. (Rev., s. 639; Code, s. 468; R. C., c. 45, s. 27; 1807, c. 723; C. S. 685.)

Editor's Note.—The remedy provided by this section is available only in cases where the judgment debtor, whose property is sold under the execution, has no title at all to the property sold. If the judgment debtor has any title at all, though it be a bare legal title, the equitable title being in some other person, or a defective title, the purchaser at the execution sale acquires the title of the judgment debtor, and has no relief against such debtor in case he suffers loss by reason of a defect in the title. See *Lewis v. McDowell*, 88 N. C. 261, 265.

Judgment Satisfied — Purchaser's Remedy against Execution Debtor.—The judgment of an execution creditor, purchasing at the execution sale property which did not belong to the judgment debtor and which is recovered from him by its own real owner, is nonetheless satisfied, and the remedy of the creditor is under this section not upon the judgment, but against the judgment debtor for reimbursement. *Halcombe v. Loudermilk*, 48 N. C. 491, 493; *Wall v. Fairley*, 77 N. C. 105.

Tantamount to Implied Warranty of Title.—This section authorizes a remedy upon an implied warranty of title to property sold under execution as belonging to a debtor, and whose debt has been thereby discharged or reduced against such debtor, and authorizes a recovery of an equal amount from him for the reimbursement of the purchaser for such sums as he may have paid. *Holliday v. McMillan*, 83 N. C. 270, 271.

Nature of Claim.—The claim which a purchaser at a sheriff's sale has against the defendant in an execution, on account of lack of title, is but a simple contract debt. *Laws v. Thompson*, 49 N. C. 104.

Substitution or Subrogation to the Rights of Execution Creditor.—Under this section a purchaser at an execution sale will be substituted to the rights of the execution creditor, as upon a failure of title in the defendant to the thing sold, to the extent that the execution creditor has been benefited. *Pemberton v. McRae*, 75 N. C. 497, 504.

The substitution spoken of in this case, however, is not a technical subrogation, as to place the purchaser upon the same dignity as a lien or judgment creditor, for as soon as the execution sale takes place and the proceeds are applied to the payment of the judgment, it is satisfied and its lien subsides thereby. All that this substitution means is that the purchaser can collect from the execution debtor an amount which the execution debtor would have to pay out of his own assets to the execution creditor for the satisfaction of the judgment.—Ed. Note.

To this effect, see earlier case, *Laws v. Thompson*, 49 N. C. 104, 106.

§ 1-324. Costs on execution paid to clerk; penalty.—The sheriff or other officer must pay the costs on all executions which are satisfied in whole or in part, to the clerk of the court from which the execution issued, and to no other person, on the second day of the term of the court; and any such officer making default herein shall forfeit and pay forty dollars for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs. (Rev., s. 640; Code, s. 472; R. S., c. 76, s. 5; 1822, c. 1149; C. S. 686.)

Art. 29. Execution and Judicial Sales.

§ 1-325. How advertised.—No real property shall be sold under execution, deed of trust, mortgage or other contracts, except as provided in other sections of this article until notice of sale has been posted at the courthouse door in the county for thirty days immediately preceding the sale, and also published once a week for four successive weeks in some newspaper published in the county, if a paper is published in the county; Provided, that if there be no newspaper published in said county the notice of such sale must be posted at the courthouse door and three other public places in the county for thirty days immediately preceding the sale. (Rev., s. 641; Code, s. 450; 1885, c.

38; 1905, c. 147; 1868-9, c. 237, s. 10; R. C., c. 45, s. 16; 1881, c. 278; 1909, c. 705; 1927, c. 255, s. 1; C. S. 687.)

Cross References.—As to advertisement of a sale of personal property, see section 1-336. As to notice and place of sale of personalty sold under mortgage or other contract, see section 45-23.

Editor's Note.—The amendment of 1927 (Pub. Laws, ch. 255) introduced some changes into this section. Prior to this amendment the notice of sale was to be posted at three public places, in addition to the courthouse door, regardless of the existence in the county of a newspaper published, whereas under the section as amended the notice is to be posted at three public places in addition to the courthouse door only in the event there is no newspaper published in the county.

The section as amended also provides for publication for "successive" weeks, formerly there being no requirement that the publication be successive.

Application to Mortgages, etc., under Power of Sale.—This section, which prescribes the notice of sale under mortgages and deeds of trust, has an operative force only in cases where the parties have made no provisions of their own prescribing the giving of notice of sale. But it is the accepted rule that the notice be given in strict compliance with express provisions contained in the instrument, or, in the absence of such provisions, in compliance with the terms of the statute; and, in either case, the sale must be effected in strict conformity with the notice given. Ed. Note. See *Ricks v. Brooks*, 179 N. C. 204, 208, 102 S. E. 207; *Hogan v. Utter*, 175 N. C. 332, 333, 95 S. E. 565; *Eubanks v. Becton*, 158 N. C. 230, 234, 73 S. E. 1009; *Ferebee v. Sawyer*, 167 N. C. 199, 83 S. E. 17. However, the law prima facie presumes the regularity of mortgage sales under power of sale. *Jenkins v. Griffin*, 175 N. C. 184, 95 S. E. 166.

It is usual to advertise under the terms of the deed of trust or mortgage and also as required by this section. This course is commended, but is not a legal requirement. Frequently the requirements in the deed of trust or mortgage are the same as the law provides for sales of real estate under execution or judicial sale. *Douglas v. Rhodes*, 188 N. C. 580, 585, 125 S. E. 261. And where there is doubt as to the meaning of any terms of the instrument, it shall be given that construction which is to effectuate the provisions of this section. Thus where a mortgage of lands provided that notice of the sale under the power thereof given in the conveyance shall be published in a newspaper, etc., "for a time not less than thirty days prior to the date of sale," and the language employed closely followed the provision of this section it was held, that the advertisement should be inserted in the newspaper once a week for four successive weeks, as provided by this section, and not consecutively for thirty days. *Raleigh Sav. Bank, etc., Co. v. Leach*, 169 N. C. 706, 86 S. E. 701.

Same—Requirements Directory Only as to Execution Sales.—The statement in *Palmer v. Latham*, 173 N. C. 60, 91 S. E. 525, that requirements as to advertising are directory only, was not necessary to the decision of the case as the question involved was as to the place of sale, and is in conflict with the decision in *Eubanks v. Becton*, 158 N. C. 230, 73 S. E. 1009, and therefore is overruled except so far as applicable to execution sales (*Shaffer v. Bledsoe*, 118 N. C. 279, 23 S. E. 1000). *Hogan v. Utter*, 175 N. C. 332, 336, 95 S. E. 565.

Same—Place of Sale.—The same considerations, with regard to the necessity, nature and method of giving notice of sale where the instrument itself prescribes that course, are applicable to the place of sale; that is, the place of sale designated in the instrument controls. *Palmer v. Latham*, 173 N. C. 60, 91 S. E. 525.

Application to Execution Sales—Requirements Directory.—The requirements of this section are held to be only directory. It is well settled, as a general rule, that a purchaser at an execution sale is not bound to look further than to see that he is an officer who sells, and that he is empowered to do so by an execution issued from a court of competent jurisdiction, and he is not affected by any irregularities in the conduct of the sheriff. *Mordecai v. Speight*, 14 N. C. 428; *McEntire v. Durham*, 29 N. C. 151. It follows from this, that a purchaser may as a general rule get a good title at a sheriff's sale when there has been no advertisement of the sale. *Burton v. Spiers*, 92 N. C. 503, 505.

But when at such sale the plaintiff in the execution, or his attorney or agent, or any other person affected with notice of such irregularity, purchases, the sale may be set aside at the instance of the defendant in the execution by a direct proceeding for that purpose. *Burton v. Spiers*, 92 N. C. 503.

Same—Purchaser Must be a Bona Fide Purchaser.—The general principle, that a purchaser at a judicial sale is not bound to look further than to see that the one selling is an officer and employed to do so by a valid execution, etc., does not obtain when the purchaser is one with personal knowledge of defects in the service of the summons, as appearing upon the face of the execution, and of other facts and circumstances rendering the sale irregular, if not void, for such purchaser can not be considered an innocent purchaser for value, etc. *Phillips v. Hyatt*, 167 N. C. 570, 83 S. E. 804.

§ 1-326. Advertisement on resale.—No resale of real property sold under execution, deed of trust, mortgage or other contracts shall be held until notice of such resale has been duly posted at the courthouse in the county for fifteen days immediately preceding the resale and also published during such fifteen day period once a week for two successive weeks in some newspaper published in the county; provided, if no newspaper is published in the county, the notice of resale must be posted at the courthouse door and three other public places in the county for fifteen days immediately preceding the resale. (1913, c. 19; 1927, c. 255, s. 2; 1943, c. 543; C. S. 688.)

Editor's Note.—The 1943 amendment added the proviso to this section and made other changes.

Application to Execution Sales.—Until 1933, there was no provision in § 45-28 for the raising of a bid in an execution sale. The 1927 amendment to § 1-326, dealing with advertisement for resales, refers to sales under execution. However, the court apparently did not regard this reference as sufficient, in the absence of an express provision in § 45-28, to authorize raised bids in execution sales. See *Weir v. Weir*, 196 N. C. 268, 145 S. E. 281. By Public Laws 1933, c. 482, execution sales were expressly added to the classes of sales in which upset bids are authorized under § 45-28.

§ 1-327. Judicial foreclosure; notice of sale and resale.—When any mortgage or deed of trust on real property shall be foreclosed by judicial proceedings it may be provided in the decree of foreclosure that the advertisement of the sale shall be begun at any time after the date of the decree of foreclosure, and such real property shall then be sold under judicial foreclosure proceedings only after notice of sale has been duly posted at the courthouse door in the county for thirty days immediately preceding the sale and also published at any time during such thirty day period once a week for four successive weeks of not less than twenty-one days in some newspaper published in the county if a newspaper is published in the county, but if there is no newspaper published in said county, the notice of such sale must be posted at the courthouse door and three other public places in the county for thirty days immediately preceding the sale: Provided, however, that in case a resale of such real property shall become necessary under such judicial foreclosure proceedings, that such real property shall then be resold only after notice of resale has been duly posted at the courthouse door in the county for fifteen days immediately preceding the resale and also published at any time during such fifteen day period once a week for two successive weeks of not less than seven days in some newspaper published in the county if a newspaper is published in the county, but if there be no newspaper published in said county, the notice of resale must be posted at the courthouse door and three other public places in the county for fifteen days immediately preceding the resale. (1929, c. 44, s. 1; 1933, c. 96, s. 1.)

Local Modification.—Stanley: Pub. Loc. 1933, c. 263.

Editor's Note.—By Public Laws 1933, c. 96, "twenty-two" was changed to "twenty-one" as it now appears in the thirteenth line of the section, and "eight" was changed to "seven" as it now appears in the seventh from the last line of the section.

§ 1-328. Notice defined.—In any sale of real property under execution, deed of trust, mortgage or other contracts, wherever any statute calls for publication of notice in a newspaper for four successive weeks or for two successive weeks, the duration of said period shall be not less than twenty-one days for the one period of publication and not less than seven days for the period of the other publication. (1929, c. 44, s. 2; 1933, c. 96, s. 2.)

Editor's Note.—Prior to Public Laws 1933, c. 96, this section required publication for "twenty-two" days for one period and "eight" days for the other.

Applied in *Little v. Harrison*, 209 N. C. 360, 183 S. E. 293.

§ 1-329. Validation of certain sales.—All sales of real property under execution, deed of trust, mortgage or other contracts made since February 21, 1929, where the original sale was published for four successive weeks, and any re-sale published for two successive weeks shall be and the same are in all respects validated as to publication of notice. (1933, c. 96, s. 3.)

§ 1-330. Notice served on defendant; when on governor and attorney general.—In addition to the advertisement above required, the sheriff shall in every case, at least ten days before a sale of real property under execution, serve a copy of so much of the advertisement as relates to the real property of any defendant on him personally if he is found in the county, or on his agent if he has a known agent therein, or if he cannot be found within the county and has no known agent therein, but his address is known, by mail to such address; and the date of service shall be ascertained by the usual course of the mail from the place where sent to the place of its address. In case of the sale under execution, or under the order of any court, of any real or personal property in which the state is interested as a stockholder or otherwise, notice in writing must be served upon the governor and attorney general, at least thirty days before the sale, of the time and place of sale, and under what process it is made, otherwise the sale is invalid. (Rev., s. 642; Code, s. 457; 1868-9, c. 237, s. 11; 1876-7, c. 224; C. S. 689.)

Requirements Directory.—The requirements of section 1-325, that a sheriff advertise a sale under execution, and of this section, that he serve a copy upon the defendant ten days before the sale, are directory, and when not followed will not render the sale void as against a stranger without notice of the irregularity. *Williams v. Dunn*, 163 N. C. 206, 79 S. E. 512.

Notice Required in Resale.—Where after sale of property under execution the judgment creditor posts an advance bid within ten days and resale is ordered, and no notice of the resale is given the judgment debtor or the purchaser at the first sale, the judgment debtor is entitled to an order for a resale of her property upon his motion aptly made, the requirement of the notice to the judgment debtor of sale of his property under execution being applicable to resales as well as to first sales. *Bank of Pinehurst v. Gardner*, 218 N. C. 584, 11 S. E. (2d) 872.

Procedure to Set Aside Sale.—The procedure to set aside a sale of lands under an execution which has not been advertised, and where notice has not been given the defendant in compliance with this section, is, as against a purchaser with notice of the irregularity, by motion in the cause, for the sale cannot be collaterally attacked. *Williams v. Dunn*, 163 N. C. 206, 79 S. E. 512.

Liability of Sheriff for Failure to Give Notice.—If the sheriff fails to give the notice provided by this section, he is liable in damages for any loss the defendant may have suffered through his failure to notify. *Williams v. Johnson*, 112 N. C. 424, 432, 17 S. E. 496.

Cited in Corporation Comm. v. Murphey, 197 N. C. 42, 47, 147 S. E. 667.

§ 1-331. Sale days; place of sale; ratification of prior sales.—All real property sold under execution shall be sold at the courthouse door of the county in which all or a part of the property is situated, on any day of the week or month except Sunday, after advertising as required by law. All sales of real property sold under order of court shall be sold at the courthouse door in the county in which all or any part of the property is situated on any day of the week or month except Sunday, unless in the order directing such sale some other place and time are designated and then it shall be sold as directed in such order on any day of the week or month except Sunday, after advertising as required by law.

Sales and resales of real property under execution, or by order of court, or under the power of foreclosure in any deed of trust or mortgage may be made on any day of any week or month, except Sunday.

All sales made prior to March 2, 1939, under execution or by order of court on any day other than the first Monday in any month, or the first three days of a term of the superior court of said county are hereby validated, ratified and confirmed.

All sales or resales of real property made prior to March 30, 1939, under order of court on the premises or at the courthouse door in the county in which all, or any part of the property, is situated, on any day other than Monday in any month, are hereby validated, ratified and confirmed. (Rev., s. 643; Code, s. 454; 1876-7, c. 216, ss. 2, 3; 1883, c. 94, ss. 1, 2; 1931, c. 23; 1937, c. 26; 1939, cc. 71, 256; C. S. 690.)

Editor's Note.—Public Laws 1939, c. 71, effective March 2, 1939, struck out this section as amended in 1931 and 1937 and inserted the first three paragraphs above in lieu thereof. Public Laws 1939, c. 256, effective March 30, 1939, directed that the last paragraph be added to this section as amended in 1931 and 1937, apparently through inadvertence to the first 1939 amendment. The cases cited below were decided prior to the 1939 amendments. See 17 N. C. Law Rev. 372.

The question whether a sale, not effected in strict compliance with the time and place at which this section requires that it should be effected, is void, so as to render the title of the purchaser invalid, has at various times given great difficulty to the court, which has resulted in conflicting decisions. Thus in *Mayers v. Carter*, 87 N. C. 146, it was held that an execution sale made at an improper time and place is void. For the same effect, see *State v. Rivers*, 27 N. C. 297. The abstract principle of law announced by these cases is that the non-observance, by the officer making the sale, of those provisions of law which are directory merely and relate to matters in pais, in the absence of notice on the part of the purchaser, will not affect the title acquired under an execution sale. Thus it is stated in the last cited case that third persons need not show affirmatively the observance on the part of the sheriff of all legal prerequisites for the sale, nor are they charged to take notice of all the irregularities. That this is the rule is plainly shown by the annotations to section 1-325. But we can find no case which dares to answer in definite terms the specific question whether the requirement of time and place of the sale under this section is mandatory with the necessary result of avoiding the purchaser's title, or merely directory, the disregard of which will merely subject the sheriff to an action for damages. The decision reached in *Mayers v. Carter*, supra, tends to indicate that it is mandatory and yet the case cites with approval *Brooks v. Ratcliff*, 33 N. C. 321, *Mordecai v. Speight*, 14 N. C. 428, in which it was held that a sale made on Tuesday and Wednesday of the week will pass title, and the case of *Wade v. Saunders*, 70 N. C. 270, to the same effect.

If we regard *Mayers v. Carter*, supra, as not overruling the expressions in the early cases in favor of the view that the disregard of the sheriff of his duty under this section does not invalidate the title of the purchaser, we find at least one early case, *Mordecai v. Speight*, supra, whose reason appears to us to be more sound, and whose principle more just. It declares that in as much as it is a common knowledge, and the purchaser knows that the usual place for a sheriff to sell is at the court house door, if he purchases at any other place than the court-house door, the sale is void and his title invalid. But since the day designated by this section is not necessarily the only day at which sales may be made to the exclusion of other days, as for example section 1-334 authorizing postponement of the sale to other days for causes, if he purchases on a day other than the one designated by this section, as to him, the sale is valid and he acquires a good title, provided he has no notice of the irregularity.

In action to foreclose land for delinquent taxes, order was issued appointing a commissioner to sell the lands and directing the sale might be had "on any day except Sunday." The commissioner sold the land on a Tuesday of a week during which there was no term of the superior court in the county. It was held that the sale was void as a matter of law since, by virtue of this section as it formerly read, sales of land could only be made on any Monday or during the first three days of any term of the superior court. *Bladen County v. Breece*, 214 N. C. 544, 200 S. E. 13, followed in *Caswell County v. Scott*, 215 N. C. 185, 1 S. E. (2d) 364.

Assent of Debtor Validates Sale.—The debtor may waive the benefit of the law which requires that the sale be made at a certain place and time, and assent to the sale at a place and time other than that prescribed by law, in which case the sale will be valid. *Biggs & Co. v. Brickell*, 68 N. C. 239; *Mayers v. Carter*, 87 N. C. 146, 148.

§ 1-332. Sales on other days validated.—All sales of real or personal property made prior to February 27, 1933, by a sheriff of any county in North Carolina, in the manner provided by law for sale of real or personal property under execution, on any day other than the day now provided by law are hereby validated.

All sales of real and personal property made prior to February 14, 1939, by a sheriff under execution, or by commissioner under order of court, in the manner provided by law for sale of real or personal property, on any day other than the days now provided by law are hereby validated.

All sales of real or personal property made prior to March 10, 1939, by a sheriff of any county in North Carolina, in the manner provided by law for sale of real or personal property under execution, on any day other than the day now provided by law, are hereby validated. (1933, c. 79; 1939, cc. 24, 94.)

§ 1-333. Sale hours.—No sale under an execution or decree shall commence before ten o'clock in the morning, or continue after four o'clock in the afternoon, of the day on which the sale is to be made, except that in towns or cities of more than five thousand inhabitants public sales of goods, wares and merchandise may be continued until ten o'clock p. m. Provided, a certain hour for such sales shall be named and the sale shall begin within one hour after the time fixed, unless postponed as provided by law, or delayed by other sales. (Rev., s. 644; Code, s. 459; R. C., c. 45, s. 17; 1794, c. 41; 1927, c. 19; C. S. 691.)

Editor's Note.—The proviso appearing at the end of this section was added by the amendment of 1927, Pub. Laws, ch. 19.

§ 1-334. Postponement.—The sheriff or other person making the sale, for the absence of bidders or any other just cause, may postpone the sale from day to day, but not for more than six days in all, and upon postponement he must post

a notice thereof on the courthouse door of his county. (Rev., s. 645; Code, s. 455; 1868-9, c. 237, s. 9; C. S. 692.)

Sale on Friday upon Postponement.—A sheriff, who advertises a sale of land levied upon execution to take place on Monday, the first day of the term, as prescribed by law, which sale is postponed from day to day, has a right to sell the same on the Friday succeeding. *Wade v. Saunders*, 70 N. C. 270.

Strict Provisions of Law not Applicable in Case of Postponement.—The strict compliance with the terms of the mortgage and statutory provisions required to make a valid sale upon foreclosure does not apply when a postponement is had by reason of the sale being enjoined or for other reasonable purposes, for in the absence of statutory or contract provisions to the contrary, as in this State, a notice of postponement made in good faith, and reasonably calculated to give proper publicity of the time and place, is held sufficient. *Ferebee v. Sawyer*, 167 N. C. 199, 83 S. E. 17.

Application to Court Sales and Mortgage Sales.—This section, authorizing the postponement of the sale from day to day for not more than six days, is held to apply to sales by the sheriff or person acting under court decrees, and not to apply to sales under power contained in a mortgage. *Ferebee v. Sawyer*, 167 N. C. 199, 83 S. E. 17.

Sufficiency of Notice.—Under the facts of the case where a sale under a power contained in a mortgage was adjourned not less than four times, the notice of the postponement consisting of a mere memorandum at the bottom of one of the original notices was held insufficient. *Ferebee v. Sawyer*, 167 N. C. 199, 83 S. E. 17.

§ 1-335. Certain sales validated.—All sales of realty made under executions issued prior to March the fifteenth, one thousand nine hundred and one, on judgments regularly obtained in courts of competent jurisdiction, are hereby validated, whether such sales were continued from day to day or for a longer period, not exceeding ten days: Provided, that such executions and sales are in all other respects regular: Provided further, that purchasers and their assigns shall have held continuous and adverse possession under a sheriff's deed for three years: Provided further, that the rights of minors and married women shall in nowise be prejudiced hereby. (Rev., s. 646; 1901, c. 742; C. S. 693.)

§ 1-336. Advertisement as to personal property.—No sale of personal property under execution may be made until it has been advertised for ten days at the door of the courthouse of the county in which it is to be sold, and at three other public places in the county, and the advertisement must designate the place and the time of sale. (Rev., s. 648; Code, s. 460; R. C., c. 45, s. 16; 1808, c. 753; 1820, c. 1066; C. S. 695.)

Cross References.—As to advertisement of sale of real property, see section 1-325. As to advertisement of personal property sold under the terms of a mortgage, see § 45-23.

Purchaser with Notice of Lack of Advertisement.—A purchaser at an execution sale of personalty, who has full knowledge of such irregularities as absence of advertisement, etc., required by this section, is not an innocent purchaser, and the rule that a purchaser at a sheriff's sale is not bound to look further than to see that he is an officer who sells, empowered to do so by a valid execution, is not applicable to his case, for the rule presupposes that the purchaser is a bona fide purchaser. *Phillips v. Hyatt*, 167 N. C. 570, 573, 83 S. E. 804.

§ 1-337. Penalty for selling contrary to law.—A sheriff or other officer who makes any sale contrary to the true intent and meaning of this article shall forfeit two hundred dollars to any person suing for it, one-half for his own use and the other half to the use of the county where the offense is committed. (Rev., s. 649; Code, s. 461;

R. C., c. 45, s. 18; 1820, c. 1066, s. 2; 1822, c. 1153, s. 3; C. S. 696.)

Cross Reference.—As to liability of sheriff's bond, see sections 162-8, 162-18.

§ 1-338. Officer's return of no sale for want of bidders; penalty.—When a sheriff or other officer returns upon an execution that he has made no sale for want of bidders, he must state in his return the several places he has advertised and offered for sale the property levied on; and an officer failing to make such statement is on motion subject to a fine of forty dollars; and every constable, for a like omission of duty, is subject to a fine of ten dollars, for the use and benefit of the plaintiff in the execution; for which, on motion of the plaintiff, judgment shall be granted by the court to which, or by justice to whom, the execution shall be returned. Nothing in, nor any recovery under, this section is a bar to any action for a false return against the sheriff or other officer. (Rev., s. 650; Code, s. 462; R. C., c. 45, s. 19; 1815, c. 887; C. S. 697.)

Cross Reference.—As to penalty for false return, see section 162-14.

§ 1-339. Officer to prepare deed for property sold.—Sheriffs or other officers selling lands by authority of any execution or process shall, upon payment of the price, prepare, execute and deliver to the purchaser a deed for the property purchased. The purchaser of land must furnish the officer with a description of it. (Rev., s. 651; Code, s. 471; R. C., c. 45, s. 30; 1848, c. 39; C. S. 698.)

Cross Reference.—As to execution of a deed of trust estate sold, see section 1-316.

A deputy clerk has power to issue executions in the name of the clerk. *Miller v. Miller*, 89 N. C. 402.

Means to Compel Sheriff.—A motion in the cause, and not a distinct action, is the proper means of compelling the sheriff to make title to the purchaser at the execution sale. *Fox v. Kline*, 85 N. C. 174.

Where the purchaser is implicated in the sheriff's derelictions, he is not entitled to call for a conveyance. *Skinner v. Warren*, 81 N. C. 373.

Failure to Pay Purchase Money—Resale by Sheriff.—If a purchaser at sheriff's sale fails to pay his bid the sheriff may resell immediately, or he may apply for a rule of court to compel payment, or he may at his own peril as to the plaintiff indulge the purchaser. *Maynard v. Moore*, 76 N. C. 158, 161, citing *McKee v. Lineberger*, 69 N. C. 217.

But a sheriff is not obliged to resell immediately, but may give the purchaser time in which to pay the purchase money, if neither party to the execution objects or complains. *Id.*

Recital in Deed Prima Facie Evidence.—The recital of execution and sale in a sheriff's deed is prima facie evidence thereof. *Wainwright v. Bobbitt*, 127 N. C. 274, 37 S. E. 336.

Recitals in a sheriff's deed are prima facie evidence of an execution sale, notwithstanding the return upon the execution may be imperfect. The fact that there was a sale may also be proved by parol. *Miller v. Miller*, 89 N. C. 402.

Necessity of Seal.—A deed of a sheriff without a seal attached is not competent evidence in ejectment to show title, and a sheriff will not be allowed to affix his seal to a deed, having omitted it by mistake, unless such equity is set up in the complaint. *Fisher v. Owens*, 132 N. C. 686, 44 S. E. 369.

Art. 30. Betterments.

§ 1-340. Petition by claimant; execution suspended; issues found.—A defendant against whom a judgment is rendered for land may, at any time before execution, present a petition to the court rendering the judgment, stating that he, or those under whom he claims, while holding the premises under a color of title believed

to be good, have made permanent improvements thereon, and praying that he may be allowed for the improvements, over and above the value of the use and occupation of the land. The court may, if satisfied of the probable truth of the allegation, suspend the execution of the judgment and impanel a jury to assess the damages of the plaintiff and the allowance to the defendant for the improvements. In any such action this inquiry and assessment may be made upon the trial of the cause. (Rev., s. 652; Code, s. 473; 1871-2, c. 147; C. S. 699.)

Cross References.—As to registration of conveyances, contracts to convey, and leases of land, see § 47-18. As to judgment for betterments having priority over homestead right, see annotation "Judgment for Improvements," division III, under section 1-369.

Editor's Note.—In *Scott v. Battle*, 85 N. C. 185, 192, it was held that the purchaser of lands from a feme covert, who was not privily examined, and whose husband did not join in the conveyance, was charged by implication of law with the invalidity of his title, and could not maintain a claim for betterments. This decision was based on *Battle's Revisal* (1873), ch. 17, sec. 262, which provides that "Where any person or those under whom he claims, while holding the premises under a title believed by him or them to be good, have made permanent improvements thereon, they may be allowed for the same over and above the value of the use and occupation of the land."

In 1883, after the decision in *Scott v. Battle* was published, the legislature changed the wording of the law, by the Code, sec. 473, so as to render nugatory the future effects of this decision by removing this objectionable construction of the law, with the rank injustice necessarily flowing therefrom. The Code provided, and it was carried forward as sec. 652 of the *Revisal* of 1905, that it would be sufficient to support the claims of such a person for betterments, if he had "held the premises under color of title believed by him to be good." Such is a provision of this section.

From the earliest period in the judicial history of North Carolina, a married woman's deed defectively executed, while a nullity as to her, has nevertheless been held to constitute good color of title. *Pearse v. Owens*, 3 N. C. 234; *Perry v. Perry*, 99 N. C. 270, 273, 6 S. E. 86; *Ellington v. Ellington*, 103 N. C. 54, 58, 9 S. E. 208; *Smith v. Allen*, 112 N. C. 223, 226, 16 S. E. 932; *Greenleaf v. Bartlett*, 146 N. C. 495, 60 S. E. 419. And it was expressly decided that such a deed, while not binding on the feme, is nevertheless valid as color of title, and sufficient for a claim for betterments under this section. *Gann v. Spencer*, 167 N. C. 429, 432, 83 S. E. 620.

Historical Observations.—The right to betterments is a doctrine that gradually grew up in the courts of equity. It was recognized that the owner of land, who recovers it, had no just and equitable claim to anything but the land itself, and a fair compensation for being kept out of possession. If it was enhanced in value by improvements, made under the belief that one was the owner, he ought not to take the increased value. It is now an established equitable principle that whenever a plaintiff seeks aid in a court of equity, against such a person, aid will be given him, only upon the terms that he shall make due compensation to such innocent person, being based upon the principle that he who seeks equity must do equity. As there are now no separate courts in which the rule can be enforced, all relief must be sought in one tribunal. The Legislature has embodied the principle in the form of law, and made it operative when land is sought to be recovered by action without regard to former distinction. *Barker v. Owen*, 93 N. C. 198, 203; *Wharton v. Moore*, 84 N. C. 479; *Merritt v. Scott*, 81 N. C. 385; *Story Eq. Jurisp.*, sec. 799; 2 *Greenleaf Ev.* sec. 549.

The civil law recognized the principle of reimbursing to the bona fide possessor the expense of his improvements if he was removed from his possession by the legal owner, by allowing him the increase in the value of the land created thereby. The betterment laws of the several states proceed upon that equitable view. *Searl v. School District*, No. 2, 133 U. S. 553, 561, 10 S. Ct. 374, 33 L. Ed. 740.

Constitutionality.—This section contravenes no part of the organic law, Federal or State. *Barker v. Owen*, 93 N. C. 198, 203.

The right of recovery, where the occupant in good faith believes himself to be the owner, is declared to stand upon a principle of natural justice and equity and such laws are held not to be unconstitutional as impairing vested rights,

since they adjust the equities of the parties as nearly as possible according to natural justice. *Searl v. School District*, No. 2, 133 U. S. 553, 561, 10 S. Ct. 374, 33 L. Ed. 740.

Claim Cannot Defeat Plaintiff's Title.—A claim for betterments, under this section, cannot be set up on the trial to resist the plaintiff's recovery, but by petition filed after a judgment declaring the plaintiff the owner of the land. *Wood v. Tinsley*, 138 N. C. 507, 51 S. E. 59. See also *Rumbough v. Young*, 119 N. C. 567, 26 S. E. 143.

Sheriff's Return of Writ as Execution.—The sheriff's return of a writ of possession with the endorsement thereon is an execution of the judgment as contemplated by the section, notwithstanding the fact that the judgment is not satisfied. *Boyer v. Garner*, 116 N. C. 125, 130, 21 S. E. 180.

Color of Title.—Under this section one making permanent improvements on lands he holds under color of title, reasonably believed by him, in good faith, to be good, though with knowledge of an adverse claim, is entitled to recover for betterments in an action by the true owner to recover the lands. *Pritchard v. Williams*, 176 N. C. 108, 96 S. E. 733.

Same—Parol Contract to Convey.—A vendor in possession, who repudiates a parol contract to convey land, is liable to the vendee for the value of the improvements. *Baker v. Carson*, 16 N. C. 381; *Albea v. Griffin*, 22 N. C. 9; *Hedgepeth v. Rose*, 95 N. C. 41; *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143.

The vendor, in a parol contract to convey land, will not be permitted to evict a vendee who has entered and made improvements, until the latter has been repaid the purchase money and compensated for betterments. *Vann v. Newsum*, 110 N. C. 122, 14 S. E. 519.

One who was induced to enter on and improve land by a parol promise that it would be settled on him as an advancement or gratuity will not be evicted until compensation has been made for improvements which he has erected on the property. *Hedgepeth v. Rose*, 95 N. C. 41.

Same—Fraudulent Misrepresentations.—Where, by fraudulent misrepresentations as to area by the vendor, a vendee is induced to purchase land, on a rescission of the contract he is entitled to reimbursements for improvements put on the land. *Hill v. Brower*, 76 N. C. 124.

Same—Unregistered Deed.—One who has improved land held by him under an unregistered deed is not entitled to the value of the betterments as against judgment creditors of his grantor. *Eaton v. Dorib*, 190 N. C. 14, 23, 128 S. E. 494, 499.

Same—Notice Required.—Notice sufficient to bar the right to compensation is not a constructive notice, or such a notice as the petitioner might have acquired by a diligent scrutiny of the title, but such facts and circumstances as might reasonably suggest to the ordinary citizen serious defects in his own title. *Carolina Cent. R. Co. v. McCaskill*, 98 N. C. 526, 4 S. E. 468.

Where the title to the land was in a feme covert who married in 1846, when under age, and she and her husband executed a bond to convey the land after she became of age to a party from whom the defendant derived title by mesne conveyances, which bond was never registered, and the defendant had no actual notice of any defect in his title, which he believed to be good, the doctrine of constructive notice from registration did not apply to such party, and he is entitled to compensation under the section for permanent improvements made by him on the land. *Justice v. Baxter*, 93 N. C. 405.

Same—Reasonable Belief.—The petitioner must show not only an honest and bona fide belief in his title, but he must satisfy the jury, also, that he had good reason for such belief. *Pritchard v. Williams*, 176 N. C. 108, 109, 96 S. E. 733.

One holding under a tenant for life, making substantial and permanent improvements on the lands, under facts and circumstances affording him a well grounded and reasonable belief that he had by his deed acquired the fee, is entitled to recover for the betterments he has thus made. *Harriett v. Harriett*, 181 N. C. 75, 106 S. E. 221.

Court Must Be Satisfied of Probable Truth.—The trial court must be satisfied of the probable truth of the allegations in a petition for betterments before it is required that the courts impanel a jury to ascertain the value of the betterments. *Hallyburton v. Slagle*, 132 N. C. 957, 44 S. E. 659.

One purchasing land at a sale by his own assignee in bankruptcy, with the fraudulent purpose of defeating the rights of his wife and children under a prior deed which he had made to them with intent to defraud his creditors, is not a bona fide holder of the premises under a color of title believed by him to be good, and is therefore not entitled to the value of improvements placed thereon by him. *Hallyburton v. Slagle*, 132 N. C. 957, 44 S. E. 659.

Same—Evidence.—A defendant in possession of land under the belief that he has a good title, has the right to show

in evidence in an action to recover the land, that he has in good faith made permanent improvements after his estate had expired and their value to the extent of the rents and profits claimed by the plaintiff. *Merritt v. Scott*, 81 N. C. 385, 389.

Either Party Entitled to Jury Assessment.—Either party is entitled to have the issue as to the value of betterments assessed by the jury, if they so desire. *Fortesque v. Crawford*, 105 N. C. 29, 10 S. E. 910.

Not Applicable to Tenants in Common.—The section does not apply to tenants in common. *Pope v. Whitehead*, 68 N. C. 191, 198.

But while this and the following sections of this article do not apply to tenants in common or mortgagors and mortgagees, yet upon equitable principles a tenant in common placing improvements upon the property is entitled to have the part so improved allotted to him in partition and its value assessed as if no improvements had been made if this can be done without prejudice to the interests of his cotenants, but this equitable principle does not apply as between mortgagor and mortgagee. *Layton v. Byrd*, 198 N. C. 466, 152 S. E. 161. See *Jenkins v. Strickland*, 214 N. C. 441, 444, 199 S. E. 612.

§ 1-341. Annual value of land and waste charged against defendant.—The jury, in assessing the damages, shall estimate against the defendant the clear annual value of the premises during the time he was in possession, exclusive of the use of the improvements thereon made by himself or those under whom he claims, and also the damages for waste or other injury to the premises committed by the defendant. The defendant is not liable for the annual value or for damages for waste or other injury for any longer time than three years before the suit, unless he claims for improvements. (Rev., ss. 653, 654; Code, ss. 474, 475; 1871-2, c. 147, ss. 2-3; C. S. 700.)

Three Year Limitation Inapplicable.—Where one in possession of lands is entitled to recover, against the true owner, for betterments he has placed thereon, he will be charged with the use and occupation of the land, without regard to the three-year statute of limitation. *Pritchard v. Williams*, 176 N. C. 108, 109, 96 S. E. 733; *Whitfield v. Boyd*, 158 N. C. 451, 453, 74 S. E. 452.

But this is because generally the owner of the land at the time of its recovery also owns the rents, and the law gives to each what belongs to him, it awards to the owner the land and his rents, and to the occupant the value of his improvements. *Harriett v. Harriett*, 181 N. C. 75, 78, 106 S. E. 221.

When Remaindermen May Not Recover.—When one holding under a tenant for life by deed apparently conveying the lands in fee after her death, is entitled to betterments, and he or the life tenant has received the rents and profits until that time, the remaindermen, after the death of the tenant for life, are not entitled to and may not recover such rents and profits, or have them credited on the value of the betterments, the ordinary rule to the contrary being inapplicable. *Harriett v. Harriett*, 181 N. C. 75, 106 S. E. 221.

§ 1-342. Value of improvements estimated.—If the jury is satisfied that the defendant, or those under whom he claims, made on the premises, at a time when there was reason to believe the title good under which he or they were holding the premises, permanent and valuable improvements, they shall estimate in his favor the value of the improvements made before notice, in writing, of the title under which the plaintiff claims, not exceeding the amount actually expended in making them and not exceeding the amount to which the value of the premises is actually increased thereby at the time of the assessment. (Rev., s. 655; Code, s. 476; 1871-2, c. 147, s. 4; C. S. 701.)

Value of Property Permanently Enhanced.—The sole matter for consideration is embraced in one proposition, and that is, "how much was the value of the property permanently enhanced, estimated as of the time of the recovery of the

same, by the betterments put thereon by the labor and expenditure of the bona fide holder of the same?" *Pritchard v. Williams*, 181 N. C. 46, 50, 106 S. E. 144.

Same—Fact for the Jury to Find.—It is a matter of fact for the jury, rather than one of law, to estimate upon the evidence whether improvements have added permanent enhanced value to the realty. *Pritchard v. Williams*, 181 N. C. 46, 49, 106 S. E. 144.

If unsuitable improvements are put upon the premises, no matter what the cost, the jury can find that it was no enhancement to the property thereby, so if the improvements were unnecessary or injudiciously made, the jury would consider the same. But it is not essential that they be useful to the plaintiff. *Pritchard v. Williams*, 181 N. C. 46, 50, 106 S. E. 144.

The measure of the value of the betterments is not the actual cost of their erection, but the enhanced value they impart to the land, without reference to the fact that they were not desired by the true owner, or could profitably be used by him in the prosecution of his business. *Carolina Cent. R. Co. v. McCaskill*, 98 N. C. 526, 4 S. E. 468.

Same—"Permanent" Defined.—The statute does not permit a recovery except for improvements that are permanent and valuable. The word "permanent" is defined in the *Century Dictionary* as "lasting, or intended to last indefinitely," "fixed or enduring," "abiding," and the like, and it was held in *Simpson v. Robinson*, 37 Ark., 132, that an improvement does not mean a general enhancement in value from the occupant's operations. *Pritchard v. Williams*, 181 N. C. 46, 49, 106 S. E. 144.

How Value of Improvements Estimated.—The rule for estimating the value of improvements is not what they have cost the defendant, but how much they have added to the value of the premises. *Daniel v. Crumpler*, 75 N. C. 184, 186; *Wetherell v. German*, 74 N. C. 603.

The trustee of one who has been adjudged a bankrupt and has theretofore paid money for improvements put upon the lands of another by his consent, in fraud of the rights of his creditors, may recover as for betterments, the value of the improvements to the land, but not a greater amount so expended. *Garland v. Arrowood*, 179 N. C. 697, 103 S. E. 2.

Cited in *Barrett v. Williams*, 220 N. C. 32, 16 S. E. (2d) 405.

§ 1-343. Improvements to balance rents.—If the sum estimated for the improvements exceeds the damages estimated against the defendant as aforesaid, the jury shall then estimate against him for any time before the said three years the rents and profits accrued against or damages for waste or other injury done by him, or those under whom he claims, so far as is necessary to balance his claim for improvements; but the defendant in such case shall not be liable for the excess, if any, of such rents, profits, or damages beyond the value of improvements. (Rev., s. 656; Code, s. 477; 1871-2, c. 147, s. 5; C. S. 702.)

If the betterments exceed in value the rental and damages for waste, the rents and profits accruing prior to the three years may be assessed so far as to balance the improvements, but no further. *Whitfield v. Boyd*, 158 N. C. 451, 74 S. E. 452; *Barker v. Owen*, 93 N. C. 198, 202.

§ 1-344. Verdict, judgment, and lien.—After offsetting the damages assessed for the plaintiff, and the allowances to the defendant for any improvements, the jury shall find a verdict for the balance for the plaintiff or defendant, as the case may be, and judgment shall be entered therefor according to the verdict. Any such balance due to the defendant is a lien upon the land recovered by the plaintiff until it is paid. (Rev., ss. 657, 658; Code, ss. 478, 479; 1871-2, c. 147, ss. 6, 7; C. S. 703.)

The sum adjudged the defendant constitutes a lien upon the land, and this can only be made effectual and enforced, if not paid, by a sale of the premises. *Barker v. Owen*, 93 N. C. 198, 202.

In ejectment a writ of ouster should not issue until a judgment for betterments has been paid. *Bond v. Wilson*, 129 N. C. 325, 332, 40 S. E. 179.

§ 1-345. Life tenant recovers from remainder-

man.—If the plaintiff claims only an estate for life in the land recovered and pays any sum allowed to the defendant for improvements, he or his personal representative may recover at the determination of his estate from the remainderman or reversioner, the value of the said improvements as they then exist, not exceeding the amount as paid by him, and he has a lien therefor on the premises as if they had been mortgaged for the payment thereof, and may keep possession of said premises until it is paid. (Rev., s. 659; Code, s. 480; 1871-2, c. 147, s. 8; C. S. 704.)

General Rule.—It is the general rule that a life tenant is not entitled to compensation from the remainderman for the enhancement of the property by reason of his improvements. *Harriett v. Harriett*, 181 N. C. 75, 77, 106 S. E. 221.

A devise of lands for life with limitation over, does not entitle the life tenant to compensation for betterments he has placed on the land during his tenancy. *Northcott v. Northcott*, 175 N. C. 148, 149, 95 S. E. 104.

Same—Mistake of Contract.—The section does not apply to a situation where the tenant makes improvements upon land during his occupation, as lessee, where he believed he was entitled to the possession for the lessor's life, when under the contract he was not; nor does the fact that the lessor silently acquiesced in the putting up the improvements change the situation. *Dunn v. Bagby*, 88 N. C. 91.

§ 1-346. Value of premises without improvements.—When the defendant claims allowance for improvements, the plaintiff may by entry on the record require that the value of his estate in the premises without the improvements shall also be ascertained. The value of the premises in such cases shall be estimated as it would have been at the time of the inquiry, if no such improvements had been made by the tenant or any person under whom he claims, and shall be ascertained in the manner hereinbefore provided for estimating the value of improvements. (Rev., ss. 661, 662; Code, ss. 482, 483; 1871-2, c. 147, ss. 10-11; C. S. 705.)

The rents should be assessed upon the basis of the property without the betterments. *Whitfield v. Boyd*, 158 N. C. 451, 453, 74 S. E. 452; *Barker v. Owen*, 93 N. C. 198.

§ 1-347. Plaintiff's election that defendant take premises.—The plaintiff in such case, if judgment is rendered for him, may, at any time during the same term, or before judgment is rendered on the assessment of the value of the improvements, in person or by his attorney in the cause, enter on the record his election to relinquish his estate in the premises to the defendant at the value as ascertained, and the defendant shall thenceforth hold all the estate that the plaintiff had therein at the commencement of the suit, if he pays therefor the said value with interest in the manner ordered by the court. (Rev., s. 663; Code, s. 484; 1871-2, c. 147, s. 12; C. S. 706.)

If the enhanced value is greatly disproportionate to the value of the land unimproved, so that it might almost be said that the owner is "improved out of his property," he has an election to let the land go, relinquishing his estate, upon payment by the defendant of its value as unimproved. *Barker v. Owen*, 93 N. C. 198, 202.

§ 1-348. Payment made to court; land sold on default.—The payment must be made to the plaintiff, or into court for his use, and the land is bound therefor, and if the defendant fails to make the payment within or at the times limited therefor, the court may order the land sold and the proceeds applied to the payment of said

value and interest, and any surplus to be paid to the defendant; but if the net proceeds are insufficient to satisfy the said value and interest, the defendant is not bound for the deficiency. (Rev., s. 664; Code, s. 485; 1871-2, c. 147, s. 13; C. S. 707.)

If the payment is not made to the plaintiff or into court for his use within a time to be fixed by the court, a sale may be ordered, and therefrom the sum due the plaintiff taken, and the residue, if any, paid to defendant. *Barker v. Owen*, 93 N. C. 198, 202.

§ 1-349. Procedure where plaintiff is under disability.—If the party by or for whom the land is claimed in the suit is a married woman, minor, or insane person, such value is deemed to be real estate, and shall be disposed of as the court considers proper for the benefit of the persons interested therein. (Rev., s. 665; Code, s. 486; 1871-2, c. 147, s. 14; C. S. 708.)

§ 1-350. Defendant evicted, may recover from plaintiff.—If the defendant, his heirs or assigns, after the premises are so relinquished to him, is evicted by force of a better title than that of the original plaintiff, the person so evicted may recover from the plaintiff or his representatives the amount paid for the premises, as so much money had and received by the plaintiff in his lifetime for the use of such person, with lawful interest thereon from the time of the payment. (Rev., s. 666; Code, s. 487; 1871-2, c. 147, s. 15; C. S. 709.)

§ 1-351. Not applicable to suit by mortgagee.—Nothing in this article applies to any suit brought by a mortgagee or his heirs or assigns against a mortgagor or his heirs or assigns for the recovery of the mortgaged premises. (Rev., s. 660; Code, s. 481; 1871-2, c. 147, s. 9; C. S. 710.)

When Section Inapplicable.—Where relationship of mortgagor and mortgagee is terminated by foreclosure prior to claimant's possession under mesne conveyances from mortgagor, this section, does not apply. *Metropolitan Life Ins. Co. v. Allen*, 208 N. C. 13, 179 S. E. 15.

In *Wharton v. Moore*, 84 N. C. 479, 483, it was said: "It is very probable the Legislature in making the exception had in view the generally admitted principle that the right to betterments is not conceded to mortgagors, for the current of authorities is to the effect that it has no application to them. In 2 *Washburn Real Prop.*, it is laid down that, 'if the mortgagor or any one standing in his place enhances the value of the premises by improvements, they become additional security for the debt, and he can only claim the surplus, if any, upon such sale being made after satisfying the debt.'"

Art. 31. Supplemental Proceedings.

§ 1-352. Execution unsatisfied, debtor ordered to answer.—When an execution against property of a judgment debtor, or any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or if he does not reside in the state, to the sheriff of the county where a judgment roll or a transcript of a justice's judgment is filed, is returned wholly or partially unsatisfied, the judgment creditor at any time after the return, and within three years from the time of issuing the execution, is entitled to an order from the court to which the execution is returned or from the judge thereof, requiring such debtor to appear and answer concerning his property before such court or judge, at a time and place specified in the order, within the county to which the execution

was issued. (Rev., s. 667; Code, s. 488, subsec. 1; C. C. P., s. 264; 1868-9, c. 95, s. 2; C. S. 711.)

Cross Reference.—As to execution against debts due corporate defendants, see § 55-143.

Purpose of Proceedings Supplemental.—The purpose is to give supplemental proceedings only in case the debtor has no property liable to execution, or to what is in the nature of execution, viz: proceedings to enforce its sale. *Hutchison v. Symons*, 67 N. C. 156, 159; *McKeithan & Sons v. Walker*, 66 N. C. 95; *Rand v. Rand*, 78 N. C. 12, 15.

The proceeding is intended to perfect the creditors' remedy in the same action and to supersede that which in a divided jurisdiction was attainable before by a bill of equity. *Bronson v. Wilmington N. C. Life Ins. Co.*, 85 N. C. 411, 413.

Supplemental proceedings are based upon an execution and may not be instituted against a defendant when there has been no execution issued within three years from the institution of such supplemental proceedings. *International Harvester Co. v. Brockwell*, 202 N. C. 805, 164 S. E. 322.

Same—Substitute for Creditor's Bill.—In *Carson v. Oates*, 64 N. C. 115, it was said: "Supplemental proceedings were intended to supply the place of proceedings in equity, where relief was given after a creditor had ascertained his debt by a judgment at law, and was unable to obtain satisfaction by process of law." Such proceedings are held to be a substitute for the former creditors' bill, and are governed by the principles established under the former practice in administering this species of relief in behalf of judgment creditors. *Rand v. Rand*, 78 N. C. 12, 14. See *Dillard v. Walker*, 204 N. C. 67, 167 S. E. 632.

Such proceedings differ from the old creditor's bill, however, in that the latter operated for the benefit of all creditors who chose to come in, while the former are only beneficial to the particular creditors who institute them. *Righton v. Pruden*, 73 N. C. 61.

Same—Complete Determination of Action.—Proceedings supplementary to execution are but a prolongation of the action necessary to the final discharge of the judgment, the purpose being that, all matters affecting the complete satisfaction and determination of the action shall be settled in the same action, instead of by a multiplicity of suits. *Rand v. Rand*, 78 N. C. 12, 15.

Nature of Proceedings—Final Process.—They are in the nature of a final process, when viewed either as a substitute for a creditor's bill to enforce the payment of a judgment at law or as a proceeding having the essential qualities of an equitable *fi. fa.* *Goodwin v. Claytor*, 137 N. C. 224, 225, 236, 49 S. E. 173.

Same—Equitable Execution.—Such proceedings are in the nature of an equitable execution, and are intended to discover and reach the property of the debtor, of every nature and kind, and apply the same according to law, to the payment of the judgment. *Vegelahn v. Smith*, 95 N. C. 254, 256; *Coates Bros. v. Wilkes*, 92 N. C. 377.

Judgment Conclusive.—A judgment, whether just or unjust, if regularly taken in a court of competent jurisdiction, may be enforced by proceedings supplementary thereto, and the judgment cannot be attacked by any member of the defendant corporation, or its creditors, except for fraud or collusion. *Heggie v. People's Bldg. & L., etc., Ass'n*, 107 N. C. 581, 590, 12 S. E. 275.

Lunatic Liable.—Supplemental proceedings lie against a lunatic in aid of execution. *Blake v. Respass*, 77 N. C. 193, 197.

Proceedings Lie against Private Corporations.—Proceedings supplemental to execution lie against a private corporation created by a special act of the Legislature, and organized for the purposes of the private gain for its shareholders. *LaFountain v. Southern Underwriters Ass'n*, 79 N. C. 514.

Not Applicable to Supreme Court.—The provisions respecting supplemental proceedings are not applicable to the supreme court, and no power has been given to it to issue an attachment in such case. *Phillips v. Trezevant*, 70 N. C. 176, 177.

Manner of Instituting Proceedings—Demand Unnecessary.—A personal demand on the debtor that he apply his property to the satisfaction of the creditor's claim, is not necessary to authorize supplemental proceedings. The prosecution of the suit to judgment and execution is a sufficient demand. *Weller & Co., v. Lawrence*, 81 N. C. 65.

Same—What Must Be Made to Appear.—To authorize the grant of an order of examination, these three facts must be made to appear, by affidavit or otherwise, to-wit: the want of known property liable to execution, which is provided by the sheriff's return of "unsatisfied," the nonexistence of any equitable estates in land within the lien of the judgment, and the existence of property, choses in action and things of value unaffected by any lien and incapable of levy. *Hinsdale*

v. Sinclair, 83 N. C. 339, 343; *Hutchison v. Symons*, 67 N. C. 156; *McKeithan & Sons v. Walker*, 66 N. C. 95.

Same—Who Entitled to Benefits.—Those creditors only are entitled to the benefit of supplementary proceedings who bring themselves within the provisions of the statute by instituting such proceedings. *Righton v. Pruden*, 73 N. C. 61.

The owner of orders for the payment of shares of stock in a corporation cannot be allowed to interplead in supplementary proceedings by a plaintiff judgment creditor who has obtained his judgment. *Heggie v. People's Bldg., etc., Ass'n*, 107 N. C. 581, 12 S. E. 275.

A judgment creditor of a corporation caused an execution to issue, which was returned unsatisfied, and he then brought a suit for himself and all other creditors against the corporation and its stockholders, demanding an account to ascertain the amount due upon unpaid stock, to pay debts of the corporation. Such suit was a new and independent action, and not demurrable on the ground that his remedy was by proceeding supplementary to execution. *Bronson v. Wilmington N. C. Life Ins., Co.*, 85 N. C. 411.

Action against an Administrator.—A judgment creditor whose execution has been returned unsatisfied cannot maintain an action against an administrator or to subject a distributive share of the judgment debtor in the estate to the satisfaction of the debt. He must proceed by supplemental proceedings. *Rand v. Rand*, 78 N. C. 12.

Three Year Limitation.—When the ordinary execution is returned unsatisfied in whole or part, the judgment creditor, at any time after such return, within three years from the time the execution is issued, is entitled to an order of the court, requiring the debtor to appear and answer respecting his property. *Vegelahn v. Smith*, 95 N. C. 254, 256.

Authority of Clerk.—This section confers upon the clerk of the superior court, acting for and in the place of the court, authority to hear and allow or disallow the motion of the plaintiffs for an order requiring the defendants to "appear and answer" concerning their property as therein allowed. *Bank v. Burns*, 107 N. C. 465, 466, 12 S. E. 252.

Where the defendant was ordered to appear before the clerk to be examined in a supplementary proceeding, when the clerk was properly informed that a similar proceeding was then pending before the judge, he should have refused to proceed, and failing to do so, the judge had the power to order that he desist from further action. *Ledford v. Emerson*, 143 N. C. 527, 55 S. E. 969.

Same—Appeal.—From an order requiring the debtor to appear, made by the clerk, an appeal lay at once to the judge as a matter of right, and the clerk cannot allow or disallow it. *Bank v. Burns*, 107 N. C. 465, 466, 12 S. E. 252.

Choses in Action.—In proceedings supplementary to execution, notes owned and held by the judgment debtor, or hypothecated as collateral to his own notes made to a bank, are choses in action, and the bank may apply them to the payment of its own claims against the judgment debtor, in accordance with the terms of hypothecation, when the same have matured, and when not matured it has an equitable right of set-off when the debtor is insolvent, to the extent necessary to protect its own interest, and, also, the right of application according to any contract it may hold, which specifically affects the property. *McIntosh Grocery Co. v. Newman*, 184 N. C. 370, 114 S. E. 535.

A bank may apply the deposits of its customer to the payment of his note after maturity, by way of set-off, unless some other creditor has in the meantime acquired a superior right thereto in some way recognized by the law; and a mere notice to the bank in proceedings supplemental to execution is insufficient to deprive the bank of this right. *McIntosh Grocery Co. v. Newman*, 184 N. C. 370, 371, 114 S. E. 535.

Choses in action cannot be reached by execution. They are subjected to the satisfaction of a judgment under the practice prevailing in this state by supplemental proceedings under this section which are in the nature of an equitable *fi. fa.* or creditor's bill. *Newberry v. Davidson Chemical Co.*, 65 F. (2d) 724, 727.

Notice Required.—"If jurisdiction has never been acquired over the principal defendant, so that a personal judgment can be rendered against him, notice, either actual or constructive, must be given him of any proceedings to reach his property, or by which his rights are to be determined, whether the suit be by garnishment or otherwise, for the reason that the rights of no person can be concluded by any proceeding till he has had his day in court. But in all cases in which he has been personally served with process, or has appeared, so that jurisdiction is acquired by the court to render a personal judgment against him, no notice need be given him of any proceedings by garnishment, instituted in aid of such action, or to collect the judgment rendered therein, unless such notice is required by

some provision of the statute under which the garnishment suit is conducted." *Rood on Garnishment*, sec. 280, quoted in *Wright v. Southern R. Co.*, 141 N. C. 164, 168, 53 S. E. 831.

Ten Days' Notice Not Required.—The requirement of ten days' notice of motions generally, has no reference to the examination of judgment debtors under supplementary proceedings, but such cases are governed by this section, which refers the time and place of examination to the discretion of the court or judge. *Weiller & Co. v. Lawrence*, 81 N. C. 65, 67.

Part of Judgment Owned by Person Other Than Defendant Can Not Be Attached.—In *Armour Fertilizer Works v. Newbern*, 210 N. C. 9, 185 S. E. 471, it was held that at the time of the rendition of a judgment another person was the equitable owner of a stipulated part thereof, so defendant had no legal or equitable interest in such part, and plaintiff was not entitled to attach such part in the supplemental proceedings instituted by it against defendant.

§ 1-353. Property withheld from execution; proceedings.—After the issuing of an execution against property, and upon proof by affidavit of a party, his agent or attorney, to the satisfaction of the court or a judge thereof, that any judgment debtor residing in the judicial district where such judge or sheriff resides has property which he unjustly refuses to apply toward the satisfaction of the judgment, such court or judge may, by order, require the judgment debtor to appear at a specified time and place, to answer concerning the same; and proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as provided upon the return of an execution, and the judgment creditor is entitled to the order of examination under this and the preceding section, although the judgment debtor has an equitable estate in land subject to the lien of the judgment, or choses in action, or other things of value unaffected by the lien of the judgment and incapable of levy. (Rev., s. 668; Code, s. 488, subsec. 2; C. C. P., s. 264; 1868-9, c. 95, s. 2; C. S. 712.)

Sufficiency of Affidavit.—Such extraordinary proceedings will not be ordered, unless a necessity for it is made to appear by an affidavit that the debtor has no property which can be reached by the execution, and that he has property or choses in action, or things of value, "which he unjustly refuses to apply to the satisfaction of the judgment." *Hutchison v. Symons*, 67 N. C. 156, 158. See *First*, etc., *Nat. Bank v. Hinton*, 213 N. C. 162, 195 S. E. 359.

An affidavit by a judgment creditor, his agent or attorney, that an execution has been issued upon his judgment—though it has not been returned—and that the defendant has not sufficient property "subject to execution" to satisfy the judgment, but has property "not exempted from execution," which he unjustly refuses to apply to its satisfaction, is sufficient to support an order from the examination of the debtor, and persons alleged to be indebted to him. *Farmers etc., Bank v. Burns*, 109 N. C. 105, 13 S. E. 871.

Same—Must Negative Existence of Property Liable to Execution.—An affidavit is insufficient to warrant the examination of the judgment debtor, if it does not negative property in the defendant liable to execution and the existence of equitable interests which may be subjected by sale in the nature of an execution; but the omission of such negative averments may be remedied by amendment at the hearing. *Weiller & Co. v. Lawrence*, 81 N. C. 65; *Hackney v. Arrington*, 99 N. C. 110, 5 S. E. 747.

Same—Objection as to Property of Defendant.—Objection that the plaintiff, in proceedings supplementary to execution, has not shown, in support of the order to examine the defendant and others, that the defendant has other property, etc., cannot be sustained when this averment is made in the plaintiff's affidavit without denial. *Farmers, etc., Bank v. Burns*, 109 N. C. 105, 13 S. E. 817, cited and approved. *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10.

Clerk's Finding of Fact Sufficient.—Where, upon the plaintiff's affidavit, the clerk finds as a fact that execution under the judgment had been issued, in proceedings supplementary to execution, it is sufficient to sustain his order in that re-

spect for the examination of the defendant and others, etc., which the lack of the return of execution does not affect. *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10.

Alias Execution Unreturned.—The fact that the sheriff has an alias execution in his hands unreturned, which was issued on the same judgment on which supplemental proceedings have been taken, is no bar to such proceedings, and no ground on which they can be dismissed. *Vegeahn v. Smith*, 95 N. C. 254.

Sufficient Service of Order to Appear.—Leaving a copy of an order on a judgment debtor, to appear and answer in supplemental proceedings, with the debtor's wife, is a sufficient notice. *Turner v. Holden*, 109 N. C. 182, 13 S. E. 731.

Court to Apply Property to Judgment.—The section intends that when the debtor refuses to apply such property to the satisfaction of the judgment, he must, when duly required, answer concerning the same, to the end that the court, in a proper way, may so apply the property to which the debtor may direct attention. *Farmers, etc., Bank v. Burns*, 109 N. C. 105, 108, 13 S. E. 871.

§ 1-354. Proceedings against joint debtors.—Proceedings supplementary to execution may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which the action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors to obtain satisfaction of judgments out of the property of joint debtors are maintainable in like manner and to the like effect. These provisions apply to all proceedings and actions pending and to those terminated by final decree or judgment. (Rev., s. 669; Code, s. 490; C. C. P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245; C. S. 713.)

Joint, as well as single debtors, may be examined after the issuance of an execution, and before its return. *Weiller & Co. v. Lawrence*, 81 N. C. 65.

§ 1-355. Debtor leaving state, or concealing himself, arrested; bond.—Instead of the order requiring the attendance of the judgment debtor, the court or judge may, upon proof by affidavit or otherwise to his satisfaction that there is danger of the debtor leaving the state or concealing himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the judgment, issue a warrant requiring the sheriff of any county where such debtor is to arrest him and bring him before the court or judge. Upon being brought before the court or judge, the debtor may be examined on oath, and, if it appears that there is danger of his leaving the state, and that he has property which he has unjustly refused to apply to the judgment, he shall be ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the court or judge as directed, and that he will not, during the pendency of the proceedings, dispose of any property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the court or judge, as for contempt. (Rev., s. 671; Code, s. 488, subsec. 4; 1868-9, c. 148, s. 4; 1868-9, c. 277, s. 8; C. S. 714.)

§ 1-356. Examination of parties and witnesses.—On examination under this article either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness; and the party or witnesses may be required to appear before the court or judge, or a referee appointed by either, and testify on any proceedings under this article in the same

manner as upon the trial of an issue. If before a referee, the examination shall be taken by the referee, and certified to the court or judge. All examinations and answers before a court or judge or referee under this article must be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof. (Rev., ss. 670, 676; Code, ss. 488 [subsec. 2], 491, 492; C. C. P., ss. 264, 267, 268; 1868-9, c. 95, s. 2; 1871-2, c. 245; C. S. 715.)

Cross-Examination.—Where the judgment debtor is examined the creditor does not make him his witness, but may cross-examine and contradict him. *Coates Bros. v. Wilkes*, 92 N. C. 377.

Evidence Taken Down in Writing.—In supplemental proceedings the evidence should be taken down in writing. *Coates Bros. v. Wilkes*, 92 N. C. 377, 383.

Production of Documents.—Where, on examination of a debtor, it appears that his account books are material to the investigation, the court may require him to produce them. *Coates Bros. v. Wilkes*, 92 N. C. 377.

§ 1-357. Incriminating answers not privileged; not used in criminal proceedings.—No person, on examination pursuant to this article, is excused from answering any question on the ground that it will tend to convict him of the commission of a crime or that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. (Rev., s. 672; Code, s. 488, subsec. 5; C. C. P., s. 264; 1868-9, c. 95, s. 2; C. S. 716.)

Witness Must Answer Questions.—A witness must answer the questions and he cannot shield himself behind his declaration that they involve self-crimination. *LaFontaine v. Southern Underwriter's Ass'n*, 83 N. C. 133, 144.

So when called to testify as to his dealings in behalf of a defunct corporation, of which he was an officer, he cannot excuse himself on the ground the evidence thus elicited might be used on the trial of indictments pending against him and others for conspiring to cheat and defraud divers persons in the management of the affairs of such corporation. *LaFontaine v. Southern Underwriters Association*, 83 N. C. 133.

Not Available for Criminal Proceedings.—Facts developed on the examination of the defendants in supplemental proceedings are forbidden to be used in evidence against them in any criminal proceeding or prosecution. *State v. Mallett*, 125 N. C. 718, 34 S. E. 651.

§ 1-358. Disposition of property forbidden.—The court or judge may, by order, forbid a transfer or other disposition of, or any interference with, the property of the judgment debtor not exempt from execution. (Rev., s. 673; Code, ss. 488 [subsec. 6], 494; C. C. P., s. 264; 1868-9, c. 95, s. 2; C. S. 717.)

Only Parties May Be Restrained.—In supplemental proceedings, the court cannot restrain the transfer of property owned by one not a party to the action. *Banks v. Burns*, 109 N. C. 105, 13 S. E. 871.

Where it is alleged that a third person has property of the judgment debtor, it is error to restrain such third person from disposing of such property until the receiver can bring an action for its recovery, unless such person has been made a party in some way to the proceeding. *Coates Bros. v. Wilkes*, 94 N. C. 174.

§ 1-359. Debtors of judgment debtor may satisfy execution.—After the issuing of an execution against property, all persons indebted to the judgment debtor, or to any one of several debtors in the same judgment, may pay to the sheriff the amount of their debt, or as much thereof as is necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount paid. (Rev., s. 674; Code, s. 489; C. C. P., s. 265; C. S. 718.)

Protection to Debtors of Judgment Debtor.—The section furnishes an easily secured and safe protection to the debtors of the judgment debtor, who are called upon to satisfy the execution. *Parks v. Adams*, 113 N. C. 473, 477, 18 S. E. 665.

Authority of Sheriff.—A sheriff is authorized by this section to receive from debtors of the defendant in the execution in his hands the debts due him, but he is not thereby invested with the power to apply the proceeds of one execution in satisfaction of another. *Smith v. McMillan*, 84 N. C. 593.

§ 1-360. Debtors of judgment debtor, summoned.—After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon affidavit that any person or corporation has property of said judgment debtor, or is indebted to him in an amount exceeding ten dollars, the court or judge may, by order, require such person or corporation, or any officer or members thereof, to appear at a specified time and place, and answer concerning the same. The court or judge may also, in its or his discretion, require notice of the proceeding to be given to any party to the action, in such manner as seems proper. (Rev., s. 675; Code, s. 490; C. C. P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245; C. S. 719.)

When Proceedings May Commence.—The proceedings given by the section may be commenced before the sale of the property levied on, at the presentation of an affidavit or other proof of its insufficient value. *McKeithan & Sons v. Walker*, 66 N. C. 95, 99.

Purpose of Appearance and Answer.—The purpose of the appearance and answer required by the section is to determine whether the sum alleged, or any part thereof is due the judgment debtor. *Rice v. Jones*, 103 N. C. 226, 231, 95 S. E. 571.

Assignee May Be Examined.—An order for examination may issue against the defendant's assignee. *Bruce v. Crabtree*, 116 N. C. 528, 21 S. E. 194.

Procedure.—The section expressly prescribes that persons having property of the judgment debtor may be examined in respect to the same, and mere notice is sufficient to bring them before the courts and make them subject to its jurisdiction for the purpose of securing the debtor's property, not for the purpose of contesting any right of such persons having the same. If they claim an interest in the property, or that the same belongs to them, they may properly suggest so. *Banks v. Burns*, 109 N. C. 105, 109, 13 S. E. 871; *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10.

Where one, who is charged in supplemental proceedings as holding property belonging to a judgment debtor, claims such property as his own, the question cannot be decided in the course of such proceedings, but must be settled by an independent action. *Carson v. Oates*, 64 N. C. 115.

Same—Notice to Defendant.—Notice to the defendant is not required, though the court may, in its discretion, order notice to be given. *Wright v. Southern R. Co.*, 141 N. C. 164, 168, 53 S. E. 831. *Wilmington v. Sprunt*, 114 N. C. 310, 19 S. E. 348.

§ 1-361. Where proceedings instituted and defendant examined.—Proceedings supplemental to execution must be instituted in the county in which the judgment was rendered; but the place designated where the defendant must appear and answer must be within the county where he resides. (Rev., s. 677; C. S. 720.)

Editor's Note.—This section is a substantial enactment of the rule laid down in *Hasty v. Simpson*, 77 N. C. 69, 70. In *Huchison v. Symons*, 67 N. C. 156, it was held that proceedings supplementary should be instituted in the county in which the action was pending; that is, where the judgment was rendered. *Hasty v. Simpson*, supra, quoted, and approved this holding, but, in addition, held that the place designated for the appearance and answer of the defendant should be in the county of his residence. Thus a beneficial rule was formulated which was, apparently, followed by the legislature in enacting this section.

§ 1-362. Debtor's property ordered sold.—The court or judge may order any property, whether

subject or not to be sold under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands of the judgment debtor or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be so applied when it appears, by the debtor's affidavit or otherwise, that these earnings are necessary for the use of a family supported wholly or partly by his labor. (Rev., s. 678; Code, s. 493; C. C. P., s. 269; 1870-1, c. 245; C. S. 721.)

Order for Condemnation of Debtor's Property.—In proceedings supplemental to execution, an order for the condemnation made by the clerk against land was within the scope of this section. *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10.

Property Subject to Sale.—The court may order any property of the judgment debtor not exempt from execution in the hands either of himself or any other person, or due to the judgment debtor, to be applied to the satisfaction of the judgment. *Rand v. Rand*, 78 N. C. 12, 16.

If it appears that a third person is indebted to the judgment debtor, the court may order such indebtedness, or so much thereof as may be necessary, to be applied to the satisfaction of the judgment against the judgment debtor. *Rice v. Jones*, 103 N. C. 226, 231, 95 S. E. 571.

Sale Required.—Where it appears from an examination under supplementary proceedings that the judgment debtor holds a claim against a third party, to be discharged by the delivery of corn at a stipulated price per bushel, it is error for the court to order such third person to deliver to the creditor a sufficient quantity of the corn, at the agreed price, to satisfy the debt. The proper order is to sell the corn and apply the proceeds to the debt. In *re Davis*, 81 N. C. 72.

When Final Order Made.—No final order can be made appropriating to the creditor any property discovered under section 1-360 until the property previously levied on is exhausted, for until that is done it cannot be known whether anything is still owing. *McKeithan & Sons v. Walker*, 66 N. C. 95, 99.

Earnings for Sixty Days.—The exemption of earnings for sixty days allowed to a judgment debtor under the section applies only as to proceedings on judgments for private debts and for taxes due. *Wilmington v. Sprunt*, 114 N. C. 310, 314, 19 S. E. 348.

The earnings of a nonresident for personal services for the sixty days next preceding are exempt from seizure in garnishment by this section. *Goodwin v. Clayton*, 137 N. C. 224, 225, 237, 49 S. E. 173 cited in *Wierse v. Thomas*, 145 N. C. 261, 268, 59 S. E. 58.

Salaries of Public Officers and Employees.—For reasons of public policy, the salaries of officers and the pay of employees of the state can not be reached by creditors by proceedings supplementary to execution. *Swepton v. Turner*, 76 N. C. 115.

Gratuitous Services.—While creditors may subject, in a supplementary proceeding, the debtor's choses in action, including a claim for compensation due for service rendered under an express or implied contract, they have no lien on his skill or attainments, and cannot compel him to exact compensation for managing his wife's property, or for services rendered to any person with the understanding that it was gratuitous. *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 285.

Where supplemental proceedings are instituted upon return of execution unsatisfied on a judgment against a husband and wife, and it appears that the husband is totally and permanently disabled and has no property upon which execution could be levied, but is receiving the sum of three hundred dollars a month under disability insurance, the judgment debtor is entitled, under his personal property exemption, to the three hundred dollars each month if such amount is necessary for the support of himself and wife. *Commissioner of Banks v. Yelverton*, 204 N. C. 441, 168 S. E. 505.

§ 1-363. Receiver appointed.—The court or judge having jurisdiction over the appointment of receivers may also by order in like manner, and with like authority, appoint a receiver in proceedings under this article of the property of the

judgment debtor, whether subject or not to be sold under execution, except the homestead and personal property exemptions. But before the appointment of the receiver, the court or judge shall ascertain if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if so, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to the receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The title of the receiver relates back to the service of the restraining order, herein provided for. (Rev., s. 679; Code, s. 494; C. C. P., s. 270; 1870-1, c. 245; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; C. S. 722.)

Cross Reference.—As to duty of receiver generally, see secs. 1-501 to 1-504.

In a race of diligence between creditors under the supplementary proceedings, the earliest applicant is presumed to be entitled to the earliest appointment. *Parks v. Sprinkle*, 64 N. C. 637.

Action as a Prerequisite to Appointment.—Where supplementary proceedings had discovered that the defendant held a specific fund which had been adjudged to belong to the plaintiff, and the clerk directed the defendant to pay over the same to the plaintiff, it was error in the judge on appeal to appoint a receiver to take charge of the fund until the plaintiff should institute an action to recover the specific fund. *Ross v. Ross*, 119 N. C. 109, 25 S. E. 792.

Evidence with Application.—The application for a receiver shall be made as in other cases, that is, the motion shall be supported by affidavits and other written or documentary evidence. *Coates Bros. v. Wilkes*, 92 N. C. 377, 383.

Motion Pending Appeal.—The motion for appointment of a receiver may be made before the judge, pending an appeal to him from the ruling of the clerk upon other questions. *Coates Bros. v. Wilkes*, 92 N. C. 377.

Subject to Review.—The appointment of a receiver in these proceedings does not rest solely in the discretion of the judge, and his action in appointing or refusing to appoint is subject to review by the Supreme Court. *Coates Bros. v. Wilkes*, 92 N. C. 377.

Reasonable Ground.—It is sufficient for the appointment of a receiver if there is reasonable grounds to believe that the judgment debtor has property which ought to be applied to the payment of the judgment. *Coates Bros. v. Wilkes*, 92 N. C. 377.

Judge to Ascertain if Other Proceedings Pending.—While it is the duty of a judge appointing a receiver under this section to ascertain if other supplementary proceedings are pending against the judgment debtor, and if so, to notify the plaintiffs therein of all proceedings before him, yet a failure to do so does not require the reversal of an order appointing a receiver, where some of the creditors actually appear and make themselves parties, and all have an opportunity to interpose before the final distribution of the fund. *Corbin v. Berry*, 83 N. C. 28.

There Shall Be but One Receiver.—This section prescribes that there shall be but one receiver of the property of a judgment debtor, to prevent a conflict of authority between the courts having a concurrent jurisdiction over the subject. *Corbin v. Berry*, 83 N. C. 28, 31.

Consolidation of Several Proceedings.—Where several supplementary proceedings are pending, and the same property is sought to be subjected, or where, in either of such proceedings, a receiver is appointed of property which is the subject of the other proceedings, the court should, in proper cases, order that the same be consolidated, preserving the priorities acquired by the superior diligence of the various litigants. *Monroe Bros. & Co. v. Lewald*, 107 N. C. 655, 12 S. E. 287.

Cited in *Nobles v. Roberson*, 212 N. C. 334, 193 S. E. 420.

§ 1-364. Filing and record of appointment; property vests in receiver.—When the court or a judge grants an order for the appointment of a receiver of the property of the judgment debtor, it shall be filed in the office of the clerk of the superior court of the county where the judgment roll in the action or transcript from justice's judgment, upon which the proceedings are taken, is filed;

and the clerk shall record the order in a book to be kept for that purpose in his office, to be called Book of Orders Appointing Receivers of Judgment Debtors, and shall note the time of its filing therein. A certified copy of the order shall be delivered to the receiver named therein, and he is vested with the property and effects of the judgment debtor from the time of the service of the restraining order, if such restraining order has been made, and if not, from the time of the filing and recording of the order for the appointment of a receiver. The receiver of the judgment debtor is subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded. (Rev., s. 680; Code, s. 495; C. C. P., s. 270; 1870-1, c. 245; C. S. 723.)

When Property Vests in Receiver.—The receiver, by virtue of his appointment, becomes the legal assignee of the judgment, and is vested with the property therein. *Turner v. Holden*, 94 N. C. 70, 71.

The general principles of law applicable to receivers apply to those appointed in supplemental proceedings. It is the duty of such receivers to take possession of the property of the debtor at once, and to bring actions to recover any property belonging to him which may be in the hands of third persons. *Coates Bros. v. Wilkes*, 92 N. C. 377.

In proceedings supplementary to execution if the debtor dies before the appointment of a receiver, or before the order of such appointment is filed in the office of the clerk of the superior court, the property and effects of such judgment debtor do not vest in the receiver. *Rankin v. Minor*, 72 N. C. 424.

Remedy of Debtor When Receiver Is Negligent.—If the receiver is negligent in the performance of his duty, the remedy of the judgment debtor might be in the removal of the receiver and appointment of a successor, or in seeking compensation in damages for the losses due to such negligence, and, if necessary, upon his bond to secure a faithful discharge of duty, he cannot interfere with the receiver's collection and control of the property. *Turner v. Holden*, 94 N. C. 70, 72.

Receiver Is under Direction of Court.—A receiver may be appointed who is invested with all the property and effects of the debtor, and may collect, preserve, and pay out the property and estate of the debtor, or their proceeds, under the direction of the court. *Rand v. Rand*, 78 N. C. 12, 16.

While the court may exercise very great control over the receiver, and may direct, in appropriate cases, that he shall or shall not do particular things, yet, ordinarily, when he is invested with full power as a receiver, he will have authority to bring appropriate, necessary actions without special leave or direction of the court. *Weill v. First Nat. Bank*, 106 N. C. 1, 5, 10, 11 S. E. 277.

A receiver, in supplemental proceedings, may bring actions to recover the judgment debtor's property without special leave or direction of the court. *Weill v. First Nat. Bank*, 106 N. C. 1, 11 S. E. 277. See also *Coates Bros. v. Wilkes*, 92 N. C. 377.

§ 1-365. Where order of appointment recorded.

—Before the receiver is vested with any real property of the judgment debtor, a certified copy of the order of appointment must be filed and recorded on the execution docket, in the office of the clerk of the superior court of the county in which any real estate of the judgment debtor is situated, and also in the office of the clerk of the superior court of the county in which the debtor resides. (Rev., s. 681; Code, s. 496; C. C. P., s. 270; C. S. 724.)

Death of Judgment Debtor before Order Filed.—When the judgment debtor dies before the filing in the clerk's office of an order appointing a receiver, the judgment creditor has no lien on his property as against the administrator of the debtor. *Rankin v. Minor*, 72 N. C. 424, cited in note in 3 L. R. A., N. S. 133.

Cited in *Nobles v. Roberson*, 212 N. C. 334, 193 S. E. 421.

§ 1-366. Receiver to sue debtors of judgment debtor.—If it appears that a person or corporation

alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt is recoverable only in an action against such person or corporation by the receiver; but the court or judge may, by order, forbid a transfer or other disposition of such property or interest till a sufficient opportunity is given to the receiver to commence and prosecute the action to judgment and execution, but such order may at any time be modified or dissolved by the court or judge having jurisdiction on such security as he directs. (Rev., s. 682; Code, s. 497; C. C. P., s. 271; 1870-1, c. 245; C. S. 725.)

Cross Reference.—As to execution against debts due corporate defendants, see § 55-143.

Court May Restrain Transfer of Property.—Under this section when it is found that a third person, not a party to the action, claims an interest in the property, or denies the debt, which is sought by the plaintiff to be applied to his judgment as belonging to the judgment debtor, the court may, by an order in the cause, restrain the transfer of such property till the receiver can bring an action to recover it, but such is brought by the receiver as the agent of the court. *Ross v. Ross*, 119 N. C. 109, 112, 25 S. E. 792.

Same—Notice Required.—In *Coates Bros. v. Wilkes*, 94 N. C. 174, 180, it was said that very clearly this section cannot be construed as implying that the order forbidding "the transfer or other disposition of such property or interest," may be made without notice to the party to be affected by it. Such an interpretation would produce an effect that would contravene natural justice, as well as fundamental right. In some way, the person to be affected adversely by an order or judgment of the court, must have notice of the proceedings against him, so that he can appear, and be heard in his own behalf. This section must be taken and construed in connection with section 1-351, which provides that "the court or judge, may by an order, require such person or corporation, or any officer or member, thereof, to appear at a time and place, and answer concerning" the property or debt alleged to belong to the judgment debtor. It moreover gives to the court or judge, authority in its or his discretion, to require the notice of such order to be given in "such manner as may seem to him or it to be proper." Notice must be given, not necessarily by summons, but as the court or judge may direct, and when the party is before the court to answer as required, the order forbidding "a transfer or other disposition of such property or interest," may be made. Thus two sections of the same statute may operate consistently and without working injustice.

Third Parties May Interplead.—In supplemental proceedings it was adjudged that the fund in question belonged to the judgment debtor, and an order made that the fund be paid into court. Afterwards, upon claim made by another, the clerk refused to pay the money to him, and appointed a receiver, who brought action against the judgment debtor to try the question of title to the fund. Held, that defendants, claimants to the fund, should have been allowed to interplead in the supplementary proceedings. *Wilson v. Chichester*, 107 N. C. 386, 12 S. E. 139.

Fraudulent Transactions of Debtor Set Aside.—A receiver is not the representative of the debtor alone, and can maintain an action to set aside fraudulent transactions of such debtor. *Pender v. Mallett*, 123 N. C. 57, 31 S. E. 351.

§ 1-367. Reference.—The court or judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts. The appointment of the referee may be made in the first order or at any time. (Rev., s. 683; Code, s. 498; C. C. P., s. 272; C. S. 726.)

Cross References.—As to examination before referee, see sec. 1-356; as to referees generally, see secs. 1-190 to 1-195; as to disobedience of orders of referee, see sec. 1-368, and annotations thereto.

Definition.—A reference has been defined as the act of sending any matter by a court of chancery, or one exercising equitable powers, to a master or other officer, in order that he may ascertain facts and report to the court. 2 Bouv. Law Dict., title Reference.

What Law Governs.—The general rule that whatever constitutes part of the procedure is determined by the law of the forum, applies to references, and the validity of a reference, and the proceedings and judgment upon it must be tested by the laws of the forum. *Alexandria v. Swann*, 5 How. 83, 12 L. Ed. 60.

The practice of referring pending actions under a rule of court, by consent of parties was well known at common law, and the report of the referees appointed, when regularly made to the court pursuant to the rule of reference, and duly accepted, is now universally regarded in the state courts as the proper foundation of judgment. Such references are proper in federal as well as state courts. *Chicago*, etc., *R. Co. v. Clark*, 178 U. S. 353, 20 S. Ct. 924, 44 L. Ed. 1099.

The evidence taken before a referee must accompany his report if there are any exceptions to which it is applicable, or perhaps any adverse rulings made in the progress of the inquiry which the evidence would tend to elucidate or explain. *Vestal v. Sloan*, 83 N. C. 555, 556.

§ 1-368. Disobedience of orders punished as for contempt.—Any person, party or witness, who disobeys an order of the court or judge or referee, duly served, may be punished by the judge as for a contempt. In all cases of commitment under this article the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the judge committing him, or the judge having jurisdiction, on such terms as are just. (Rev., s. 684; Code, s. 500; C. C. P., s. 274; 1869-70, c. 79, s. 3; C. S. 727.)

Cross Reference.—As to contempt generally, see §§ 5-1 to 5-9.

Court May Enforce Its Lawful Orders.—It is an essential attribute of a court to enforce by proper process its lawful orders, and without this its essential functions would be paralyzed or destroyed. *LaFontaine v. Southern Underwriters*, 83 N. C. 132, 133, 137; *Pain v. Pain*, 80 N. C. 322.

As to whether the violation of a void order of a court constitutes contempt, see note in 12 N. C. Law Rev. 260.

Contempt of Referee Punished by Court.—When, in the course of proceedings supplementary to the execution, a witness is examined by a referee, a contempt, in refusing to answer the questions, must be punished by the court making the reference. *LaFontaine v. Southern Underwriters*, 83 N. C. 132, 133.

Judge Passes on Inability to Comply.—Where a party to an action, having been directed to perform an order of the court, otherwise to be in contempt, applied, after notice, to have the order discharged, and offered to produce affidavits showing his inability to comply with the order, it was the duty of the judge to hear and pass on the affidavits. *Childs v. Wiseman*, 119 N. C. 497, 26 S. E. 126.

SUBCHAPTER XI. HOMESTEAD AND EXEMPTIONS.

Art. 32. Property Exempt from Execution.

§ 1-369. Property exempted.—The homestead and personal property exemptions as defined and declared by the article of the state constitution entitled *Homesteads and Exemptions* are exempt from sale under execution and other final process, as provided in the state constitution: Provided, the allotment of the homestead shall, as to all property therein embraced, suspend the running of the statute of limitations on all judgments against the homesteader during the continuance of the homestead. (Rev., s. 685; Code, s. 501; 1885, c. 359; 1887, c. 17; 1895, c. 397; 1901, c. 612; 1879, c. 256; R. C., c. 45, s. 7; 1848, c. 38; R. C., c. 45, s. 8; 1844, c. 32; 1846, c. 53; 1848, c. 38, s. 2; 1866-7, c. 61, s. 7; 1876-7, c. 263; C. S. 728.)

I. In General.

A. Nature of Homestead.

B. Nature and Duration of Exemptions.

II. Constitutional Provisions and Purpose.

A. In General.

B. Who Entitled to Homestead and Exemptions.

C. Homestead in Land Only.

III. Judgments and Liens.

Cross References.

As to conveyance of homestead, see sec. 1-370 and annotations thereto. See also, N. C. Constitution, Art. X, §§ 1, 2, 3, 4, 5 and 8.

I. IN GENERAL.

Editor's Note.—In *Poe v. Hardie*, 65 N. C. 447, the homestead has been called a "determinable fee," and in *Littlejohn v. Egerton*, 77 N. C. 379, it is spoken of as "a quality annexed to land whereby the estate is exempted from sale under execution". These inadvertent expressions, as to the effect produced upon the debtor's estate in the exempt land, have led to serious difficulties in interpreting the beneficent provisions of the constitution and subsidiary statutes in securing a home to the debtor and his family, without trenching needlessly upon the rights of creditors.

The correct view is expressed by Bynum, J., in *Bank v. Green*, 78 N. C. 247, 252: "Their legal effect is simply to protect the occupant in the enjoyment of the land, set apart as a homestead, unmolested by his creditors". No new estate is conferred upon the owner, and no limitation is imposed upon his old estate. It is obvious that it would be more correct to say that there is conferred upon him a determinable exemption from the payment of his debts in respect to the particular property allotted to him. It cannot be contended that the assignment is in any sense a conveyance of land, nor does it profess to pass title. It only serves to indicate where the homestead is and whether there is any excess subject to levy and sale to pay judgment creditors. See *Keener v. Goodson*, 89 N. C. 273; *Mebane v. Layton*, 89 N. C. 396; *Markham v. Hicks*, 90 N. C. 204.

Favored by Law.—The law favors the homestead. Every safeguard is given the homesteader and the courts have carefully protected his rights as guaranteed by the Constitution. *Cheek v. Walden*, 195 N. C. 752, 754, 143 S. E. 465.

Estoppel to Claim.—Under certain circumstances the homesteader is estopped from claiming the homestead exemption. *Cheek v. Walden*, 195 N. C. 752, 755, 143 S. E. 465, citing *Caudle v. Morris*, 160 N. C. 168, 76 S. E. 17; *Simmons v. McCullin*, 163 N. C. 409, 412, 79 S. E. 625; *Duplin County v. Harrell*, 195 N. C. 445, 142 S. E. 481.

Equity of Redemption.—It is well settled that the homestead may be allotted in an equity of redemption. *Cheek v. Walden*, 195 N. C. 752, 754, 143 S. E. 465. Citing *Cheat-ham v. Jones*, 68 N. C. 153; *Gaster v. Hardee*, 75 N. C. 460; *Burton v. Spiers*, 87 N. C. 87; *Hinson v. Adrian*, 92 N. C. 122; *Thurber v. LaRoque*, 105 N. C. 301; *Montague v. Bank*, 118 N. C. 283, 24 S. E. 6; *Duplin Co. v. Harrell*, 195 N. C. 445, 142 S. E. 481.

A. Nature of Homestead.

Exceptions to Homestead Exemption.—A homestead is exempt from sale under execution, except (1) for taxes; (2) for obligations contracted in the purchase of the premises; (3) for mechanics and laborer's lien; (4) for debts contracted prior to the constitution. *Mebane v. Layton*, 89 N. C. 396; *Cumming v. Bloodworth*, 87 N. C. 83, 85.

Definition of a Homestead.—In *Hager v. Nixon*, 69 N. C. 108, 110, it is said: "No precise definition of a homestead is given in the constitution, and it would only mislead us if we should look into dictionaries or the laws of other states and take the definitions there given as fixing the meaning of the word as given in our laws. We must look to our own legislation alone to ascertain what it is."

Same—Not an Estate.—A homestead is not an estate at all, but merely an exemption. *Candle v. Morris*, 160 N. C. 168, 76 S. E. 17; *Chadbourn Sash, etc., Co. v. Parker*, 153 N. C. 130, 69 S. E. 1; *Thomas v. Fulford*, 117 N. C. 667, 23 S. E. 635; *Jones v. Britton*, 102 N. C. 166, 9 S. E. 554. See also, *Hicks v. Wooten*, 175 N. C. 597, 96 S. E. 107.

In *Thomas v. Fulford*, 117 N. C. 667, 671, 23 S. E. 635, it was said: "In some of the earlier decisions it is treated as an estate and called a determinable fee, but this doctrine has long since been abandoned and we have numerous decisions that hold the homestead is not an estate, but an exemption only."

Same—Not Color of Title.—The assignment of a homestead does not constitute color of title. *Keener v. Goodson*, 89 N. C. 273, 277.

Time of Application.—The "poor debtor" is in time if he makes his application and procures the assignment to be made at any time before the property is changed and converted by a sale. *State v. Floyd*, 33 N. C. 496, 498.

Assignment by Sheriff Not Needed to Vest Right.—The action of a sheriff in assigning a homestead by metes

and bounds is not needed to any extent to vest the right, but merely to find the quantum so as to enable him to ascertain the excess, if any. *Gheen v. Summey*, 80 N. C. 188. See also, *Littlejohn v. Egerton*, 77 N. C. 379, 380.

Sale by Homesteader of Estate in Reversion.—A sale by the owner of a homestead of his estate in reversion stands as at common law, and the owner has full power to sell it, or to mortgage it if he desires to raise money on the credit of it. *Jenkins v. Bobbitt*, 77 N. C. 385, 387.

B. Nature and Duration of Exemptions.

Effect of Exemption Laws.—Exemption laws have no extraterritorial force or effect. *Goodwin v. Claytor*, 137 N. C. 225, 49 S. E. 173; *Sexton v. Phoenix Ins. Co.*, 132 N. C. 1, 43 S. E. 479; *Balk v. Harris*, 122 N. C. 64, 30 S. E. 318.

The exemption laws of this state protect the property of a debtor in this state from exemptions issuing from the courts of this state, and (by congressional action) from the courts of the United States. *Balk v. Harris*, *supra*.

Exemptions relate only to the remedy, and the right to an exemption is subject to the law of the forum. *Goodwin v. Claytor*, 137 N. C. 225, 49 S. E. 173; *Sexton v. Phoenix Ins. Co.*, 132 N. C. 1, 43 S. E. 479.

Same—Remedial in Nature.—Exemption laws are remedial in their nature and should always receive a liberal construction. *Goodwin v. Claytor*, 137 N. C. 225, 49 S. E. 173.

Same—Exchange of Exempt Goods.—If an article of property, which has been exempt from execution, is exchanged for another article, the one received in exchange is not exempt. *Lloyd v. Durham*, 60 N. C. 282, 283.

Presumption in Favor of Exemption.—There is a presumption of fact in favor of the exemption, and the creditor who seeks to subject the homestead to the payment of his debt, must bring himself within one of the exceptions by proper averment and proof. *Mebane v. Layton*, 89 N. C. 396.

Duration of Exemption.—The personal property exemption exists only during the life of the homesteader. *Smith v. McDonald*, 95 N. C. 163; *Johnson v. Cross*, 66 N. C. 167.

How Choses in Action Made Available.—Except in case of attachment proceedings wherein provision is made for exceptional and urgent cases, choses in action can only be made available to the creditor by civil action in the nature of an equitable *fi. fa.* or by the statutory method of supplemental proceedings, both of which remedies in proper instances are here still open to claimants. *McIntosh Grocery Co. v. Newman*, 184 N. C. 370, 373, 12 S. E. 535; *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10.

II. CONSTITUTIONAL PROVISIONS AND PURPOSE.

A. In General.

Favored by Constitution.—The homestead interest is favored by the Constitution. *Leak v. Gay*, 107 N. C. 468, 12 S. E. 312.

Purpose of Homestead Provisions.—The framers of the Constitution meant exactly what they said and ordained, that a certain part of the real property of the debtor should be set apart for his use and occupation, where he might dwell with his family in peace and contentment without any creditors to molest or make him afraid, so long as he might live, and to extend the benefit of the exemption to the wife during her life, if there should be no children of the marriage, and if there were children then during the minority of the children or any one of them. The leading idea, if not the only one, was to create an exemption and not an estate, and an exemption for a limited period only, leaving the estate which the debtor already had in the land unimpaired. *Joyner v. Sugg*, 132 N. C. 580, 583, 44 S. E. 122.

The homestead law is a beneficent provision for the protection of a wife and children against the neglect and improvidence of the father and husband. *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437.

Pre-existing Debt.—The second section of Article X of the Constitution, of 1868, which exempts from execution real property of a resident debtor not exceeding in value one thousand dollars, was declared void as to pre-existing debts, being in contravention of Article I, sec. 10 of the Federal Constitution. *Edwards v. Kearzey*, 96 U. S. 595, reversing *Edwards v. Kearsey*, 74 N. C. 241. For the law governing cases which arose subsequent to this one concerning pre-existing debts, see *Earle v. Hardie*, 80 N. C. 177; *Richardson v. Wicker*, 80 N. C. 172, 173; *Gamble v. Rhyne*, 80 N. C. 183.

Where a homestead is sold to satisfy a debt created before the ratification of the Constitution of 1868, one thousand dollars of the proceeds of sale, if that sum is left after paying the old debt, will be treated as the homestead. *Leak v. Gay*, 107 N. C. 468, 12 S. E. 312.

Homestead is Vested Right.—The homestead right is a

right vested by the Constitution, and cannot be destroyed by any irregularity in the proceedings for its allotment. *Formeyduval v. Rockwell*, 117 N. C. 320, 23 S. E. 488.

B. Who Entitled to Homestead and Exemptions.

Only Residents Entitled to Homestead and Exemptions.—The homestead and personal property exemptions can be claimed only by residents of this state. *Goodwin v. Claytor*, 137 N. C. 225, 49 S. E. 173; *Jones v. Alsbrook*, 115 N. C. 46, 20 S. E. 170.

Same—Constitutional Purpose.—The right of homestead provided and secured by the Constitution (Art. X, sections 2, 5, 8), is incident to residence in this state. Only residents have and are entitled to such right. A non-resident has no such right, although he may be the owner of real property situated in the state. The terms of the Constitution do not embrace him, and moreover, the plain purpose is to exempt the homes of those who have or can acquire them "from sale under execution or other final process obtained on any debt." He has no home within the state for himself or his family, and the reason for the exemption as to him does not exist. *Baker v. Leggett*, 98 N. C. 304, 305, 4 S. E. 37.

Residents Defined.—The leading purpose of the Constitution, Article X, secs. 1, 2, 3, 8, is to secure the homestead to the debtor and his family and the term "resident" therein should be so construed as to accomplish that purpose, unless there should be found some positive or necessary and reasonable rule of law to the contrary. *Chitty v. Chitty*, 118 N. C. 647, 649, 24 S. E. 517.

The words "a resident of this state," employed in the Constitution, Art. X, Sec. 2, in respect to homesteads, have a more restricted meaning than that usually given to domicile. *Lee v. Mosely*, 101 N. C. 311, 7 S. E. 874.

The residence must be actual, and not constructive. *Munds v. Cassidy*, 98 N. C. 558, 4 S. E. 353, 355.

Same—Forfeiture of Right.—If the person claiming a homestead voluntarily removes from the state, with a purpose to make his home elsewhere, he forfeits his right in this respect. *Finley v. Saunders*, 98 N. C. 462, 4 S. E. 516.

Where a debtor ceased to be a resident of the state before his property became applicable to a creditor's claim, the general exemption laws of the state do not operate in his favor. *Wierse v. Thomas*, 145 N. C. 261, 59 S. E. 58, 15 L. R. A. (N. S.) 1008.

A resident, after executing a deed of trust of his property, with a recital reserving his personal property exemptions, and after assigning his exemptions so reserved, became a nonresident without having his exemptions allotted to him. Neither the assignee nor the attaching creditors could get the benefit of the exemptions. *Latta v. Bell*, 122 N. C. 639, 30 S. E. 15. See also, *Norman v. Craft*, 90 N. C. 211.

Right Not Destroyed by Fraud.—When the owner of lands has had his deed thereto to his wife set aside by his creditors as fraud upon them, and has continued in the occupation of the lands, he is still entitled to his homestead interest therein. *Rose v. Bryan*, 157 N. C. 173, 72 S. E. 960; *Rankin v. Shaw*, 94 N. C. 405, 407.

When Wife and Children Succeed to Homestead.—The wife and children only succeed to the homestead in the event of the death of the father or husband. They are not entitled to it after his removal from the state, though they may remain. *Finley v. Saunders*, 98 N. C. 462, 4 S. E. 516.

A widow is not entitled to a homestead in the lands of her husband if he die leaving children—minors or adults. *Wharton v. Leggett*, 80 N. C. 169, 171. See also *Hager v. Nixon*, 69 N. C. 108, 113. But see later case under "Purpose of Homestead Provisions," *supra*.

When Dower Right Paramount to Homestead Right.—In *Watts v. Leggett*, 66 N. C. 197, *Pearson, C. J.*, speaking for the court, said: "If the homestead had been laid off in the lifetime of the husband, at his death the dower of the wife would have been assigned so as to include the dwelling house in which the husband had usually resided and buildings used therewith. Thus the dower would be assigned so as to include the homestead or a part thereof, and the right of dower having attached at the time of marriage, would have been paramount, and the right of the children to enjoy the homestead during the minority of any one of them must have been taken subject to this paramount right of dower, the effect being to postpone the enjoyment of the children as to so much of the homestead as is covered by the dower, until the death of the widow, leaving them, of course, to the present enjoyment of such part of the homestead and land appertaining thereto as is not covered by the dower." See also, *Gregory v. Ellis*, 86 N. C. 579, 583.

Reversionary Interest.—The reversionary interest in a homestead cannot be sold by an administrator in a petition to make real estate assets during the minority of one of the children of the intestate. *Hinsdale v. Williams*, 75 N.

C. 430. See also, *Mebane v. Layton*, 89 N. C. 396, 400; *Maynard v. Moore*, 76 N. C. 158, 162; *Barnes v. Cherry*, 190 N. C. 772, 130 S. E. 611.

Collateral Attack.—The allotment of a homestead to one having no right thereto is void, and may be attacked collaterally. *Williams v. Whitaker*, 110 N. C. 393, 14 S. E. 924.

But the allotment cannot be attacked collaterally by the judgment debtor or anyone claiming under him. *Formeyduval v. Rockwell*, 117 N. C. 320, 23 S. E. 488.

Mortgage or Deed of Trust Paramount.—As against a mortgage or deed of trust, the grantor has no right of homestead. *Roper v. National Fire Ins. Co.*, 161 N. C. 151, 76 S. E. 869.

Adverse Possession under Sheriff's Deed.—Where there is an actual adverse possession under a sheriff's deed, the Supreme Court, in order to give full effect to the constitutional provision, will remand the case to the end that the superior court may have the homestead laid off. *Littlejohn v. Egerton*, 77 N. C. 379.

C. Homestead in Land Only.

Not Applicable to Proceeds of Sale.—The law confers a homestead right only in land, and not in the proceeds of the sale of land. *Utley v. Jones*, 92 N. C. 261.

Where a homestead is sold, the proceeds lose the quality of homestead exemptions, and become subject to the personal property exemption. *Lane v. Richardson*, 104 N. C. 642, 10 S. E. 189.

Lands Subject to Homestead Right.—To claim a homestead in land it must be owned and occupied by and allotted to the claimant at the time of the issuance of the execution; and the vendee of a judgment debtor cannot claim and have laid off a homestead in the lands conveyed as against a levy by the sheriff thereon under a judgment had against the vendor prior to his deed. *Chadbourne Sash etc., Co. v. Parker*, 153 N. C. 130, 131, 69 S. E. 1.

The owner of land is not restricted to the tract of land on which he resides. *Mayho v. Cotton*, 69 N. C. 289.

Reservation of Right.—A reservation of an indefinite right of homestead in land from a conveyance thereof is valid. *Kirkwood v. Peden*, 173 N. C. 460, 92 S. E. 264.

III. JUDGMENTS AND LIENS—SUSPENSION OF LIMITATIONS.

Limitations.—The running of the statute of limitations on a judgment is not suspended until there has been an actual allotment of a homestead. *Farrar v. Harper*, 133 N. C. 71, 45 S. E. 510. See also, *Cleve v. Adams*, 222 N. C. 211, 22 S. E. (2d) 567.

Same—As to Judgments.—When the judgment debtor's homestead is allotted, the allotment, as to all property therein embraced, suspends the running of the statute of limitations on all judgments against the homesteader during the continuance of the homestead. *Barnes v. Cherry*, 190 N. C. 772, 774, 130 S. E. 611; *Formeyduval v. Rockwell*, 117 N. C. 320, 325, 23 S. E. 488.

Same—Judgments Docketed.—The statute of limitations does not run against a debt of a homesteader during the existence of his interest in the homestead, provided it has been actually laid off; and then only as to debts affected by the allotment, that is, judgments docketed in the county where the land is situated and solely with reference to the lien of such judgments upon the reversionary interest. *Morton v. Barber*, 90 N. C. 399; *McDonald v. Dickson*, 85 N. C. 248.

In *Cotten v. McClenahan*, 85 N. C. 254, 258, it was said: "There is no stay to the statute until there has been an allotment of the homestead, and then only to the enforcement of the liens of docketed judgments upon the interest in reversion. As to all other debts and for all other purposes the statute runs." Quoted in *Kirkwood v. Peden*, 173 N. C. 460, 465, 92 S. E. 264.

The laying off of a homestead under a docketed judgment suspends the statute of limitations during the continuance of the homestead, and when it has been laid off since the enactment of the statute it is taken by the homesteader subject to its provisions, and upon conveyance thereof is subject to execution under the judgment. *Watters v. Hedgpeh*, 172 N. C. 310, 90 S. E. 314.

In *Davenport v. Fleming*, 154 N. C. 291, 294, 70 S. E. 472, it was said: "It follows that when the ownership of a tract of land and any and all interests therein, except the homestead interest, has been passed from the debtor by valid conveyance, and such homestead interest determines by the death of the parties entitled, or by any of the recognized methods of abandonment, it does so in favor of the grantee in such conveyance, and where such conveyance has become effective before a judgment is docketed, there is no estate in the debtor to which a judgment lien could

attach and no interest of the judgment creditor in the property that would call for or permit the interference of a court in his behalf by injunction or otherwise." Quoted, approved, and followed in *Kirkwood v. Peden*, 173 N. C. 460, 463, 92 S. E. 264.

Same—Ten Year Limitation.—Under a statute limiting the life of the docketed judgment to ten years, a lien of such judgment is not prolonged by the allotment and recording of the homestead to the debtor after the expiration of ten years, though the judgment was kept revived. *Wilson v. Beaufort County Lumber Co.*, 131 N. C. 163, 42 S. E. 565.

The Judgment Lien.—The Acts of 1885, ch. 359, restored the lien of a docketed judgment upon land set apart as a homestead. *Rankin v. Shaw*, 94 N. C. 405, 408.

In *Jones v. Britton*, 102 N. C. 166, 168, 9 S. E. 554, it was said: "The condition and measure of the state of the owner of the homestead in the land is not changed by, or because of, the homestead—the estate, unchanged, continues—and the restriction, the limitation that distinguishes the homestead, is upon the right of the judgment creditor to have the land sold by execution or other proper final process to satisfy his docketed judgment, which constitutes his lien upon the land."

This lien is not meaningless and nugatory; it implies that the creditor shall have the property devoted to the satisfaction of his judgment debt, as far as may be necessary, when and as soon as the exemption of it from sale shall be over. The law is true and sincere; it does not thus create and allow a lien in favor of the creditor, and leave the owner of the homestead at liberty to destroy the property, and thus render such lien worthless. He is allowed to live upon and use it, but not destroy or impair the substance of it, as against the creditor having a lien. *Jones v. Britton*, 102 N. C. 166, 170, 9 S. E. 554.

Under this section a docketed judgment has a lien upon the homestead even after it has been set apart. *Summers Hdw. Co. v. Jones*, 222 N. C. 530, 533, 23 S. E. (2d) 883.

Lien by Attachment.—The lien of an attachment levied upon land of a non-resident debtor is paramount to the right of a homestead therein acquired by the debtor by becoming a citizen of the State prior to the rendition of judgment in the action. *Watkins v. Overby*, 83 N. C. 165.

Merger of Judgments.—Where a judgment creditor sues on his judgment constituting a lien on the homestead of the debtor and obtains a new judgment, the first judgment is not merged in the second. *Springs v. Pharr*, 131 N. C. 191, 42 S. E. 590, 92 Am. St. Rep. 775.

Judgments Obtained Prior to 1868.—A judgment obtained on an obligation incurred prior to the Constitution of 1868, could have been enforced on the lands of the judgment debtor, notwithstanding the allotment thereof as a homestead under another judgment, and is barred by the ten-year statute of limitations. *Blow v. Harding*, 161 N. C. 375, 77 S. E. 340.

As against the liens of judgment creditors, a mortgagor of lands is entitled to his homestead exemption in his equity of redemption and an injunction will lie against the sale of the property under execution when his homestead has not been allotted. *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465.

§ 1-370. Conveyed homestead not exempt.—The allotted homestead is exempt from levy so long as owned and occupied by the homesteader or by any one for him, but when conveyed by him in the mode authorized by the constitution, article ten, section eight, the exemption ceases as to liens attaching prior to the conveyance. The homesteader who has conveyed his allotted homestead may have another allotted, and as often as is necessary. This section shall not have any retroactive effect. (Rev., s. 686; 1905, c. 111; C. S. 729.)

Construction of Constitution.—This section is in accordance with the views of the court, and expresses the proper construction of the Constitution, Article X, sec. 2. *Chadbourne Sash, etc., Co. v. Parker*, 153 N. C. 130, 69 S. E. 1.

This section seems to deal with "allotted homesteads." See *Chadbourne Sash, etc., Co. v. Parker*, 153 N. C. 130, 69 S. E. 1; *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465; *Duplin County v. Harrell*, 195 N. C. 445, 142 S. E. 481; *Equitable Life Assur. Soc. v. Russos*, 210 N. C. 121, 124, 185 S. E. 632.

Conveyance of Homestead.—The homestead exemption ceases upon its conveyance by the homesteader. *Crouch v.*

Crouch, 160 N. C. 447, 449, 76 S. E. 482; *Candle v. Morris*, 160 N. C. 168, 173, 76 S. E. 17.

Same—Examination of Wife.—Where a homesteader seeks to convey his homestead, joinder and privy examination of the wife is necessary only when the homestead has been allotted. *Dalrymple v. Cole*, 170 N. C. 102, 104, 86 S. E. 988; *Mayho v. Cotton*, 69 N. C. 289, 292; *Hager v. Nixon*, 69 N. C. 108.

Same—By Mortgage.—The conveyance of an allotted homestead by mortgage does not destroy the exemption or revive the right to issue execution on an outstanding and unsatisfied judgment; and a homestead may be allotted in mortgaged land. *Cleve v. Adams*, 222 N. C. 211, 22 S. E. (2d) 567.

Section Not Retroactive.—By its express terms this section does not have a retroactive effect, and has no application to homesteads allotted prior to 1905. *Watters v. Hedgpeeth*, 172 N. C. 310, 90 S. E. 314.

Under the section a vendee cannot acquire title under color until seven years adverse possession since 1905. *Crouch v. Crouch*, 160 N. C. 447, 449, 76 S. E. 482.

Cited in *Farris v. Hendricks*, 196 N. C. 439, 442, 146 S. E. 77; *Duplin County v. Harrell*, 195 N. C. 445, 142 S. E. 481; *Cheek v. Walden*, 195 N. C. 752, 754, 143 S. E. 465.

§ 1-371. Sheriff to summon and swear appraisers.—Before levying upon the real estate of any resident of this state who is entitled to a homestead under this article, and the constitution of this state, the sheriff [or a deputy sheriff designated by the sheriff, and who shall be twenty-one years of age or over], or other officer charged with the levy shall summon three discreet persons qualified to act as jurors, to whom he shall administer the following oath: "I, A. B., do solemnly swear (or affirm) that I have no interest in the homestead exemption of C. D., and that I will faithfully perform the duties of appraiser (or assessor, as the case may be), in valuing and laying off the same. So help me, God." In cases where he deems it necessary he may summon the county surveyor or some other competent surveyor to assist in laying off the homestead by metes and bounds. The portions of this section in brackets shall apply to the following counties only: Guilford, Mecklenburg, Ashe, Jackson, Alamance, Martin, Brunswick, Davidson, Sampson, Davie, Randolph, Lenoir, Durham, Wilson, Cumberland, Scotland, New Hanover, Vance, Rowan, Henderson, Cabarrus, Pitt, Rockingham, Chowan, Gates, Perquimans, Pasquotank, Camden, Currituck, Hertford, Edgecombe, Harnett, Forsyth, Iredell, Lincoln, Bertie, Caldwell, Wayne, Halifax, Buncombe, Johnston, Moore, Duplin, Graham, Martin, Onslow. (Rev., s. 687; Code, s. 502; 1893, c. 58; 1868-9, c. 137, s. 2; 1931, c. 58; 1933, cc. 37, 147; C. S. 730.)

Cross References.—As to the form of a certificate to be endorsed on return, see sec. 1-392, No. 4; as to resident within the meaning of this section, see annotations under sec. 1-369.

Editor's Note.—The Act of 1931 inserted the words in brackets in this section, and provided that the amendment should apply only to certain named counties. They, together with counties added by later amendments, are enumerated in the last sentence of the section.

Public Laws 1933, c. 37, made the amendment of 1931 applicable in Duplin, Graham and Martin counties, although the original act was applicable to Martin. Public Laws 1933, c. 147, made the amendment of 1931 applicable in Onslow county.

Duty of Officer Mandatory.—This section enjoins upon the sheriff the mandatory duty of summoning three discreet persons to appraise and allot a homestead to any judgment debtor who is entitled to such exemption, before levying an execution in his hands upon the land. Neither his ignorance of the rights of a debtor nor his obstinate refusal to recognize them will be allowed to defeat the latter's claim to the benefit of a homestead for which the Constitution provides, though the presumption of law prevails in favor of the legality of his action in selling until a party attack-

ing it shows its invalidity because made in disregard of a statute enacted to carry into effect the organic law. *Dickens v. Long*, 112 N. C. 311, 316, 17 S. E. 150.

Appraisers—Qualifications.—There is no requirement that appraisers in order to allot the homestead shall have the qualification of being freeholders, as is the case with extraordinary or tales jurors, but simply that they shall be "qualified to act as jurors," i. e., as ordinary or regular jurors. *Hale Bros. v. Whitehead*, 115 N. C. 28, 20 S. E. 166.

Same—Exception.—An exception on the ground of the disqualification of an appraiser of a homestead exemption should be taken before the appraisers enter upon the discharge of their official duties. *Burton v. Spiers*, 87 N. C. 87.

Same—May Be Appointed by Clerk.—For the allotment of a homestead, the court may direct the clerk to appoint three commissioners for that purpose. *Benton v. Collins*, 125 N. C. 83, 95, 34 S. E. 242.

Same—Constable May Summons.—A constable; to whom an execution from the court of a justice of the peace has been delivered, may summons appraisers and administer to them the prescribed oaths. *McAuley v. Morris*, 101 N. C. 369, 373, 7 S. E. 883.

Necessity That Appraisers Be Sworn.—Appraisers appointed to lay off a homestead must be sworn; and unless it appears that they were sworn the proceedings may be treated as a nullity. *Smith v. Hunt*, 68 N. C. 482.

Same—Oath Administered by Deputy Sheriff.—That appraisers laying off a homestead were sworn by a deputy sheriff is, at most, an irregularity, and can not be taken advantage of in a collateral proceeding if exceptions were not taken in apt time. *Oates v. Munday*, 127 N. C. 439, 37 S. E. 457.

Cited in *Cheek v. Walden*, 195 N. C. 752, 754, 143 S. E. 465.

§ 1-372. Duty of appraisers; proceedings on return.—The appraisers shall value the homestead with its dwelling and buildings thereon, and lay off to the owner or to any agent or attorney, in his behalf, such portion as he selects not exceeding in value one thousand dollars, and must fix and describe the same by metes and bounds. They must then make and sign in the presence of the officer a return of their proceedings, setting forth the property exempted, which shall be returned by the officer to the clerk of the court for the county in which the homestead is situated and filed with the judgment roll in the action, and a minute of the same entered on the judgment docket, and a certified copy thereof under the hand of the clerk shall be registered in the office of the register of deeds for the county. The officer must likewise make a transcript of the return over his hand and return it without delay to the clerk of the court of the county from whence the execution issued, and said clerk must likewise file and make minute of the same as above directed. In all judicial proceedings the original return or a certified copy may be read in evidence. (Rev., ss. 688, 689; Code, ss. 503-4; 1868-9, c. 137, ss. 3-4; 1877, c. 272; C. S. 731.)

Cross References.—As to appeal as to reallocation, see sec. 1-374. As to reallocation for increase of value, see sec. 1-373. As to form of appraisers return, see sec. 1-392. As to costs of laying off and appraising homestead, see sec. 6-28.

Interpretation of Section.—The section, prescribing how the homestead shall be valued and laid off, is as broad and comprehensive in its terms and effect as it can be; properly interpreted, there is no exceptive provision in it, by implication or otherwise, as to any debt or class of debts; it allows, and in legal effect requires, that the homestead shall be valued and laid off in every case where it may be done. *Long v. Walker*, 105 N. C. 90, 118, 10 S. E. 858.

Valuation of Land and Buildings.—The section provides that "the appraisers shall thereupon proceed to value the homestead with its dwellings and buildings thereon, and lay off," etc. This evidently means that the land and buildings there shall be valued together in making up the estimate of a thousand dollars. *Ray v. Thornton*, 95 N. C. 571, 577.

Same—Must Not Exceed \$1,000.—Where lands belonging to a judgment creditor are indivisible, he is not entitled to have the whole of it allotted to him as a homestead, if it

exceeds one thousand dollars in value. *Campbell v. White*, 95 N. C. 491, 494.

Where the jury value the tract at \$2,000, the land should be divided into two parts of equal value, and the homesteader will take his choice. *Shoaf v. Frost*, 123 N. C. 343, 344, 31 S. E. 653.

Same—When Less than \$1,000.—An allotment of a homestead to the value of \$800, laid off under execution, does not render the allotment void, especially when the plaintiff in an independent action contesting its validity has introduced the former record containing the proceedings for laying off the homestead, and contends on appeal that it was erroneously admitted in the trial court. *Carstarphen v. Carstarphen*, 193 N. C. 541, 137 S. E. 658.

Same—Conclusive.—The valuation placed on the tract of land by the jury is conclusive. *Shoaf & Co. v. Frost*, 123 N. C. 343, 344, 31 S. E. 653.

Same—May Take Present Value.—Judgment creditors cannot complain of the homesteader's election to take the present value of his homestead. *Leak v. Gay*, 107 N. C. 482, 12 S. E. 315.

Same—Duty of Appraisers.—The duty of the appraisers extends no further than the valuation and allotment by bounds of the homestead. *Aiken v. Gardner*, 107 N. C. 236, 239, 12 S. E. 250.

In the allotment of a homestead the appraisers should estimate the value of the interest of the homesteader in the land, taking into consideration any encumbrances thereon, and assign to him his interest in the land, and not the corpus itself. *McCaskill v. McKinnon*, 125 N. C. 179, 34 S. E. 273.

Manner of Allotment.—The law does not intend that the defendant shall have the empty form of a homestead, but the substance as well, when he has land that may be laid off to him for that purpose, and this without reference to whether it embraces the dwelling house or not. Generally the dwelling house and buildings used therewith, must be embraced, but there may be reasons why this cannot be done, as when the land on which they are situated is encumbered for all or more than its value. *Flora v. Robbins*, 93 N. C. 38, 40.

Where a judgment debtor owned several town lots, some of which, including the one on which his dwelling was situated, in which he resided—were encumbered by prior liens (mortgages) to the extent of their full value, and the others were unencumbered, it was held, that he had the right to have his homestead allotted from the unencumbered lands without reference to whether they embraced his dwelling and other buildings. *Flora v. Robbins*, 93 N. C. 38.

Same—Must Be in Severalty.—There must be a specific allotment of the homestead in severalty without any community of interest between the homesteader and the purchaser of the excess. *Campbell v. White*, 95 N. C. 491, 494.

Debtor's Right to Select.—A judgment debtor is entitled to an opportunity to be present and exercise his constitutional right to select his homestead; and where it appears upon the face of the return that he was not present, by no fault of his own, the appraisal and allotment of a homestead under an execution is void. *McKeithen v. Blue*, 142 N. C. 360, 55 S. E. 285; *McGowan v. McGowan*, 122 N. C. 164, 29 S. E. 372.

Same—What Constitutes.—Where a mortgagor conveyed his personal property, more than \$500 in value, with a clause in the deed reserving his "personal property exemption and to be selected by him" the title to the whole of it passed to the mortgagee and remained in him, until the exempted articles were legally set apart; and the act of executing a second mortgage conveying a part of said property is not a selection of such part, nor a separation of the same from the bulk. *Norman v. Craft*, 90 N. C. 211.

Description of Allotment.—When the land is sufficiently identified the allotment is not open to the objection that the homestead should have been fixed and described by metes and bounds. *Kelly v. McLeod*, 165 N. C. 382, 384, 81 S. E. 455; *Ray v. Thornton*, 95 N. C. 571.

Report of Appraisers.—The omission of appraisers to insert in their report the date of the allotment is not a sufficient ground for vacating it. *Bevans v. Goodrich*, 98 N. C. 217, 223, 3 S. E. 516.

It is allowable for appraisers of a homestead to amend their return before it has been filed. *Gudger v. Penland*, 118 N. C. 832, 834, 23 S. E. 921.

Same—When Registration Not Necessary.—It is not necessary to have the appraisers' return of the allotment of the homestead registered in the office of the Register of Deeds of the county in which the homestead is situated, (provided it is filed in the judgment roll of the action in which the judgment was rendered) in order to make the judgment lien valid and binding on the homestead until the homestead estate shall expire. The filing of the return in

the judgment roll, is constructive notice to all who have dealings with the homesteader concerning the homestead. *Bevan v. Ellis*, 121 N. C. 224, 28 S. E. 471. See also, *Carstarphen v. Carstarphen*, 193 N. C. 541, 546, 137 S. E. 658; *Crouch v. Crouch*, 160 N. C. 447, 76 S. E. 482.

The unregistered allotment of a homestead is competent evidence, unless objected to in apt time. *Gudger v. Penland*, 118 N. C. 832, 833, 23 S. E. 921.

Same—As Notice of Extent.—The direction contained in the section as to the disposition to be made of the report of the exemption, is not to give notice of its extent only, but to subject it to a motion made in a reasonable time to set it aside. *Burton v. Spiers*, 87 N. C. 87, 90.

Cited in *Cheek v. Walden*, 195 N. C. 752, 754, 143 S. E. 465.

§ 1-373. Reallotment for increase of value.—A judgment creditor of a debtor whose homestead has been allotted may apply in writing to the clerk of the superior court of the county in which the homestead lies for an order for its reallotment, if there is in the hands of the sheriff of that county an execution issued from the proper court against said debtor. The application must be accompanied by the affidavits of three disinterested freeholders of the county in which the homestead lies, setting forth that, in their opinion, it has increased in value fifty per centum or more since the last allotment. Upon the filing of the application and affidavits the clerk shall issue notice to the judgment debtor to appear before him on a day not more than five days from the day of its service and show cause why his homestead should not be reallotted. The notice must state upon whose application it is issued. Upon the return day of the notice the clerk shall consider the affidavits filed, as heretofore required, and any additional affidavits filed by either party, and if he is of opinion that the homestead has probably appreciated in value fifty per centum or more since the last allotment, he shall command the sheriff to reallot to the judgment debtor his homestead, in the same manner as if no homestead had been allotted. If upon the reallotment any excess is found, it shall be disposed of by the sheriff as in ordinary cases of execution and levy. This section does not prevent the judgment creditor from resorting to the equity jurisdiction of the courts for a reallotment of the homestead of his judgment debtor in any case. (Rev., s. 691; 1893, c. 149; C. S. 732.)

Cross Reference.—As to costs, see sec. 6-21.

Procedure for Reallotment.—If the increase is 50 per cent or more, the creditor may have a reallotment in a proceeding before the clerk, in aid of an execution in the sheriff's hands. If the increase is less than 50 per cent, the judgment creditor can proceed by suit in the nature of an equitable action to subject the excess to his debt. *McCaskill v. McKinnon*, 125 N. C. 179, 34 S. E. 273; *Vanstory v. Thornton*, 110 N. C. 10, 14 S. E. 637.

Where a portion of the land included in the allotment was subject to a mortgage prior thereto, and has since been sold thereunder, in making the reallotment it must clearly appear that this portion was not included in the revaluation. *McCaskill v. McKinnon*, 125 N. C. 179, 34 S. E. 273.

Same—Intrinsic and Market Value.—If it appears, upon a reallotment of the homestead, that the value thereof has increased, it is immaterial in point of law whether the increase had come in the market value or in the intrinsic value, the effect is the same—the homestead is not to exceed in value the sum of \$1,000. *McCaskill v. McKinnon*, 125 N. C. 179, 34 S. E. 273.

Cited in *Cheek v. Walden*, 195 N. C. 752, 754, 143 S. E. 465.

§ 1-374. Appeal as to reallotment.—From the order of the clerk commanding or refusing a reallotment, either party may appeal to the judge resident in or holding the courts of the district, who

shall hear the matter in chambers in any county of the judicial district to which belongs the county in which the proceedings were instituted. In other respects the proceedings upon such appeal are as now provided for appeals from the clerk on issues of law. (Rev., s. 691; 1893, c. 149; C. S. 733.)

Cited in *Cheek v. Walden*, 195 N. C. 752, 754, 143 S. E. 465.

§ 1-375. Levy on excess; return of officer.—The levy may be made upon the excess of the homestead, not laid off according to this chapter, and the officer shall make substantially the following return upon the execution: "A. B., C. D., and E. F., summoned and qualified as appraisers or assessors (as the case may be), who set off to X. Y. the homestead exempt by law. Levy made upon the excess." (Rev., s. 692; Code, s. 505; 1868-9, c. 137, s. 5; C. S. 734.)

Cross Reference.—As to sale of the excess, see annotations to sections under Execution, Article 28, and Execution and Judicial Sales, Article 29.

The levy must be only upon the excess. *Gardner v. McConaughy*, 157 N. C. 481, 483, 73 S. E. 125.

Cited in *Cheek v. Walden*, 195 N. C. 752, 754, 143 S. E. 465.

§ 1-376. When appraisers select homestead.—If no selection is made by the owner, or any one acting in his behalf, of the homestead to be laid off as exempt, the appraisers shall make selection for him, including always the dwelling and buildings used therewith. (Rev., s. 693; Code, s. 506; 1868-9, c. 137, s. 6; C. S. 735.)

When No Buildings on the Land.—If the land proposed to be sold is all that the execution debtor has, he is entitled to have his homestead therein laid off to him, although there is no dwelling house or other habitable building thereon, because he may build a house and other buildings on the land, and thus have the beneficent provisions of the Constitution. *McCracken v. Adler*, 98 N. C. 400, 403, 4 S. E. 138; *Flora v. Robbins*, 93 N. C. 38; *Murchison v. Plyer*, 87 N. C. 79; *Spoon v. Reid*, 78 N. C. 244.

Cited in *Cheek v. Walden*, 195 N. C. 752, 754, 143 S. E. 465.

§ 1-377. Homestead in tracts not contiguous.—Different tracts of land not contiguous may be included in the same homestead, when a homestead of contiguous land is not of the value of one thousand dollars. (Rev., s. 694; Code, s. 509; 1868-9, c. 137, s. 15; C. S. 736.)

Application of Section.—While it may have been supposed by the framers of the organic law that a debtor would usually elect to have his homestead allotted in his dwelling-place and the surrounding land, his choice is not positively restricted to that, nor to contiguous land. *Fulton v. Roberts*, 113 N. C. 421, 425, 18 S. E. 510. *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437; *Flora v. Robbins*, 93 N. C. 38.

A homestead may be laid off in two tracts of land not contiguous, the two not exceeding \$1,000 in value. *Martin v. Hughes*, 67 N. C. 293.

§ 1-378. Personal property appraised on demand.—When the personal property of any resident of this state is levied upon by virtue of an execution or other final process issued for the collection of a debt, and the owner or an agent, or attorney in his behalf, demands that the same, or any part thereof, be exempt from sale under such execution, the sheriff or other officer making the levy shall summon three appraisers, as heretofore provided, who, having been first duly sworn, shall appraise and lay off to the judgment debtor such articles of personal property as he or another in his behalf selects and to which he is entitled under this article and the constitution of the state, in

no case to exceed in value five hundred dollars, which articles are exempt from said levy, and return thereof shall be made by the appraisers, as upon the laying off of a homestead exemption. (Rev., s. 695; Code, s. 507; 1868-9, c. 137, ss. 12, 13; C. S. 737.)

Cross References.—As to summons, oath, and qualification of appraisers, see sec. 1-371, and annotations thereto. As to return made by appraisers, see sec. 1-372. As to appraisers' oath and fees, see sec. 1-379. As to residents, see annotations under sec. 1-369. As to persons entitled to exemptions, see annotations under sec. 1-369. As to costs of appraisal and laying of exemptions, see sec. 6-28.

As to right to claim income from life insurance policies as exempt, see note in 12 N. C. Law Rev. 67.

Section Subsidiary to Constitution.—This section was enacted to carry out the provisions of Art. X section 1. *Jones v. Allsbrook*, 115 N. C. 46, 49, 20 S. E. 170.

Continuation of Levy.—In *Shepherd v. Murrill*, 90 N. C. 208, 210, the language of the section, "whenever the personal property of any resident of this state shall be levied upon," etc., is held to mean, at any time, while it is levied upon, and the levy continues to the day of sale.

Same—Time of Allotment.—The complete capacity to make the allotment would always remain until the day of sale, and we can see no reason, certainly no substantial reason, why it might not be done on the day of the levy, or on any day before the sale, or on that day. *Shepherd v. Murrill*, 90 N. C. 208, 210. See *Crow v. Morgan*, 210 N. C. 153, 185 S. E. 668.

Unlike the homestead exemption, which must be allotted before levying upon the land, the right to personal property exemption may be insisted on at any time before sale, or appropriation of the property by the court. *BeFarrah v. Spell*, 178 N. C. 231, 233, 100 S. E. 321; *Chemical Co. v. Sloan*, 136 N. C. 122, 48 S. E. 577.

So long as an execution is in the officer's hands and in force, the preliminary action of the appraisers is in fieri and capable of correction and amendment, and it is a right both of the debtor and the creditor that the exemption shall be ascertained up to and just before the process is executed by a sale, so that, in behalf of the debtor, the exemption may be enlarged if any property to which he is entitled has been omitted, and so that, in behalf of the creditor, no exemption shall be allowed to the debtor if it appears at the sale that he is not entitled to the same. *Jones v. Allsbrook*, 115 N. C. 46, 20 S. E. 170.

Order of Court as Final Process.—The order of the court directing the payment of money is "final process," within the meaning of the Constitution and this section. *BeFarrah v. Spell*, 178 N. C. 231, 233, 100 S. E. 321.

Debtor's Right of Selection.—It is immaterial how much, or what other personal estates, the debtor possessed, the statute gives him the right, when his property is seized under execution, to select such, not exceeding the limits in value, as he may prefer to retain as exempt. *Scott v. Kenan*, 94 N. C. 298, 303.

Property from Which Exemption is Made.—In laying off the personal property exemption of a debtor, the property upon which there is no lien must be first exempted. *Cowan v. Phillips*, 122 N. C. 72, 28 S. E. 961. See *Crow v. Morgan*, 210 N. C. 153, 185 S. E. 668.

Same—Choses in Action.—A chose in action may be chosen by a debtor as a part of his exemption. *Frost v. Naylor*, 68 N. C. 325, cited in note in *L. R. A.* 1915D, 382.

A judgment is personal property, and, if it was required to make up the amount to which the person, in whose favor it was rendered, is entitled to exemption, it is the duty of the officer having the execution to so allot it. *Curlee v. Thomas*, 74 N. C. 51, 54.

Property Not Subject to Exemption.—A tenant cannot claim his personal property exemption out of the crops, as against his landlord, until the rents are paid. *Hamer v. McCall*, 121 N. C. 196, 197, 28 S. E. 297.

Fines and Costs in Criminal Action.—The personal property exemption cannot be claimed as against a fine and costs in a criminal action. *State v. Williams*, 97 N. C. 414, 415, 23 S. E. 370.

Value of Exemption.—The section merely follows the language of the Constitution, Art. X, Sec. 1, in giving each resident of the state a personal property exemption of \$500, against execution or any other final process. *BeFarrah v. Spell*, 178 N. C. 231, 233, 100 S. E. 321.

A debtor is entitled to \$500 of personal property as a personal property exemption, and when this amount has been once allotted, and has been diminished by use, loss or other cause, the debtor has a right to have any other per-

sonal property he may have exempted, up to the prescribed limit. *Campbell v. White*, 95 N. C. 344.

Right Personal to Debtor.—As far as personal property is concerned, the right of exemption is personal to the debtor, and it loses its quality of exemption as soon as it is transferred. *Lane v. Richardson*, 104 N. C. 642, 10 S. E. 189.

Appraisers' Report.—When there has been a failure to levy under an execution on the property of a judgment debtor, a report of the jury of appraisers to set aside his personal property exemption will be void which does not set aside to him specifically the articles his exemption gives him, or allow him an opportunity to select the articles. *Gardner v. McConaughy*, 157 N. C. 481, 73 S. E. 125.

Same—Made to Clerk.—The return of the appraisers of personal property exemptions should be made to the clerk of the superior court, but an allotment is not vitiated by making it returnable to another place. The court has power to direct the return to be made to the proper office, and it should exercise that power instead of dismissing the proceedings for defect in the return. *McAuley v. Morris*, 101 N. C. 369, 7 S. E. 883.

When Exception Not Regular.—Where a defendant's exceptions to an allotment did not comply with the requirements of the section and while the proceeding was not, in some respects, regular, but when it appears that the defendant's constitutional right has not been preserved, the matter of form becomes immaterial, and the facts having been found by the judge and all the parties are before the court, the proceeding may be treated as a motion in the cause and relief administered. *McKeithen v. Blue*, 142 N. C. 360, 55 S. E. 285.

Both Creditor and Debtor Are Entitled to Have Procedure Conform to Statute.—In the allotment of the personal property exemption, the creditor as well as the debtor is entitled to have the procedure conform to the constitutional provisions and the statutes enacted pursuant thereto. *Crow v. Morgan*, 210 N. C. 153, 185 S. E. 668.

§ 1-379. Appraiser's oath and fees.—The persons summoned to appraise the personal property exemption must take the same oath and are entitled to the same fees as the appraisers of the homestead, and when both exemptions are claimed by the judgment debtor, at the same time, one board of appraisers must lay off both, and are entitled to but one fee. (Rev., s. 696; Code, s. 508; 1868-9, c. 137, s. 14; C. S. 738.)

Cross Reference.—As to oaths required of homestead appraisers, see sec. 1-371.

Necessity of Oath.—Freeholders appointed to allot personal property exemptions must be sworn, and it must appear that they were sworn. *Smith v. Hunt*, 68 N. C. 482, 484.

§ 1-380. Returns registered.—It is the duty of the register of deeds to indorse on each of said returns the date when received for registration, and to cause the same to be registered without unnecessary delay. He shall receive for registering the returns the same fees allowed him by law for other similar or equivalent services, which fees shall be paid by said resident applicant, his agent or attorney, upon the reception of the returns by the register. (Rev., s. 698; Code, s. 513; 1868-9, c. 137, s. 9; C. S. 739.)

§ 1-381. Exceptions to valuation and allotment; procedure.—If the judgment creditor for whom levy is made, or judgment debtor or other person entitled to homestead and personal property exemption, is dissatisfied with the valuation and allotment of the appraisers or assessors, he, within ten days thereafter, or any other creditor within six months and before sale under execution of the excess, may notify the adverse party and the sheriff having the execution in hand, and file with the clerk of the superior court of the county where the allotment is made a transcript of the return of the appraisers or assessors which they or the sheriff shall allow to be made upon demand, together with his objections in writing to said return.

Thereupon the said clerk shall put the same on the civil issue docket of the superior court for trial at the next term thereof as other civil actions, and such issue joined has precedence over all other issues at that term. The sheriff shall not sell the excess until after the determination of said action. The ten days and six months respectively begin to run from the date of the filing of the return of the valuation and allotment of the appraisers or assessors by the officer with the clerk of the superior court of the county from whence the execution issued. (Rev., s. 699; Code, s. 519; 1887, c. 272, s. 2; 1883, c. 357; C. S. 740.)

Cross References.—As to proof of service, see section 1-102. As to costs of reassessment, see sec. 6-29.

Editor's Note.—By the Act of 1868-69, ch. 137, it was provided that if a judgment creditor, or debtor entitled to a homestead, should be dissatisfied with the allotment of the appraisers, it should be the duty of the township trustees to examine the action of the appraisers, and make a report of their findings.

The township board of trustees was a quasi corporation, organized under the Constitution of 1868, with limited governmental functions. The duty of reassessing the allotments of homesteads, etc., was not one of its corporate powers, but was a duty imposed upon its individual members by the Legislature.

The Act of 1876-77, ch. 141, abrogated several sections of Art. VII of the Constitution of 1868, including the one creating the Board of Township Trustees. The Board of County Commissioners was created to exercise the jurisdiction vested in and exercised by the boards of trustees of the several counties. But it would seem that the county commissioners were given only the corporate duties and powers of the boards of trustees, and not those duties and obligations imposed by legislative enactment. Hence, there was a failure to deposit elsewhere an appellate jurisdiction for revising the action of the appraisers. The remedy for a party, creditor or debtor aggrieved, seemed to be in a direct application to the court to which the execution and allotment were returnable, yet there was no basis for such procedure. The Legislature came to the relief of the situation by passing the Act of 1883, ch. 357, the first section of which constitutes this section. See *Hartman v. Spiers*, 94 N. C. 150; *Jones v. Commissioners*, 85 N. C. 278; *Burton v. Spiers*, 87 N. C. 87, 90; *Hartman v. Spiers*, 87 N. C. 28, 31.

Estopped from Claiming Additional Allotment.—An allotment of a homestead to the debtor of lands less in value than one thousand dollars, regular in form and unobjected to within the time allowed by law, was an estoppel of the debtor from claiming any additional allotment in other lands which he had at the time of the allotment. *Whitehead v. Spivey*, 103 N. C. 66, 9 S. E. 319.

Time of Application.—The application for a re-assessment of a homestead by the township board of trustees (now the superior court) must be made before the sale of the excess by the sheriff. *Heptinstall v. Perry*, 76 N. C. 190.

Service of Notice.—Notices of dissatisfaction with allotment of personal property exemption under the section cannot be served by mail or given orally. *Allen v. Strickland*, 100 N. C. 225, 6 S. E. 780.

Where Exception Filed.—Exceptions to the allotment of a homestead or personal property exemptions, in all cases, must be filed in the office of the clerk of the superior court of the county where the allotment is made, together with a transcript of the allotment or appraisement. *McAuley v. Morris*, 101 N. C. 369, 7 S. E. 883.

The section does not require that the exception be filed in the court of a justice of the peace if the judgment shall be in or the execution shall issue thereupon from that court. *McAuley v. Morris*, 101 N. C. 369, 371, 7 S. E. 883.

Appraiser's Return.—The return of the appraisers of the personal property exemption in question should regularly have been made by the constable to the clerk of the superior court of the county in which the appraisal was made, and filed there as directed in the statute; but that the return was inadvertently or improperly made to the court of the justice of the peace did not render the appraisal and allotment void. *McAuley v. Morris*, 101 N. C. 369, 372, 7 S. E. 883.

Collateral Attack of Allotment.—An allotment of a homestead cannot be collaterally attacked by the judgment debtor or anyone claiming under him. *Formeyduval v. Rockwell*, 117 N. C. 320, 325, 23 S. E. 488; *Welch v. Welch*, 101 N. C. 565, 570, 8 S. E. 156.

If he is dissatisfied therewith, he must present his objections in the manner prescribed by this section. *Welch v. Welch*, 101 N. C. 565, 8 S. E. 156.

Where a homesteader acquiesces in allotment of his homestead for many years, a grantee of the homesteader will not be permitted to defeat judgment creditors by proof of purchase in good faith for a full price. *Oates v. Munday*, 127 N. C. 439, 37 S. E. 457.

Applied in *Crow v. Morgan*, 210 N. C. 153, 185 S. E. 668.

§ 1-382. Revaluation demanded; jury verdict; commissioners; report.—When an increase of the exemption or an allotment in property other than that set apart is demanded, the party demanding must in his exceptions specify the property from which the increase or reallocation is to be had. If the appraisal or assessment is reduced, the jury shall assess the value of the property embraced therein; if increased, the value of the property specified in the objections from which the increase is demanded shall also be assessed; but if the allotment is made in property other than that first set apart, the jury shall assess the value of the property so allotted. The court shall appoint three disinterested commissioners to lay off and set apart the homestead and personal property exemption in accordance with the verdict of the jury and the judgment of the court, and in the manner prescribed by law. The commissioners, who shall be summoned by the sheriff, must meet upon the premises and, after being sworn by the sheriff or a justice of the peace to faithfully perform the duties of appraisers or assessors in allotting and laying off the homestead or personal property exemption, or both, in accordance with the verdict and judgment aforesaid, must allot and lay off the same and file their report to the next term of the court, when it shall be heard by the court upon exceptions thereto. (Rev., s. 700; 1885, c. 347; C. S. 741.)

When Valuation by Jury Unnecessary.—Where the debtor designated the particular land which he desires to have allotted him as "an increase of exemption" and the creditors assent thereto, neither party can demand that the property shall be valued by a jury. *Bevans, etc. & Co. v. Goodrich*, 98 N. C. 217, 220, 3 S. E. 516.

Appointment and Summons of Commissioners.—Upon an appeal from the appraisal of a homestead and personal property exemptions and the assessment of the value thereof by a jury, the commissioners to set apart the exemptions in accordance with the verdict must be appointed by the court and summoned by the sheriff. *Shoaf & Co. v. Frost*, 116 N. C. 675, 21 S. E. 409.

Valuation by Jury Is Final.—Upon an appeal from an appraiser the valuation as determined by the verdict of the jury is final and the commissioners appointed by the court to set apart the exemptions in accordance with the verdict must be guided by that valuation. *Shoaf & Co. v. Frost*, 116 N. C. 675, 21 S. E. 409; *Shoaf & Co. v. Frost*, 121 N. C. 256, 28 S. E. 412.

§ 1-383. Undertaking of objector.—The creditor, debtor, or claimant objecting to the allotment made by the appraisers or assessors under execution or petition must file with the clerk of the superior court an undertaking in the sum of one hundred dollars for the payment to the adverse party of such costs as are adjudged against him. (Rev., s. 701; Code, s. 522; C. S. 742.)

§ 1-384. Set aside for fraud, or irregularity.—An appraisal or allotment by appraisers or assessors may be set aside for fraud, complicity, or other irregularity; but after an allotment or assessment is made or confirmed by the superior court at term time, as hereinbefore provided, the homestead shall not thereafter be set aside or again

laid off by any other creditor except for increase in value. (Rev., s. 702; Code, s. 523; C. S. 743.)

Cross References.—As to reallocation for increase of value, see sec. 1-373; as to appeal as to re-allotment, see sec. 1-374.

When Reason Not Sufficient.—An allotment of a homestead will not be set aside, because it might have been assigned in a manner more convenient to the homesteader. *Ray v. Thornton*, 95 N. C. 571.

Where the homestead has once been regularly allotted and set apart, it cannot be re-allotted at the instance of a judgment creditor whose debt was in existence when the allotment was made, except for fraud or other irregularity. *Gully v. Cole*, 96 N. C. 447, 1 S. E. 520. This case was decided before the enactment of secs. 1-373, 1-374.

§ 1-385. Return registered; original or copy evidence.—When the homestead and personal property exemption is decided by the court at term time the clerk of the superior court shall immediately file with the register of deeds of the county a copy of the same, which shall be registered as deeds are registered; and in all judicial proceedings the original or a certified copy of the return may be introduced in evidence. (Rev., s. 703; Code, s. 524; C. S. 744.)

Object of Section.—The object of the section is to give notice to all persons dealing with the owner of the homestead, that it is his homestead, not subject to be sold "under execution" or other final process obtained on any debt against him. *Gully v. Cole*, 96 N. C. 447, 449, 1 S. E. 520.

§ 1-386. Allotted on petition of owner.—When any resident of this state desires to take the benefit of the homestead and personal property exemption as guaranteed by article ten of the state constitution, or by this article, such resident, his agent or attorney, must apply to a justice of the peace of the county in which he resides, who shall appoint as assessors' three disinterested persons, qualified to act as jurors, residing in said county. The jurors, on notice by the order of the justice, shall meet at the applicant's residence, and, after taking the oath prescribed for appraisers before some officer authorized to administer an oath, lay off and allot to the applicant a homestead with metes and bounds, according to the applicant's direction, not to exceed one thousand dollars in value, and make and sign a descriptive account of the same and return it to the office of the register of deeds.

Said assessors shall set apart of the personal property of said applicant, to be by him selected, articles of personalty to which he is entitled under this chapter, not exceeding in value the sum of five hundred dollars, and make, sign and return a descriptive list thereof to the register of deeds. (Rev., ss. 697, 704; Code, ss. 511, 512; 1868-9, c. 137, ss. 7, 8; C. S. 745.)

Cross References.—As to form of petition, see section 1-392, No. 2; as to form for return, see sec. 1-392, No. 3; as to who is a resident within the meaning of the section, see annotations under sec. 1-369; as to qualifications of assessors, see annotations under sec. 1-371; as to procedure generally, see annotations under secs. 1-369 to 1-372.

Who May Petition.—In *Hughes v. Hodges*, 102 N. C. 236, 254, 9 S. E. 437, *Merrimon, J.*, dissenting, said as follows:

"It is not true that the homestead right is operative and beneficial only when the owner is in debt, or pressed by 'final process, obtained on any debt.' It is ever operative; the owner has the right, though he might owe nothing, and be possessed of great wealth, his wife and children have the benefit of it, and he could divest himself of it only with the assent of his wife. He might have it valued and laid off to him at any time, though ordinarily he would not do so."

Nature of Proceedings.—The allotment of a homestead is a quasi in rem proceeding. *Williams v. Whitaker*, 110 N. C. 393, 395, 14 S. E. 924.

Return of Appraisers.—A return of the appraisers of the personal property set apart, which designates it with sufficient certainty, is all that the section requires. *Ray v. Thornton*, 95 N. C. 571.

Same—Descriptive List.—Appraisers of personal property for exemption, must make such a descriptive list of the property as will enable creditors to ascertain what property is exempt. *Smith v. Hunt*, 68 N. C. 482, 484.

Cited in *Cheek v. Walden*, 195 N. C. 752, 754, 143 S. E. 465.

§ 1-387. Advertisement of petition; time of hearing.—When a person entitled to a homestead and personal property exemption files the petition before a justice of the peace to have the same laid off and set apart under the preceding sections, the justice shall make advertisement in some newspaper published in the county, for six successive weeks, and if there is no newspaper in the county, then at the courthouse door of the county in which the petition is filed, notifying all creditors of the applicant of the time and place for hearing the petition. The petition shall not be heard nor any decree made in the cause in less than six nor more than twelve months from the day of making advertisement as above required. (Rev., s. 705; Code, s. 515; 1868-9, c. 137, s. 11; C. S. 746.)

Who Are Bound.—The allotment of homestead is a quasi in rem proceeding and only those persons having actual or constructive notice are bound thereby. *Williams v. Whitaker*, 110 N. C. 393, 14 S. E. 924.

§ 1-388. Exceptions, when allotted on petition.—When the homestead or personal property exemption is allotted on the petition of the person entitled thereto, any creditor may, within six months from the time of the assessment or appraisal, and upon ten days notice to the petitioner, file his objections with the register of deeds of the county in which the premises are situated, and the register of deeds shall return the same to the clerk of the superior court of that county, who shall place them on the civil issue docket, and they shall be tried as provided for homestead and personal property exemptions set off under execution. (Rev., s. 706; Code, s. 520; C. S. 747.)

§ 1-389. Allotted to widow or minor children on death of homesteader.—If a person entitled to a homestead exemption dies without the homestead having been set apart, his widow, if he leaves no children, or his child or children under the age of twenty-one years, if he leaves such, may proceed to have the homestead exemption laid off by petition. If the widow or children have failed to have the exemption set apart in the manner provided, then in an action brought by his personal representatives to subject the realty of the decedent to the payment of debts and charges of administration, it is the duty of the court to appoint three disinterested freeholders to set apart to such widow, child or children a homestead exemption under metes and bounds in the lands of the decedent. The freeholders shall under their hands and seals make return of the same to the court, which shall be registered in the same manner as homestead exemptions. (Rev., s. 707; Code, s. 514; 1868-9, c. 137, s. 10; 1893, c. 332; C. S. 748.)

Cross References.—As to constitutional provisions, see Art. X, §§ 3 and 5. As to widows and minor children entitled to homestead, see annotations under sec. 1-369.

Purpose and Constitutionality.—The manifest purpose of the section is to prevent the widow and minor children from

being prejudiced by the failure of one entitled to a homestead to cause it to be laid off in his lifetime. It cannot be supposed that the effect of the statute is to go beyond the Constitution when its professed object is to carry into effect its provisions. *Watts v. Leggett*, 66 N. C. 197.

Widow Entitled to Homestead.—A widow who has no homestead of her own, is entitled to have one allotted to her out of the lands of her deceased husband, even though no homestead was allotted to him during his life. *Smith v. McDonald*, 95 N. C. 163.

But a widow cannot, under this section, have a homestead laid off for herself and minor children after the death of her husband when he died without leaving debts. *Hager v. Nixon*, 69 N. C. 108.

Unborn Child Entitled to Allotment.—A child in ventre sa mere at the time of its father's death is entitled to have a homestead allotted from the homestead of its father. In *Re Seabolt*, 113 Fed. 766, 771.

When to "Widow and Minor Children."—The fact that an assignment of a homestead was made to "the widow and minor children" of decedent does not make it void, since it will be considered surplusage as to the widow. *Formey-duval v. Rockwell*, 117 N. C. 320, 23 S. E. 488.

When Homestead Can Not Be Divested.—A homestead, whether laid off to a husband in his lifetime, or to his widow (there being no children), after his death, cannot be divested in favor of the heir by the release or extinguishment of the deceased husband's debts. *Tucker v. Tucker*, 103 N. C. 170, 9 S. E. 299.

Widow Not Entitled to Exemption of Personality.—The personal property exemption exists only during the life of the homesteader, and after his death his widow has no right to have it allotted to her. *Smith v. McDonald*, 95 N. C. 163.

§ 1-390. Liability of officer as to allotment, return and levy.—Any officer making a levy, who refuses or neglects to summon and qualify appraisers as heretofore provided, or fails to make due return of his proceedings, or levies upon the homestead set off by appraisers or assessors except as herein provided, is guilty of a misdemeanor, and he and his sureties are liable to the owner of the homestead for all costs and damages in a civil action. (Rev., ss. 708, 3584; Code, s. 516; 1868-9, c. 137, s. 17; C. S. 749.)

Officer's Breach of Duty.—The section subjects the sheriff to indictment and to liability on his official bond for disregard or non-performance of his duty under the provisions of the law relating to homestead and personal property exemptions. *Welch v. Welch*, 101 N. C. 565, 569, 8 S. E. 176; *Mebane v. Layton*, 89 N. C. 396, 400. *Richardson v. Wicker*, 80 N. C. 172, 174; *State v. Barefoot*, 104 N. C. 224, 228, 10 S. E. 170.

And for such a breach of duty, an action on the officer's official bond lies in favor of the debtor. *Scott v. Kenan*, 94 N. C. 298, 302.

Where a complaint alleges that a judgment debtor demanded his personal property exemptions in apt time, but that the sheriff failed and refused to allot it to him, and afterwards sold the property and applied the money to executions in his hands, it sufficiently alleges a breach of the bond. *Scott & Burton v. Kenan*, 94 N. C. 298.

Same—Measure of Damages.—The measure of damages is the actual loss sustained, and not the value of the property at the time of the levy. *Jones v. Allsbrook*, 115 N. C. 46, 53, 20 S. E. 170.

Cited in *Cheek v. Walden*, 195 N. C. 752, 754, 143 S. E. 465.

§ 1-391. Liability of officer, appraiser, or assessor, for conspiracy or fraud.—Any officer, appraiser, or assessor who willfully or corruptly conspires with a judgment debtor, judgment creditor, or other person, to undervalue or to overvalue the homestead or personal property exemption of a debtor, or applicant, or assigns false metes and bounds, or makes or procures to be made a false and fraudulent return thereof, is guilty of a misdemeanor and is liable to the party injured thereby for all costs and damages in a civil action. (Rev., ss. 690, 3585, 3586; Code, ss. 517, 518; 1868-9, c. 137, ss. 18, 19; C. S. 750.)

Duty of Sheriff.—It is the duty of a sheriff to lay off the

homestead of the defendant in the execution, and to sell the excess in a prudent and just manner so as to realize a fair price. *Andrews v. Pritchett*, 72 N. C. 135, 137.

§ 1-392. Forms.—The following forms must be substantially followed in proceedings under this article:

[No. 1]

Appraisers' Return.

When the homestead is valued at less than one thousand dollars, and personal property also appraised.

The undersigned having been duly summoned and sworn to act as appraisers of the homestead and personal property exemption of A. B., of Township, County, by C. D., Sheriff (or constable or deputy) of said county, do hereby make the following return: We have viewed and appraised the homestead of the said A. B., and the dwellings and buildings thereon, owned and occupied by said A. B. as a homestead, to be one thousand dollars (or any less sum) and that the entire tract, bounded by the lands of.....andis therefore exempted from sale under execution according to law. At the same time and place we viewed and appraised at the values annexed the following articles of personal property, selected by said A. B. (here specify the articles and their value, to be selected by the debtor or his agent), which we declare to be a fair valuation, and that the said articles are exempt under said execution. We hereby certify that we are not related by blood or marriage to the judgment debtor or the judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this..... day of, 19

O. K.....[L. S.]
L. M.....[L. S.]
R. S.....[L. S.]

The above return was made and subscribed in my presence, day and date above given.

C. D....., (Sheriff or Constable.)

[No. 2]

Petition for Homestead before a Justice of the Peace.

Before....., J. P.
.....County.

In the Matter of A. B.

A. B. respectfully shows that he (she or they, as the case may be) is (or are) entitled to a homestead exempt from execution in certain real estate in said county, and bounded and described as follows: (Here describe the property). The true value of which he (she or they, as the case may be) believes to be one thousand dollars, including the dwelling, and buildings thereon. He (she or they) further shows that he (she or they, as the case may be) is (or are) entitled to a personal property exemption from execution, to the value of (here state the value), consisting of the following property: (Here specify.) He (she or they, as the case may be) therefore prays your worship to appoint three disinterested persons qualified to act as jurors, as assessors, to view the premises, allot and set apart to your petitioner his homestead and personal property exemption, and report according to law.

[No. 3]

Form for Appraisal of Personal Property Exemption.

The undersigned having been duly summoned and sworn to act as appraisers of the personal property of A. B., of Township, County, and to lay off the exemption given by law thereto, by C. D., Sheriff (or other officer) of said county, do hereby make and subscribe the following return:

We viewed and appraised at the values annexed, the following articles of personal property selected by the said A. B., to wit: which we declare to be a fair valuation, and that said articles are exempt under said execution.

We hereby certify, each for himself, that we are not related by blood or marriage to the judgment debtor or judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this day of, 19

O. K.....[L. S.]
L. M.....[L. S.]
R. S.....[L. S.]

The above return was made and subscribed in my presence, day and date above given.

C. D....., (Sheriff or Constable.)

[No. 4]

Certificate of Qualification to Be Endorsed on Return by Sheriff.

The within named B. F., G. H., and J. R. were summoned and qualified according to law, as appraisers of the exemption of the said A. B., under an execution in favor of X. Y., thisday of, 19.....

C. D.....(Sheriff).

[No. 5]

Minute on Execution Docket.

X Y
vs.

A B

Execution issued, 19

Homestead appraised and set off and return made, 19 (Rev., s. 709; Code, s. 524; C. S. 751.)

Cited in *Crow v. Morgan*, 210 N. C. 153, 185 S. E. 668.

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

Art. 33. Special Proceedings.

§ 1-393. Chapter applicable to special proceedings.—The provisions of this chapter on civil procedure are applicable to special proceedings, except as otherwise provided. (Rev., s. 710; Code, s. 278; C. S. 752.)

Statutory Provisions.—The provision that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, etc.," contained in section 1-69 is applicable in special proceedings. *Welfare v. Welfare*, 108 N. C. 272, 12 S. E. 1025. But in an action by the heirs at law for partition of an intestate's lands, the administrator cannot be made a party defendant, upon his opposition to the partition, as he does not come within the foregoing provision. *Garrison v. Cox*, 99 N. C. 478, 6 S. E. 124.

Regular Action Bars Right to Special Proceedings.—Where an action in the nature of a creditor's bill was brought by

the plaintiff (a creditor of defendant's testatrix) to the superior court at term time, and after the institution of the action the defendant commenced a special proceeding in the probate court for a sale of the land of his testatrix for assets, it was held, that the superior court had acquired jurisdiction of the matter, and that the defendant should be restrained from further proceedings in the probate court. *Haywood v. Haywood*, 79 N. C. 42.

Abandonment of Proceedings.—By virtue of this section petitioners in condemnation proceedings may abandon the proceedings and take a voluntary nonsuit even after the commissioners have made their appraisal and report and petitioners have filed exceptions thereto, provided petitioners abandon the proceedings before confirmation of the commissioners' report. *Nantahala Power, etc., Co. v. Whitington Mfg. Co.*, 209 N. C. 560, 184 S. E. 48.

§ 1-394. Contested special proceedings; commencement; summons.—Special proceedings against adverse parties shall be commenced as is prescribed for civil actions. The summons shall command the officer to summons the defendant or defendants to appear and answer the complaint, or petition, of the plaintiff within ten days after its service upon the defendant or defendants, and must contain a notice stating in substance that if the defendant or defendants fail to answer the complaint, or petition, within the time specified, plaintiff will apply to the court for the relief demanded in the complaint, or petition. The summons must run in the name of the state, be signed by the clerk of the superior court having jurisdiction in the special proceeding, and be directed to the sheriff or other proper officers of the county, or counties, in which the defendant, or defendants, or any of them reside or may be found, and must be returnable before the clerk. The clerk shall indicate on the summons by appropriate words that the summons is issued in a special proceeding and not in a civil action. The manner of service, whether by the sheriff or by publication, shall be as is prescribed for summons in civil actions by § 1-89: Provided, however, that in special proceedings before the clerk, the plaintiff or petitioner shall not be required to serve a copy of the petition or complaint upon each of the defendants, as required in civil actions, but in lieu thereof such petitioner or petitioners may deliver to the clerk at the time of the issuance of the summons copies (not to exceed three) of the petition or complaint for the use of the defendants. Provided, further, where the defendant is an agency of the state the time for filing answer or other plea shall be not less than thirty (30) days after the date of service. (Rev., ss. 711, 712; Code, ss. 279, 287; 1868-9, c. 93, s. 4; 1927, c. 66, s. 5; 1929, cc. 50, 237, s. 3; 1939, c. 49, s. 2; 1939, c. 143; C. S. 753.)

Editor's Note.—The first 1939 amendment changed all of this section as amended except the first sentence. The second 1939 amendment added the second proviso at the end of this section. For comment on these amendments, see 17 N. C. Law Rev. 345.

Condemnation Proceedings.—A special proceeding for the purpose of condemning land for railroad purposes must be begun by the issuance of a summons. *Carolina R. R. v. Pennearden Lumber Co.*, 132 N. C. 644, 650, 44 S. E. 358.

No Sessions of Court in Proceedings Before Clerk.—There are no terms or sessions of court for proceedings pending before the clerk, each case having its own return day; and a demurrer to a petition or written motion made and entitled in the original cause in proceedings for partition before the clerk to set aside a judgment therein, on the ground that it fails to state the term at which it was rendered, is bad. *Hartsfield v. Bryan*, 177 N. C. 166, 98 S. E. 379.

Duty of Clerk to Issue Execution.—It is the duty of the clerk of the court, upon the application of the plaintiff, to issue, in proper cases, the execution against the person of the defendant. *Kinney v. Laughenour*, 97 N. C. 325, 329, 2 S. E. 43.

Some form of action or special proceeding is essential to the rendition of a judgment and in this state it must always be commenced by summons or attachment. *Morris v. House*, 125 N. C. 550, 560, 34 S. E. 712.

Where Service Made Returnable to Court in Term.—Where a summons in a special proceeding was improperly made returnable to the superior court in term, it was proper for the judge to remand the proceeding, with directions that the summons be amended so as to make it returnable before the clerk on a day certain. *Simmons v. Norfolk, etc., Steamboat Co.*, 113 N. C. 147, 18 S. E. 117.

Less Than Ten Days' Notice Given.—A judgment under a service of less than ten days, although irregular, is valid until reversed or vacated by a direct action, and cannot be collaterally attacked. *Nall v. McConnell*, 211 N. C. 258, 261, 190 S. E. 210. When the time between service and return day of the summons is less than the time allowed by statute, the clerk is not bound to dismiss the action, but should allow further time to the defendant for an appearance. *Stafford v. Gallops*, 123 N. C. 19, 31 S. E. 265.

§ 1-395. Return of summons.—The officer to whom the summons is addressed shall note on it the day of its delivery to him, and, if required by the plaintiff, shall execute it immediately. When executed, he shall immediately return the summons with the date and manner of its execution, by mail or otherwise, to the clerk of the court issuing it. (Rev., s. 713; Code, s. 280; C. C. P., s. 75; C. S. 754.)

Cross Reference.—See section 1-88 et seq. and notes thereto.

The failure of the clerk to note on the summons the day it was received is irregular but does not render the summons void. *Strayhorn v. Blalock*, 92 N. C. 292, 294.

Before Whom Returnable.—The summons in special proceedings is returnable before the clerk. *Tate v. Powe*, 64 N. C. 644.

"Service" Prima Facie Sufficient.—When the sheriff returns that he has "served" the summons, this is *prima facie* sufficient and implies that he has served it as the statute directs, until the contrary is made to appear in some proper way. *Strayhorn v. Blalock*, 92 N. C. 292, 294.

Fees.—Under the practice of the Code of Civil Procedure a sheriff is not required to execute process until his fees are paid or tendered by the person at whose instance the service is to be rendered; but this does not excuse him for a failure to make a return of the process. A writ of summons is a mandate of the court, and must be obeyed by its officer, and if he has any valid excuse for not executing the writ, he must state it in his return. *Jones v. Gupton*, 65 N. C. 48; *Johnson v. Kennedy*, 70 N. C. 436.

§ 1-396. When complaint filed.—The complaint or petition of the plaintiff must be filed in the clerk's office at or before the time of the issuance of the summons, unless time for filing said complaint or petition is extended as provided by section 1-398. (Rev., s. 714; Code, s. 281; C. C. P., s. 76; 1876-7, c. 241, s. 4; 1943, c. 543; C. S. 755.)

Editor's Note.—Prior to the 1943 amendment the plaintiff was required to file his complaint or petition at the time of issuing the summons or within ten days thereafter.

§ 1-397: Repealed by Session Laws 1943, c. 543.

§ 1-398. Filing time enlarged.—The time for filing the complaint, petition, or any pleading may be enlarged by the court for good cause shown by affidavit, but may not be enlarged by more than ten additional days, nor more than once, unless the default was occasioned by accident over which the party applying had no control, or by the fraud of the opposing party. (Rev., s. 716; Code, s. 283; C. C. P., s. 79; C. S. 757.)

Power of Clerk Extinguished.—Where an application was filed to remove an administrator, and no answer having been filed, the clerk refused the motion, and on appeal the judge reversed the order and remanded the case, the clerk has power to allow an answer to be filed. *Patterson v. Wadsworth*, 94 N. C. 538, 540.

§ 1-399. Defenses pleaded; transferred to civil issue docket; amendments.—In special proceedings a defendant or other party thereto may plead any equitable or other defense, or ask any equitable or other relief in the pleadings which it would be competent to ask in a civil action; and when such pleas are filed the clerk shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings. The trial judge may, with a view to substantial justice between the parties, allow amendments to the pleadings and interpleas in behalf of any person claiming an interest in the property. (Rev., s. 717; 1903, c. 566; C. S. 758.)

Clerk Must Transfer Case Where Equitable Defense Plead.—"When a party shall plead any equitable or other defense, or ask for any equitable or other relief in the pleadings, it is required that the clerk shall transfer the cause to the civil issue docket, for trial during term, upon all issues raised by the pleadings, and the judge may allow amendments to the pleadings for the purpose of a hearing of the case upon its merits." *Little v. Duncan*, 149 N. C. 84, 85, 62 S. E. 770. See also, *Ex parte Wilson*, 222 N. C. 99, 22 S. E. (2d) 262 (con. op.).

In *Smith v. Johnson*, 209 N. C. 729, 184 S. E. 486, it was held that defendant could plead the equitable relief of mutual mistake and when this plea was filed the clerk properly transferred the cause to the civil issue docket.

Questions of Fact Decided by Clerk.—Questions of fact are first determined by the clerk and on appeal they are subject to review by the judge. *Vanderbilt v. Roberts*, 162 N. C. 273, 78 S. E. 156.

Clerk May Not Grant Affirmative Equitable Relief.—The clerk, in special proceedings, has no power to make any order granting affirmative equitable relief. Equitable defenses may be set up in the answer in such proceedings by way of avoidance, and when such equitable defenses exist they should be so pleaded; but when pleaded they amount to no more than defenses, and cannot be affirmatively administered. *Vance v. Vance*, 118 N. C. 864, 24 S. E. 768.

Right to Jury Trial.—In special proceedings, pending before clerks, the parties have the right to insist that any issue of fact raised by the pleadings shall be framed by the clerk and transmitted to the superior court in term for trial by jury. *Southern R. Co. v. Porter*, 105 N. C. 246, 247, 11 S. E. 328.

Same—Alimony without Divorce.—When in special proceedings for alimony without divorce the pleadings raise the issues of the validity of the marriage, or whether the husband has abandoned the wife, or whether the husband is a drunkard or spendthrift, the right of trial by jury arises and the case should be transferred by the judge to the civil issue docket for the purpose. *Crews v. Crews*, 175 N. C. 168, 95 S. E. 149.

Same—Waiver.—Where they fail, before an order appointing commissioners is made, to insist upon a verdict upon the controverted facts, they waive the right of trial by jury. *Southern R. Co. v. Porter*, 105 N. C. 246, 248, 11 S. E. 328.

Boundary Disputes.—For full treatment of partitioning of land and settlement of boundary disputes, see section 38-1 et seq. and the notes thereto.

Ejectment.—When tenancy in common is denied and there is a plea of sole seizin, non tenent insimul, the proceeding in legal effect is converted into an action in ejectment and should be transferred, by virtue of this section, to the civil issue docket for trial at term on issue of title, the burden being upon the petitioners to prove their title as in ejectment. *Gibbs v. Higgins*, 215 N. C. 201, 204, 1 S. E. (2d) 554.

Partition.—While the clerk has original jurisdiction of special proceedings for the partition of land held by tenants in common, this jurisdiction is divested or suspended by a plea of non tenent insimul or of sole seizin. He is required to forthwith transfer the cause to the civil issue docket for trial as in case of other civil actions. *Bailey v. Hayman*, 222 N. C. 58, 60, 22 S. E. (2d) 6.

Amendments on Appeal.—In cases of appeal from the probate court (now the clerk of the superior court) to the superior court the judge has the same right to allow amendments as if the case had been constituted in his court. *Sudderth v. McCombs*, 67 N. C. 353.

Evidence Considered Upon Appeal.—If there be issues of law or material questions of fact decided by the clerk, they may be reviewed by the judge at term or in chambers, on appeal properly taken; and in passing upon these questions of fact, the court may act on the evidence already

received, or if this is not satisfactory, it may ordinarily require the production of other evidence as an aid in the proper disposition of the question presented. *Mills v. McDaniel*, 161 N. C. 112, 76 S. E. 551.

Cited in *Jackson v. Jernigan*, 216 N. C. 401, 5 S. E. (2d) 143.

§ 1-400. Ex parte; commenced by petition.—If all the parties in interest join in the proceeding and ask the same relief, the commencement of the proceedings shall be by petition, setting forth the facts entitling the petitioners to relief, and the nature of the relief demanded. (Rev., s. 718; Code, s. 284; 1868-9, c. 93; C. S. 759.)

Judgment Creditors May Become Parties.—Where the executor has filed a proper petition for the sale of realty to pay debts, the judgment creditors interested in the surplus, if not made parties, and desiring to contest one of the debts set out in the partition for fraud, may make themselves parties and proceed therein accordingly, the procedure being *ex parte* on the part of the executor and an independent action by them will not lie for fraud until after final judgment in the proceedings. *Wadford v. Davis*, 192 N. C. 484, 135 S. E. 353.

§ 1-401. Clerk acts summarily; authority from nonresident.—In cases under § 1-400, if all persons to be affected by the decree, or their attorney, have signed the petition and are of full age, the clerk of the superior court has power to hear and decide the petition summarily. If any of the petitioners reside out of the state, an authority from them, to the attorney, in writing, must be filed with the clerk before he may make any order or decree to prejudice their rights. (Rev., s. 719; Code, s. 285; 1868-9, c. 93, s. 2; C. S. 760.)

All Parties Interested Must be Joined.—When in special proceeding, under which certain timber interests were sold by a commissioner, it does appear upon the face of the record that certain persons of age were not made parties, or that they have not appeared as such in person or by attorney, and they have in no way waived their rights, they are not bound by a judgment rendered therein, and as to them the entire proceeding is void upon its face. *Moore v. Rowland Lumber Co.*, 150 N. C. 261, 63 S. E. 953.

§ 1-402. Judge approves when petitioner is infant.—If any petitioner is an infant, or the guardian of an infant, acting for him, no final order or judgment of the clerk, affecting the merits of the case and capable of being prejudicial to the infant, is valid, unless submitted to and approved by the judge resident or holding court in the district. (Rev., s. 720; Code, s. 286; 1887, c. 61; C. P., s. 420; 1868-9, c. 93, s. 3; C. S. 761.)

Infants Represented by Guardian.—In an *ex parte* proceeding to sell land for assets infant heirs are represented by a guardian or next friend, and the order must be approved by the judge. *Harris v. Brown*, 123 N. C. 419, 424, 31 S. E. 877.

Same—Where Represented by Administrator.—While it is irregular for the administrator in such case to represent a minor heir as guardian, yet, where there is no suggestion of any unfair advantage having been taken in the sale, confirmation or elsewhere in the proceeding, such irregularity will not vitiate the title of purchaser. *Harris v. Brown*, 123 N. C. 419, 420, 31 S. E. 877.

Who May Approve.—An emergency judge has the same jurisdiction for making approvals under this section as has the regular judge of the superior court. See discussion in 1 N. C. Law Rev. 284.

One who joins as infant in a petition is bound by the judgment, though it is not approved by the judge of the court. *Lindsay v. Beaman*, 128 N. C. 189, 190, 38 S. E. 811.

Court Presumed to Have Protected Interests of Infants.—Where the lands of infants are sold under an order of the superior court upon an *ex parte* petition, in which the infants are represented by next friends, it is presumed that the court protected their interests, and was careful to see that they suffered no prejudice. *Tyson v. Belcher*, 102 N. C. 112, 9 S. E. 634.

Cited in *Ward v. Agrillo*, 194 N. C. 321, 323, 139 S. E. 451.

§ 1-403. Orders signed by judge.—Every order or judgment in a special proceeding required to be made by a judge of the superior court, in or out of term, must be authenticated by his signature. (Rev., s. 722; Code, s. 288; 1868-9, c. 93, s. 5; 1872-3, c. 100; C. S. 762.)

Section, While Directory, Should Always Be Observed.—“We have a plain provision in our statute law requiring every judgment granted by a judge to be signed by him. And this Court has held that this statute, apparently mandatory, should always be observed; still it is held to be only directory, and a judgment passed in open court and filed with the papers as a part of the judgment roll is a valid judgment, though not signed by the judge.” *Range Co. v. Carver*, 118 N. C. 328, 338, 24 S. E. 352. *Matthews v. Joyce*, 85 N. C. 258; *Rollins v. Henry*, 78 N. C. 342; *Keener v. Goodson*, 89 N. C. 273; *Spencer v. Credle*, 102 N. C. 68, 8 S. E. 901; *Bond v. Wool*, 113 N. C. 20, 18 S. E. 77.

§ 1-404. Reports of commissioners and jurors.—Every order or judgment in a special proceeding imposing a duty on commissioners or jurors must prescribe the time within which the duty must be performed, except in cases where the time is prescribed by statute. The commissioners or jurors shall within twenty days after the performance of the duty file their report with the clerk of the superior court, and if no exception is filed to it within twenty days, the court may proceed to confirm the same on motion of any party and without special notice to the other parties. (Rev., s. 723; 1893, c. 209; C. S. 763.)

Confirmation Discretionary with the Court.—The confirmation by the court, if no exception is filed to the report within the twenty days after it is filed with the clerk, lies within the discretion of the court. *Ex parte Garrett*, 174 N. C. 343, 93 S. E. 838. But in partition proceedings it is obligatory for the court to confirm the same. *Id.*

Proceedings to Sell Land Appealable.—A proceeding to sell lands to make assets to pay the debts of the deceased, under this section, is appealable from the clerk of the Superior Court, and open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and is to be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. *Perry v. Perry*, 179 N. C. 445, 102 S. E. 772.

Same—Jurisdiction of Judge.—The fact that the commissioner appointed to sell lands to make assets to pay the debts of a deceased person has sold them several times under resales ordered by the clerk of the Superior Court, and that the clerk has granted the purchaser's motion to confirm the sale after the lapse of more than twenty days from the last sale, without an advanced bid until after the expiration of that time, does not affect the jurisdiction of the judge on appeal to examine into the matter and order resale upon being satisfied that justice and the rights of the parties require it. *Perry v. Perry*, 179 N. C. 445, 102 S. E. 772.

Power of Clerk.—The clerk has no power to confirm a sale reported by a commissioner until the expiration of twenty days from the date on which the report was filed. *Vance v. Vance*, 203 N. C. 667, 668, 166 S. E. 901.

Applied in *Buncombe County v. Arbogast*, 205 N. C. 745, 172 S. E. 364.

§ 1-405. No report set aside for trivial defect.—No report or return made by any commissioners may be set aside and sent back to them or others for a new report because of any defect or omission not affecting the substantial rights of the parties, but the defect or omission may be amended by the court, or by the commissioners with permission of the court. (Rev., s. 724; Code, s. 289; 1868-9, c. 93, s. 7; C. S. 764.)

Report Conclusive until Set Aside.—The report of commissioners appointed to condemn lands and assess damages for the purpose of drainage is, like the verdict of a jury, conclusive of the facts therein ascertained, until set aside. *Norfolk Southern R. Co. v. Ely*, 101 N. C. 8, 7 S. E. 476.

Substantial Rights Affected.—The omission in a report

of commissioners to make partition of lands to state affirmatively that the allotments in their opinion were equal in value, affects the substantial rights of the parties, and the clerk or judge may set it aside with directions, either that the commissioners shall make a reallocation, or that others shall be appointed to do so. *Skinner v. Carter*, 108 N. C. 106, 12 S. E. 908.

Description of Land Unnecessary.—A report of the commissioners is not invalid because it does not contain a description. *Hanes v. R. R.*, 109 N. C. 490, 491, 13 S. E. 896. Nor is it mandatory that such report be under seal. *Id.*

§ 1-406. Commissioner of sale to account in sixty days.—In all actions or special proceedings when a person is appointed commissioner to sell real or personal property, he shall, within sixty days after the maturity of the note or bond for the balance of the purchase money of said property, or the payment of the amount of the bid when the sale is for cash, file with the clerk of the superior court a final account of his receipts and disbursements on account of the sale; and the clerk must audit the account and record it in the book in which the final settlements of executors and administrators are recorded. If any commissioner appointed in any action or special proceeding before the clerk fails, refuses or omits to file a final account as prescribed in this section, or renders an insufficient or unsatisfactory account, the clerk of the superior court shall forthwith order such commissioner to render a full and true account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such commissioner shall fail to appear or refuse to exhibit such account, the clerk of the superior court may issue an attachment against said commissioner for a contempt and commit him till he exhibits such account, or files a bond for the amount held or unaccounted for as is prescribed by law for administrators, the premium for which is to be deducted from the commissioner's fee, earned by said commissioner in said action or special proceeding. (Rev., s. 725; 1901, c. 614, ss. 1, 2; 1933, c. 98; C. S. 765.)

Editor's Note.—The last two sentences of this section, giving the clerk power to force a final settlement, were added by Public Laws 1933, c. 98.

Applied in *Peal v. Martin*, 207 N. C. 106, 176 S. E. 282.

§ 1-407. Commissioners selling land for reinvestment, etc., to give bond.—Whenever in any cause or special proceeding there is a sale of real estate for the purpose of a reinvestment of the money arising from such sale or for any other purpose, and the proceeds from such sale are held by a commissioner or other officer designated by the court to receive such money, for purposes of reinvestment or otherwise, the commissioner or officer so receiving same shall execute a good and sufficient bond, to be approved by the court, in an amount at least equal to the corpus of the fund, and payable to the state of North Carolina for the protection of the fund and the parties interested therein, and conditioned that such custodian of the money shall faithfully comply with all the orders of the court made or to be thereafter made concerning the handling of reinvestment of said funds and for the faithful and final accounting of the same to the parties interested; but the court in its discretion may waive the requirement of such bond in those cases where the court requires the funds or proceeds from such sale to be paid by the purchaser

or purchasers direct to the court. The premium for any such bond shall be paid from the corpus of the fund intended to be thereby protected. (1919, c. 259; 1935, c. 45; C. S. 766.)

Local Modification.—Duplin: 1935, c. 45.

Editor's Note.—Prior to the amendment of 1935 the clause at the end of the first sentence provided that the court could dispense with the bond where it was not contemplated that the money would be ultimately reinvested under the direction of the court.

Bond.—Where an order has been made for the sale of timber growing upon lands affected with contingent interests, the court should also require its commissioner appointed for the sale to give bond for the preservation and proper application of the proceeds of sale, etc.; but this provision does not affect the title of the purchaser, who is not required to see to the application of the funds, and the proper order in this respect may be supplied by amendment or supplementary decree. *Midyette v. Lycoming Timber & Lumber Co.*, 185 N. C. 423, 117 S. E. 836. See also, *Pools v. Thompson*, 183 N. C. 588, 112 S. E. 323.

§ 1-408. Action in which clerk may allow fees of commissioners; fees taxed as costs.—In all civil actions and special proceedings instituted in the superior court in which a commissioner, or commissioners, are appointed under a judgment by the clerk of said court, said clerk shall have full power and authority and he is hereby authorized and empowered to fix and determine and allow to such commissioner or commissioners a reasonable fee for their services performed under such order, decree or judgment, which fee shall be taxed as a part of the costs in such action or proceeding, and any dissatisfied party shall have the right of appeal to the judge, who shall hear the same de novo. (1923, c. 66, s. 1; C. S. 766(a).)

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

Art. 34. Arrest and Bail.

§ 1-409. Arrest only as herein prescribed.—No person may be arrested in a civil action except as prescribed by this article, but this provision shall not apply to proceedings for contempt. (Rev., s. 726; Code, s. 290; C. C. P., s. 148; C. S. 767.)

Cross References.—As to execution against the person, see section 1-311. As to persons taken in arrest and bail proceeding being entitled to insolvent debtor's oath, see § 23-29. As to arrest in criminal actions, see Art. 6, ch. 15 on Criminal Procedure. As to bail in criminal action, see Art. 10, ch. 15 on Criminal Procedure.

Editor's Note.—Statutes authorizing arrest in civil cases are in derogation of personal liberty and should be strictly construed; the conditions are jurisdictional and not directory.

Article I, section 16 of the state Constitution provides that "There shall be no imprisonment for debt in this state except for fraud." This provision of the Constitution has no application to actions of tort but is confined to actions arising ex contractu. *Long v. McLean*, 88 N. C. 3.

The words except in cases of fraud are very broad, and they comprehend not only fraud in attempting to delay and defeat the collection of a debt by concealing property or other fraudulent devices, but embraces also fraud in making the contract, false representations, for instance, and fraud in increasing the liabilities, as when an administrator, by applying the funds of the estate to his own use, paying his own debts, and the like. *Powers v. Davenport*, 101 N. C. 286, 293, 7 S. E. 747; *Melvin v. Melvin*, 72 N. C. 384.

Now, in order to avoid a violation of this article of the Constitution and at the same time protect honest creditors against dishonest debtors, it devolved upon the legislature, in cases of fraud, to enact such laws as were necessary, in its discretion, for arrest and imprisonment in proper cases, and to provide for all necessary proceedings in relation thereto. This is done in this and the following sections. *Preiss v. Cohen*, 117 N. C. 54, 59, 23 S. E. 162.

Section 23-13 Applies.—Parties arrested and in custody, in

pursuance of the provisions contained in this and the following sections, if the order of arrest is not vacated "on motion," must seek their discharge in the mode prescribed in sec. 23-13. *Wingo v. Watson*, 98 N. C. 482, 485, 4 S. E. 463; *Preiss v. Cohen*, 117 N. C. 54, 60, 23 S. E. 162.

Application to Partnership.—Where a partnership has terminated and all debts have been paid and the partnership affairs otherwise adjusted, or where the partnership was for a single venture or special purpose which has been closed, and nothing remains but to pay over the amount due, in either case an action will lie in favor of one partner against the other, and if the facts bring the claim within the provisions of this article on arrest and bail, the plaintiff is entitled to this ancillary remedy. *Ledford v. Emerson*, 140 N. C. 288, 52 S. E. 641.

Where Judgment of Nonsuit Reversed.—Where there has been a motion for an order of arrest and bail under this section, and a judgment of non-suit is reversed, the motion may be renewed. *Hensley v. Helvenston*, 189 N. C. 636, 127 S. E. 625.

For definition of arrest see *State v. Buxton*, 102 N. C. 129, 8 S. E. 774; *Journey v. Sharpe*, 49 N. C. 165, 167; *Hadley v. Tinnin*, 170 N. C. 84, 86 S. E. 1017.

Cited in *Ledford v. Smith*, 212 N. C. 447, 193 S. E. 722.

§ 1-410. In what cases arrest allowed.—The defendant may be arrested, as hereinafter prescribed, in the following cases:

1. In an action for the recovery of damages on a cause of action not arising out of contract where the action is for wilful, wanton, or malicious injury to person or character or for wilfully, wantonly or maliciously injuring, taking, detaining, or converting real or personal property.

Editor's Note.—The 1943 amendment omitted the words "where the defendant is not a resident of the state, or is about to remove therefrom, or" formerly appearing after the word "contract" in line two of subdivision 1. It also added the requirement of the subdivision that the injury, etc., be wilful, wanton or malicious.

See note under § 1-311.

In General.—The following cases were decided before the 1943 amendment, and should be evaluated with that fact in mind.

In *Hoover v. Palmer*, 80 N. C. 313, 315, the court said: It is fair to conclude that the legislature in providing for arrest and bail in an action for injury to person used those words—*injury to person*—according to their established legal signification in the classification of rights and injuries thereto as taught in the elementary writers, and, thus considered, the language employed in legal effect authorized, as we think, an arrest for all those injuries (seduction included) which may be suffered in respect of any rights of person, absolute or relative. This, we hold, was intended to be and is the proper construction of the section.

Mere Negligence Insufficient.—A judgment that execution issue against the person of the defendant cannot be sustained upon the mere finding that the defendant negligently injured the plaintiff's property; in order to justify such execution under this section and section 1-311, the injury must have been intentionally or maliciously inflicted, i. e., with some element of violence, fraud or criminality. *Oakley v. Lasater*, 172 N. C. 96, 89 S. E. 1063.

Malpractice.—In an action to recover for malpractice of defendant, execution against the person of defendant may not issue in the absence of allegation and evidence of actual malice. *Olinger v. Camp*, 215 N. C. 340, 1 S. E. (2d) 870.

Wrongful Conversion.—Where a cotenant wrongfully converted a race horse, by selling it while in his possession, he was liable to arrest under this section. *Doyle v. Bush*, 171 N. C. 10, 86 S. E. 165.

In Action for Libel.—An arrest in an action for libel is not within the provisions of the Constitution (Art. I, § 16) prohibiting imprisonment for debt. *Moore v. Green*, 73 N. C. 394.

Slander of Title.—Although it was not necessary in the case to decide the precise point, the court stated in *Sneed v. Harris*, 109 N. C. 349, 354, 13 S. E. 920, that it was questionable whether an action for slander of title was embraced by this article on arrest and bail.

Seduction.—The seduction of a daughter, being an infringement of the father's relative rights of persons, is an injury to his person within the meaning of this section, and a sufficient ground for the arrest of the defendant in an action for such tort. *Hoover v. Palmer*, 80 N. C. 313. It involves also fraud and deceit *ex vi termini*. *Hood v. Sud-*

derth, 111 N. C. 215, 16 S. E. 397. See also the next subsection as to seduction.

This section was mentioned as applying to injury to character in *Michael v. Leach*, 166 N. C. 223, 225, 81 S. E. 760. As applying to injury to person in *Howie v. Spittle*, 156 N. C. 180, 181, 72 S. E. 207.

2. In an action for a fine or penalty, for seduction, for money received, for property embezzled or fraudulently misapplied by a public officer, attorney, solicitor, or officer or agent of a corporation or banking association in the course of his employment, or by any factor, agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

Editor's Note.—Originally, this section contained the words "in an action on a promise to marry." In *Moore v. Mullen*, 77 N. C. 327, the court held this provision to be in conflict with Art. I, section 16 of the Constitution. Soon thereafter this provision was stricken out of the section by the legislature and the word "seduction" substituted. This seems to be a legislative construction that where a woman should sue for the seduction, instead of a mere breach of promise, an arrest would lie. *Hood v. Sudderth*, 111 N. C. 215, 221, 16 S. E. 397.

In General.—This section is plain and very comprehensive in its terms and purpose. It intends, certainly, to embrace all cases where the relation of trust and confidence, in respect to money received by, or personal property in the possession of one party for the benefit of another, is raised and exists between such parties by reason of their mutual contract, express or implied. The purpose is to give the more efficient remedy where the cause of action involves a breach of trust on the part of the defendant sustaining a fiduciary relation to the plaintiff. *Travers v. Deaton*, 107 N. C. 500, 503, 12 S. E. 373; *Boykin v. Maddrey*, 114 N. C. 89, 98, 19 S. E. 106; *Chemical Co. v. Johnson*, 98 N. C. 123; 3 S. E. 723; *Powers v. Davenport*, 101 N. C. 286, 7 S. E. 747.

The section gives to a plaintiff, whose money or property has been put beyond his reach by his agent or trustee by an act in violation of his duty, the remedy of arrest and bail, that he may the better compel his unfaithful agent or trustee to make amends for his unfaithfulness, and it "turns a deaf ear" to one who would excuse himself by asserting that he did not mean to do wrong when consciously doing that which was a breach of the trust reposed in him, or by alleging that he honestly believed that he would be able to replace the misapplied funds, so that no loss would eventually come to the plaintiff. *Boykin, etc. Co. v. Maddrey*, 114 N. C. 89, 100, 19 S. E. 106.

Applications of the Section.—Where a firm of merchants gave to manufacturers of fertilizers its note for a consignment of goods, agreeing to hold such goods or the proceeds of the sale thereof, or the notes of farmers given therefor, in trust for the manufacturers, a fiduciary relation was established and a violation of the contract was a breach of trust for which, upon proper affidavits and the required undertaking, an order of arrest could be obtained. *Boykin, etc. Co. v. Maddrey*, 114 N. C. 89, 19 S. E. 106.

One who fraudulently conveys property held by him as trustee can be legally arrested under this section. *Durham Fertilizer Co. v. Little*, 118 N. C. 808, 24 S. E. 664.

An action for seduction may be brought under this section by the woman seduced, and an order for the arrest of the defendant may be granted in such action. *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397. As to parent bringing action, see *Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43.

A defendant, in an action for money received or property fraudulently misapplied by him as agent, may be arrested under the provisions of this section. *Gossler v. Wood*, 120 N. C. 69, 27 S. E. 33.

This section applies to arrest for alienating the affections of a wife. *Edwards v. Sorrell*, 150 N. C. 712, 64 S. E. 898.

Fraud Committed in Another State.—The fact that the fraud for which the defendant was arrested was committed in another state is no ground for immunity from arrest, under this section, authorizing arrests for frauds in fiduciary transactions. *Powers v. Davenport*, 101 N. C. 286, 7 S. E. 747.

When Partner Liable.—Where members of a firm assume a fiduciary relation as to property committed to them, and a misappropriation is made by one partner with the knowledge, connivance, or assent of the other, the intent of the latter to commit a breach of trust is conclusively presumed, from such knowledge and acts, for all the purposes of arrest

and bail. *Boykin, etc. Co. v. Maddrey*, 114 N. C. 90, 19 S. E. 106.

Insolvent May Be Arrested.—An insolvent defendant may be arrested in a civil action for money received and fraudulently misapplied. *Carroll v. Montgomery*, 128 N. C. 278, 38 S. E. 874.

Non-resident Liable.—A non-resident of this State may be arrested and held to bail for fraud under this section. *Powers v. Davenport*, 101 N. C. 286, 7 S. E. 747.

3. In an action to recover the possession of personal property, unjustly detained, where all or any part of the property has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.

4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

No Arrest Unless Action Pending.—Where plaintiff brought an action against defendant, setting out two causes of action, one on a note and the other for embezzlement, and judgment was rendered on the note by default but no judgment was entered upon the other cause and it was removed from the docket, no order of arrest was permissible under this section since there is no action pending wherein the allegations of fraud in the complaint, used as an affidavit, could authorize a warrant of arrest. *Stewart v. Bryan*, 121 N. C. 46, 28 S. E. 18.

Contract Action Not Affected.—Where, in an action on contract, the plaintiff alleges fraud and deceit on the part of the defendant and sues out the ancillary process of arrest and bail, this does not change the nature of the contract action. *Copeland v. Fowler*, 151 N. C. 353, 355, 66 S. E. 215.

Fraud Necessary for Arrest under Section.—A defendant cannot be arrested under this section, unless he has been guilty of fraud in contracting the debt for which the action is brought. *McNeely v. Haynes*, 76 N. C. 122.

A debt is fraudulently contracted where a purchase of property is made with an intent on the part of the purchaser not to pay for the same. See 69 Ohio State Reports, 311, construing the similar provision of the Ohio Code.

Section Applies to Subsequent Fraud.—A person may be arrested and held to bail for a fraud committed after the contracting of the debt—e. g., by concealing property, or other devices for the purpose of defeating his creditor. *Powers v. Davenport*, 101 N. C. 286, 7 S. E. 747.

Partner Must Have Knowledge.—One partner can not be arrested for the fraud of his copartner of which he had no knowledge, and in which he in nowise connived. *McNeely v. Haynes*, 76 N. C. 122; *Boykin, etc., Co. v. Maddrey*, 114 N. C. 89, 101, 19 S. E. 106.

5. When the defendant has removed, or disposed of his property, or is about to do so, with intent to defraud his creditors.

No woman shall be arrested in any action except for a willful injury to person, character or property, and no person shall be arrested on Sunday. (Rev., s. 727; Code, s. 291; C. C. P., s. 149; 1869-70, c. 79; R. C., c. 31, s. 54; 1777, c. 118, s. 6; 1891, c. 541; 1943, c. 543; C. S. 768.)

In General.—The words "removed, or disposed of" used in this section are of different and broader meaning than the words in subsection 2, supra, and are broad enough to comprehend real estate. *Durham Fertilizer Co. v. Little*, 118 N. C. 808, 818, 24 S. E. 664.

That there can be no arrest on Sunday, see *White v. Morris*, 107 N. C. 93, 99, 12 S. E. 80.

Fraudulent Conveyance.—One who fraudulently conveys his real estate with intent to defeat his creditors can be legally arrested under this section. *Durham Fertilizer Co. v. Little*, 118 N. C. 808, 24 S. E. 664.

Arrest for "Willful Injury."—For the arrest of a woman under the provisions of this section, for "willful injury," etc., an actual intent is not necessary if the defendant's negligence is so gross as to manifest a reckless indifference

to the rights of others. *Weathers v. Baldwin*, 183 N. C. 276, 111 S. E. 183.

§ 1-411. Order and affidavit.—An order for the arrest of the defendant must be obtained from the court in which the action is brought or a judge thereof, and may be made where it appears to the court or judge, by affidavit of the plaintiff or of any other person, that a sufficient cause of action exists and that the case is one of those provided for in this article. (Rev., ss. 728, 729; Code, ss. 292, 293; C. C. P., ss. 150, 151; C. S. 769.)

The Order.—The order of arrest must proceed from the court in which the action is brought or from a judge thereof. *Houston v. Walsh*, 79 N. C. 36, 38.

Same—Jurisdiction.—An order of arrest, under this section is a judicial and not a ministerial proceeding, in the issuance of which the judge and the clerk have concurrent jurisdiction. *Bryan v. Stewart*, 123 N. C. 93, 31 S. E. 286.

Same—Voidable Only.—An order of arrest granted by a court having jurisdiction is not void. It may be erroneous if issued upon an insufficient affidavit. *Tucker v. Davis*, 77 N. C. 330.

Grounds May Be Stated in Complaint.—The grounds for the arrest may be, and most usually are, set forth in an affidavit by the plaintiff, or any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 1-410. *Roulhac v. Brown*, 87 N. C. 1, 3. The cause of arrest may be stated in the complaint but the statement must be as explicit as if set forth in an affidavit and properly verified. *Peebles v. Foote*, 83 N. C. 102.

Positive Statement of Facts Desirable.—The affidavit should state the facts positively, when this can be done. *Harriss v. Sneeden*, 101 N. C. 273, 278, 7 S. E. 801; *Peebles v. Foote*, 83 N. C. 102.

Grounds of Belief Should Be Stated.—If the affidavit states certain things which the party believes are about to be done, then the grounds of belief must be stated in order that the court may judge of the reasonableness thereof. *Peebles v. Foote*, 83 N. C. 102, 104 and cases cited.

Examples—Sufficient Statement.—In an action for arrest and bail, the affidavit of the plaintiff alleged the existence of a cause of action and the fraud committed by defendants in contracting the debt, and that upon information and belief they had fraudulently removed and disposed of their property: Held, sufficient to justify the order of arrest. *Paige v. Price*, 78 N. C. 10.

Where the affidavit upon which an order of arrest and attachment was obtained was as follows: "That the said P. has disposed of and secreted his property with intent to defraud his creditors—it was held to be sufficient." *Hughes v. Person*, 63 N. C. 548.

Same—Insufficient Statement.—An affidavit for arrest of an administrator who has been charged with assets to a certain amount is not sufficient if it does not show fraud in the misapplication of the funds by an administrator. *Melvin v. Melvin*, 72 N. C. 384.

General Rumor.—Mere general rumor that a person indebted has removed to another state is not sufficient to justify his creditor in suing out a warrant for his arrest. There should be such evidence as would induce a reasonable man to believe that the facts existed upon which he based his application. *Tucker v. Wilkins*, 105 N. C. 272, 11 S. E. 575.

Court Must Be Convinced.—It is not sufficient that the cause of action may exist—this must not be left to conjecture or bare probability—the court must be satisfied from the evidence before it that a cause does exist. *Harriss v. Sneeden*, 101 N. C. 273, 278, 7 S. E. 801.

Allowing Second Affidavit.—The refusal to allow a second affidavit to be filed is an exercise of discretion, which can not be reviewed upon appeal; the plaintiff might have filed a second sufficient affidavit immediately, and obtained a second warrant of arrest. *Wilson v. Barnhill*, 64 N. C. 121.

Question of Law.—The question of the sufficiency of the affidavit is one of law, addressed to the court alone. *Wood v. Harrell*, 74 N. C. 338, 340.

§ 1-412. Undertaking before order.—Before making the order the court or judge shall require a written undertaking on the part of the plaintiff of at least one hundred dollars, with sufficient surety, payable to the defendant, to the effect that if the defendant recovers judgment the

plaintiff will pay all damages which he sustains by reason of the arrest, not exceeding the sum specified in the undertaking. (Rev., s. 730; Code, s. 294; C. C. P., s. 152; 1868-9, c. 277, s. 7; C. S. 770.)

Cross Reference.—As to giving the bond of a surety company as surety, see Art. 2, ch. 109 on Bonds.

Applies to Suits in Forma Pauperis.—A plaintiff who is allowed to sue, in forma pauperis, has no right to an order of arrest, without first filing the undertaking required by this section. *Rowark v. Homesley*, 68 N. C. 91.

Judge Can Increase Bond.—The trial court has power to increase or diminish the bond, and an order increasing the bond can not be questioned unless abuse of discretion is shown. *Fayetteville Light, etc., Co. v. Lessem Co.*, 174 N. C. 358, 93 S. E. 836.

Amount of Bond Not Subject to Review.—The discretion of the court in fixing the amount of the bond is not subject to review. *Fayetteville Light, etc., Co. v. Lessem Co.*, 174 N. C. 358, 93 S. E. 836.

§ 1-413. Issuance and form of order.—The order may be made to accompany the summons, or to issue at any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a place and time therein mentioned to the clerk of the court in which the action is brought. Notice of the return must be served on the plaintiff or his attorney as prescribed by law for the service of other notices. (Rev., s. 731; Code, s. 295; C. C. P., s. 153; C. S. 771.)

Cross Reference.—As to execution against the person of a debtor after judgment, see section 1-311.

In General.—The words "before judgment," as used in this section mean "final judgment" upon the matters put in issue by the pleadings, and hence the judgment rendered for the debt simply, in an action in which there are allegations of fraud, does not interfere with the rights of the parties in the matters in dispute on the question of fraud, if properly prosecuted. *Preiss v. Cohen*, 117 N. C. 54, 23 S. E. 162. *Houston v. Walsh*, 79 N. C. 35.

Process Can Be Served on Prisoner in Jail.—The sheriff can serve process anywhere in his county—the jail possesses no "privilege of sanctuary" and service of process upon a prisoner there is valid. *White v. Underwood*, 125 N. C. 25, 34 S. E. 104.

This section is mentioned in *Powers v. Davenport*, 101 N. C. 291, 7 S. E. 747.

Written Warrant Necessary.—For the benefit of the citizen, that he may at all times be able to call upon the officers to produce his authority, and to see precisely what it was, the law established the necessity of a written warrant. *Lutterloh v. Powell*, 2 N. C. 395, 396.

Defendant under Criminal Process.—A defendant, who has been brought into court on criminal process, and discharged from arrest under the same on bail, is not privileged from being arrested on civil process immediately afterwards, during the sitting of the court and before he leaves the court room. *Moore v. Green*, 73 N. C. 394.

The exemption of witnesses and jurors from civil arrest accorded by §§ 8-64 and 9-18, and of nonresident parties and witnesses voluntarily attending court here, on grounds of public policy does not apply to parties arrested in criminal proceeding. *White v. Underwood*, 125 N. C. 25, 34 S. E. 104.

Witnesses Attending Court.—The principle of the common law, that a suitor, while going to, remaining at, and returning home from court, is exempted from arrest, is in force in this state. *Hammerskold v. Rose*, 52 N. C. 629.

Nonresident Attending as Witness.—A citizen of another state, while voluntarily attending court as a witness, is privileged from arrest in a civil case. *Ballinger v. Elliott*, 72 N. C. 596.

§ 1-414. Copies of affidavit and order to defendant.—The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver him a copy thereof. (Rev., s. 732; Code, s. 296; C. C. P., s. 154; C. S. 772.)

§ 1-415. Execution of order.—The sheriff shall

execute the order by arresting the defendant and keeping him in custody until discharged by law. The sheriff may call the power of the county to his aid in the execution of the arrest. (Rev., s. 733; Code, s. 297; C. C. P., s. 155; C. S. 773.)

§ 1-416. Vacation of order for failure to serve.—The order of arrest is of no avail, and shall be vacated or set aside on motion, unless it is served upon the defendant, as provided by law, before the docketing of any judgment in the action. (Rev., s. 734; Code, s. 295; C. C. P., s. 153; C. S. 774.)

An order of arrest issued after final judgment in an action is illegal and void. *Houston v. Walsh*, 79 N. C. 36.

§ 1-417. Motion to vacate order; jury trial.—A defendant arrested may at any time before judgment apply on motion to vacate the order of arrest or to reduce the amount of bail. He may deny upon oath the facts alleged in the affidavit of the plaintiff on which the order of arrest was granted, and demand that the issue so raised by the plaintiff's affidavit and the defendant's denial be submitted to the jury and tried in the same manner as other issues. If the issues are found by the jury in favor of the defendant, judgment shall be rendered discharging him from arrest and vacating the order of arrest, and he shall recover of the plaintiff all costs of the proceeding in such arrest incurred by him in defending the action. (Rev., s. 735; Code, s. 316; 1889, c. 497; C. C. P., s. 174; C. S. 775.)

In General.—This section and sections 1-419 and 23-29 et seq., prescribing the methods by which a prisoner may be discharged in certain instances before final judgment, should be construed together; and, when so construed, the remedies given in section 23-29 et seq. are in addition to those given in sections 1-417 and 1-419. *Edwards v. Sorrell*, 150 N. C. 712, 64 S. E. 898.

Motion Must Be Made before Judgment.—A motion to vacate the order of arrest can only be made before judgment. *Roulhac v. Brown*, 87 N. C. 1, 3. And where such a motion has been once refused, and no appeal taken, the matter is *res adjudicata* and a similar motion will not be entertained. *Id.*

Motion Heard Anywhere in District.—A motion to vacate an order of arrest may be heard by a judge out of court anywhere within the district that his duties require him to be during the time in which he is assigned to the district. *Parker v. McPhail*, 112 N. C. 502, 16 S. E. 848. See also *Ledbetter v. Pinner*, 120 N. C. 455, 457, 27 S. E. 123.

Clerk Can Hear Motion.—It would be perfectly regular to move to vacate before the clerk and appeal from his ruling to the judge, as was done in *Roulhac v. Brown*, 87 N. C. 1. But the clerk might be dilatory in acting, and the party has his election to proceed more summarily by applying in the first instance to the judge. *Parker v. McPhail*, 112 N. C. 502, 504, 16 S. E. 848.

New Matter Not to Be Considered.—The validity of an order of arrest and warrant of attachment is determined upon facts alleged in the original affidavit, and existing at the time when the proceeding is instituted, not upon new matter which may have afterwards transpired. *Devries & Co. v. Summit*, 86 N. C. 126.

Where Jury Trial Demanded.—If the defendant demanded the jury trial permitted by this section the judge would have been compelled to remand the motion to vacate to the county where the action was pending, that the issues so arising might be tried at the first term of court. *Parker v. McPhail*, 112 N. C. 502, 16 S. E. 848.

Lower Court's Finding of Fact Conclusive.—In arrest and bail proceedings, where a motion was made by the defendant to vacate the order of arrest and the court found that the facts were sufficient to sustain the order, the findings of fact by the court below are final, and will not be reviewed unless it be objected properly that there was no evidence to support them. *Travers v. Deaton*, 107 N. C. 500, 12 S. E. 373; *Harriss v. Sweeden*, 101 N. C. 273, 7 S. E. 801; *Parker v. McPhail*, 112 N. C. 502, 16 S. E. 848.

A party under arrest in a civil action, moving to vacate the order upon affidavits submitted to the court, is not

entitled to a trial by jury upon the questions of fact raised. *Wingo v. Watson*, 98 N. C. 482, 4 S. E. 463.

Irregular or False Order Will Be Vacated.—An order of arrest will be vacated by a judge without any undertaking by the defendant, if on its face it appears to have been issued irregularly, or for a cause insufficient in law, or false in fact. *Bear v. Cohen*, 65 N. C. 511.

Supplemental Affidavit Sufficient.—Where an order of arrest was made upon an invalid affidavit, and a counter affidavit was filed by the defendant, and a supplemental one by the plaintiff which was duly verified, it was held, that the judge below erred in vacating the order. *Benedict, etc., Co. v. Hall*, 76 N. C. 113.

Rendition of judgment prior to hearing is not reversible error. *Allison v. Maddrey*, 114 N. C. 421, 19 S. E. 646.

Prior Acquittal in Another State.—It is no ground for vacating an order of arrest that the defendant had been indicted, tried and acquitted by the courts of another state upon the same charge. *Powers v. Davenport*, 101 N. C. 286, 7 S. E. 747.

Appeal.—An order vacating an order of arrest "affects a substantial right claimed" and hence an appeal from such order lies. *Fertilizer Co. v. Grubbs*, 114 N. C. 470, 474, 19 S. E. 597.

But where, in the hearing of a motion to vacate an order of arrest, the judge finds as a fact that the act upon which it was based was not committed, the finding is final and can not be reviewed. *Parker v. McPhail*, 112 N. C. 502, 16 S. E. 848.

An appeal from the judgment of a justice of the peace discharging one who has been arrested in a civil action vacates the judgment, and the order of arrest continues in force pending the appeal. *Patton v. Gash*, 99 N. C. 280, 6 S. E. 193.

§ 1-418. Counter affidavits by plaintiff.—If the motion is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proof, in addition to those on which the order of arrest was made. (Rev., s. 736; Code, s. 317; C. C. P., s. 175; C. S. 776.)

Simple Denial Insufficient.—If the order was properly granted it ought not to be vacated upon the simple denial of the alleged cause of action; but where the answer or counter affidavits meet the allegations of the plaintiff fully and in detail, and furnish convincing evidence of their truth, the order should be vacated. *Harriss v. Sneeden*, 101 N. C. 273, 7 S. E. 801.

Facts Must Be Fully Controverted.—When one who has been arrested moves to vacate the order of arrest upon counter affidavits, purporting to meet the facts alleged against him, he should do so fully and clearly, otherwise the order of arrest will be continued. *Powers v. Davenport*, 101 N. C. 286, 7 S. E. 747.

Additional Evidence.—Where the defendant moves to vacate the order upon the ground that it was irregularly or improvidently granted, the plaintiff will not be allowed to offer additional evidence in support of his application; but if the defendant moves to vacate upon counter proofs the plaintiff may produce further evidence. *Harriss v. Sneeden*, 101 N. C. 273, 7 S. E. 801.

§ 1-419. How defendant discharged.—The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest, as provided in this article. (Rev., s. 737; Code, s. 298; C. C. P., s. 156; C. S. 777.)

Rights of Nonresidents.—Where nonresidents are arrested under the provisions of this article they are entitled to the benefit of sections 23-29 to 23-42, relating to insolvent debtors, in securing their discharge. *Burgwyn v. Hall*, 108 N. C. 489, 13 S. E. 222.

§ 1-420. Defendant's undertaking.—The defendant may give bail by causing a written undertaking, payable to the plaintiff, to be executed by sufficient surety to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he is arrested

in an action to recover the possession of personal property unjustly claimed, an undertaking to the same effect as that provided by law to be given by defendant for the retention of property, under the article entitled Claim and Delivery. (Rev., s. 738; Code, s. 299; C. C. P., s. 157; C. S. 778.)

The word "amenable" as used in this section means "answerable" or "responsive" to the process of the court having jurisdiction; and when execution is issued against the person of the debtor it is his duty to surrender himself, or of the obligors on the bond to do so, and a failure constitutes a breach of the obligation. *Pickelsimer v. Glazener*, 173 N. C. 630, 92 S. E. 700.

Voluntary Appearance.—The condition of the undertaking that the defendant shall, at all times during the pendency of the action, render himself amenable to the process of the court is met when the defendant voluntarily appears in court upon the hearing of the motion against his surety. *Stepp v. Robinson*, 203 N. C. 803, 805, 167 S. E. 147.

§ 1-421. **Defendant's undertaking delivered to clerk; exception.**—Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the clerk of the court in which the suit is brought, with his return endorsed, and a certified copy of the undertaking of the bail, and notify the plaintiff or his attorney thereof. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted it and the sheriff is exonerated from the liability. (Rev., s. 739; Code, s. 304; C. C. P., s. 162; C. S. 779.)

§ 1-422. **Notice of justification; new bail.**—On the receipt of notice of exception to the bail, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or his attorney notice of the justification of the same or other bondsmen (specifying the places of residence and occupation of the latter) before the court, justice of the peace, or judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bondsmen are given, there must be a new bond, in the form hereinbefore prescribed. (Rev., s. 741; Code, s. 305; C. C. P., s. 163; C. S. 780.)

§ 1-423. **Qualifications of bail.**—The qualifications of bail must be as follows:

1. Each of them must be a resident and freeholder within the state.

2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification is equivalent to that of two sufficient bail. (Rev., s. 740; Code, s. 306; C. C. P., s. 164; C. S. 781.)

Definition.—Bail are those persons who become sureties for the appearance of a defendant in court. *Bouvier's Law Dict.*, Vol. 2, p. 209.

Bond Should Show Facts.—A bail bond should show on its face that the surety is a resident and freeholder within the state, or his justification should establish these facts. *Howell v. Jones*, 113 N. C. 429, 18 S. E. 672.

§ 1-424. **Justification of bail.**—For the purpose of justification, each of the bail shall attend before the court or judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the court, judge or justice of the peace, in his discretion, may think proper. The examination must be reduced to writing and subscribed by

the bail, if required by the plaintiff. (Rev., s. 742; Code, s. 307; C. C. P., s. 165; C. S. 782.)

§ 1-425. **Allowance of bail.**—If the court, judge or justice of the peace finds the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk. The sheriff is then exonerated from liability. (Rev., s. 743; Code, s. 308; C. C. P., s. 166; C. S. 783.)

Purpose of Bail.—The main object of a bail bond taken to release the prisoner from custody in arrest and bail is to secure his presence to answer the process of the court and, for this purpose, to keep him within its jurisdiction, and not merely to obtain money upon his default. *Pickelsimer v. Glazener*, 173 N. C. 630, 92 S. E. 700.

§ 1-426. **Deposit in lieu of bail.**—The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall then give a certificate of the deposit to the defendant, who shall be discharged from custody. (Rev., s. 744; Code, s. 309; C. C. P., s. 167; C. S. 784.)

§ 1-427. **Deposit paid into court; liability on sheriff's bond.**—Within four days after the deposit the sheriff must pay it into court, and take from the officer receiving it two certificates of such payment, one of which he must deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency. (Rev., s. 745; Code, s. 310; C. C. P., s. 168; C. S. 785.)

Cross Reference.—As to payment by sheriff of money collected on execution, see section 162-18.

§ 1-428. **Bail substituted for deposit.**—If money is deposited, as provided in §§ 1-426 and 1-427, bail may be given and justified upon notice according to law at any time before judgment. Thereupon the judge, court or justice of the peace shall direct, in the order of allowance, that the money deposited be refunded by the sheriff or other officer to the defendant, and it shall be refunded accordingly. (Rev., s. 746; Code, s. 311; C. C. P., s. 169; C. S. 786.)

§ 1-429. **Deposit applied to plaintiff's judgment.**—When money has been deposited, and remains on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk or other officer shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment shall refund any surplus to the defendant. If the judgment is in favor of the defendant the clerk or other officer shall refund to him the whole sum deposited and remaining unapplied. (Rev., s. 747; Code, s. 312; C. C. P., s. 170; C. S. 787.)

§ 1-430. **Defendant in jail, sheriff may take bail.**—If a person for want of bail is lawfully committed to jail, at any time before final judgment, the sheriff, or other officer having him in custody, may take bail and discharge him; and the bail bond shall be regarded in every respect as other bail bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken. (Rev., s. 748; Code, s. 318; R. C., c. 11, s. 8; C. S. 788.)

§ 1-431. When sheriff liable as bail.—If, after arrest, the defendant escapes, or is rescued, or bail is not given or justified, or a deposit is not made instead thereof, the sheriff is himself liable as bail. But he may discharge himself from such liability by the giving and justification of bail at any time before process against the person of the defendant to enforce an order or judgment in the action. (Rev., s. 749; Code, s. 313; C. C. P., s. 171; C. S. 789.)

In General.—A sheriff who accepts an insufficient undertaking in arrest and bail proceedings, or who, after exceptions filed thereto by the plaintiff, fails to give notice of the time when and the place where the bail will justify, is liable as special bail to the plaintiff, and he will not be exonerated from liability by the fact that he acted in good faith in taking the insufficient bond, or by the fact that the plaintiff was nearby and knew what was going on when an alleged justification was being made by the surety. *Howell v. Jones*, 113 N. C. 429, 18 S. E. 672.

In *State v. Brittain*, 25 N. C. 17, it is said that after once taking the bail the sheriff, on finding the bail to be insufficient, has no right to rearrest the defendant, and that the defendant in such a case is justified in resisting the arrest. *State v. Queen*, 66 N. C. 615, 617.

Escape of Prisoner.—A sheriff having permitted one arrested by him upon mesne process in a civil action to go into an adjoining room, from which he escaped, subjected himself to the liability as bail. *Winborne & Bro. v. Mitchell*, 111 N. C. 13, 15 S. E. 882.

Same—Defendants Insolvent Immaterial.—When the sheriff is sued as bail he cannot give in evidence, in mitigation of damages, the defendant's insolvency. *Winborne & Bro. v. Mitchell*, 111 N. C. 13, 14, 15 S. E. 882.

Notice and Exceptions Unnecessary.—If the sheriff fails to take bail, the plaintiff need not file exceptions nor give notice to fix him as bail. *Adams v. Jones*, 60 N. C. 198.

Defective Bond Does Not Satisfy Section.—A paper, though intended as a bail bond, which is so defective and imperfect as to be adjudged not to be such, cannot be regarded as the taking of bail. *Adams v. Jones*, 60 N. C. 198, 199.

§ 1-432. Action on sheriff's bond.—If a judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned wholly or partly unsatisfied, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency. (Rev., s. 750; Code, s. 314; C. C. P., s. 172; C. S. 790.)

§ 1-433. Bail exonerated.—At any time before final judgment against them, the bail may be exonerated, either by the death of the defendant or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution of the judgment. (Rev., s. 751; Code, s. 303; C. C. P., s. 161; C. S. 791.)

Meaning of "State Prison."—The term "State prison," as used in this section, applies to either the penitentiary or the county jail. *Sedberry v. Carver*, 77 N. C. 319.

When Imprisonment Does Not Exonerate.—Where the imprisonment of a defendant under this section, expired before judgment was obtained, either against the principal in the original action or against the bail upon his undertaking: Held, that such imprisonment does not exonerate the bail. *Sedberry v. Carver*, 77 N. C. 319; *Adrian v. Scanlin*, 77 N. C. 317.

Imprisonment on Other Charges.—Upon the failure of defendant to appear when his case was called, judgment nisi was entered and sci. fa. and capias issued. Upon the hearing of the sci. fa., the surety showed that at the time of the call of the case defendant was incarcerated in another county of this state on other charges, that upon the subsequent trial in such other county defendant was sentenced to imprisonment, and that the surety had secured capias and filed same with the officials of the state's prison so that defendant would be surrendered to the court to stand trial

upon the expiration of his sentence. Held: Notwithstanding that this section relates only to bonds executed in arrest and bail proceedings, the bail will be exonerated during defendant's detention, since only the state and not the surety can produce the body of defendant, and judgment absolute against the surety should be stricken out and hearing on the sci. fa. continued until the surety has had opportunity to produce defendant after his release from prison. *State v. Eller*, 218 N. C. 365, 11 S. E. (2d) 295.

Exoneration by Surrender of Principal.—The obligors on the bond may, at any time before final judgment against them, be released by the defendant's voluntary surrender of his person, or his production by the obligors in accordance with the terms of the bond, etc., whereupon the liability of the latter ceases. *Pickelsimer v. Glazener*, 173 N. C. 630, 92 S. E. 700.

When Absolute Judgment Error.—Where a defendant and the sureties on his appearance bond appear in answer to a scire facias and show that defendant's failure to appear at a prior term of court in accordance with the terms of the bond was due to the fact that defendant had been turned over to a federal court by a prior bondsman and that defendant was then serving a sentence imposed by that court, it is error for the court to enter absolute judgment on the bond, the cases against defendant as well as the hearing on the scire facias being subject to continuance. *State v. Welborn*, 205 N. C. 601, 172 S. E. 174.

§ 1-434. Surrender of defendant.—At any time before final judgment against them, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and acknowledge the surrender by a certificate in writing.

2. Upon the production of a copy of the undertaking and sheriff's certificate, the court or judge may, upon a notice to the plaintiff of ten days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and papers used on said application they shall be exonerated accordingly. But this section does not apply to an arrest in an action to recover the possession of personal property unjustly detained, so as to discharge the bail from an undertaking given to the effect provided by law to be given by defendant for the retention of property, under the article entitled Claim and Delivery. (Rev., s. 752; Code, s. 300; C. C. P., s. 158; C. S. 792.)

Cross Reference.—As to surrender of defendant when he appears upon motion against the surety, see § 1-436 and annotations thereunder.

As to claim and delivery, see sections 1-472 to 1-484.

Where Prisoner Again Arrested.—Where in arrest and bail the prisoner under bail bond has been again arrested to await a warrant in extradition proceedings, and imprisoned in the jail of the county by the same sheriff, semble, upon the refusal of the sheriff to receive the prisoner from the obligors on the bail bond, that the trial judge upon hearing the obligors' motion should order the prisoner retained in custody pending the action of the Governor, who, upon notification, may consider the rights of our own courts as being prior to those of other jurisdiction, and hold the prisoner to answer in our courts. *Pickelsimer v. Glazener*, 173 N. C. 630, 92 S. E. 700.

§ 1-435. Bail may arrest defendant.—For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority endorsed on a certified copy of the undertaking may empower any person over twenty-one years of age to do so. (Rev., s. 753; Code, s. 301; C. C. P., s. 159; C. S. 793.)

In General.—Where a prisoner in arrest and bail is released from custody of the law upon bail, the principal is

regarded as delivered to the custody of his sureties under the original process, who may thereafter seize and deliver him in discharge of their liability, or imprison him temporarily when necessary until this can be done, exercising this right in person or by agent in this or another State, upon the Sabbath or otherwise, and, if necessary, break and enter his house for that purpose. *Pickelsimer v. Glazener*, 173 N. C. 630, 92 S. E. 700.

§ 1-436. Proceedings against bail by motion.—

In case of failure to comply with the undertaking the bail may be proceeded against by motion in the cause on ten days' notice to them. (Rev., s. 754; Code, s. 302; C. C. P., s. 160; C. S. 794.)

Cross Reference.—As to when the statute of limitations runs against an action under this section, see section 1-52, par. 7.

Motion Must Be Brought Within Three Years.—Proceedings against bail, in civil actions, are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the state in the meantime. *Albemarle Steam etc., Co. v. Williams*, 111 N. C. 35, 15 S. E. 877.

Principal's Insolvency No Defense.—Insolvency of the principal is no defense to an action against the bail. *Winborne & Bro. v. Mitchell*, 111 N. C. 13, 15 S. E. 882.

When Action Against Bail Lies.—Where the debtor is released upon bail, the creditor may proceed to judgment, and issue execution against the debtor's property, and afterwards against his person, if returned "nulla bona"; and should the latter writ be returned "non est inventus," the plaintiff may move on ten days' notice for judgment against the bail, making available to the latter all defenses he may have as to the surrender of his principal; and a judgment rendered against him at an intermediate stage of the proceedings is reversible error. *Pickelsimer v. Glazener*, 173 N. C. 630, 92 S. E. 700.

Where the defendant, appeared in open court, in response to notice served upon his surety or bail, he was then "amenable to the process of the court," notwithstanding his refusal thus to surrender himself, and the court should have ordered execution against the person of the defendant, rather than hold the surety or bail, for failure to surrender him. *Stepp v. Robinson*, 203 N. C. 803, 804, 167 S. E. 147.

§ 1-437. Liability of bail to sheriff.—The bail taken upon the arrest are, unless they justify, or other bail are given or justified, liable to the sheriff by action for damages which he may sustain by reason of such omission. (Rev., s. 755; Code, s. 315; C. C. P., s. 173; C. S. 795.)

§ 1-438. When bail to pay costs.—When a notice issues against a person, as the bail of another, and the bail, at or before the term of the court at which he is bound to appear, or ought to plead, is not discharged from his liability by the death or surrender of his principal or otherwise, he is liable for all costs which accrue on said notice, notwithstanding he may be afterwards discharged, by the death or surrender of the principal, or otherwise. (Rev., s. 756; Code, s. 319; R. C., c. 11, s. 10; C. S. 796.)

Certain Costs Not Allowed.—The costs allowed against bail, notwithstanding a surrender, &c., do not include such as are incurred on account of an improper and ineffectual appeal. *Clark v. Latham*, 53 N. C. 1.

§ 1-439. Bail not discharged by amendment.—No amendment of process or pleading discharges the bail of the party arrested thereon, unless it enlarges the sum demanded beyond the sum expressed in the bail bond. (Rev., s. 757; Code, s. 320; R. C., c. 11, s. 11; C. S. 797.)

Art. 35. Attachment.

§ 1-440. In what actions attachment granted.—A warrant of attachment against the property of one or more defendants in an action may be granted upon the application of the plaintiff, as

specified in this article, when the action is to recover a sum of money only, or damages for one or more of the following causes:

1. Breach of contract, express or implied.
2. Wrongful conversion of personal property.
3. Any other injury to real or personal property, in consequence of negligence, fraud, or other wrongful act.
4. Any injury to the person, caused by negligence or wrongful act. (Rev., s. 758; Code, s. 347; C. C. P., s. 197; 1893, c. 77; 1901, c. 740; C. S. 798.)

Editor's Note.—In chapter 7 section 16 of the Rev. Code it was provided that an attachment would lie against the property of one who injured the person or property of another, and within three months thereafter absconded from the State. The attachment had to be issued within three months from the time of the injury. For cases under this old provision, see *Blankinship v. McMahon*, 63 N. C. 180; *Webb v. Bowler*, 50 N. C. 362.

Definitions and Object.—An order of attachment is an execution by anticipation. It empowers the officer to seize and hold the estate of the alleged debtor for the satisfaction of a claim or demand to be established in the future and for which a judgment may never be obtained. See *Green v. Van Buskirk*, 7 Wall. 139, 149, 19 L. Ed. 109.

Attachment is a mesne process, merely an incident to a suit. *Ex parte Des Moines, etc., R. Co.*, 103 U. S. 794, 796, 26 L. Ed. 46.

The object of the writ is to enable the plaintiff to obtain a lien upon the property which may be subsequently enforced by a sale upon execution, if judgment be obtained. *Roller v. Holly*, 176 U. S. 398, 406, 20 S. Ct. 410, 44 L. Ed. 520, 523.

Origin of the Writ.—Attachment, other than the common-law writ which issued out of the common pleas upon the non-appearance of the defendant at the return of the original writ, had its origin in the civil law, and afterwards was adopted in England in the form of a custom of the London merchants, and out of this, as modified and extended by statute, has grown the modern law in respect to this remedy. It was resorted to in order to compel the attendance of the debtor as well as to afford a security to the creditor. *Grocery Co. v. Bag Co.*, 142 N. C. 174, 177, 55 S. E. 90. See *Chinnis v. Cobb*, 210 N. C. 104, 185 S. E. 638.

History of the Section.—Under the Code of 1868, as originally enacted, this provisional remedy was allowed in actions on a contract for the recovery of money only, or in actions for wrongful conversion of personal property; and several decisions of the court, construing the first clause of the statute, held that an attachment was only permissible for breaches of contract involving the recovery of liquidated damages, or damages which could be limited and defined by some standard or data contained in the contract itself. See *Price v. Cox*, 83 N. C. 261; *Wilson v. St. Louis Cook Mfg. Co.*, 88 N. C. 5. Shortly after these decisions were announced, the statute was amended so as to provide the remedy for breach of contract (express or implied), wrongful conversion of personal property, any other injury to personal property in consequence of negligence, fraud or other wrongful act. Code 1883, section 347. The legislature of 1893 (chapter 77) added "injuries to real property" to the section, and in 1901 there was another amendment adding, "or any injury to the person, caused by negligence or other wrongful act," making the law on the subject as it now appears. *Worth v. Knickerbocker Trust Co.*, 151 N. C. 191, 194, 65 S. E. 918.

The amendment of 1901 showed the intent of the Legislature to broaden the right to this writ, and make the same almost coextensive with any well grounded demand for a judgment in personam. And there is no valid reason for the distinction between actions for slander and libel, and any other demand for unascertained and unliquidated damages for injuries to the person. *Tisdale v. Eubanks*, 180 N. C. 153, 156, 104 S. E. 339.

Nature and Function.—An attachment is not the foundation of an independent action, but is an ancillary and auxiliary remedy collateral to the action. *Marsh v. Williams*, 63 N. C. 371; *Toms v. Warson*, 66 N. C. 417. Its function is to seize the property of a defendant and hold it within the grasp of the law until the trial can be had and the rights of the parties determined, or it may be released pending the action if seized without proper cause. In no sense is it a process to bring the defendant into court. It may be issued to accompany the summons, or at any time there-

after. *Ditmore v. Goins*, 128 N. C. 325, 328, 39 S. E. 61. See *Chinnis v. Cobb*, 210 N. C. 104, 185 S. E. 638.

Created by Statute.—Attachment is the creature of local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied there. *Harris v. Balk*, 198 U. S. 215, 222, 25 S. Ct. 625, 49 L. Ed. 1023.

Conflict between State and Federal Jurisdiction.—In case of conflict of authority under a state and federal process, in order to avoid unseemly collision between them, the question as to which authority should for the time prevail does not depend upon the rights of the respective parties to the property seized, whether the one is paramount to the other, but upon the question as to which jurisdiction has first attached by the seizure and custody of the property under its process. *Covell v. Heyman*, 111 U. S. 176, 177, 4 S. Ct. 355, 28 L. Ed. 390.

And this rule applies notwithstanding the fact that the property has been brought into custody by illegal means. *Gumbel v. Pitkin*, 124 U. S. 131, 155, 8 S. Ct. 379, 31 L. Ed. 374.

Defects or Irregularities.—The court will not be deprived of the jurisdiction which it has acquired by the levy of a writ of attachment by the fact that the affidavit may have been defective, or that the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities. *Copper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931.

Custody of the Law.—Property in custodia legis is not subject to levy under process which would have the effect of taking it out of his possession and control. *Gumbel v. Pitkin*, 124 U. S. 131, 156, 8 S. Ct. 379, 31 L. Ed. 374.

Possession of Goods.—As a general rule it matters not in whose possession the property is found, if the taking be otherwise rightful. *Livingston v. Smith*, 5 Pet. 90, 98, 8 L. Ed. 57.

A defendant's property or choses in action in the hands of third persons may be attached under this section. *Newberry v. Meadows Fertilizer Co.*, 206 N. C. 182, 173 S. E. 67.

An Unusual Writ.—There is a marked distinction between the ordinary writ and an attachment. In this latter the plaintiff is allowed to get a judgment against the defendant without personal service of process, which is contrary to the course of the common law, and as a protection to the absent defendant, the statute requires all the material facts to be set out in an affidavit, which is made the ground work of this proceeding. *Webb v. Bowler*, 50 N. C. 362, 364.

A Proceeding Quasi in Rem.—Attachment of the property of nonresident defendants in this state is a proceeding quasi in rem, for the purpose of bringing him under the jurisdiction of the state court for the purpose of determining the controversy in the action brought against him, when properly constituted. *Mohn v. Cressey*, 193 N. C. 568, 137 S. E. 718.

Strict Construction.—In 2 Lewis's *Sutherland on Statutory Construction* (2 Ed.), sec. 566, p. 1049, it is stated: "A party seeking the benefit of such a statute must bring himself strictly, not within the spirit, but within the letter; he can take nothing by intentment The remedy by attachment is special and extraordinary, and the statutory provisions for it must be strictly construed, and cannot have force in cases not plainly within their terms." And the decisions of this state are in full approval of this position. *Skinner v. Moore*, 19 N. C. 138; *State Bank v. Hinton*, 12 N. C. 397, 398; *Carson v. Woodrow*, 160 N. C. 143, 75 S. E. 996.

In *State Bank v. Hinton*, 12 N. C. 397, it was said by the court, in speaking of the attachment law, that "there is no law in the statute book which more imperiously demands a strict construction; for the property of an absentee may be sold upon an attachment wrongfully sued out before he is appraised of the proceeding, and, if he then should discover that no bond and affidavit were taken and returned, his remedy must at best be very imperfect." *Leak v. Moorman*, 61 N. C. 168.

But where, in a proceeding of attachment, it appears from the whole record that the provisions of the statute have been substantially complied with, the action will not be dismissed nor the attachment dissolved. *Grant v. Burgwyn*, 79 N. C. 513; *Best v. British, etc., Mortg. Co.*, 128 N. C. 351, 38 S. E. 923; *Page v. McDonald*, 159 N. C. 38, 41, 74 S. E. 642.

Unliquidated Damages.—Previous to 1893, in a number of cases arising under the section, it was held that the remedy of attachment was confined to actions upon contracts in which the amount of damages could be specified in the affidavit; and that the remedy would not apply if the action be one for unliquidated damages. See *Price v. Cox*, 83 N. C. 261; *Wilson v. St. Louis Cook Mfg. Co.*, 88 N.

C. 5; *Mullen v. Norfolk, etc., Canal Co.*, 114 N. C. 8, 19 S. E. 106.

But since the amendment of 1893 the issuance of the writ has been upheld in actions for money, and for unliquidated damages in the cause specified, and for none other. *Judd v. Crawford Gold Min. Co.*, 120 N. C. 397, 27 S. E. 81; *Long v. Home Ins. Co.*, 114 N. C. 465, 19 S. E. 347; *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198; *Tisdale v. Eubanks*, 180 N. C. 153, 156, 104 S. E. 339.

An attachment can be granted under this section, in an action for unliquidated damages before judgment. *Newberry v. Meadows Fertilizers Co.*, 206 N. C. 182, 188, 173 S. E. 67.

Meaning of "Property."—*Webb v. Bowler*, 50 N. C. 362 was an action where the validity of an attachment was in question, and it was held that the term "property" should be confined to tangible property, and that a false warranty or deceit in the sale of personal property was not an injury to the property of another, within the meaning of the statute. Since these decisions were rendered, however, and probably in consequence of them, this restricted significance of the word "property," when used in statutes or the rule of interpretation on the question presented, has been altered by express enactment, section 12-3. *Worth v. Knickerbocker Trust Co.*, 151 N. C. 191, 195, 65 S. E. 918.

When Attachment Lies.—An action is clearly one in which the writ of attachment is allowed where the wrong alleged is an injury by which the plaintiff's interest and investment in a power company has been wrongfully destroyed or very greatly impaired. *Worth v. Knickerbocker Trust Co.*, 151 N. C. 191, 196, 65 S. E. 918.

An attachment in equity will lie against the principal, even though the remedy at law against his surety has not been exhausted. *Alexander v. Taylor*, 62 N. C. 36.

Same—Slander.—The security of a person's good name and reputation is within his personal rights as a citizen, and slander thereof is an injury to his person, and will sustain a proceeding for an attachment within the intent and meaning of this section, as an "injury to the person by wrongful act." *Tisdale v. Eubanks*, 180 N. C. 153, 104 S. E. 339.

Same—Death by Wrongful Act.—The history of legislation as to attachments culminating in this section, shows a legislative intent to broaden the right of this writ to make the same almost coextensive with any well-grounded demand for judgment in personam, and is sufficiently comprehensive to include the action for "causing the death of another by wrongful act, neglect, or default of another." *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882.

Only property which is subject to execution is attachable. *Chinnis v. Cobb*, 210 N. C. 104, 109, 185 S. E. 638, citing *Willis v. Anderson*, 188 N. C. 479, 124 S. E. 834.

Attachment may be levied on land as under execution, and whatever interest the debtor has subject to execution may be attached, but the debtor must have some beneficial interest in the land. *Chinnis v. Cobb*, 210 N. C. 104, 109, 185 S. E. 638, citing *Willis v. Anderson*, 188 N. C. 479, 124 S. E. 834.

Interest in Land under Spendthrift Trust Not Subject to Attachment.—Plaintiff attached property which had belonged to defendant's mother prior to her death. Thereafter the will was probated which devised the property in trust for defendant under a spendthrift trust. It was held that defendant took nothing as heir at law of her mother, and her interest in the land under the spendthrift trust was not subject to attachment, and the fact that the attachment was attempted to be levied prior to the probate of the will created no lien on the land. *Chinnis v. Cobb*, 210 N. C. 104, 185 S. E. 638.

Tax Books of Sheriff Not Liable.—Though a sheriff, who has settled for the taxes due on a tax list which have not been paid to him, may collect the same within the time allowed by law, yet the tax books, showing the debts thus due him, cannot be attached by a creditor to whom he is indebted. *Davie v. Blackburn*, 117 N. C. 383, 23 S. E. 321.

Bill Can Name Several Persons.—A bill seeking an attachment, on account of a single claim, is not multifarious because it prays that such attachment issue against property in the hands of various persons, or because it seeks from such persons an account of their respective dealings with the debtor. *Alexander v. Taylor*, 62 N. C. 36.

An intervener in an action wherein attachment on the defendant's property has been issued, who claims a prior lien by reason of a former order of court in another and independent proceeding, becomes party to the present action and may not successfully attack the validity of the proceedings in attachment, and the question of priority is left to be determined in the present action. *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882.

An action to cancel judgment of retraxit will not sup-

port the service of process by publication and attachment, since it is not one to recover a sum of money only nor damages for one or more of the causes of action enumerated in this section. *Stevens v. Cecil*, 216 N. C. 350, 4 S. E. (2d) 879.

Applied in *Banner v. Carolina Button Corp.*, 209 N. C. 697, 184 S. E. 508.

Cited in *Farmers Federation v. Lockman*, 198 N. C. 77, 150 S. E. 673.

§ 1-441. Affidavit must show what.—To entitle the plaintiff to a warrant of attachment he must show by affidavit to the satisfaction of the court as follows:

1. That one of the causes of action specified in § 1-440 exists against the defendant. If the action is to recover damages for breach of contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him.

2. That the defendant is either a foreign corporation or a nonresident of the state, or a domestic corporation none of whose officers can be found in the state after due diligence; or, if he is a natural person and a resident of the state, that he has departed therefrom, or keeps himself concealed therein, with intent to defraud his creditors or to avoid service of summons; or, if the defendant is a natural person or a domestic corporation, that he or it has removed, or is about to remove, property from the state, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property with like intent. (Rev., s. 759; Code, s. 349; C. C. P., s. 201; 1897, c. 476; C. S. 799.)

I. In General.

II. The Affidavit.

A. Necessary Allegations.

B. What Can Be Omitted.

C. Amendment.

III. Pleading and Practice.

I. IN GENERAL.

Editor's Note.—In *Abrams v. Pender*, 44 N. C. 260, it was decided that, under the section as it then read, it was required that the removal of the defendant should have been fraudulent or with intent to evade the process before an attachment lay. But an attachment is now made a provisional remedy in the progress of a cause and can be sued out whenever the defendant is a non-resident regardless of intent. *Wheeler v. Cobb*, 75 N. C. 21, 26.

Strict Construction.—The provisions of this section must be strictly followed. *Spiers v. Halstead*, etc., Co., 71 N. C. 209, 210; *Wheeler v. Cobb*, 75 N. C. 21, 24; *Leak v. Moorman*, 61 N. C. 168.

By Whom Made.—An affidavit in attachment may be made generally by the plaintiff, his agent or attorney. *Henrietta Min.*, etc., Co. v. *Gardner*, 173 U. S. 123, 19 S. Ct. 327, 43 L. Ed. 640.

When One a Non-Resident.—Where one voluntarily removes from this to another state, for the purpose of discharging the duties of an office of indefinite duration, which requires his continued presence there for an unlimited time, such a one is a nonresident of this state for the purpose of an attachment, and that notwithstanding he may occasionally visit this state, and that he may have the intent to return at some uncertain future time. *Wheeler v. Cobb*, 75 N. C. 21, 26.

But the fact that a person leaves the state to seek work, for the purpose of prospecting with a view to change his residence if desirable, does not sustain an attachment on the ground that the defendant was a nonresident. *Mahoney v. Tyler*, 136 N. C. 40, 43 S. E. 549.

One who has left the State for an indefinite time, his return depending upon a doubtful contingency, is a non-resident under subsection 2 of this section notwithstanding he may intend to return at some time in the future, and his motion made by special appearance to vacate the attachment on the ground of residence will be denied. *Brann v. Hanes*, 194 N. C. 571, 140 S. E. 292.

Domicile is not determinative of the question whether one is a nonresident within the meaning of such subsection. Nor is the cause of the absence, such as severe illness,

material if such absence prevents personal service of summons upon him during an indefinite period of time. *Brann v. Hanes*, 194 N. C. 571, 140 S. E. 292.

Intent.—This section, authorizing a warrant of attachment where a fraudulent disposition of property is made as against creditors, relates to the intent with which it is disposed of, and not to the manner in which the property is acquired. *Howland v. Marshall*, 127 N. C. 427, 37 S. E. 462.

Affidavit Necessary in Attachment.—In order for the valid issuance of an attachment from the superior court, it is necessary that the requisite facts be shown to the court by an affidavit of prescribed form and substance under this section. *Carson v. Woodrow*, 160 N. C. 143, 75 S. E. 996.

Submission to Jurisdiction as Relieving from Attachment.

—Where the service by publication and attachment on a defendant absent from the State comes within the provisions of § 1-98 and subsection 2 of this section, and thereunder his property here has been attached as required to give validity to the publication of service, he may submit himself to the jurisdiction of the court and relieve his property of the levy in attachment. *Brann v. Hanes*, 194 N. C. 571, 140 S. E. 292.

Cited in *Bizzell v. Mitchell*, 195 N. C. 484, 142 S. E. 706; *Farmers Federation v. Lockman*, 198 N. C. 77, 150 S. E. 673.

II. THE AFFIDAVIT.

A. Necessary Allegations.

Specific.—The affidavit to procure an attachment must be specific. *Bacon v. Johnson*, 110 N. C. 114, 14 S. E. 508, and must set forth one of the grounds recited in this section. *Mullen v. Norfolk*, etc., Canal Co., 114 N. C. 8, 10, 19 S. E. 106.

Grounds of Belief Must Be Stated.—Where the plaintiff makes oath that he believes or apprehends the property will be removed, he must also state the grounds of apprehension. *Penniman v. Daniel*, 90 N. C. 154.

When the affidavit is that the defendants are "about to assign or dispose of their property with intent to defraud the plaintiffs," which is not the assertion of a fact, but necessarily of a belief merely, the grounds upon which such belief is founded must be set out so that the court may adjudge if they are sufficient. *Hughes v. Person*, 63 N. C. 548; *Gashine*, etc., Co. v. *Baer*, 64 N. C. 108; *Clark v. Clark*, 64 N. C. 150; *Penniman v. Daniel*, 90 N. C. 154. *Judd v. Crawford Gold Min. Co.*, 120 N. C. 397, 399, 27 S. E. 81. And if not set out the affidavit is fatally defective. *First Nat. Bank v. Tarboro Cotton Factory*, 179 N. C. 203, 102 S. E. 195.

Examples of Sufficient Statement.—Affidavits for publication of the summons and notice of attachment are sufficient when they show that the defendant cannot, after due and diligent search, be found in this state, that he is a non-resident and has property here of which the court has jurisdiction, and that the plaintiff has a cause of action against the defendant, arising out of a contract by which he expressly promises to pay a specific sum to the plaintiff for services rendered at his request, which sum is still due and owing. *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642.

An affidavit for an attachment is sufficient which states that the defendant is a nonresident and has property in this state, or has removed, or is about to remove some of his property from this state with intent to defraud his creditors. The statute puts the modes in the alternative, and the plaintiff succeeds if he establishes either. *Penniman v. Daniel*, 90 N. C. 154.

In proceedings for attachment an affidavit is sufficient which sets out: 1st., that the defendant is indebted, etc.; 2d., that the defendant has departed from this state with intent, as the affiant is informed and believes, to avoid the service of summons. *Hess*, etc., Co. v. *Brower*, 76 N. C. 428.

B. What Can Be Omitted.

Absence of Defendant.—It is not requisite, and therefore need not be averred, that the defendant can not be found in the state in order to procure a warrant of attachment. *Luttrell v. Martin*, 112 N. C. 593, 605, 17 S. E. 573.

Defendant's Property.—It is not necessary that the affidavit upon which an attachment is sought should state that the defendant has property in this state. *Branch v. Frank*, 81 N. C. 180. *Foushee v. Owen*, 122 N. C. 360, 363, 29 S. E. 770; *Parks v. Adams*, 113 N. C. 473, 476, 18 S. E. 665 overruling *Windley v. Bradway*, 77 N. C. 333 and *Spiers v. Halstead*, etc., Co., 71 N. C. 209.

Jurisdiction of Court.—Where, in proceedings for attachment, it sufficiently appears of record that the court had jurisdiction of the subject-matter, it is unnecessary that the affidavit of the attaching creditors specifically allege its jurisdiction. *County Sav. Bank v. Tolbert*, 192 N. C. 126, 133 S. E. 558. *Page v. McDonald*, 159 N. C. 38, 43,

74 S. E. 642; *Bacon v. Johnson*, 110 N. C. 114, 14 S. E. 508; *Davis v. Davis*, 179 N. C. 185, 102 S. E. 270.

When Made by Agent.—An affidavit made by an agent under this section need not state why it is not made by the principal. *Bruff, etc., Co. v. Stern & Bro.*, 81 N. C. 183; *Sheldon v. Kivett*, 110 N. C. 408, 14 S. E. 970.

Defective Statement.—An affidavit for a warrant of attachment, under this section, which states "that the defendant is absent so that the ordinary process of law cannot be served upon him," without an averment that the absence "was with intent to defraud his creditors and to avoid the service of summons," is fatally defective. *Love & Co. v. Young*, 69 N. C. 65.

The affidavit, upon which a warrant of attachment has been issued, which alleges that the defendant is about to assign, dispose of and secrete money or goods with intent to defraud creditors, without setting forth the grounds upon which this belief is based, is fatally defective. *First Nat. Bank v. Tarboro Cotton Factory*, 179 N. C. 203, 102 S. E. 195.

C. Amendment.

Court Can Allow Amendment.—It is settled that an affidavit can be amended by leave of the court, granted in its discretion, even though the first affidavit was wholly insufficient. *Brown, etc., Co. v. Hawkins*, 65 N. C. 645; *Branch v. Frank*, 81 N. C. 180; *Bank v. Blossom*, 92 N. C. 695; *Penniman v. Daniel*, 93 N. C. 332; *Cushing v. Styron*, 104 N. C. 338, 10 S. E. 258. *Sheldon v. Kivett*, 110 N. C. 408, 14 S. E. 970.

Same—Effect of Findings.—An affidavit on attachment defective in failing to set forth the facts as to defendant's being about to leave the State, etc., may be amended by permission of court, and where the court has found with plaintiff upon conflicting oral evidence, his findings have the effect of an amendment allowed by him. *Thornburg v. Burton*, 197 N. C. 193, 148 S. E. 28.

Relates Back to Beginning.—An amendment of an insufficient affidavit in attachment relates back to the beginning of the proceedings, and no rights based on such irregularity can be acquired by third parties by subsequent attachments intervening between the original affidavit and the amendment. *Cook v. New York Corundum Min. Co.*, 114 N. C. 617, 19 S. E. 664.

Error for Clerk to Refuse.—A plaintiff has a right to amend his affidavit as to mere matters of form, and if he is ready to swear to the amended affidavit it is error in the clerk to refuse it. *Palmer v. Boshier*, 71 N. C. 291.

No Appeal from Court's Order.—From the leave to amend the affidavit no appeal lies. *Lippard v. Roseman*, 72 N. C. 427; *Henry v. Cannon*, 86 N. C. 24; *Wiggins v. McCoy*, 87 N. C. 499; *Jarrett v. Gibbs*, 107 N. C. 303, 12 S. E. 272. *Sheldon v. Kivett*, 110 N. C. 408, 14 S. E. 970; *Cook v. New York Corundum Min. Co.*, 114 N. C. 617, 19 S. E. 664.

III. PLEADING AND PRACTICE.

Court Finds Facts.—In attachment and other ancillary proceedings it is competent for the court to find the facts from the affidavits and other evidence; and a party consenting to this mode of trial cannot afterwards demand a jury trial. *Pasour v. Lineberger*, 90 N. C. 159.

Determination of Validity.—The validity of a warrant of attachment is determined upon facts alleged in the original affidavit and existing at the time when the proceeding is instituted, not upon new matter which may have afterwards transpired. *Devries & Co. v. Summit*, 86 N. C. 126.

Insufficient Cause.—The trial judge may vacate an attachment pending trial where it plainly appears from the pleadings that the action of the plaintiff must fail. *Knight v. Hatfield*, 129 N. C. 191, 39 S. E. 807.

Remedy When Affidavit Defective.—A plea in abatement is the proper mode of taking advantage of a defect in the affidavit for an attachment. *Leak v. Moorman*, 61 N. C. 168.

Collateral Attack.—The validity of the affidavit cannot be collaterally attacked. *Wehrman v. Conklin*, 155 U. S. 314, 15 S. Ct. 129, 29 L. Ed. 167.

Appeal.—Where an appeal is taken from a refusal to discharge an attachment, the court below cannot in the meantime allow a motion "to dismiss" the same to be entered, for the appeal takes the case out of its jurisdiction. *Pasour v. Lineberger*, 90 N. C. 159.

The findings of fact of the clerk of the Superior Court, on a motion to vacate an attachment, supported by the evidence and approved by the judge, are not subject to review on appeal to the Supreme Court. *Brann v. Hanes*, 194 N. C. 571, 140 S. E. 292.

§ 1-442. Affidavit to be filed.—It is the duty of the plaintiff procuring a warrant of attachment, within ten days from its issuance, to file the affi-

davit on which it was granted in the office of the clerk of the superior court to which, or with the justice of the peace before whom, the process is returnable. (Rev., s. 760; Code, s. 355; C. C. P., s. 201; C. S. 800.)

§ 1-443. By whom granted.—If the action is not founded on a contract, or if founded on a contract and the sum demanded exceeds two hundred dollars, a warrant of attachment may be obtained from the judges of the district embracing the county in which the action was begun, or from the clerk of the superior court from which the summons in the action issued; and it may be issued to any county in the state where the defendant has property, money, effects, choses in action, or debts due him, and shall be made returnable before the clerk at the same time and place to which the summons is returnable. (Rev., s. 761; Code, s. 351; C. C. P., s. 199; 1869-70, c. 147; 1870-1, c. 166, ss. 1, 3; 1874-5, c. 111; 1876-7, c. 251; Ex. Sess. 1921, c. 92, s. 17; C. S. 801.)

Cross Reference.—As to return of summons, see § 1-89.

Editor's Note.—Prior to 1921 the last clause in this section read "and shall be made returnable in term time to the court from which the summons issued." By Public Laws, Ex. Sess., 1921, Ch. 92, Sec. 17, this clause was changed to read "and shall be made returnable before the clerk at the same time and place to which the summons is returnable."

Clerk Can Grant Attachment Out of Term Time.—The clerk of the court, acting as and for the court, has authority out of term time to grant the warrant of attachment, and likewise to allow all proper amendments in that respect and connection. *Howland v. Marshall*, 127 N. C. 427, 429, 37 S. E. 462. *Cushing v. Styron*, 104 N. C. 338, 10 S. E. 258.

A Ministerial Act.—The clerk only acts ministerially in issuing the process for attachment. *Evans v. Etheridge*, 96 N. C. 42, 1 S. E. 633.

Clerk May Grant When He is Plaintiff.—A clerk of the superior court, upon making the necessary affidavit before some person authorized by law, may issue a warrant of attachment in an action in which he is plaintiff. *Evans v. Etheridge*, 96 N. C. 42, 1 S. E. 633.

Issuance of Blank Forms Not Permitted.—When an attachment form in blank, including a form for the affidavit, has been signed by the clerk and delivered to the attorney of the party seeking the attachment, upon condition that he properly fill out the papers and give sufficient bond, the writ and the levy thereunder are both void, though subsequently approved by the clerk. *Carson v. Woodrow*, 160 N. C. 143, 75 S. E. 996.

When Clerk Denies Amendment.—Where the clerk refuses to allow an amendment he may, and should, state his reason for such refusal, even after appeal to the court in term. *Cushing v. Styron*, 104 N. C. 338, 10 S. E. 258.

Appeal from Clerk's Decision.—From the decision of the clerk in granting a warrant of attachment an appeal lies to the judge. *Howland v. Marshall*, 127 N. C. 427, 429, 37 S. E. 462. *Cushing v. Styron*, 104 N. C. 338, 10 S. E. 258.

§ 1-444. Time of issuance; service of summons.—The warrant of attachment may be granted to accompany the summons, or at any time thereafter. Personal service of the summons must be made upon the defendant against whose property the attachment is granted, within thirty days after its granting, or else, upon the expiration of the same time, service of summons by publication must be commenced pursuant to an order obtained therefor, and if publication has been or is thereafter commenced, the service must be made complete by the continuance thereof. (Rev., s. 762; Code, s. 348; C. C. P., s. 197; C. S. 802.)

Cross Reference.—As to when service by publication can be resorted to, and for the meaning of "due diligence" in such cases, see section 1-98 and annotations thereunder.

Service by Publication.—The provisions of the Code, authorizing the attachment of the property of a non-resident defendant upon constructive service of a summons by publication, have many of the features of the foreign attachment. Such proceeding is an extraordinary and summary remedy, and is in derogation of the common law and statute law of the United States, and cannot be recognized in a case commenced in a Federal court. Even in a State court the plaintiff must strictly and technically perform all the conditions required by the statute entitling him to such remedy. Jurisdiction in such cases cannot be acquired or enlarged by implication and liberal construction. *Lackett v. Rumbaugh*, 45 Fed. 23, 29.

"Within Thirty Days" Not Applicable to Publication.—Under this section publication is not required to be made, like personal service of summons, "within thirty days after the attachment granted," but must be commenced upon expiration of the thirty days, that means "after" the expiration of the thirty days, and where publication was begun on the day after the expiration of the thirty days, that strictly conforms to the statute. *Mills v. Hansel*, 168 N. C. 651, 652, 85 S. E. 17.

The publication of summons and attachment was not irregular because commenced within thirty days from the time of issuing the summons. *Currie v. Golconda Mining, etc., Co.*, 157 N. C. 209, 72 S. E. 980.

Time Can Be Extended.—In *Finch v. Slater*, 152 N. C. 155, 156, 67 S. E. 264, it is held that where the court has acquired jurisdiction by attachment of property, the time for serving summons by publication, when it has not been properly made, can be extended in the discretion of the court. *Mills v. Hansel*, 168 N. C. 651, 653, 85 S. E. 17.

Main Action Commenced By Summons.—The warrant of attachment is only a provisional or ancillary remedy in and dependent upon a main action commenced by the issuing of a summons. *Lackett v. Rumbaugh*, 45 Fed. 23, 29.

When Summons Unnecessary.—In proper instances, where civil actions are commenced and service is obtained by attachment of the defendant's property and publication of a notice based upon the jurisdiction thus acquired, the issuance of a summons at the commencement of the action is unnecessary. *Jenette v. Hovey & Co.*, 182 N. C. 30, 108 S. E. 301.

Same—Section 7-136 Not Applicable.—In attachment and publication on a nonresident defendant before a justice of the peace, where the defendant's property within the jurisdiction of the court has been levied on, a summons is not required; and therefore the requirements of sec. 7-136, that the summons must be made returnable not more than thirty days after its issuance, are inapplicable. *Best v. British, etc., Mortg. Co.*, 128 N. C. 351, 352, 38 S. E. 923, cited and affirmed by *Walker, J.*, in *Grocery Co. v. Collins Bag Co.*, 142 N. C. 174, 55 S. E. 90, and by *Allen, J.*, in *Currie v. Golconda Min., etc., Co.*, 157 N. C. 209, 217, 72 S. E. 980. *Mills v. Hansel*, 168 N. C. 651, 85 S. E. 17.

Where Nonresident Has No Actual Notice.—A nonresident defendant in attachment proceedings, against whom judgment has been rendered under service of summons by publication, and who has not had actual notice of the action until after the judgment had been rendered, may, as a matter of right upon showing that he has a good and meritorious defense, have the judgment vacated by motion within the statutory period, and he can avail himself of any defense he originally had. *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642.

Proceedings When Notice Not Duly Served.—If the notice was not duly served by the publication, it was error to discharge an attachment granted as ancillary to an action because of the insufficiency of the affidavit to obtain service of the summons by publication, for it is possible that the defect may be cured by amendments. *Branch v. Frank*, 81 N. C. 180. *Mills v. Hansel*, 168 N. C. 651, 652, 85 S. E. 17.

The remedy is not to dismiss the attachment, but by ordering a republication, for, as the defendant is a nonresident, to dismiss the attachment may deprive the plaintiff of all remedy by the removal of the property before a new proceeding and attachment can be had. *Price v. Cox*, 83 N. C. 261; *Penniman v. Daniel*, 90 N. C. 154, 159; *Penniman v. Daniel*, 93 N. C. 332. *Mills v. Hansel*, 168 N. C. 651, 652, 85 S. E. 17.

Cited in *Bizzell v. Mitchell*, 195 N. C. 484, 487, 142 S. E. 706.

§ 1-445. Undertaking.—The officer, before issuing the warrant, must require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recovers judgment, or the attachment is set aside by order of the court, the plaintiff will pay all costs that

are awarded to the defendant, and all damages which he sustains by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least two hundred dollars. (Rev., s. 763; Code, s. 356; C. C. P., s. 202; C. S. 803.)

Separate Action By Successful Defendant.—This section clearly implies that the successful defendant in attachment must seek relief in a separate action on the undertaking. *Mahoney v. Tyler*, 136 N. C. 40, 43, 48 S. E. 549.

Mistake in Signing Undertaking.—Where, by mistake, the surety on the undertaking of the plaintiff signs his name to the justification of the undertaking instead of to the undertaking itself, this is held to be a valid and binding undertaking. *Boger v. Cedar Cove Lumber Co.*, 165 N. C. 557, 559, 81 S. E. 784.

Misjoinder of Principal and Surety.—An action will not be dismissed for a misjoinder of parties where the plaintiff is suing, in the same action, the principal and surety on an attachment bond. The remedy is by motion to have the causes divided. *Smith v. American Bonding Co.*, 160 N. C. 574, 76 S. E. 481.

When Action Lies Against Creditor.—In an action to recover on the bond given by the creditor and his surety in attachment proceedings for a wrongful levy therein, the statute of limitations begins to run from the rendition of the judgment and not from the time the property was replevied. The recovery of the judgment in the former action is the condition authorizing the present suit, and a vacation of the attachment. *Smith v. American Bonding Co.*, 160 N. C. 574, 76 S. E. 481.

Creditor Not Liable For Sheriff's Failure.—An attaching creditor is not liable on his bond for the failure of the sheriff to perform his duty relative to the attached property. *Mahoney v. Tyler*, 136 N. C. 40, 48 S. E. 549.

When Bond Sufficient.—Where an attachment was sued out against the owner of a vessel, it was held that a prosecution bond, made payable to the "owner" of the vessel by that description, was sufficient. *Bryan v. Steamer Enterprise*, 53 N. C. 260.

§ 1-446. Validity of undertaking.—It is not a defense to an action upon an undertaking, given upon granting a warrant of attachment, that the warrant was granted improperly, for want of jurisdiction, or for any other cause. (Rev., s. 764; Code, s. 358; C. S. 804.)

§ 1-447. To whom warrant directed; duty of officer.—The warrant shall be directed to the sheriff of any county in which the property of the defendant is located, or, in case it is issued by a justice of the peace, to the sheriff or any constable of such county, and shall require the sheriff or constable to attach and safely keep all the property of the defendant within his county, or so much thereof as is sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, together with costs and expenses; it must also state when and where it shall be returned. Several warrants may be issued at the same time to the sheriffs of different counties, but where the warrant is issued by a justice of the peace to another county than his own, the clerk of the superior court of his county must certify that he is a justice of the peace and that the signature to the warrant is in the handwriting of the justice. (Rev., s. 765; Code, s. 357; 1895, c. 435, s. 1; C. C. P., s. 203; C. S. 805.)

Editor's Note.—The former statute, of which section 1-447 is a modification, contained the clause, "Provided such county be that of the justice issuing the warrant" (*Battle's Revisal*, sec. 203; the Code, sec. 357); but the proviso was subsequently struck from the statute. Public Laws 1895, ch. 435. The amendment apparently indicates the legislative intent to extend the reach of the warrant of attachment, as distinguished from original process, beyond the boundaries of the county in which the justice resides. See *Mohn v. Cressey*, 193 N. C. 568, 572, 137 S. E. 718.

Superior Court Writ Should Be Directed to Sheriff.—By reason of the same rule of strict construction mentioned in

the annotations under sec. 1-440 it must be held that a writ of attachment issuing out of the superior court on causes within that jurisdiction shall be addressed to the sheriff of the county. *Carson v. Woodrow*, 160 N. C. 143, 147, 75 S. E. 996.

This section makes a clear distinction between writs issuing from the superior court and the court of a justice of the peace, and in express terms requires that writs of attachment from the superior courts shall be addressed to the sheriff of the county. *Carson v. Woodrow*, 160 N. C. 143, 147, 75 S. E. 996.

Warrant Issued to Constable Instead of Sheriff.—An irregularity in issuing a warrant of attachment to the constable or other lawful officer of the county, when the statute requires it to be issued to the sheriff, may be afterwards cured by an amendment of the court when it appears that the warrant was served by a deputy sheriff. *Temple v. Eades Hay Co.*, 184 N. C. 239, 114 S. E. 162.

An attachment issued by the clerk of a court for a sum within the jurisdiction of the court, and made returnable to the proper term of the court, will not be dismissed for want of form because directed "to any constable or other lawful officer to execute and return within thirty days (Sundays excepted)," when it appears that it was executed by the sheriff. *Askew v. Stevenson*, 61 N. C. 288.

Clerical Error in Warrant.—A warrant in attachment, in substantial conformity with this section, and, in fact executed by the deputy sheriff of the proper county, is valid, and will not be held otherwise when verified by a proper agent, though by apparent clerical error it was stated in its beginning to have been made by a member of the firm, the power of the trial judge to allow amendments is plenary under the provisions of sec. 1-165. *May Co. v. Menzies Shoe Co.*, 186 N. C. 144, 119 S. E. 227.

When Sheriff is Defendant.—The words of this section "all the property of the defendant" do not, when the sheriff is the defendant, include his tax books showing debts due to him for taxes. *Davie v. Blackburn*, 117 N. C. 383, 23 S. E. 321.

§ 1-448. Notice; service and content.—When the warrant of attachment is taken out at the time of issuing the summons, and the summons is to be served by publication, the order shall direct that notice be given in the publication to the defendant of the issuing of the attachment. When the warrant of attachment is obtained after the issuing of the summons, the defendant must be notified by publication of the fact for four successive weeks in some newspaper published in the county to which it is returnable, or if none, then in one published in the judicial district including said county. The publication shall state the names of the parties, the amount of the claims, and in a brief way the nature of the demand and the time and place to which the warrant is returnable. In proceedings by attachment begun before justices of the peace, advertisement in a newspaper is not necessary, but advertisement at the courthouse door and four other public places in the county for four successive weeks is sufficient publication, both as to the summons and warrant of attachment. (Rev., s. 766; Code, s. 352; 1893, c. 363; 1870-1, c. 166, s. 3; 1874-5, c. 111, s. 2; C. S. 806.)

Cross Reference.—As to service by publication, see annotations under section 1-444 and under section 1-98.

Editor's Note.—Under former statutes, when the defendant was a nonresident, attachment issued either in the form of an original or a judicial attachment, and without any notice until there had been a levy or caption of the goods of the debtor, when advertisement was required if the defendant resided without the jurisdiction. Rev. Code, ch. 7, secs. 12 and 13. By sec. 12 it was provided that "No judicial process shall be issued against the estate of any person residing without the limits of the state, unless the same be grounded on an original attachment, or unless the leading process of the suit has been executed on the person of the defendant when within the state." This was the method of proceeding against nonresidents until the adoption of the Code system. The remedy then became ancillary to the principal suit for the recovery of the debt. But there was no essential change in the procedure by

which the defendant was brought before the court and compelled to appear and submit his person to its jurisdiction, or lose his property as the penalty for his default, or so much thereof as was necessary to satisfy the plaintiff's demand. See *Grocery Co. v. Collins Bag Co.*, 142 N. C. 174, 177, 55 S. E. 90.

When Publication of Summons Sufficient.—In order that the cardinal principle of our judicial system should not be even seemingly violated, it was required that in the original action, instead of the idle and useless ceremony of issuing a summons for a man whom it was well known could not be found, publication in such manner as would be likely to give notice of the action should be made; and such is the meaning and clear intent of this section as plainly manifested by its words. It is true that civil actions are commenced by issuing a summons, but this refers to cases where the defendant, being within the jurisdiction of the court, can be served personally. *Best v. British, etc., Mortg. Co.*, 128 N. C. 351, 38 S. E. 923, cited and approved. *McClure v. Fellows*, 131 N. C. 509, 42 S. E. 951 overruled. *Grocery Co. v. Collins Bag Co.*, 142 N. C. 174, 178, 55 S. E. 90.

Omission of Notice in the Order.—Where notice of the attachment is omitted from the order of publication, but in the published notice the defendant is informed that an attachment has been issued against his property, to what court it is returnable, etc., the court has power to amend the order of publication, so as to insert a requirement that notice be given of the attachment. *Bank v. Blossom*, 92 N. C. 695.

Affidavit after Order.—It seems that the affidavit to obtain an order for the publication of a summons may be made after the order, provided the order remains in abeyance until the affidavit is filed. *Bank v. Blossom*, 92 N. C. 695.

Publication for Five Weeks.—Where notice of an attachment and the summons were published in one notice for five weeks, it was held, a sufficient publication of the notice of the attachment, but not of the summons. *Bank v. Blossom*, 92 N. C. 695.

Where a publication of a summons was only made for five weeks, the court has power to retain the action and order a sufficient publication. *Bank v. Blossom*, 92 N. C. 695.

Warrant and Summons Distinguished.—This section provides that in attachment proceedings in a justice's court, advertisement in a newspaper shall not be necessary, but advertisement at the courthouse door and four other public places in the county for four successive weeks shall be sufficient publication, both as to the summons and warrant of attachment. This modification permits the incorporation of the warrant of attachment to be made in the summons, not the summons in the warrant. The summons is an official process, and must be signed and issued by the justice of the peace, whether its service is to be made personally or by publication, while the warrant, if not incorporated in the summons as above provided, is not official and may be signed by the plaintiff himself, and if not taken out at the time of issuing the summons, has to be served separately. *Ditmore v. Goins*, 128 N. C. 325, 327, 39 S. E. 61.

Failure to Order or Make Service.—Where an affidavit, filed in an action wherein attachment is sought against the property of a nonresident within the jurisdiction of the court, is sufficient for the clerk to order service of the summons by publication, but service has not been ordered or made, and the cause has come up on the defendant's special appearance and motion to dismiss on that ground, and pending the motion the plaintiff, upon an additional affidavit, without the knowledge of the judge, has obtained an order of publication from the clerk, it is within the sound discretion of the judge to permit the publication of the summons to be proceeded with, and deny the defendant's motion. *Jenette v. Hovey & Co.*, 182 N. C. 30, 108 S. E. 301.

Defendant's Bond Constitutes Waiver.—Where property has been levied on under the writ, a bond given by the defendants in discharge of the attachment as provided by section 1-457 will be considered equivalent to a personal appearance in the action and a waiver of the requirement for further service of the summons. It amounts to a voluntary submission of the defendant's cause to the jurisdiction of the court. *Mitchell v. Elizabeth City Lumber Co.*, 169 N. C. 397, 398, 86 S. E. 343.

Statement of Amount.—Under this section which provides that when the summons in an attachment suit is to be served by publication, the publication shall state the fact of the attachment, "the amount of the claims," and in a brief way the nature of the demand, an order and a publication based thereon which fail to state the amount of the plaintiff's claims are fatally defective. *Flint v. Coffin*, 176 Fed. 872, 873.

In attachment the plaintiff can not recover an amount in

excess of that stated in the summons. *Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218

§ 1-449. Execution, levy, and lien.—The officer to whom the warrant of attachment is directed and delivered shall seize and take into his possession the tangible personal property of the defendant or so much as is necessary, and he is liable for the care and custody of such property, as if it had been seized under execution. He shall levy on the real estate of the defendant as prescribed for executions; he shall make and return with the warrant an inventory of the property seized or levied on, and, subject to the direction of the court, shall collect all debts owing to the defendant. Where the sheriff or other officer levies an attachment upon real estate, he must certify the levy to the clerk of the superior court of the county where the land lies, with the names of the parties, and the clerk must note the same on his judgment docket and index it on the index to judgments, and the levy is a lien only from the date of entry by the clerk, except that if it is so docketed and indexed within five days after being made it is a lien from the time it was made. (Rev., s. 767; Code, s. 359; 1895, c. 435, s. 2; C. C. P., s. 204; 1943, c. 543; C. S. 807.)

Editor's Note.—The 1943 amendment struck out the words "and take such legal proceedings in his own name or in that of the defendant as are necessary for that purpose," formerly appearing at the end of the second sentence of this section.

Section 1-116 and This Section Construed in Pari Materia.—See note to § 1-116.

A levy on land under an attachment is sufficient, if it gives such a description as will distinguish and identify the land. *Grier v. Rhyne*, 67 N. C. 338.

Homestead.—The lien of an attachment levied upon land of a nonresident debtor is paramount to the right of a homestead therein acquired by the debtor by becoming a citizen of the state prior to the rendition of judgment in the action. *Watkins v. Overby*, 83 N. C. 165.

Effect of Levy.—Property seized under attachment is only a legal deposit in the hands of the sheriff to abide the event of the action, and after judgment against the defendant, he is entitled to the same exemptions in the property attached as he would have been had there been no attachment. *State v. Rhyne*, 80 N. C. 183.

Enforceable against Subsequent Purchasers.—When the officer has complied with the provisions of this section, the plaintiffs have a lien on such property, which is enforceable against all subsequent purchasers from the defendant. *Newberry v. Meadows Fert. Co.*, 203 N. C. 330, 338, 166 S. E. 79.

§ 1-450. Return of warrant by sheriff.—The sheriff shall return the warrant of attachment, and the undertakings provided for in this article, with a statement of his proceedings thereon, at the time and place at which it is on its face returnable, and upon, or at any time after, the return, he may obtain from the court to which the warrant was returnable a certified copy thereof, which, for the purpose of giving him authority, is the same as the original, and when the warrant has been fully executed or discharged, the sheriff shall return it, with his proceedings, to said court. (Rev., s. 768; Code, s. 376; C. C. P., s. 214; C. S. 808.)

§ 1-451. When granted by justice of peace.—If the action is not founded on contract and the value of the property in controversy does not exceed the sum of fifty dollars, the warrant of attachment may, or if the action is founded on contract and the sum demanded does not exceed two hundred dollars, the warrant of attachment must be obtained from and made returnable be-

fore a justice of the peace of a county to the superior court of which it would have been returnable had the sum demanded exceeded two hundred dollars, or had the action not been founded on contract. (Rev., s. 769; Code, s. 353; C. C. P., s. 200; 1876-7, c. 251; C. S. 809.)

Wrongful Issue by Justice.—An attachment wrongfully issued from the justice's court against a citizen of the State, transiently absent, is remedied by recordari. *Merrell v. McHone*, 126 N. C. 528, 36 S. E. 35.

§ 1-452. Publication in justice's court.—The plaintiff, within thirty days after obtaining a warrant of attachment from a justice of the peace, must cause publication thereof to be made for four successive weeks at the courthouse door and four other public places in the county where the warrant is returnable. (Rev., s. 770; Code, s. 350; C. C. P., s. 198; 1868-9, c. 95, s. 3; 1870-1, c. 166, s. 4; 1874-5, c. 111; C. S. 810.)

§ 1-453. Justice's attachment against land.—If the attachment is levied on real property, the justice shall proceed to try the action, but may not issue an execution to sell the real property, and shall return the papers in the case to the office of the clerk of the superior court of his county, where the judgment shall be docketed. The levy of the attachment, however, is a lien on the real estate, when the provisions of the section as to execution and levy of attachment are complied with. (Rev., s. 771; Code, s. 354; 1868-9, c. 95, s. 4; C. S. 811.)

Lien Created from Levy of Attachment.—Attachment issued by a justice creates a lien from its levy, and not merely from docketing of the judgment in the superior court. *Morefield v. Harris*, 126 N. C. 626, 36 S. E. 125.

§ 1-454. Sale of attached property pending litigation.—If any property seized under attachment is perishable, or of a character to materially deteriorate in value pending litigation, or of such character that the expense of keeping it until the determination of the suit would be likely to exceed one-fifth of its value, or if any part of it consists of a vessel, or of any share or interest therein, and the person to whom it belongs, or his agent, does not within ten days after the serving of the attachment reclaim the same, the sheriff or other officer having possession shall apply to the court for authority to sell the property, stating the circumstances. The property shall then be sold, under the order and direction of the court, and the proceeds are liable to the judgment obtained upon the attachment, and shall be retained by the sheriff or other officer to await the judgment. (Rev., 772; Code, s. 360; C. C. P., s. 205; R. C., c. 7, s. 6; 1777, c. 115, s. 28; C. S. 812.)

Sale of Third Party's Goods.—Where an attachment is levied upon the goods of a third party which, being perishable, are sold by the sheriff, and the third party interpleads in the action and recovers judgment, the costs and expenses of the attachment, sale, etc., are not properly chargeable against the fund arising from such sale. *Haywood v. Hardie*, 76 N. C. 384.

An Intervener obtaining the possession of property attached by giving a replevy bond may not sell part of the property, such sale not being made as provided by this section, and claim the right to pay for the part sold and return the balance thereof. *Bulluck v. Haley*, 198 N. C. 355, 151 S. E. 731.

§ 1-455. Replevy by defendant; undertaking.—The person owning the property advertised to be sold according to the provisions of this article, or his agent or attorney, may, at any time before sale, replevy the same, by giving an undertak-

ing in double the amount of the value of the property, with sufficient surety, to the effect that he will return the property to the sheriff or other officer, if its return is adjudged by the court, and pay all costs that are awarded against him; and if return of the property cannot be had, then that he will pay plaintiff its value, and all costs and damages that are awarded against him. Upon the execution of this undertaking, the sheriff, or other officer, shall deliver the property to the person owning it. (Rev., s. 773; Code, s. 361; R. C., c. 7, s. 5; 1777, c. 115, s. 28; C. S. 813.)

Recovery of Expenses Incurred under This Section.—In an action to recover on an attachment bond for the wrongful levy therein, damages may be awarded for the reasonable expense the plaintiff, who was the defendant in the attachment proceedings, has incurred in procuring the undertaking he had given to obtain the release of the property attached. *Smith v. American Bonding Co.*, 160 N. C. 574, 76 S. E. 481.

But damages may not be recovered in an action for a wrongful levy in attachment for railroad and traveling expenses, and the value of the plaintiff's time in procuring the release of his property. *Smith v. American Bonding Co.*, 160 N. C. 574, 76 S. E. 481.

Cited in *Bizzell v. Mitchell*, 195 N. C. 484, 487, 142 S. E. 706.

§ 1-456. Defendant may apply for discharge and delivery of property.—When the defendant has appeared in such action, he may apply to the court in which it is pending, or to the judge thereof, for an order to discharge the attachment; and if the order is granted, all the proceeds of sale, and moneys collected in the action, and all property attached remaining in the hands of any officer of the court, under any process or order in the action, shall be delivered or paid to the defendant or his agent, and released from the attachment. Where there is more than one defendant, and the several property of one of them has been seized by virtue of the order of attachment, the defendant whose several property was seized may apply in like manner for relief. (Rev., s. 774; Code, s. 373; C. C. P., s. 212; C. S. 814.)

Clerk Has Jurisdiction.—The clerk of the superior court has jurisdiction to vacate an attachment. *Palmer v. Boshier*, 71 N. C. 291.

By giving the undertaking in the manner provided by § 1-457 the debtor may procure the release of the attachment. *Bizzell v. Mitchell*, 195 N. C. 484, 142 S. E. 706. See note under § 1-457.

Vacation without Undertaking.—An attachment will be vacated by the Judge without any undertaking on the part of the defendant, if on its face it appears to have been issued irregularly, or for a cause insufficient in law, or false in fact. *Bear v. Cohen*, 65 N. C. 511.

Motion out of Term.—It would be a great hardship upon a defendant whose property had been seized under an irregular attachment if he were prohibited from having it set aside until the regular term of the court, which might be nearly six months after the seizure, hence he may move to vacate before the return term. *Palmer v. Boshier*, 71 N. C. 291, 293.

When Motion Lies.—Where in an action against a foreign fraternal insurance society, the funds in the hands of a collector were attached and the society claimed that such funds were held upon an express trust for the benefit of the widows and orphans of the deceased members, and were not subject to attachment, the society was entitled to raise such a question by motion to vacate the attachment. *Brenizer v. Royal Arcanum*, 141 N. C. 409, 53 S. E. 835.

When Defendant Bankrupt.—Where the defendant was adjudged a bankrupt, that was held to be sufficient ground for vacating an attachment levied upon his property. *Mixer v. Oil etc., Co.*, 65 N. C. 552; *Ward v. Hargett*, 151 N. C. 365, 36 S. E. 340.

When Discharge Not Granted.—A warrant of attachment cannot be discharged upon the special appearance of the defendant when the grounds for his motion involved

the finding of facts such as he has no interest in. *Foushee v. Owen*, 122 N. C. 360, 29 S. E. 770.

Same—Insufficient Affidavit.—It is error to discharge an attachment, granted as ancillary to an action, because of the insufficiency of the affidavit to obtain service of the summons by publication, for it is possible that the defect may be cured by amendment. *Branch v. Frank*, 81 N. C. 180; *Price v. Cox*, 83 N. C. 261.

Hence, where the application to vacate an attachment is to the clerk before the sitting of the court to which the summons is made returnable, a further order of publication to cure a defective service may be obtained upon an affidavit to the court without discharging the attachment. *Penniman v. Daniel*, 90 N. C. 154.

Failure of Defendant to Move to Vacate.—The proper publication of summons for a nonresident defendant whose property has been attached gives the defendant notice that he can vacate the warrant if insufficient, and upon his failing to move to vacate the process he will not be held to be prejudiced by a subsequent judgment. *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642.

No Sale after Vacation.—The sales of property mentioned in this section and sec. 1-468 have reference to those made before the attachment is vacated, as, for instance, sales made under the order of the court in accordance with section 1-454 when the property is perishable. The sheriff has no right, after the attachment has been vacated, to sell any property seized by him, as it then becomes his duty to deliver at once to the defendant all property in his hands. *Mahoney v. Tyler*, 136 N. C. 40, 44, 48 S. E. 549.

Does Not Apply to Subsequent Sale.—This section, providing for the restitution of property upon an order dissolving the attachment, does not apply to cases where there has been a sale or transfer of the property by the defendant to the plaintiff after the levy of the attachment. *Jackson, etc., Co. v. Burnett*, 119 N. C. 195, 25 S. E. 868.

Same—Jury Trial.—Notwithstanding the dissolution of an attachment, the plaintiff, who claims that the property has been transferred to him by the defendant after the levy of the warrant, is entitled to have submitted to the jury an issue as to the ownership of the property. *Jackson, etc., Co. v. Burnett*, 119 N. C. 195, 25 S. E. 868.

Court Retains Attached Property.—The property attached will remain in the custody of the court to await the determination of the action unless relieved. *Page v. McDonald*, 159 N. C. 38, 40, 74 S. E. 642.

Refusal of Sheriff to Deliver Property.—If the sheriff fails or refuses to deliver the property, the defendant could perhaps apply to the court and obtain an order requiring him to do so, or could sue the sheriff and his sureties for the default, but the plaintiff would not be liable. *Mahoney v. Tyler*, 136 N. C. 40, 44, 48 S. E. 549.

Proceedings upon Vacating Attachment.—When the court vacates the attachment and taxes the plaintiffs with the costs of the attachment proceedings, and then gives judgment in favor of the plaintiffs for the debt and the costs of the action other than the costs awarded to the defendant, its jurisdiction and power are exhausted. Nothing else can be done except, perhaps, to make an order for the return of the property seized under the attachment if the provision in this section is not self-executing (*Devries v. Summit*, 86 N. C. 126), and such an order is necessary. The general practice has been to insert such a direction to the sheriff in the order vacating the attachment. *Jackson, etc., Co. v. Burnett*, 119 N. C. 195, 25 S. E. 868; *Mahoney v. Tyler*, 136 N. C. 40, 45, 48 S. E. 549.

Decision is Res Judicata.—A decision on a motion to vacate an attachment is res judicata until reversed. *Roulhac v. Brown*, 87 N. C. 1; *Passour v. Lineberger*, 90 N. C. 159; *Morganton Manufacturing, etc., Co. v. Lumber Co.*, 177 N. C. 404, 99 S. E. 104.

Appeal.—An appeal lies from the refusal to dismiss an attachment. *Sheldon v. Kivett*, 110 N. C. 408, 14 S. E. 973; *Fertilizer Co. v. Grubbs*, 114 N. C. 470, 19 S. E. 597; *Judd v. Crawford Gold Mining Co.*, 120 N. C. 397, 399, 27 S. E. 81.

Same—When Facts Must Be Set Out.—The superior court judge is not required to set out the facts upon which he has vacated an attachment levied on the defendant's property, unless the party, appealing and complaining of the ruling of law, requests him to find the facts necessary to give him the benefit of his exceptions. *Coharie Lumber Co. v. Buhmann*, 160 N. C. 385, 75 S. E. 1008.

Same—Same—Not Reviewable.—On appeal it will be presumed that the superior court judge found facts sufficient to support his order vacating an attachment on the debtor's property, when they do not appear of record; and any facts found by him, so appearing, are not reviewable. *Coharie Lumber Co. v. Buhmann*, 160 N. C. 385, 75 S. E. 1008.

Bond in Lieu of Attachment Lien.—Where attachment

has been levied on the defendant's property necessary for the prosecution of his business, and upon his giving bond, he or his receiver is permitted by the court to continue operations, the giving of the bond is in lieu of the lien acquired in attachment, and analogous to the proceedings in discharge authorized by this and § 1-457. *Martin v. McBryde*, 182 N. C. 175, 108 S. E. 739.

§ 1-457. Defendant's undertaking. — Upon the application provided for in § 1-456 the defendant must deliver to the court an undertaking in at least double the amount claimed by the plaintiff in his complaint, executed by two sureties residing in this state, approved by the court, to the effect that the surety will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking. If it appears by affidavit that the property attached is of less value than the amount claimed by the plaintiff, the court or judge may order it to be appraised, and the amount of the undertaking shall then be double the amount so appraised. Where there is more than one defendant, and the several property of one of them has been seized by virtue of the order of attachment, the defendant whose several property was seized may deliver to the court an undertaking, in accordance with this section, to the effect that he will, on demand, pay to the plaintiff the amount of judgment that may be recovered against him, and all of this section, applicable to such an undertaking, shall be applied thereto. (Rev., s. 775; Code, s. 374; C. C. P., s. 213; C. S. 815.)

When Undertaking Unnecessary. — The undertaking required in this section is not necessary when the warrant "on its face appears to have been issued irregularly, or for a cause insufficient in law or false in fact." *Bear v. Cohen*, 65 N. C. 511; *Devries & C. v. Summit*, 86 N. C. 126, 131.

When an attachment on the debtor's property has been vacated by the superior court judge, the defendant should not be required to give the undertaking under this section to regain possession of the property. *Coharie Lumber Co. v. Buhmann*, 160 N. C. 385, 75 S. E. 1008.

Effect of Undertaking as Waiver or Estoppel.—Giving the undertaking by defendant under this section is equivalent to a general appearance in the action, and waives certain irregularities. It estops the defendant from denying ownership of the property levied on, but not from traversing the truth of the allegation on which the attachment is based. Giving the undertaking does not waive the validity of the statutory ground of attachment. *Bizzell v. Mitchell*, 195 N. C. 484, 142 S. E. 706.

Hearing as to Validity of Ground of Attachment.—When defendant gives the undertaking under this section the matter of the validity of statutory ground on which attachment was procured may be heard before the trial of the main issue, but, if demand is made, it may be heard before the trial of the merits or it may be tried with the main issue. *Bizzell v. Mitchell*, 195 N. C. 484, 142 S. E. 706.

Necessity for Separate Action on Undertaking.—By consent a surety on an undertaking on attachment can come in and the matter of the validity of the grounds of attachment be determined in one action; otherwise a separate action must be brought on the undertaking. *Bizzell v. Mitchell*, 195 N. C. 484, 142 S. E. 706.

The judgment contemplated in this section is not only a judgment establishing the debt, but a judgment establishing the validity of the ground on which the attachment is procured, when the validity is traversed. *Bizzell v. Mitchell*, 195 N. C. 484, 142 S. E. 706.

No summary judgment against the surety on the undertaking under this section can be rendered. *Bizzell v. Mitchell*, 195 N. C. 484, 142 S. E. 706; *Hoft v. Coastwise Shipping, etc., Co.*, 215 N. C. 690, 3 S. E. (2d) 20.

Discharge of Surety.—When defendant in attachment enters a general appearance and traverses the allegations of fraudulent concealment of his property upon which the attachment was based, and gives bond to retain possession

of the property attached, and upon the trial the issue as to fraud is found in his favor, the surety on the bond is discharged from liability, and it is not necessary that a motion to vacate the attachment be previously made. *Bizzell v. Mitchell*, 195 N. C. 484, 142 S. E. 706.

When the surety signs a bond under this section, he enters into the obligation with reference to the cause as it then stands, so when a new element of liability is introduced by an amendment, the surety is discharged. *Rushing v. Ashcraft*, 211 N. C. 627, 629, 191 S. E. 332.

Surety Concluded from Asserting Insufficiency of Bond.—Where judgment by default final has been rendered against the principal debtor and the surety on an attachment bond given in the action in the form required by this section to secure whatever judgment may be rendered, and the property attached has accordingly been retained by the debtor, the surety is concluded from asserting the insufficiency of the bond in not having another surety thereon, as the statute required, when the bond was given and accepted as he had intended, and he had not excepted thereto. *Thompson v. Dillingham*, 183 N. C. 566, 112 S. E. 321.

§ 1-458. All property liable to attachment.—The rights or shares of the defendant in the stock of any association or corporation, with the interest and profits thereon, and all other property in this state of the defendant, are liable to be attached, levied on, and sold to satisfy the judgment and execution. (Rev., s. 776; Code, s. 362; C. C. P., s. 206; C. S. 816.)

In General. — The intention of the Legislature, as clearly expressed, in section 1-441, was to authorize the attachment of stock in foreign corporations, and also in the case of individuals or domestic corporations which are removing their property from the State with the intent to defraud creditors, or doing any other act for which attachment would lie, and to authorize the attachment of stock in domestic corporations also. It seems to us that this section means that, as it clearly says: "The rights or shares of the defendant's stock in any corporation or association are liable to be attached." *Parks-Cramer Co. v. Southern Express Co.*, 185 N. C. 428, 430, 117 S. E. 505. As to attachment of stock in a foreign corporation, see 3 N. C. Law Rev. 103.

Under this section, all property in this state, whether real or personal, tangible or intangible, owned by a nonresident defendant in an action to recover on any of the causes of action included within the provisions of § 1-440, is liable to attachment. *Newberry v. Meadows Fert. Co.*, 203 N. C. 330, 337, 166 S. E. 79.

Unpaid Balances Due to Corporation. — Under this section of the Code, the unpaid balances due a foreign corporation on subscriptions to its stock by subscribers residing in this State are property of such a corporation, and subject to attachment for the payment of its debts. *Cooper v. Adel Security Co.*, 122 N. C. 463, 30 S. E. 348.

Property Absorbed by Nonresident Corporation. — Where a nonresident express company doing business in this State, and having property herein, incurred a liability to its shipper for breach of its contract for the transportation and delivery of a shipment, and afterwards became absorbed in another nonresident corporation carrying on the same business with the same property and stock of the selling (debtor) company, the one continuing to do business here is subject to attachment under the provisions of sections 1-458, 1-459, 1-461 et seq., where the cause of action arose here; and the fact that the certificates of stock are not physically in the jurisdiction of the courts of this State is immaterial. *Parks-Cramer Co. v. Southern Exp. Co.*, 185 N. C. 428, 117 S. E. 505.

A distributive share in the hands of an administrator, due the wife of a non-resident debtor, can not be subjected to the payment of the husband's debts in this State by means of an attachment in equity. *McLean v. McPhaul*, 59 N. C. 15.

§ 1-459. Levy on intangible property.—The execution of the attachment upon any such rights, shares, or any debts or other property incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or with the debtor or individual holding such property, with a notice showing the property levied on. This certified

copy must be furnished to the sheriff by the plaintiff, and the certification must be by the clerk of the court from which the warrant was issued, or by the justice of the peace who issued it. A person receiving or collecting moneys within this state on behalf of any corporation of this or any other state or government is deemed a local agent for the purpose of this section. Such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose or the plaintiff resides in the state, or when the service can be made within the state personally upon the president, treasurer or secretary thereof. Whenever a writ of attachment may be sued out against a nonresident debtor owning shares of stock in a resident corporation, and no officer of said resident corporation may be found in the county of its principal office upon whom service of said attachment may be made, said writ may be served by leaving a certified copy of the warrant of attachment with the person in charge of the property of said corporation in said county, together with a notice showing the stock levied upon. Provided, however, no attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined. (Rev., s. 777; Code, s. 363; C. C. P., s. 207; 1905, c. 294; 1921, c. 94; 1941, c. 353, s. 24½; C. S. 817.)

Editor's Note.—Public Laws 1941, c. 353, added the proviso at the end of this section. Public Laws 1921, c. 94, added that portion of the last sentence which appears before the proviso. The effect of the 1921 amendment is discussed by the court as follows: The defendant relies upon Laws 1921, ch. 94, which amends sec. 1-459, by expressly providing that shares of stock held by a nonresident debtor in a resident corporation of this state may be attached, as an implied authority that if the stock is held in a foreign corporation doing business here it cannot be attached; but we do not think that that was the purpose or the effect of the Act of 1921, which was intended simply to make it plainer that the stock of a nonresident in a North Carolina corporation could be attached under sec. 1-459. *Parks-Cramer Co. v. Southern Express Co.*, 185 N. C. 428, 432, 117 S. E. 505.

If it were true that stock owned by a nonresident is not attachable here, the Amendment of 1921 is ineffectual, for whether the stock attached is that of a domestic corporation of this state or a foreign corporation, in either event, if the owner is a nonresident the certificates of stock would not be physically liable in this state. *Parks-Cramer Co. v. Southern Express Co.*, 185 N. C. 428, 432, 117 S. E. 505.

This section is commented upon in 2 N. C. Law Review 119 and 3 N. C. Law Review 103, 106.

Corporation a Party to Proceedings. — A corporation is a necessary party to an attachment proceeding to subject the amounts due it from unpaid subscriptions to its stock to the payment of its debts. *Cooper v. Adel Security Co.*, 122 N. C. 463, 30 S. E. 348.

§ 1-460. Certificate of defendant's interest to be furnished to sheriff.—When the sheriff or other officer, with a warrant of attachment or execution, applies to a president or other head or director, secretary, cashier or managing agent of any association or corporation, or to any debtor or individual, for the purpose of attaching or levying on the property of the defendant in such warrant, such officer, debtor or individual must furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in the association or corporation, with any dividend or any incumbrance thereon, or the amount and de-

scription of the property held by such association, corporation, or individual, for the benefit of, or debt owing to, the defendant. If the officer, debtor or individual refuses to do so, he may be required by the court or judge to appear before him, and be examined on oath concerning the matter, and obedience to this order may be enforced by attachment. (Rev., s. 778; Code, s. 369; C. C. P., s. 208; C. S. 818.)

Examination Operates as Lien. — An examination of the city officials operates as a lien on anything owing by the city to the defendants in the suit, as of the day when the copy of the warrant of attachment was delivered; and thereby prevents any alterations of the state of accounts between the defendants and the city. *Carmer v. Evers*, 80 N. C. 56, 59.

§ 1-461. Proceedings against garnishee.—When the sheriff or other officer serves an attachment on any person supposed to be indebted to, or to have any property of the defendant in the attachment, he shall at the same time summon in writing such person as a garnishee. The summons and notice shall be issued by the clerk of the superior court, or justice of the peace, at the request of the plaintiff, to appear at the court to which the attachment is returnable, or if issued by a justice of the peace, at a place and time named in the notice, not exceeding twenty days from date of notice, to answer upon oath what he owes to the defendant and what property of the defendant he has in his hand and had at the time of serving the attachment, and to his knowledge and belief what effects or debts of the defendant there are in the hands of any other, and what person. When an attachment is served on a garnishee in the above manner, upon his appearance and examination, judgment may be entered up and execution awarded for the plaintiff against the garnishee, for all sums of money due the defendant from him, and for all property of any kind belonging to the defendant, in his possession or custody, for the use of the plaintiff, or so much thereof as will satisfy the debt and costs and all charges incident to levying the same. All property whatsoever in the hands of any garnishee belonging to the defendant is liable to satisfy the plaintiff's judgment, and must be delivered to the sheriff or other officer serving the attachment. (Rev., s. 779; Code, s. 364; R. C., c. 7, s. 7; 1777, c. 115, s. 28; C. S. 819.)

Cross Reference.—As to exemption of earnings, see section 1-362.

In General. — A garnishment is in effect a suit by its principal debtor, the defendant in the action, in the name of the plaintiff, and for his use and benefit, against the garnishee to recover the debt due to the plaintiff's debtor and apply it to the satisfaction of the plaintiff's demand. *Goodwin v. Claytor*, 137 N. C. 224, 225, 231, 49 S. E. 173.

This section applies alike to residents and nonresidents, persons and corporations, and it will not be declared unconstitutional in an action instituted long subsequent to its enactment. *Newberry v. Meadows Fertilizer Co.*, 206 N. C. 182, 173 S. E. 67.

Nature of Garnishment. — It arrests the property in the hands of the garnishee, interferes with the owner's or creditor's control over it, subjects it to the judgment of the court, and therefore has the effect of a seizure. *Miller v. United States*, 11 Wall. 268, 297, 20 L. Ed. 135.

The proceeding by garnishment is designed to subject a debt due to the defendant, to the payment of the demand of his creditor, by investing the creditor with a judicial power to collect and apply the amount due. *Wanzer v. Truly*, 17 How. 584, 586, 15 L. Ed. 276.

The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to defeat his creditors. Chicago, etc.,

R. Co. v. Sturm, 174 U. S. 710, 715, 19 S. Ct. 797, 43 L. Ed. 1144.

Proceeding in Rem.—In garnishment proceedings, whatever of substance there is must be with the debtor, he holding the res in his hands, giving character to the action as one in the nature of a proceeding in rem. Chicago, etc., R. Co. v. Sturm, 174 U. S. 710, 715, 19 S. Ct. 797, 43 L. Ed. 1144.

Intention of the Section.—The language employed in this section clearly indicates the intention that any money due by the garnishee, or goods in his hands belonging to the debtor at the time of appearance and answer, shall be applied in satisfaction of the debt. Goodwin v. Claytor, 137 N. C. 224, 225, 230, 49 S. E. 173.

Jurisdiction Necessary.—The court entertaining a garnishment must have some jurisdiction over the thing garnished. Balk v. Harris, 124 N. C. 467, 32 S. E. 799.

Personal Service Necessary.—This section in relation to garnishments evidently contemplated personal service, as no provision is made for a constructive service of the summons; and this statute has always been strictly construed. Parker v. Scott, 64 N. C. 118, 120.

Purpose of Warrant.—The issuance of a warrant of attachment by a justice of the peace having jurisdiction of the action is only for the purpose of acquiring jurisdiction over a defendant who is a nonresident of the state, and is only incidental to the relief sought in the original action under this section, and the warrant in garnishment may run beyond the limit of the county wherein the action was brought. Mohn v. Cressey, 193 N. C. 568, 137 S. E. 718.

Warrant Incidental to Original Action.—Want of authority in the justice to issue an original process to any county other than his own did not inhibit the running of the warrant of attachment to another county, or the service of a notice upon the garnishee to appear before the court to which the attachment was returnable to answer upon oath as the statute provides; for issuing the warrant was only incidental to the original action. Baker etc., Co. v. Belvin, 122 N. C. 190, 30 S. E. 337; Mohn v. Cressey, 193 N. C. 568, 572, 137 S. E. 718.

Judgment against Garnishee.—A judgment may be taken against a garnishee, who is found to be indebted to the debtor, in the action to which the garnishment proceeding is ancillary, and is not necessary to bring a separate action against such garnishee. Baker, etc., Co. v. Belvin, 122 N. C. 190, 30 S. E. 337. Carmer v. Evers, 80 N. C. 56, a case which held the opposite of this, discussed and overruled since it was decided under former law.

Same—Rights Acquired.—A plaintiff in garnishment is, in his relation to the garnishee, substituted merely to the rights of his own debtor, and cannot enforce any greater claim against the garnishee than the debtor himself, if suing, would have been entitled to recover. Goodwin v. Claytor, 137 N. C. 224, 225, 49 S. E. 173.

Same—Order.—Where judgment is given against a garnishee in an action against the debtor, it is proper to make an order applying the collections made on such judgment to the judgment obtained, or to be obtained, against the debtor. Baker, etc., Co. v. Belvin, 122 N. C. 190, 30 S. E. 337.

Judgment against Both.—Where service of summons was had by publication on a nonresident of the state, and a debt due the defendant was garnished, the plaintiff did not lose any lien on the debt by taking a judgment against the defendants and the garnishee. Goodwin v. Claytor, 137 N. C. 224, 225, 49 S. E. 173.

No Personal Judgment.—In garnishment proceedings against a nonresident defendant, service being had by publication, no jurisdiction is acquired to support a personal judgment against the defendant. Goodwin v. Claytor, 137 N. C. 224, 225, 49 S. E. 173.

Moneys Not Yet Due.—Under this section, moneys due by a garnishee, or goods in his hands at the time of appearance and answer, are applicable to the debt, though not earned and due when he was summoned to answer. Goodwin v. Claytor, 137 N. C. 224, 225, 49 S. E. 173.

Exemption of Earnings.—Section 1-362 provides that earnings of a debtor for his personal services for the 60 days next preceding shall be exempt from execution. It was held that the exemption protects such earnings from seizure in garnishment. Goodwin v. Claytor, 137 N. C. 224, 225, 49 S. E. 173.

Same—Claim Must Be Made.—When a man has earned wages they can be garnished as his property, if no personal exemption is claimed. Pocumoke Guano Co. v. Colwell, 177 N. C. 218, 98 S. E. 535.

Bank May Be Garnishee.—A national bank may be proceeded against by garnishment to impound the proceeds of a draft in its hands. Markham-Stephens Co. v. Richmond Co., 177 N. C. 364, 99 S. E. 17.

What Law Governs.—To enable the judgment creditor to arrest the payment of what is due the judgment debtor, which might be paid so as to defeat the rights of the creditor, he must go to the domicile of his debtor, and can only do it under the laws and procedure in force there. It is a legal necessity and considerations of situs are somewhat artificial. Chicago, etc., R. Co. v. Sturm, 174 U. S. 710, 716, 19 S. Ct. 797, 43 L. Ed. 1144.

The obligation of the garnishee can be enforced by the courts of the foreign state after personal service of process therein, just as well as by courts of the domicile of the debtor. Harris v. Balk, 198 U. S. 215, 223, 25 S. Ct. 625, 49 L. Ed. 1023.

Execution and Proceedings to Enforce.—Under this section no lien attaches to any specific property of the garnishee until the issuance of execution on the judgment and proceedings to enforce such execution. Newberry v. Meadows Fert. Co., 203 N. C. 330, 166 S. E. 79.

Execution may be issued against garnishees prior to final judgment against defendant, and the property held subject to the orders of the court pending final judgment. Newberry v. Meadows Fertilizers Co., 206 N. C. 182, 173 S. E. 67.

There is no distinction between an execution on an ordinary judgment issued under § 1-305, and an execution on a judgment against a garnishee issued under this section. They are both judgments and sections to be construed in pari materia. Id.

Where judgment has been regularly entered against certain garnishees in proceedings under § 1-440, the clerk of the Superior Court may issue execution on the judgment against the garnishees without notice or a hearing under this section and § 1-305. Id.

§ 1-462. Failure of garnishee to appear.—When a garnishee is summoned and fails to appear and discover on oath as directed, the court, after solemnly calling the garnishee, shall enter a conditional judgment against him, and thereupon a notice shall issue against him returnable to the court having jurisdiction, to show cause why final judgment should not be entered against him. Upon due execution of the notice, if the garnishee fails to appear at the time and place named, and discover on oath in the manner aforesaid, the court shall confirm the judgment and award execution for the plaintiff's whole judgment and costs. Upon examination of the garnishee, if it appears to the court that there is any of the defendant's property in the hands of a person who has not been summoned, the court, upon motion of the plaintiff, shall grant a judicial attachment, to be levied in the hands of every such person having any of the property of the defendant in his custody or possession, who must appear and answer and be liable as other garnishees. (Rev., s. 780; Code, s. 365; R. C., c. 7, s. 8; 1777, c. 115, s. 28; 1838, c. 2; C. S. 820.)

§ 1-463. Garnishee denying debt; issue tried.—When a garnishee denies that he owes to, or has in his possession any property of, the defendant, and the plaintiff on oath suggests to the court the contrary, or when a garnishee makes such a statement of facts that the court cannot proceed to give judgment thereon, the court shall order an issue to be made up, which must be tried by a jury, and on their verdict judgment shall be rendered. In a court of a justice of the peace, he may try such issue, unless a jury is demanded, and then proceedings are to be conducted, in all respects, as in jury trials before justices of the peace. (Rev., s. 781; Code, s. 366; R. C., c. 7, s. 9; 1793, c. 389, s. 2; C. S. 821.)

Jury Trial.—Under this section the plaintiff in garnishment proceedings, upon the suggestion that he wishes to traverse the return of the garnishee, is entitled, without any formal or verified statement, to have the issue tried

by a jury. *Brenizer v. Royal Arcanum*, 141 N. C. 409, 53 S. E. 835.

Where Defendant Denies Ownership. — The judgment against a nonresident debtor being exhausted by a sale of the property attached, a nonresident defendant in attachment proceedings, who denies ownership of the attached property, cannot be injured by the judgment, and hence, is not entitled to have an issue submitted as to the title to the property. *Foushee v. Owen*, 122 N. C. 360, 29 S. E. 770.

Garnishee a Mere Stakeholder. — The requirement of this section that an issue shall be made up and determined by the jury where the garnishee in attachment denies owing the principal defendant, should be construed with section 1-73, requiring the making of all necessary parties to a full determination of the controversy; and it does not apply when the garnishee takes the position of a mere stakeholder and sets up in his answer that another, not a party to the action, is the owner of the funds attached, and asks that such other person be brought in so as to protect it, the garnishee, in the payment of the funds under an order of the court. *Temple v. Eades Hay Co.*, 184 N. C. 239, 114 S. E. 162.

§ 1-464. Property with garnishee valued; garnishee exonerated.—When a garnishee on oath confesses that he has in his hands any property of the defendant of a specific nature, or is indebted to him by any security or promise for the delivery of any specific article, except as hereinafter excepted, the court shall immediately order a jury to be impaneled and sworn to inquire into the value of such specific property, and the verdict of the jury subjects the garnishee to the payment of the valuation, or as much of it as is sufficient to satisfy the debt or damages and costs of the plaintiff. In a court of a justice of the peace, he may try such issue, unless a jury is demanded, and then proceedings are to be conducted in all respects as in jury trials before justices of the peace. If the garnishee states in his answer that the specific property was left with him by the defendant as a bailment, or that he has tendered said specific articles according to contract, and that they were refused by the defendant, and that he then was and always had been ready to deliver the same; or that he had such specific articles at the time and place specified in such covenant or agreement ready to be delivered, and is still ready to deliver them; and such statement is admitted by the plaintiff or found by a jury or the court, then in any such case the garnishee shall be exonerated by the delivery of such specific articles to the sheriff, who shall proceed as if the attachment had been originally levied on the property. (Rev., s. 782; Code, s. 367; R. C., c. 7, s. 11; 1793, c. 389; 1794, c. 424; C. S. 822.)

Where one contracted with a dentist for a set of artificial teeth for his wife, and paid him full consideration, and the husband afterwards absconded before the teeth were furnished, the dentist was not liable as garnishee to a creditor for the value of the teeth. *Cherry v. Hooper*, 52 N. C. 82.

§ 1-465. Conditional judgment against garnishee.—When a garnishee declares in his answer that the money or specific article due by him will become payable or deliverable at a future day, and this is admitted by the plaintiff or found by a jury or the court, a conditional judgment shall be entered against the garnishee, and the plaintiff may obtain judgment against the defendant for his demand, but may not take final judgment against the garnishee without notice to show cause. (Rev., s. 783; Code, s. 368; R. C., c. 7, s. 12; 1794, c. 424, s. 2; C. S. 823.)

§ 1-466. Satisfaction of judgment.—If judgment is entered for the plaintiff in the action, the sheriff shall satisfy the same out of the property attached by him, if it is sufficient for that purpose—

1. By paying over to the plaintiff the proceeds of all property sold and debts or credits collected by him, or so much as is necessary to satisfy the judgment.

2. If any balance remains due, and an execution has been issued on the judgment, he shall sell under the execution as much of the attached real or personal property, except as provided in subdivision four of this section, as is necessary to satisfy the balance, if enough for that purpose remains in his hands. In case of the sale of any rights or shares in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale, and the purchaser has all the rights and privileges in respect thereto which were had by the defendant.

3. If any of the attached property belonging to the defendant has passed out of the hands of the sheriff without having been sold or converted into money, he shall repossess himself of the same, and for that purpose has all the authority which he had to seize it under the attachment. A person who willfully conceals or withholds such property from the sheriff is liable to double damages at the suit of the party injured.

4. Until the judgment against the defendant is paid, the sheriff may collect the notes and other evidences of debt, and the debts that were seized or attached, under the warrant of attachment, and prosecute any bond he has taken in the course of such proceedings, and apply the proceeds to the payment of the judgment.

At the expiration of six months from the docketing of the judgment the court has power, upon petition of the plaintiff, accompanied by an affidavit setting forth fully all the proceedings which have been had by the sheriff since the service of the attachment, the property attached, and the disposition thereof, also the affidavit of the sheriff that he has used due diligence, and endeavored to collect the evidences of debt in his hands so attached, and that there remains uncollected of the same any part or portion thereof, to order the sheriff to sell the same upon such terms and in such manner as is deemed proper. Notice of this application must be given to the defendant or to his attorney, if the defendant has appeared in the action. If the summons has not been personally served on the defendant, the court shall make such rule or order, as to service of notice and time of service, as is deemed just. When the judgment and all costs of the proceedings have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property or the proceeds thereof. (Rev., s. 784; Code, s. 370; C. C. P., s. 209; C. S. 824.)

Section Grants Power. — This section gives an express direction to the sheriff to sell the property previously levied on by him under the attachment, and invests him with as much power and authority to act in the premises as if an execution, in the form of a venditioni exponas, had been issued to him, specially commanding him to sell the particular property. *Electric Co. v. Engineering Co.*, 128 N. C. 199, 38 S. E. 831; *Chemical Co. v. Sloan*, 136 N. C. 122, 43 S. E. 577; *May v. Getty*, 140 N. C. 310, 318, 53 S. E. 75; *Morganton Mfg. etc., Co. v. Lumber Co.*, 177 N. C. 404, 407, 99 S. E. 104.

Duty of Sheriff. — The attachment is simply a levy before judgment, and upon execution issuing on the judgment it is the duty of the sheriff to sell the attached property. *Gamble v. Rhyne*, 80 N. C. 183; *Morganton Mfg., etc. Co. v. Lumber Co.*, 177 N. C. 404, 407, 99 S. E. 104; *Farmers Manufacturing Co. v. Steinmetz*, 133 N. C. 192, 194, 45 S. E. 552.

Same—Not Error to Condemn Property. — Where ancillary proceedings of attachment are brought with the main action, and the attachment is not discharged, it is not error to condemn the attached property for sale to pay the judgment, as the sheriff would be required to sell the same upon issuance of execution. *Farmers Manufacturing Co. v. Steinmetz*, 133 N. C. 192, 45 S. E. 552.

Sale under Execution. — A sale under an execution issuing upon a judgment on an attachment only passes the right of the defendant in attachment. *Electric Co. v. Eng. Co.*, 128 N. C. 199, 38 S. E. 831.

Judgment Against Nonresident. — No judgment in personam may be entered or enforced against a nonresident who has not been personally served with summons. *Johnson v. Whilden*, 166 N. C. 104, 81 S. E. 1057.

Exemptions after Judgment. — Property seized under attachment is only a legal deposit in the sheriff to abide the event of the action, and after judgment against the defendant, he is entitled to the same exemptions in the property attached as he would have been had there been no attachment. *Gamble v. Rhyne*, 80 N. C. 183.

Where Property Is in Possession of Third Party. — Where a person in possession of property is not a party to the attachment suit, the plaintiff, in addition to a judgment for his debt, is not entitled to a judgment for such property, but must proceed under this section. *Electric Co. v. Eng. Co.*, 128 N. C. 199, 38 S. E. 831.

Property Held until Final Judgment. — This section indicates that the property is held until final judgment and the sheriff can collect from the garnishee against whom judgment is entered. *Newberry v. Meadows Fertilizer Co.*, 206 N. C. 182, 188, 173 S. E. 67.

§ 1-467. Plaintiff may sue on defendant's bond. — The actions herein authorized to be brought by the sheriff may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs and expenses on account thereof, not exceeding two hundred and fifty dollars in any one action. The sureties must in all cases, when required by the sheriff, justify by making an affidavit that each is a freeholder, and worth double the amount of the penalty of the bond, over and above all demands, liabilities and exemptions. (Rev., s. 785; Code, s. 371; C. C. P., s. 210; C. S. 825.)

§ 1-468. On defendant's recovery, bonds and property delivered to him. — If the foreign corporation, or the absent, absconding, or concealed defendant, recovers judgment against the plaintiff in such action, any bond taken upon the issuing of the warrant of attachment, and any bond taken by the sheriff, except such as are mentioned in § 1-467, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant or to his agent, on request, and the warrant shall be discharged and the property released. (Rev., s. 786; Code, s. 372; C. C. P., s. 211; C. S. 826.)

Sheriff Cannot Sell after Vacation. — The sales of property mentioned in this section refer to those before the attachment is vacated as for instance sales made under the order of the court in accordance with section 1-454 when property is perishable. The sheriff has no right, after the attachment has been vacated, to sell any property seized by him, as it then becomes his duty to deliver at once to the defendant all property in his hands. *Mahoney v. Tyler*, 136 N. C. 40, 44, 48 S. E. 549.

Bank a Mere Stakeholder. — Where the funds of a non-resident defendant are attached in the hands of a local

bank, which is only an agency for collection, which position it alleges in its answer, and also alleges ownership of title by its forwarding bank, the position taken by the local bank is that of a mere stakeholder without interest, between two conflicting claimants, and it may successfully maintain that the forwarding bank be made a party to the action, and await the determination of this question in the action, in order to protect itself in the payment of the funds attached in its hands. *Temple v. Eades Hay Co.*, 184 N. C. 239, 114 S. E. 162.

§ 1-469. Motion to vacate or increase security. — The defendant, or person who has acquired a lien upon, or interest in, his property before or after it was attached, may at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, apply to the court having jurisdiction to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative, as in cases of other provisional remedies. (Rev., s. 787; Code, s. 377; C. S. 827.)

Cross Reference. — As to appeal from order of clerk denying motion to increase security, see notes to §§ 1-274 and 1-275.

When Third Party Intervenes. — Parties who intervene in attachment proceedings can not be heard to object to the irregularity of the same, that being a matter between the parties to the main action. *Cook v. N. Y. Corundum, etc., Co.*, 114 N. C. 617, 19 S. E. 664.

Motion May Be Made by One of Several Defendants. — Any one of several defendants whose property has been attached has such an interest in the action as to maintain a motion to vacate the attachment. *Luff v. Levey*, 203 N. C. 783, 166 S. E. 922.

Vacation in Case Increased Bond Is Not Filed. — The judge of the Superior Court has the power to order the plaintiff to give further security or an increased bond, under this section, but he may not add a condition to the order that the attachment be vacated ipso facto if the increased bond is not filed by a certain time. The plaintiff will be given a reasonable time for filing the bond. *Luff v. Levey*, 203 N. C. 783, 166 S. E. 922.

Cited in *Bizzell v. Mitchell*, 195 N. C. 484, 487, 142 S. E. 760.

§ 1-470. Exceptions to and justification of sureties. — The sureties to all undertakings in all proceedings for attachment may be excepted to, and justified as prescribed in respect to bail upon an order of arrest. (Rev., s. 788; Code, s. 378; C. S. 828.)

§ 1-471. Intervention. — When the property attached is claimed by any other person, the claimant may intervene, as provided for intervention in claim and delivery. (Rev., s. 789; Code, s. 375; R. C., c. 7, s. 10; 1793, c. 389, s. 3; C. S. 829.)

Cross Reference. — As to interpleader in claim and delivery, see section 1-482 and annotations thereunder.

Nature of Bill. — A bill in the nature of a bill of interpleader will not lie by a party in interest to ascertain and establish his own rights when there are other conflicting rights between third persons, unless the relief sought is equitable relief. *Killian v. Ebbinghaus*, 110 U. S. 568, 572, 4 S. Ct. 232, 28 L. Ed. 246.

Justice Has Jurisdiction. — Attachment proceedings relating to personal property, being only ancillary to the main action, a justice of the peace may entertain and try an interplea to determine the title, although the value of the property exceeds \$50. *Grambling, etc., & Co. v. Dickey*, 118 N. C. 986, 24 S. E. 671.

Remedies of Claimant. — One whose property has been attached by a sheriff, under a warrant issued in an action to which he is not a party, may intervene or interplead in the action, and demand judgment that he is the owner of the property, and an order directing the sheriff to release the property under this section. Or he may bring an action against the sheriff and the sureties on his official bond for the property or for damages for its conversion. *Stein v. Cozart*, 122 N. C. 280, 30 S. E. 340. Or he may

bring an action against the plaintiffs at whose instance the warrant was issued, and the property wrongfully seized, joining the sheriff as a defendant or not as he sees fit; if the sheriff has taken an indemnity bond, he may sue the obligor and the sureties on such bond. *Tyler v. Mahoney*, 168 N. C. 237, 84 S. E. 362; *Martin v. Buffalo*, 128 N. C. 305, 38 S. E. 902; *Gay v. Mitchell*, 146 N. C. 509, 510, 60 S. E. 426; *Tatham v. Dehart*, 183 N. C. 657, 112 S. E. 430; *Flowers v. Spears*, 190 N. C. 747, 752, 130 S. E. 710.

Separate Trial.—In attachment a separate trial for the intervenor is discretionary with the trial judge. *Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218.

Intervenor Cannot Interfere in Main Action.—In attachment an intervenor has no right to interfere in the action between the original parties, since he is interested only as to the title to the property. *Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218.

Burden of Proving Title.—In attachment the burden is on the intervenor to establish title to the property. *Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218.

Defendant Holding Property as Agent.—Where the evidence tends to show that a defendant holds property levied on as agent for another, such third person should be allowed to be made a party. *Farmers' Bank, etc., Co. v. Murphy*, 189 N. C. 479, 127 S. E. 527.

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621; **Francis v. Mortgage Security Corp.**, 198 N. C. 734, 735, 153 S. E. 317.

Art. 36. Claim and Delivery.

§ 1-472. Claim for delivery of personal property.—The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons or at any time before answer, claim the immediate delivery of the property as provided in this article. (Rev., s. 790; Code, s. 321; C. C. P., s. 176; C. S. 830.)

In General.—Strictly speaking, there is no such action under the Code as "claim and delivery." The action is for the recovery of a specific chattel, and the delivery of the chattel is a provisional remedy, ancillary, but not essential to such action. If the plaintiff see fit, delivery of the chattel may be waived, and the action prosecuted to recover possession of the chattel, as in the old action of detinue, or to recover the value of the property, as in trover or trespass. *Wilson v. Hughes*, 94 N. C. 182; *Jarman v. Ward*, 67 N. C. 32; *Allsbrook v. Shields*, 67 N. C. 333; *Hopper v. Miller*, 76 N. C. 402.

Founded on Right to Possession.—Replevin (and the action of claim and delivery is but a longer name for the same thing) is founded on the right of the plaintiff to the possession of the property. If the defendant also claims the possession, the main issue is on that right, and the party establishing it will have judgment to retain or be restored to the possession, as the case may be. *Holmes v. Godwin*, 69 N. C. 467, 472.

A Substitute for Common Law Remedies.—Under this section the action of "claim and delivery" is a substitute for the action of replevin, if a bond is given by the plaintiff; if not, it is a substitute for the action of detinue or trover. *Jarman v. Ward*, 67 N. C. 32; *Hopper v. Miller*, 76 N. C. 402, 404.

An Ancillary Remedy.—Under the State Constitution, Art. IV, Sec. 1, there is but one form of action in civil cases. In that, many ancillary remedies may be asked, i. e., Arrest and Bail, Claim and Delivery, Injunction, Attachment, and Appointment of Receivers. These need not be asked, even if the party is entitled to them, *Wilson v. Hughes*, 94 N. C. 182, and if they are improperly asked they are simply denied or dismissed, but that does not affect the action itself, which goes on if the plaintiff is entitled to any other remedy. *Deloatch v. Coman*, 90 N. C. 186; *Morris v. O'Brian*, 94 N. C. 72; *Hargrove v. Harris*, 116 N. C. 418, 419, 21 S. E. 916.

Adopted from New York Code.—This statutory remedy is adopted from the Code of New York. *Manix v. Howard*, 82 N. C. 125, 129.

Statute Must Be Followed.—To entitle a party to maintain an action for claim and delivery of personal property, there must be a compliance with all the requisites specified in this and the following section. *Hirsh v. Whitehead & Co.*, 65 N. C. 516.

Object Is to Recover Specific Property.—The recovery of the thing itself, and not damages in lieu thereof, is the primary object of the suit, and the value is given only as an alternative when delivery of the specific property can

not be had. *Hendley v. McIntyre*, 132 N. C. 276, 277, 43 S. E. 824.

Who May Bring the Action.—One in the rightful possession of property as bailee can maintain an action of claim and delivery against a wrong-doer who is depriving him of possession. *Hopper v. Miller*, 76 N. C. 402.

Same—Tenant.—The crop produced by a tenant being vested in the lessor until the rents shall be paid, he can maintain an action for recovery of an undivided portion thereof, and it is not necessary that he shall specifically designate in his complaint, or affidavit in claim and delivery, such undivided part. *Boone v. Darden*, 109 N. C. 74, 13 S. E. 728.

But one tenant in common of personal property may not maintain claim and delivery against a third person in possession without the other owners, it being required that the claimant show sole ownership. *Allen v. McMillan*, 191 N. C. 517, 132 S. E. 276.

Same—Landlord.—Where, in a contract between the landlord and tenant, no time was fixed for the division of the crops, the landlord was not obliged to wait until the whole crop had been gathered, but had a right to bring his action for the possession of the crop before it was fully harvested. *Rich v. Hobson*, 112 N. C. 79, 16 S. E. 931. But see *State v. Copeland*, 86 N. C. 692, 694; *Jordan v. Bryan*, 103 N. C. 59, 9 S. E. 135.

Same—Mortgagee.—After default and refusal to surrender possession to the mortgagee, the mortgagee becomes, in law, the absolute owner of the mortgaged property, though the mortgagor had the right to redeem, until the property is sold; and the mortgagee is entitled to the same remedy against him for the possession that he would have against any other person who had the possession of his property. *Kiser & Co. v. Blanton*, 123 N. C. 400, 404, 31 S. E. 878.

Same—Assignee of Chattel Mortgage.—The assignee of a chattel mortgage may maintain proceedings in claim and delivery for the possession of the mortgaged property or for its value, etc., in his own name and right, after the note secured by the mortgage is overdue and remains unpaid. *Johnson v. Bray*, 174 N. C. 176, 93 S. E. 728.

Against Party in Possession.—An action for the possession of property must be brought against the party in possession. *Haughton v. Newberry*, 69 N. C. 456; *Webb v. Taylor*, 80 N. C. 305; *Moore v. Brady*, 125 N. C. 35, 37, 34 S. E. 72; *General Motors Accept. Corp. v. Waugh*, 207 N. C. 717, 178 S. E. 85.

Claim and delivery is not maintainable against one who has neither possession nor control of the property sought to be recovered, but who has sold and delivered it to another party. *Webb v. Taylor*, 80 N. C. 305, citing *Jones v. Green*, 20 N. C. 488; *Charles v. Elliott*, 20 N. C. 606; *Foscue v. Eubank*, 32 N. C. 424; *Haughton v. Newberry*, 69 N. C. 456; *Slade v. Washburn*, 24 N. C. 414.

Recovery of Title Deed.—Claim and delivery will lie for the recovery of a title deed if the controversy does not involve the determination of the title to the land conveyed by it. *Pasterfield v. Sawyer*, 132 N. C. 258, 43 S. E. 799.

Where Crops Removed.—The action will lie where the crops are removed from the land leased. *Livingston v. Farish*, 89 N. C. 140.

Crops on Wife's Land.—Claim and delivery will not lie for crops produced on wife's land, under a crop lien given by husband without her consent. *Rawlings v. Neal*, 126 N. C. 271, 35 S. E. 597.

Where Nature of Goods Changed.—If a person bestows his labor upon the property of another, thereby changing it into another species of article (as if corn be made into whiskey, prior to prohibition acts, etc.), the property is changed, and the owner of the original material cannot recover the article in its altered condition, but is only entitled to its value in the shape in which it was taken from him. *Potter v. Mardre*, 74 N. C. 36.

Statute of Limitations Applies.—The three-year statute of limitations in § 1-52 is also applicable to an action of claim and delivery. Hence where a note was given in payment for personal property and the statute of limitations had run on the note no action of claim and delivery could be maintained. *Lester Piano Co. v. Loven*, 207 N. C. 96, 176 S. E. 290.

Jurisdiction of Justice.—Where plaintiff, in an action before a justice of the peace to recover \$75 due for rent, alleged that defendant wrongfully detained the crop on which the rent was a lien, and incidentally asked for a delivery of the crop which was not alleged to be worth "not more than fifty dollars," the justice of the peace was not deprived of jurisdiction by such allegation and prayer. *Hargrove v. Harris*, 116 N. C. 418, 21 S. E. 916.

Trial by Jury.—Where the evidence is conflicting as to the plaintiff's sole ownership of the personal property in

claim and delivery, the question is one for the jury. *Allen v. McMillan*, 191 N. C. 517, 518, 12 S. E. 276.

Judgment. — Where claim and delivery is adjudge to get possession of property for the purpose of selling it, according to the terms of a contract, to pay an indebtedness, and all parties interested are before the court and the amount due ascertained, the plaintiff upon recovering holds as a trustee, and a judgment, directing an adjustment of all the equities involved in order that the matter may be determined, is the proper one to be rendered; and if possession of the property cannot be had, then the judgment should be in the alternative. *Austin v. Secrest*, 91 N. C. 214.

In claim and delivery the judgment should be for the delivery of the property or its value. *Oil Co. v. Grocery Co.*, 136 N. C. 354, 48 S. E. 781.

Cited in *McKinney v. Sutphin*, 196 N. C. 318, 321, 145 S. E. 621; *C. I. T. Corp. v. Watkins*, 208 N. C. 448, 181 S. E. 270.

§ 1-473. Affidavit and requisites.—Where a delivery is claimed, an affidavit must be made before the clerk of the court in which the action is required to be tried or before some person competent to administer oaths, by the plaintiff, or some one in his behalf, showing—

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to its possession by virtue of a special property therein, the facts in respect to which must be set forth.

2. That the property is wrongfully detained by the defendant.

3. The alleged cause of the detention, according to his best knowledge, information and belief.

4. That the property has not been taken for tax, assessment or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and,

5. The actual value of the property. (Rev., s. 791; Code, s. 322; C. C. P., s. 177; 1881, c. 134; C. S. 831.)

Broad Language. — The words of this section are as broad as can well be imagined, and include every case, with four specified exceptions, where the plaintiff makes an affidavit that he is entitled to the possession of certain personal property, and that it is wrongfully detained by the defendant, and gives the "undertaking". *Jones v. Ward*, 77 N. C. 337, 338.

Under this section there is no limitation or restriction put upon the plaintiff, who seeks to recover personal property and have the same immediately delivered to him, except that the same has not been taken for tax assessments or fines pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or, if seized, that it is by statute exempt from such seizure. The language of the Code is immensely broader in its scope than the language of the revised statutes on the subject in hand. *Mitchell v. Sims*, 124 N. C. 411, 415, 32 S. E. 735.

Rights Conferred. — Under this section when the immediate delivery of the property is sought, the broad language of the statute gives the right to the claimant, upon his executing the bond required by law, to take the property from the possession of any person, even from an officer of the law. *Mitchell v. Sims*, 121 N. C. 411, 415, 32 S. E. 735.

When Section Applies. — It is only in cases when the plaintiff seeks to have the property delivered to him instantly, and to have the possession pending the action, as in the old action of replevin, that the affidavit and undertakings are required. *Jarman v. Varl*, 67 N. C. 32, 33.

Affidavit Essential. — The affidavit required by the Code is indispensable to maintain claim and delivery. *Griffith v. Richmond*, 126 N. C. 377, 35 S. E. 620.

Affidavit Must Comply with Section. — In making the affidavit this section must be strictly followed. *Hirsh v. Whitehead*, 65 N. C. 516.

Plaintiff Should State Interest. — It seems that the plaintiff should set forth his special interest in the property. *Cooper v. Evans*, 174 N. C. 412, 93 S. E. 897.

Affidavit Made "Per" Another. — In claim and delivery of personal property, an affidavit made by plaintiff "per"

another is sufficient. *Spencer v. Bell*, 109 N. C. 39, 13 S. E. 704.

Deputy Can Take Affidavit. — The deputy of the clerk of the superior court is authorized to take the affidavit of the plaintiff and to order the seizure of personal property in an action of claim and delivery. *Jackson v. Buchanan*, 89 N. C. 74.

Burden of Proof.—In claim and delivery proceedings the burden is on the plaintiff to establish a cause of action. *Smith v. Cook*, 196 N. C. 558, 146 S. E. 229.

Applied in General Motors Accept. Corp. v. Waugh, 207 N. C. 717, 178 S. E. 85.

Cited in *McKinney v. Sutphin*, 196 N. C. 318, 145 S. E. 621.

§ 1-474. Order of seizure and delivery to plaintiff.—The clerk of the court shall, thereupon, and upon the giving by the plaintiff of the undertaking prescribed in the succeeding section, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed is located, to take it from the defendant and deliver it to the plaintiff. (Rev., s. 792; Code, s. 323; C. C. P., s. 178; C. S. 832.)

Summons Necessary. — In an action for the claim and delivery of personal property, the issuing of a summons is necessary to give the clerk jurisdiction to make the order to the sheriff, requiring him to take such property and deliver the same to the plaintiff, and an order to that effect without such summons is no justification to the sheriff or the defendant for any action in the premises. *Potter v. Mardre*, 74 N. C. 36.

A Ministerial Act.—"In issuing the order, the clerk does not represent the court, whose officer he is, and as in numerous cases he is authorized to do, under the statute, but he performs a ministerial act, peremptorily enjoined, and exercises a function belonging to the office." *Jackson v. Buchanan*, 89 N. C. 74, 76.

Same—Deputy Can Make Order. — It was held in *Jackson v. Buchanan*, 89 N. C. 74, that the clerk of the superior court, in making the order of seizure of property in the provisional remedy of claim and delivery only does a ministerial and not a judicial act or service, and therefore a deputy clerk might make such order. *Evans v. Etheridge*, 96 N. C. 42, 43, 1 S. E. 633.

Plaintiff Must Continue the Action. — In an action of claim and delivery it is not competent to the plaintiff, after the property is put into his possession by process of law, to move to dismiss the action and fail to file a complaint, thereby raising no issue and depriving the defendant of an opportunity to assert his right. *Manix v. Howard*, 82 N. C. 125.

Cited in *McKinney v. Sutphin*, 196 N. C. 318, 145 S. E. 621.

§ 1-475. Plaintiff's undertaking. — The plaintiff must give a written undertaking payable to the defendant, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, with damages for its deterioration and detention if return can be had, and if for any cause return cannot be had, for the payment to him of such sum as may be recovered against the plaintiff for the value of the property at the time of the seizure, with interest thereon as damages for such seizure and detention. (Rev., s. 793; Code, s. 324; 1885, c. 50; C. C. P., s. 179; C. S. 833.)

Cross Reference. — As to the judgment in an action for the recovery of personal property, see section 1-230.

Judgment Should Be in Alternative. — A judgment on the forthcoming bond in claim and delivery proceedings should be in the alternative for the return of the property, or, if that cannot be had, for its value with damages. *Grubbs v. Stephenson*, 117 N. C. 66, 67, 23 S. E. 97.

Value Ascertained. — For the benefit of the sureties upon the undertaking the value of the property at the time of seizure should also be ascertained, as they are liable for such value, not exceeding the indebtedness secured. *Griffith v. Richmond*, 126 N. C. 377, 35 S. E. 620.

Where, in claim and delivery proceedings, the vendor of the property, who had retained title until the notes for its purchase should be paid, intervened and was adjudged to be entitled to the property, the plaintiff (purchaser from the vendee), who had given bond for the return of the property to the defendant, if so adjudged, is entitled to have its value ascertained and should be adjudged to pay that amount, not exceeding, however, the balance due the vendor. *Barrington v. Skinner*, 117 N. C. 47, 48, 23 S. E. 90.

Measure of Damages Where Property Can Not Be Returned.—Where defendant recovers judgment and the property cannot be returned to him, the measure of damages is the value of the property at the time of its seizure, and an instruction that defendant, from whom an automobile had been taken in claim and delivery by the assignor of a chattel mortgage thereon, would be entitled to recover, if plaintiff's seizure of the property were wrongful, the amount paid on the purchase price of the car less the value of the use obtained from the car by defendant, is held error. *C. I. T. Corp. v. Watkins*, 208 N. C. 448, 181 S. E. 270.

The plaintiff and surety are not liable where sheriff seized and retained certain property not specified or described in the affidavit. *Williams v. Perkins*, 192 N. C. 175, 134 S. E. 417.

Voluntary Nonsuit by Plaintiff.—Where the plaintiff has taken a voluntary nonsuit after the property had been taken in claim and delivery and therein sold, the defendant in that action may maintain an independent action for damages, against the plaintiff in the former action and the surety on his bond, given in conformity with this section, wherein nominal damages at least are recoverable, with actual damages for the value of the property at the time of the seizure under claim and delivery. *Davis Bros. Co. v. Wallace*, 190 N. C. 543, 130 S. E. 176.

Cited in *McKinney v. Sutphin*, 196 N. C. 318, 145 S. E. 621.

§ 1-476. Sheriff's duties.—Upon the receipt of the order from the clerk with the plaintiff's undertaking, the sheriff shall forthwith take the property described in the affidavit, if it is in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion. (Rev., s. 793; Code, s. 324; C. C. P., s. 179; 1885, c. 50; C. S. 834.)

Sheriff Acts Officially.—The sheriff or his deputy is not the agent of the party who sued out the claim and delivery, but he is an officer to carry out the mandate of the court. *Williams v. Perkins*, 192 N. C. 175, 178, 134 S. E. 417.

Action against Sheriff.—Where the sheriff has wrongfully seized certain personal property of the defendant in claim and delivery, not described therein as the subject of such seizure, the defendant may maintain an independent action for damages against the sheriff. *Williams v. Perkins*, 192 N. C. 175, 134 S. E. 417.

Quoted in *General Motors Accept. Corp. v. Waugh*, 207 N. C. 717, 178 S. E. 85.

Cited in *McKinney v. Sutphin*, 196 N. C. 318, 145 S. E. 621.

§ 1-477. Exceptions to undertaking; liability of sheriff.—The defendant may, within three days after the service of a copy of the affidavit and undertaking, notify the sheriff personally, or by leaving a copy at his office in the county-seat of the county, that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When the defendant excepts, the sureties must justify on notice, in like manner as upon bail on arrest. The sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived as above provided, or until they justify, or until new sureties are substituted and justify. If the defendant excepts to the sureties he can-

not reclaim the property as provided in the succeeding section. (Rev., s. 794; Code, s. 325; C. C. P., s. 180; C. S. 835.)

Sheriff Liable as Surety.—In delivering property to a defendant, when seized in claim and delivery proceedings without taking a proper undertaking and requiring the same to be justified, a sheriff becomes liable as a surety thereon. *Wells v. Bourne*, 113 N. C. 82, 18 S. E. 106.

Same—Measure of Damages.—In such case the measure of liability is the delivery of the property to the plaintiff (if such delivery be adjudged), with damages for its deterioration, or (failing delivery) the value of the property; and to subject the sheriff as surety, it is necessary to show that execution has been returned unsatisfied. *Wells v. Bourne*, 113 N. C. 82, 18 S. E. 106.

Same—What Plaintiff Must Prove.—Where plaintiff, in an action against a sheriff to recover damages for his failure to take a proper undertaking for the return of property seized by him at the instance of the plaintiff and adjudged to be returned, failed to show that execution issued for the property and against the sureties on the undertaking had been returned unsatisfied, he failed to show, and can not recover, actual damage against such sheriff. *Wells v. Bourne*, 113 N. C. 82, 18 S. E. 106.

When Objection Must Be Made.—The objection that what purports to be the undertaking of the plaintiff, in such action, was not properly executed, comes too late when made at the trial term. *Spencer v. Bell*, 109 N. C. 39, 13 S. E. 704.

Cited in *McKinney v. Sutphin*, 196 N. C. 318, 145 S. E. 621.

§ 1-478. Defendant's undertaking for replevy.—At any time before the delivery of the property to the plaintiff, the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, payable to the plaintiff, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, with damages for its deterioration and detention, and the costs, if delivery can be had, and if delivery cannot be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages for such taking and detention, together with the costs of the action. If a return of the property is not so required, within three days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, unless it is claimed by an interpleader.

The defendant's undertaking shall include liability for costs, as provided in this section, only where the undertaking is given in actions instituted in the superior court. (Rev., s. 795; Code, s. 326; 1885, c. 50, s. 2; C. C. P., s. 181; 1911, c. 17; C. S. 836.)

Cross References.—As to judgment in an action for the return of personal property, see section 1-230.

Liability of Surety.—The principle, applying to ordinary contracts, that a surety is released from liability by an extension of time given to his principal does not apply to a surety on a replevin bond given under the provisions of this section, where the defendant retains possession of the property the subject of claim and delivery by reason of the bond, and under its conditions, and thereafter a judgment by consent of the parties is entered by the court; and where the consent judgment stays execution for sixty days, and in that time the defendant upon whom the judgment places liability has disposed of the same, the surety remains liable to the extent of his principal's obligation. *Wallace & Sons v. Robinson*, 185 N. C. 530, 117 S. E. 508.

Where, in claim and delivery, the defendant pleads that he became possessed of the property under a contract of sale, upon the facts being so found by the jury (the property having been sold under an order of the court pendente lite), judgment should be rendered against the sureties to the extent of the defendant's undertaking for the penalty of the bond,

to be discharged upon the payment of the contract price with interest and cost, less the payments by the defendant. *Hall v. Tillman*, 110 N. C. 220, 14 S. E. 745.

The liability of the surety on a replevy bond in claim and delivery is not required to be determined in a separate action. *Federal Finance, etc., Co. v. Teeter*, 196 N. C. 232, 145 S. E. 8.

Same—Debt Recovered.—The sureties to an undertaking, on behalf of the defendant, in claim and delivery are not liable for any debt which the plaintiff may recover in the action. *Hall v. Tillman*, 103 N. C. 276, 9 S. E. 194.

Liability Where Bond Voluntary.—Where an action of claim and delivery is instituted in a court inferior to the superior court, the defendant is not required by this section to give bond for the payment by him of the costs of the action, if a judgment adverse to him is rendered in the action. However, when, the bond is so conditioned, the bond is not for that reason void and unenforceable against either the defendant or his surety. In the absence of fraud, mistake, or other matters entitling them or either of them to equitable relief, both the defendant and his surety are bound accordingly to the terms of the bond, which they executed voluntarily. *Wright v. Nash*, 205 N. C. 221, 223, 171 S. E. 48.

The recovery against the surety can in no event exceed the penalty of the bond. *Boyd v. Walters*, 201 N. C. 378, 160 S. E. 451.

Summary Judgment against Sureties.—Summary judgment may be rendered against the defendant's sureties on an undertaking to retain the property in an action of claim and delivery, but the judgment must be such as is authorized by this section, and sec. 1-230. *Hall v. Tillman*, 103 N. C. 276, 9 S. E. 194.

Form of Judgment against Surety.—Where the defendant in claim and delivery replevies the property, giving bond for the retention to cover loss in the action, the form of the judgment against the surety on the bond should be for the full amount of the bond, to be discharged upon return of the property and the payment of damages and costs recovered by the plaintiff. *Boyd v. Walters*, 201 N. C. 378, 160 S. E. 451.

Sureties' Defenses.—The surety on a replevin bond in claim and delivery, under the requirements of this section that the property shall be delivered to the plaintiff, or, if it cannot be, the value at the time it was delivered to the defendant, etc., may not, upon adjudication in plaintiff's favor, set up the defense that it had been taken by another, or prevented by the act of God, or that another than the plaintiff had a superior title to the property by mortgage or otherwise. *Garner v. Quakenbush*, 188 N. C. 180, 124 S. E. 154.

The remedy of a surety on a replevin bond to contest his liability as such under a consent judgment entered by the court against the defendant, his principal, is by appeal from the judgment, or by an independent action in case of fraud, and not by his motion in the case. *Wallace & Sons v. Robinson*, 185 N. C. 530, 117 S. E. 508.

Recovery of Costs.—The language of this section is not so explicit as that of the original section of the Code, but it is fairly susceptible of the interpretation that the entire costs of prosecuting the action involving the title to the property should be recovered by a plaintiff who prevails against the defendant and the sureties on the bond. *Hall v. Tillman*, 110 N. C. 220, 229, 14 S. E. 745.

Quoted in General Motors Accept. Corp. v. Waugh, 207 N. C. 717, 178 S. E. 85.

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621; *McCormick v. Crofts*, 198 N. C. 664, 665, 153 S. E. 152.

§ 1-479. Qualification and justification of defendant's sureties.—The qualification of the defendant's sureties, and their justification, is as prescribed in respect to bail upon an order of arrest. The defendant's sureties, upon notice to the plaintiff of not less than two nor more than six days, shall justify before the court, a judge or justice of the peace, and upon this justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until justification is completed or expressly waived, and he may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff. (Rev., ss. 796, 797; Code, ss. 327, 328; C. C. P., ss. 182, 183; C. S. 837.)

Cross References.—As to qualifications of bail in arrest and bail, see section 1-423. As to justification, see section 1-424.

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621.

§ 1-480. Property concealed in buildings.—If the property, or any part of it, is concealed in a building or enclosure, the sheriff shall publicly demand its delivery. If it is not delivered he must cause the building or enclosure to be broken open, and take the property into his possession. If necessary, he may call to his aid the power of his county, and if the property is upon the person the sheriff or other officer may seize the person, and search for and take it. (Rev., s. 798; Code, s. 329; C. C. P., s. 184; C. S. 838.)

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621.

§ 1-481. Care and delivery of seized property.—When the sheriff has taken property, as provided in this article, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping it. (Rev., s. 799; Code, s. 330; C. C. P., s. 185; C. S. 839.)

Expenses of Seizing Included in Costs.—It is proper to allow in the bill of costs the expense of seizing and caring for the property. *Hendricks v. Ireland*, 162 N. C. 523, 525, 7 S. E. 1011.

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621.

§ 1-482. Property claimed by third person; proceedings.—When the property taken by the sheriff is claimed by any person other than the plaintiff or defendant the claimant may intervene upon filing an affidavit of his title and right to the possession of the property, stating the grounds of such right and title, and upon his delivering to the sheriff an undertaking in an amount double the value of the property specified in his affidavit, for the delivery of the property to the person entitled to it, and for the payment of all such costs and damages as may be awarded against him, this undertaking to be executed by one or more sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property. A copy of this undertaking and accompanying affidavit shall be served by the sheriff on the plaintiff and defendant at least ten days before the return day of the summons in the action, when the court trying it shall order a jury to be impaneled to inquire in whom is the right to the property specified in plaintiff's complaint. The finding of the jury is conclusive as to the parties then in court, and the court shall adjudge accordingly, unless it is reversed upon appeal. In a court of a justice of the peace he may try such issue unless a jury is demanded, and then proceedings are to be conducted in all respects as in jury trials before justices of the peace. In a court of a justice of the peace an intervener shall not be required to serve on the plaintiff and defendant the affidavits and bonds required by this section, ten days before return day; but if said bond and affidavit are filed by any person owning the property when such case is called for trial, he shall be allowed to intervene: Provided that this section shall not be construed to prevent any such intervener or third person from intervening and asserting his claim to the property, or any part thereof, without giving bond as herein required, where such intervener or other third person does not ask for possession of the

property pending the trial of the issue. (Rev., s. 800; Code, s. 331; C. C. P., s. 186; R. C., c. 7, s. 10; 1793, c. 389, s. 3; 1913, c. 188; 1933, c. 131; C. S. 840.)

Cross References.—As to bringing in third parties in general, see section 1-73. For further cases under "interpleader," see annotations under section 1-471, the provisions of which are identical with this section.

Editor's Note.—The original section required that the undertaking be in double the value of the property stated in the plaintiff's affidavit, while the 1933 amendment required double the value as stated in the intervenor's affidavit. This was probably intended to apply where the intervening claimant does not demand all the property involved or its value has depreciated, and not to allow his statement of the value generally to control as against the security which the plaintiff has been required to give. 11 N. C. Law Rev. 217.

Purpose.—Is it not the purpose of the section to allow the person interpleading to come into the action in its course, allege and prove his title and right of possession of the property upon their real merits, and, if he shall succeed, take it without the delay and expense incident to a separate and independent action that otherwise he might be forced to bring? This seems to us to be the just and reasonable view, and the one that harmonizes with well-settled principles of the law applicable. *Claywell v. McGimpsey*, 15 N. C. 89; *Churchill v. Lee*, 77 N. C. 341; *Hudson v. Wetherington*, 79 N. C. 3; *Wallace Bros. v. Robeson*, 100 N. C. 206, 211, 2 S. E. 650.

Right to Intervene Well Settled.—The right of an outside claimant to intervene is well settled by precedent. *Sims v. Goettle Brothers*, 82 N. C. 269; *Toms v. Watson*, 66 N. C. 417; *Bruff v. Stern*, 81 N. C. 183; *McKesson v. Mendenhall*, 64 N. C. 286; *Clemmons v. Hampton*, 70 N. C. 534.

Intervenor Restricted to Question of Title.—It is well settled that in an action involving the title to property an interpleader is restricted to the issue as to his title or claim to the property, and cannot raise or litigate questions or rights which do not affect such titles. *McLean v. Douglas*, 28 N. C. 233; *Dawson v. Thigpen*, 137 N. C. 462, 467, 49 S. E. 959.

In a proceeding under this section the intervenor is not called on or required, and indeed he is not permitted to question the validity of the plaintiff's claim against the defendant, nor to file any answer thereto which denies or tends to deny its validity. On the contrary, the intervenor, has himself become the actor in the suit, and, on authority, is restricted to the issue whether his claim of right and title is superior to that of the original plaintiff. *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882; *Maynard v. Ins. Co.*, 132 N. C. 711, 44 S. E. 405; *Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218; *Hill v. Patillo*, 187 N. C. 531, 532, 122 S. E. 306.

Intervenor Must Prove Title.—In proceedings in attachment one who interpleads under this section is an actor upon whom rests the burden of proving his title to the property he claims. And this is so, although the property was in his possession when seized by the sheriff. *Wallace Bros. v. Robeson*, 100 N. C. 206, 2 S. E. 650; *Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218.

Appearance Waives Objections.—A party to an action is deemed to have waived his right to object to the sufficiency of an affidavit of an attorney for an interpleader or intervenor, as not having been made in accordance with the requirements of our statute, by appearing at the taking of depositions in his behalf and cross-examining his witness. *Allen v. McMillan*, 191 N. C. 517, 132 S. E. 276.

Voluntary Recognition of Jurisdiction.—Where the court has allowed a third party to interplead and ordered him to be made a party to the action, an appearance of an original party to the action must first attack the validity of the order, if he so desires, and a voluntary recognition that the court has acquired jurisdiction of a party is conclusive. *Allen v. McMillan*, 191 N. C. 517, 132 S. E. 276.

Separate Trial.—A separate trial for the intervenor is discretionary with the trial judge. *Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218.

Three Years Delay by Intervenor.—In an action for the possession of personal property, under this section, a third party claiming such property loses his right to be made a party to the suit after a lapse of three years from the filing of his affidavit and his motion to allow him to interplead. *Clemmons v. Hampton*, 70 N. C. 534.

Surety Cannot Interplead.—Where the defendant in claim and delivery proceedings consents to a judgment against himself and sureties on the replevin bond, the sureties cannot be allowed to intervene as parties and move to have the judgment vacated, when they have not offered to interplead and claim the property in the manner prescribed by

this section. *McDonald v. McBryde*, 117 N. C. 125, 23 S. E. 103.

Nonsuit by Plaintiff.—In an action to recover possession of personal property, where the defendant has replevied the property and a third person has interpleaded, the plaintiff may take a nonsuit, but the action goes on for the interpleader. *Dawson v. Thigpen*, 137 N. C. 462, 49 S. E. 959.

Jurisdiction of Justice of the Peace.—A justice of the peace may entertain and try an interplea to determine the title although the value of the property exceeds \$50. *Grambling v. Dickey*, 118 N. C. 986, 24 S. E. 671.

When Garnishee Bank a Mere Stakeholder.—Where funds of a nonresident defendant are attached in a local bank that maintains the position of a mere stakeholder, and alleges ownership of its forwarding bank, and asks that the forwarding bank be made a party to the action, the forwarding bank, when brought in, may make its own claim of title and thus cure the defect, if any, in the proceedings in this respect, it being a matter of procedure. *Temple v. Eades Hay Co.*, 184 N. C. 239, 114 S. E. 162.

Same—No Bond Required.—The bond required of an intervenor by this section, has no application in attachment where the garnishee bank holding the funds attached does so as a stakeholder, not claiming them, but only seeks to hold the same for the adjudication of the court between two conflicting claimants. *Temple v. Eades Hay Co.*, 184 N. C. 239, 114 S. E. 162.

Husband and Wife.—Where the plaintiffs attach property and bring action against a husband and wife to have a deed from the husband to the wife set aside and to subject the property attached to the payment of the judgment, the wife has a right to set up her claim to the property attached, and the refusal of the trial court to require her to give an interpleader bond under this section is not error. *Unaka, etc., Nat. Bank v. Lewis*, 201 N. C. 148, 159 S. E. 312.

Applied in General Motors Accept. Corp. v. Waugh, 207 N. C. 717, 178 S. E. 85.

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621; *Francis v. Mortgage Security Corp.*, 198 N. C. 734, 153 S. E. 317.

§ 1-483. Delivery of property to intervenor.—Upon the filing by the claimant of the undertaking set forth in § 1-482, the sheriff is not bound to keep the property, or to deliver it to the plaintiff; but may deliver it to the claimant, unless the plaintiff executes and delivers to him a similar undertaking to that required of claimant; and notwithstanding such claim, when so made, the sheriff may retain the property a reasonable time to demand such indemnity. (Rev., s. 801; Code, s. 332; R. C., c. 7, s. 10; 1793, c. 389, s. 3; C. S. 841.)

Purpose of Section.—This section is intended only for the benefit of the sheriff, and to enable him to protect himself against the claim of the third party, by taking from the plaintiff an indemnity against such claim before he delivers the property to him. It does not amount, on the part of the third claimant, to becoming a party to the action, it is not a necessary step in that direction, and the third claimant may become a party under section 1-73 without having made and served such affidavit. *Clemmons v. Hampton*, 70 N. C. 534.

Sheriff Must Take Security.—Under this section the property is not to be delivered to the intervenor by the sheriff until the security is given. *Bear v. Cohen*, 65 N. C. 511, 514.

§ 1-484. Sheriff to return papers in ten days.—The sheriff must return the undertaking, notice and affidavit, with his proceedings thereon, to the court in which the action is pending within ten days after taking the property mentioned therein. (Rev., s. 802; Code, s. 133; C. C. P., s. 187; C. S. 842.)

Art. 37. Injunction.

§ 1-485. When temporary injunction issued.—A temporary injunction may be issued by order in accordance with the provisions of this article. The order may be made by any judge of the superior court in the following cases, and shall be issued by the clerk of the court in which the action is required to be tried:

1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

2. When, during the litigation, it appears by affidavit that a party thereto is doing, or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual; or,

3. When, during the pendency of an action, it appears by affidavit of any person that the defendant threatens or is about to remove or dispose of his property, with intent to defraud the plaintiff. (Rev., s. 806; Code, ss. 334, 338; C. C. P., ss. 188, 189; C. S. 843.)

I. General Considerations.

II. Nature.

III. Grounds of Relief.

A. Character of Relief In General.

B. Availability of Other Relief.

C. Application of Section.

I. GENERAL CONSIDERATION.

Effect upon Prior Law.—This section is merely a statutory recognition of the abolition of the distinction between special and common injunctions, a distinction existing under the old practice. Since the adoption of the Code all injunctions are simply ancillary proceedings and are not available to anyone the basis of whose claim for such relief does not come within at least one of the enumerated classes of this section. *Person v. Person*, 154 N. C. 453, 70 S. E. 752. Under the existing procedure issuance of an injunction presupposes, as an essential requisite, the pendency of an action which is receiving or will receive a judicial determination. *Armstrong v. Kinsell*, 164 N. C. 125, 80 S. E. 235.

Definitions.—An injunction in its ordinary sense is a command, and this command may be either to do or refrain from doing some particular thing. See *Frinck v. Hay*, 22 Wall. 250, 22 L. Ed. 857.

Injunctions are also classified as interlocutory or temporary and perpetual. *Kicklife v. Owings*, 17 How. 47, 49, 15 L. Ed. 44.

Restraint Sought Must Be Germane to Subject of Action.—This section does not permit injunction to issue when the restraint sought is not germane to the subject of the action. *Jackson v. Jernigan*, 216 N. C. 401, 5 S. E. (2d) 143.

Restraining Order and Injunction Distinguished.—This section in no wise abolishes the distinction between restraining orders and injunctions. The distinctive features between these remedial agencies remain and are respected to the utmost extent by the courts.

A restraining order can be issued in any cause by any judge of the superior court anywhere in the state, and made returnable at any time within twenty days, at any place, before a judge residing in or assigned to or holding by exchange the courts within the district in which the county where the cause is pending is situated; but a perpetual injunction can be granted only in the county where the cause is pending, and by the judge who tries the cause at the final hearing. *Hamilton v. Card*, 112 N. C. 589, 17 S. E. 519. See also *Kinston v. Wooten*, 150 N. C. 295, 63 S. E. 1061.

An injunction may be granted by a judge out side the county in which the main cause is pending since this is an ancillary proceeding not involving the merits of the cause. *Parker v. McPhail*, 112 N. C. 502, 503, 16 S. E. 848. This principle was recognized and applied in *Ledbetter v. Pinner*, 120 N. C. 405, 27 S. E. 123, a case in which the validity of a judgment obtained in special proceedings was contested on the grounds that it was entered outside of the county in which the main action was litigated.

Mandamus and Mandatory Injunction Distinguished.—In North Carolina, where both legal and equitable jurisdiction is vested in the same court, there is very little difference in its practical results between proceedings in mandamus and mandatory injunction, the former is permissible when the action is to enforce performance of duties existent for the benefit of the public, and the latter is confined usually to causes of an equitable nature, and to the enforcement of rights which solely concerns individuals. *Clinton*

Dunn Tel. Co. v. Carolina Tel. etc., Co., 159 N. C. 9, 74 S. E. 636.

Good Faith and Reasonable Diligence Necessary.—Before injunctive relief will be granted it is necessary that the plaintiff show his good faith and reasonable diligence in instituting his action, *Jones v. Commissioners*, 107 N. C. 248, 12 S. E. 69, and such facts exhibited by the plaintiff must constitute a substantial cause of action. *Moore v. Silver Valley Min. Co.*, 104 N. C. 534, 10 S. E. 679.

Constitutional Provisions.—The constitutional prohibition of trial of "issues of fact" by the Supreme Court extends to issues of fact as heretofore understood, and does not hinder that tribunal from trying such questions of fact as may be involved in a consideration of the propriety of continuing or vacating an order for a provisional injunction. *Heilig v. Stokes*, 63 N. C. 612, 613.

Increasing Bond.—Under this section the garnishees may be restrained and enjoined from making further payments on their indebtedness to the defendant, until the final determination of the action, but the defendant and the garnishees may move that the bond required of the plaintiffs shall be increased in amount, to the end that said defendant and the garnishees shall be fully protected against loss or damage resulting from the injunction. *Newberry v. Meadows Fert. Co.*, 203 N. C. 330, 339, 166 S. E. 79.

Cited in *Collins v. North Carolina State College*, 198 N. C. 337, 151 S. E. 646; *Hopkins v. Swain*, 206 N. C. 439, 174 S. E. 409; *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850.

II. NATURE.

Beneficial Process.—The injunction is a beneficial process for the protection of rights, and is favorably viewed by courts of chancery, as its object is to prevent rather than redress injuries. See *Cherokee Nation v. Georgia*, 5 Pet. 1, 77, 8 L. Ed. 25. (Dissenting Opinion).

Extraordinary and Provisional Remedy.—Although the specific details for the granting of injunctions are set out in the section, an injunction is still regarded as an extraordinary and provisional remedy, recourse to which may only be had by a party who has exhausted all available remedies. *Chambers v. Penland*, 78 N. C. 53, 56; or unless it be made to appear that the party will suffer irreparable injury unless such relief is granted. *Fink v. Stewart*, 94 N. C. 484.

Equitable Remedy.—Injunction, being equitable in its nature and origin, must be administered upon equitable principles, except in so far as it may come within some plain statutory provision. *Person v. Leary*, 127 N. C. 114, 117, 37 S. E. 149.

Must Be an Adequate Remedy at Law.—The remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. See *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 12, 19 S. Ct. 77, 43 L. Ed. 341.

Inadequacy of Other Remedies.—The general rule is that where a complainant has unquestioned rights which are not adequately protected by legal remedies, he is entitled to the aid of equity. *Union Pacific R. Co. v. Cheyenne*, 113 U. S. 516, 5 S. Ct. 601, 28 L. Ed. 1098; *Corbus v. Alaska Treadwell Min. Co.*, 187 U. S. 455, 23 S. Ct. 157, 47 L. Ed. 256.

But an injunction will not issue to protect the complainant's rights, where he has an adequate legal remedy. *Allen v. Baltimore, etc., R. Co.*, 114 U. S. 311, 5 S. Ct. 925, 962, 29 L. Ed. 200; *Arkansas Building, etc., Ass'n v. Madden*, 175 U. S. 269, 272, 20 S. Ct. 119, 44 L. Ed. 159.

Remedy Only in Foreign Courts.—Formerly a court of equity would grant an injunction where otherwise the party seeking it would be driven to the courts of another state for the purpose of obtaining it. *Richardson v. Williams*, 56 N. C. 116; *Hauser v. Mann*, 5 N. C. 410, 411.

Power of Courts.—The section tends greatly to enlarge the power of the court to grant equitable relief, especially since the granting of the temporary injunction, herein provided, may be accompanied with the appointment of a receiver when necessary for the protection of the subject-matter of the action. *Roper Lumber Co. v. Wallace*, 93 N. C. 22, 23.

III. GROUNDS OF RELIEF.

A. Character of Relief in General.

An injunction can only operate in personam and unless jurisdiction of the party can be acquired, the attempted procedure is a nullity; and upon this principle proceedings to restrain the negotiation of a note in the hands of a holder, a nonresident and beyond the borders of the state, should be dismissed. *Warlick v. Reynolds*, 151 N. C. 606, 66 S. E. 657; *Armstrong v. Kinsell*, 164 N. C. 125, 80 S. E. 235.

The writ does not operate in rem but in personam, *Phelps v. McDonald*, 99 U. S. 298, 25 L. Ed. 473. An injunction issues only to the parties before the court and not to the court. *Central Nat. Bank v. Stevens*, 169 U. S. 432, 463, 18 S. Ct. 403, 42 L. Ed. 807.

Must Be Some Interference. — There must be some interference, actual or threatened, with property or rights of a pecuniary nature, to give chancery jurisdiction to exercise the injunctive powers of the court. See *In re Debs*, 158 U. S. 564, 583, 15 S. Ct. 900, 39 L. Ed. 1092.

B. Availability of Other Relief.

In General.—It is well established that when proper relief can otherwise be had then no injunction will be issued, and where a party can obtain his relief by a motion in the original action he will not be permitted later to institute a new and independent action for the purpose of obtaining an injunction. *Faison v. McIlwaine*, 72 N. C. 312, 313, and cases there cited.

Irreparable Injury.—The rule in regard to the granting of an injunction on the ground that the injury complained of is irreparable in its nature is a strict one. The plaintiff must clearly show that the injury is peculiar in nature, one that cannot be repaired, put back again, or atoned for in damages. *Bond v. Wool*, 107 N. C. 139, 12 S. E. 281; *Goldsboro Lumber Co. v. Hines Bros. Lumber Co.*, 127 N. C. 130, 37 S. E. 152. See also, *McKesson v. Hennessee*, 66 N. C. 473. As to allegations of insolvency when injury is irreparable, see note to § 1-486.

Where Execution Improperly or Prematurely Issued. — Where there has been an improper or premature execution by the clerk, the injured party's remedy is the perfection of his appeal and notice thereof which will have the effect of staying the proceedings, and an injunction will not be granted in such case. *Bryan v. Hubbs*, 69 N. C. 423, 433.

Where it is shown that injury will result from the issuance of an irregular execution, the proper remedy is by motion to set aside and not injunction. *Foard v. Alexander*, 64 N. C. 69, 71.

C. Application of the Section.

Criminal Law. — The courts cannot enjoin the enforcement of the criminal law, nor can the validity of an ordinance be tested by an injunction. *Paul v. Washington*, 134 N. C. 363, 380, 47 S. E. 793.

Act Already Committed. — An injunction will not issue to restrain an act which has already been committed. *Yount v. Setzer*, 155 N. C. 213, 71 S. E. 209.

Specific Instances.—It is impossible in a work of this nature to state the facts and circumstances appearing in the numerous cases pertaining to the subject. A few of the leading cases illustrative of the principles herein before set out, together with references to the particular places in the digest where other cases are collected, are given in order that the practitioner may have a key to the subject. Ed. Note.

Wasteful or Wrongful Disposition of Property of Dissolved Corporation. — The court, upon the dissolution of a corporation, has full control over the property of such corporation, and if necessary for the protection of such property, an injunction may be properly issued. *State v. Roanoke Nav. Co.*, 84 N. C. 705.

Wasteful Destruction by Personal Representative. — A temporary injunction restraining the disposition of assets in this state of an estate administered on in another state, in which the administrator is alleged to have committed a devastavit, was properly continued in their action to the hearing of the cause. *Coleman v. Howell*, 131 N. C. 125, 42 S. E. 555.

Utility Companies and Municipal Corporations. — The section applies equally as well whether the parties litigants be public service or municipal corporations or individuals. See *Woodley v. Carolina Tel. etc., Co.*, 163 N. C. 284, 79 S. E. 598; *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319; *Merrick v. Intramontaine R. Co.*, 118 N. C. 1081, 24 S. E. 667.

As to enjoining continuing trespass, see § 1-486, and the notes thereto.

§ 1-486. When solvent defendant restrained.—

In an application for an injunction to enjoin a trespass on land it is not necessary to allege the insolvency of the defendant when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees. (Rev., s. 807; 1885, c. 401; C. S. 844.)

Irreparable Injury. — The cases are in accord in holding that if the injury which the plaintiff is sustaining or is

about to sustain is an irreparable one so that there can be no sufficient recompense in money, then the plaintiff need not, in his pleadings, allege the insolvency of the defendant, but if the injury is an ordinary one which may be atoned for in money, then the plaintiff, in order to secure a temporary injunction, must allege the defendant's insolvency, for otherwise he has an adequate remedy in an action for damages. *Stewart v. Munger*, 174 N. C. 402, 93 S. E. 927; *Lewis v. Roper Lumber Co.*, 99 N. C. 11, 5 S. E. 19.

Continuing Trespass. — Where it appears that the facts of the case are in dispute and the trespass by the defendant would be continuous, and would produce injury to the plaintiff, a restraining order should issue to the hearing. *Sutton v. Sutton*, 161 N. C. 665, 77 S. E. 838, and, because of this section, it is unnecessary in such case to allege the insolvency of the defendant, *Cobb v. Atlantic etc., R. Co.*, 172 N. C. 58, 89 S. E. 807. The same principle is applicable where the plaintiff shows apparent title to the lands and satisfies the court that his claim for injunctive relief is made in good faith. *Lodge v. James*, 156 N. C. 159, 72 S. E. 204.

Effect upon Discretionary Power of the Court. — The construction placed on this section does not deprive the courts of their discretionary power to require a bond to secure the plaintiff against damages, or to appoint a receiver, where there is a bona fide contention as to the title to lands or timber trees thereon. *Stewart v. Munger*, 174 N. C. 402, 93 S. E. 927.

Continuance to Hearing.—When a continuous trespass is sought to be enjoined, and the rights of the parties require the determination of the jury upon conflicting evidence, and irreparable injury for the continued trespass will likely follow, the courts will ordinarily continue the cause to the hearing to prevent further litigation, cost, and trouble, when no harm thereby can be done, irrespective of the solvency of the alleged trespasser. *Norfolk So. R. Co. v. Rapid Transit Co.*, 195 N. C. 305, 141 S. E. 882.

Destruction of Trees. — Allegations that defendant is insolvent and is cutting down timber trees on plaintiff's land and hauling them off and threatens to continue to do so, to the irreparable damage of the plaintiff, is sufficient to authorize the appointment of a receiver, and since the enactment of this section, it is not necessary to allege the insolvency of the defendant. *McKay v. Chapin*, 120 N. C. 159, 26 S. E. 701.

§ 1-487. Timber lands, trial of title to.—In all actions to try title to timber lands and for trespass thereon for cutting timber trees, when the court finds as a fact that there is a bona fide contention on both sides based upon evidence constituting a prima facie title, no order shall be made pending such action, permitting either party to cut said timber trees, except by consent, until the title to said land or timber trees is finally determined in the action. In all cases where the title to any timber or trees, or the right to cut and remove the same during a term of years, is claimed by any party to such action, and the fee of the soil or other estate in the land by another, whether party to the action or not, the time within which such timber or trees may be cut or removed by the party claiming the same, and all other rights acquired in connection therewith, shall not be affected or abridged, but the running of the term is suspended during the pendency of the action. (Rev., s. 808; 1901, c. 666, s. 1; 1903, c. 642; C. S. 845.)

Purpose of Section. — The primary object of this section is to throw a greater safe-guard around the rights of the litigating parties and to preserve the timber upon the lands in dispute, until the rights of the respective parties can be adjudicated. *Moore v. Fowle*, 139 N. C. 51, 51 S. E. 796.

Constitutional Provisions. — Although the time for cutting the timber trees was extended with the enactment of this section, it is now settled that the section does not interfere with any vested right within the meaning of the constitutional provision prohibiting such interference. *Riley & Co. v. Carter*, 165 N. C. 334, 81 S. E. 414.

Plaintiff Must Show a Bona Fide Claim. — The plaintiff, in order to prevent a dissolution of the injunction obtained against the defendant, must show (1) a bona fide claim to the lands, and (2) that such claim is based upon evidence

constituting a **prima facie** title. *Moore v. Fowle*, 139 N. C. 51, 51 S. E. 796.

Cited in *Lawhon v. McArthur*, 213 N. C. 260, 195 S. E. 786.

§ 1-488. When timber may be cut.—In any action specified in § 1-487, when the judge finds as a fact that the contention of either party is not in good faith and is not based upon evidence constituting a **prima facie** title, upon motion of the other party, who may satisfy the court of the bona fides of his contention and who may produce evidence showing a **prima facie** title, the court may allow such party to cut the timber trees by giving bond as required by law. Nothing in this section affects the right of appeal, and when any party to such action has been enjoined, a sufficient bond must be required to cover all damages that may accrue to the party enjoined by reason of the injunction as now required by law. (Rev., s. 809; 1901, c. 666, ss. 2, 3; C. S. 846.)

Editor's Note.—This section shows clearly the legislative intent to preserve the power of the courts to require a bond of the party who succeeds in having the injunction dissolved, and who is then allowed to proceed to cut the timber trees; but the exercise of this procedure is greatly limited by the provisions of this section, most of which are conditions precedent to its exercise.

Essential Elements.—Under this section the plaintiff must not only show (a) that his claim is made in good faith and (b) that he has a **prima facie** title thereto, but the court must be able to find as a fact, (c) that the claim of the adverse party is not made in good faith. When relief is sought under this provision all these conditions must be complied with. *Johnson v. Duvall*, 135 N. C. 642, 47 S. E. 611.

Injunction Granted Where Contention Bona Fide.—This section was not intended to be a substitute for the preceding sections, and when the court fails to find, in the light of all the evidence, that there is not a **bona fide** contention, then it should grant an injunction under sections 1-486, 1-487. *Kelly v. Enterprise Lumber Co.*, 157 N. C. 175, 72 S. E. 957.

Cited in *Lawhon v. McArthur*, 213 N. C. 260, 195 S. E. 786.

§ 1-489. Time of issuing.—The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, upon its appearing satisfactorily to the judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction. (Rev., s. 810; Code, s. 339; C. C. P., s. 190; 1943, c. 543; C. S. 847.)

Editor's Note.—The 1943 amendment substituted the words "at the time of commencing the action, or at any time afterwards" for the words "when or at any time after commencing the action," formerly appearing in the second and third lines of this section.

Section Construed Strictly.—This section has received a strict construction and a compliance with the procedural steps is mandatory, and is not subject to waiver by agreement of the parties. *Taylor v. Boone*, 172 N. C. 93, 89 S. E. 1065.

Requisites—(a) Affidavit.—Where there is a failure to serve a copy of the affidavit with the injunction, and the judge does not allow such service to be thereafter made, the injunction will be dissolved. *Taylor v. Boone*, 172 N. C. 93, 89 S. E. 1065.

Same—(b) Summons.—An injunction granted before the issuing of the summons in action is premature, since by the express provision of the section an injunction can only be granted at the commencement of the action, (or sometime thereafter). *Trexler v. Newsom*, 88 N. C. 13, 14; *Horne v. Commissioners*, 122 N. C. 466, 470, 29 S. E. 581. But if the defendant goes to trial after the summons has been irregularly issued, and answers the plaintiff's complaint, he is held to have waived the irregularity. *Heilig v. Stokes*, 63 N. C. 612.

§ 1-490. Not issued for longer than twenty days without notice.—No restraining order, or order to

stay proceedings, for a longer time than twenty days shall be granted by a judge out of court, except upon due notice to the adverse party; but the order shall continue and remain in force until vacated after notice, to be fixed by the court, of not less than two nor more than ten days. (Rev., s. 811; Code, s. 346; C. C. P., s. 345; 1905, c. 26; C. S. 848.)

See note under § 27-29.

Old Procedure Retained.—The Code does not change the mode of setting aside an irregular execution; it must still be done by a motion in the cause, and an injunction, where necessary, must be obtained in like manner. *Foard v. Alexander*, 64 N. C. 69, 71.

Effect of Issuance for More than Twenty Days without Notice.—An order to stay proceedings, made, without notice, by a judge out of court for a longer time than twenty days, is irregular and a demurrer to the complaint in the action in which such order was made may be treated as a motion to vacate. *Foard v. Alexander*, 64 N. C. 69.

§ 1-491. Issued after answer, only on notice.—An injunction shall not be allowed after the defendant has answered, except upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the judge granting or refusing the injunction. (Rev., s. 812; Code, s. 340; C. C. P., s. 191; C. S. 849.)

When Special Notice Required.—Special notice of motions for injunctions is only required when made or to be heard out of term; but in such cases, if the opposing party voluntarily appears, in person or by attorney, he will be ordinarily deemed to have waived notice. In cases other than these, the principle that one who has been duly made party to a pending action is bound to take notice of all motions, orders, etc., made during term time, applies with full force and no further notice is required. *Hemphill v. Moore*, 104 N. C. 378, 10 S. E. 313.

§ 1-492. Order to show cause.—If the judge deems it proper that the defendant, or any of several defendants, should be heard before granting an injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained. (Rev., s. 813; Code, s. 342; C. C. P., s. 193; C. S. 850.)

Service upon Corporation.—Ordinarily a corporation before the grant of injunction has a right to service of an order to show cause upon some officer or agent, but if the officers or agents keep themselves out of the way for the express purpose of avoiding such a service, it cannot justly complain if the service on its attorney is made the equivalent of that which its agents by their wrongful acts have made impossible. See *Eureka Lake, etc., Canal Co. v. Yuba County*, 116 U. S. 410, 418, 6 S. Ct. 429, 29 L. Ed. 671.

§ 1-493. What judges have jurisdiction.—The judges of the superior court have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings. A judge holding a special term in any county may grant an injunction, or issue a restraining order, returnable before himself, in any case which he has jurisdiction to hear and determine under the commission issued to him, and the same is returnable as directed in the order. (Rev., s. 814; Code, s. 335; 1876-7, c. 223, ss. 1, 2; 1879, c. 63, ss. 1, 3; C. S. 851.)

Restraining Orders.—The general jurisdiction of restraining orders and injunctions is vested in the judges of the superior courts. Any judge of such court may issue a restraining order in any cause and anywhere in the state. *Hamilton v. Icard*, 112 N. C. 589, 590, 17 S. E. 519.

Perpetual Injunction.—A perpetual injunction must be granted only in the county in which the cause is pending.

Hamilton v. Icard, 112 N. C. 589, 590, 17 S. E. 519. See also, *Ledbetter v. Pinner*, 120 N. C. 455, 456, 27 S. E. 123.

Motions for Receiver.—Motions for the appointment of a receiver may be made before the resident judge of the district, or one assigned to the district or one holding the courts thereof by exchange, at the option of the mover. *Corbin v. McGowan*, 83 N. C. 28.

Appointment of Receiver by County Court.—A general county court is without jurisdiction to appoint a receiver for a judgment debtor having property in another county against whom judgment is rendered in the county court. *Essex Inv. Co. v. Pickelsimer*, 210 N. C. 541, 187 S. E. 813.

Cited in *Hopkins v. Swain*, 206 N. C. 439, 174 S. E. 409.

§ 1-494. **Before what judge returnable.**—All restraining orders and injunctions granted by any of the judges of the superior court, except one holding a special term in any county, shall be made returnable before the resident judge of the district, or the judge assigned to the district, or holding by exchange the courts of the district where the civil action or special proceeding is pending, within twenty days from date of order. If the judge before whom the matter is returned fails, for any reason, to hear the motion and application, or to continue them to some other time and place, any judge resident in, or assigned to hold the courts of, some adjoining district may hear and determine the said motion and application, after giving ten days notice to the parties interested in the application or motion, upon its being satisfactorily shown to him by affidavit or otherwise that the judge before whom the matter was returnable failed to act upon or to continue the same to some other time and place. This removal continues in force the motion and application theretofore granted, till they can be heard and determined by the judge having jurisdiction. (Rev., s. 815; Code, s. 336; 1876, c. 223, s. 2; 1879, c. 63, ss. 2, 3; 1881, c. 51; C. S. 852.)

Restraining Order.—A restraining order for a period of twenty days can be made returnable anywhere in the state. *Hamilton v. Icard*, 112 N. C. 589, 590, 17 S. E. 519.

Failure of Judge to Hear Motion.—Where the judge to whom the motion is returnable fails to hear it, the judge of the adjoining district can hear it upon ten days notice to the parties. *Hamilton v. Icard*, 112 N. C. 589, 590, 17 S. E. 519.

Judge Holding Special Term.—A judge holding a special term cannot make a restraining order returnable before himself where the summons is returnable to a term of court beginning after the special term. *Royal v. Thornton*, 150 N. C. 293, 63 S. E. 1040.

Perpetual Injunctions.—See section 1-493.

Receivers.—See note to section 1-493.

Cited in *Ward v. Agrillo*, 194 N. C. 321, 323, 139 S. E. 451; *Hopkins v. Swain*, 206 N. C. 439, 174 S. E. 409.

§ 1-495. **Stipulation as to judge to hear.**—By a stipulation in writing, signed by all the parties to an application for an injunction order, or their attorneys, to the effect that the matter may be heard before a judge designated in the stipulation, the judge before whom the restraining order is returnable by law, or who is by law the judge to hear the motion for an injunction order, shall, upon receipt of the stipulation forward it and all the papers to the judge designated, whose duty it then is to hear and decide the matter, and return all the papers to the court out of which they issued, the necessary postage or expressage money to be furnished to the judge. (Rev., s. 816; Code, s. 337; 1883, c. 33; C. S. 853.)

Stipulation of Parties.—Agreement in writing by all parties concerned as to what judge of the superior court shall hear the motion is allowed under this section. *Hamilton v. Icard*, 112 N. C. 589, 590, 17 S. E. 519; *Crabtree v. Scheelky*, 119 N. C. 56, 58, 25 S. E. 707.

Same—Duty of Judge Designated.—When the parties have thus stipulated as to what judge shall hear the motion, it is the duty of such judge, if he has before him all the facts, to hear and determine the case, and it is error to continue the injunction. *Cooper v. Cooper*, 127 N. C. 490, 37 S. E. 492.

Applied in *Forester v. North Wilkesboro*, 206 N. C. 347, 174 S. E. 112.

§ 1-496. **Undertaking.**—Upon granting a restraining order or an order for an injunction, the judge shall require as a condition precedent to the issuing thereof that the clerk shall take from the plaintiff a written undertaking, with sufficient sureties, to be justified before, and approved by, the clerk or judge, in an amount to be fixed by the judge, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he sustains by reason of the injunction, if the court finally decides that the plaintiff was not entitled to it. (Rev., s. 817; Code, s. 341; C. C. P., s. 192; C. S. 854.)

Editor's Note.—The phrase "such damages as he may sustain by reason of the injunction," included in this section, has been a fruitful source of much litigation. Persons against whom injunctions have been issued and which were later dissolved, have frequently sought shelter under the broad wording of this section and have attempted to prove all imaginable types and forms of "damages." The courts, however, are inclined to construe the section quite strictly and, wherever possible, the general principles on the subject of damages have been applied rather than the loose construction of which the section is capable of being given.

Section Mandatory.—The provision in this section that the plaintiff in injunction give bond is mandatory, the amount fixed by the judge, conclusive of the extent of the liability thereon, the procedure being for the defendant to move to have the amount increased when he so desires, or thinks it necessary for his protection. *McAden v. Watkins*, 191 N. C. 105, 131 S. E. 375; *James v. Withers*, 114 N. C. 474, 478, 19 S. E. 367.

Burden of Proof as to Amount.—Before judgment can be given upon an injunction bond, the party alleging that he had been damaged by reason of said injunction must establish the quantum of damages sustained. *Hyman v. Devereux*, 65 N. C. 590. And this amount does not include the personal expenses in attending the hearing. *Midgett v. Vann*, 158 N. C. 128, 73 S. E. 801. For full discussion as to attorneys' fees, see *Hyman v. Devereux*, 65 N. C. 588, 590.

Effect of Failure to Require Bond.—The validity of an injunction is not affected by a failure to require an indemnity bond to accompany it; nor is a party for that reason justified in disobeying the mandate, but if aggrieved, his remedy is in a motion to dissolve. *Young v. Rollins*, 90 N. C. 125.

Effect of Filing Defective Bond.—Failure to give the required undertaking is merely an irregularity which will be cured by a subsequent execution thereof. *McKay v. Chapin*, 120 N. C. 159, 25 S. E. 701.

Failure to give the required undertaking under this section is merely an irregularity, which will be cured by the subsequent execution thereof. *Standard Bonded Warehouse Co. v. Cooper*, 30 Fed. (2d) 842, 845, citing *McKay v. Chapin*, 120 N. C. 159, 26 S. E. 701.

Where Money Deposited without Sureties.—Where an injunction is issued under an order that the plaintiff shall give an undertaking with sufficient sureties in a certain sum, it seems that a deposit in money of the sum named will be sufficient, but whether so or not the giving by the plaintiff of the required undertaking before the hearing of a motion to vacate the injunction for the want of it, will supply the alleged defect, and prevent the injunction from being vacated on that account. *Richards v. Baurman*, 65 N. C. 162.

Undertaking Given Prior to Injunction.—Where an undertaking has been given before the issue of a restraining order, it is not necessary for the court, on the return of the order to show cause and upon continuing the injunction to the trial, to require a new undertaking from the plaintiff unless it be shown that the bond already given is insufficient. *Preiss v. Cohen*, 112 N. C. 278, 17 S. E. 520.

In an action to abate a public nuisance plaintiff relator is not required to give an undertaking, the provisions of

this section not being applicable. *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850.

Procedure under Section. — It is not contemplated, under this section, that a separate action shall be brought upon an injunction bond but the damages sustained by reason of an injunction shall be ascertained by proper proceedings in the same action, and may be by reference or otherwise as the judge shall direct. *North Carolina Gold, etc., Co. v. North Carolina Ore, etc., Co.*, 79 N. C. 48. See also, *Nansemond Timber Co. v. Rountree*, 122 N. C. 45, 29 S. E. 61; *Crawford v. Pearson*, 116 N. C. 718, 21 S. E. 561.

Cited in *Gruber v. Ewbanks*, 199 N. C. 335, 338, 154 S. E. 318.

§ 1-497. Damages on dissolution.—A judgment dissolving an injunction carries with it judgment for damages against the party procuring it and the sureties on his undertaking without the requirement of malice or want of probable cause in procuring the injunction, which damages may be ascertained by a reference or otherwise, as the judge directs, and the decision of the court is conclusive as to the amount of damages upon all the persons who have an interest in the undertaking. (Rev., s. 818; Code, s. 341; 1893, c. 251; C. S. 855.)

Want of Probable Cause. — Prior to the amendment of this section by the Acts of 1893 it was an essential element of the defendant's recovery on the plaintiff's indemnity bond that he be able to prove malice or want of probable cause in the institution of the injunction proceedings. *Burnett v. Nicholson*, 79 N. C. 548. Under the section as it now stands it is no longer necessary to allege want of probable cause. *Crawford v. Pearson*, 116 N. C. 718, 21 S. E. 561.

Injunction Sought with Malice. — The preceding section, requiring a bond in an injunction to cover the defendant's damages, and this section, providing for the recovery thereof in the same action, do not limit the remedy to that action, in the event the injunction was sought with malice and without probable cause; and defendant has the right therein to elect between this remedy and that by independent action, without limiting his recovery to an action on the bond when the damages sought are in excess of that amount. *Shute v. Shute*, 180 N. C. 386, 104 S. E. 764.

For procedure under the section, see notes to section 1-488.
Cited in *Gruber v. Ewbanks*, 199 N. C. 335, 338, 154 S. E. 318.

§ 1-498. Issued without notice; application to vacate.—If the injunction is granted without notice, the defendant, at any time before the trial, may apply, upon notice to be fixed by the court of not less than two nor more than ten days, to the judge having jurisdiction, to vacate or modify the same, if he is within the district or in an adjoining district, but if out of the district and not in an adjoining district, then before any judge who is at the time in the district, and if there is no judge in the district, before any judge in an adjoining district. The application may be made upon the complaint and the affidavits on which the injunction was granted, or upon the affidavits on the part of the defendant, with or without answer. If no such application is made, the injunction continues in force until such application is made and determined by the judge, and a verified answer has the effect only of an affidavit. (Rev., s. 819; Code, s. 344; C. C. P., s. 195; 1905, c. 26; C. S. 856.)

Section Mandatory. — The requirement of notice to the defendant is essential to the validity of the proceedings, and where an injunction has been granted without such notice the injunction will be vacated. *Armstrong v. Kinsell*, 164 N. C. 125, 80 S. E. 235.

Modification of Previously Granted Injunction. — A judge may at the instance of the defendant modify an injunction previously granted without giving notice to the plaintiff, but in such case he must found his action merely upon the complaint, and cannot consider the answer or affidavits on the part of the defendant. *Sledge v. Blum*, 63 N. C. 374, 375.

Answer Treated in Affidavit. — The answer under the present practice, in an application to vacate an injunction, is itself but an affidavit when verified and the plaintiff may introduce other affidavits to support the allegations in his complaint; such a verified answer is not conclusive but has only the effect of an affidavit. *Blackwell Durham Tobacco Co. v. McElwee*, 94 N. C. 429.

After the answer and all the affidavits have been filed, if it appears to the court that the plaintiff's whole equity is denied and his case is fully met, the injunction will not be continued to the final hearing. *Rigsbee v. Durham*, 98 N. C. 81, 3 S. E. 749. See also, *Cooper v. Cooper*, 127 N. C. 490, 37 S. E. 492.

However, where it appears from the affidavits that there is probable cause or it can reasonably be seen that the plaintiff will be able to make out his case at the final hearing, then the injunction will be continued. *Seip v. Wright*, 173 N. C. 14, 91 S. E. 359.

Time within Discretion of Judge. — The time, when the affidavits of defendants should be filed and the granting of continuance in injunction cases, is largely within the discretion of the judge. *Tobacco Growers Co-op. Ass'n v. Harvey & Son Co.*, 189 N. C. 494, 127 S. E. 545.

§ 1-499. When opposing affidavits admitted.—If the application is made upon affidavits on the part of the defendant, the plaintiff may oppose the same by affidavits or other proof, in addition to those on which the injunction was granted. (Rev., s. 820; Code, s. 345; C. C. P., s. 196; C. S. 857.)

Original Affidavits Supported by Counter Affidavits. — When the defendant, in an application for a provisional remedy, meets the plaintiff's allegations by counter affidavits, it is competent for the plaintiff to support his original affidavits by others to the same effect and in reply to those offered by the defendants. *Young v. Rollins*, 85 N. C. 485.

Defective Affidavit Made Sufficient by Counter Affidavit.—Where the plaintiff's first affidavit is insufficient in form, and objection is made thereto by the defendant, the replying affidavit by the plaintiff will cure the objectionable consequence of the defects contained in the original affidavit. *Clark v. Clark*, 64 N. C. 150.

Sufficiency of Verification. — An affidavit, upon which an application for a provisional remedy is based, is sufficiently verified when made before a commissioner for this state resident in another state and authenticated by his official signature and seal. *Young v. Rollins*, 85 N. C. 485.

§ 1-500. Restraining orders and injunctions in effect pending appeal; indemnifying bond.—Whenever a plaintiff shall appeal from a judgment rendered at chambers, or in term, either vacating a restraining order theretofore granted, or denying a perpetual injunction in any case where such injunction is the principal relief sought by the plaintiff, and where it shall appear that vacating said restraining order or denying said injunction will enable the defendant to consummate the threatened act, sought to be enjoined, before such appeal can be heard, so that the plaintiff will thereby be deprived of the benefits of any judgment of the supreme court, reversing the judgment of the lower court, then in such case the original restraining order granted in the case shall in the discretion of the trial judge be and remain in full force and effect until said appeal shall be finally disposed of: Provided, the plaintiff shall forthwith execute and deposit with the clerk a written undertaking with sufficient surety, approved by the clerk or judge, in an amount to be fixed by the judge to indemnify the party enjoined against all loss, not exceeding an amount to be specified, which he may suffer on account of continuing such restraining order as aforesaid, in the event that the judgment of the lower court is affirmed by the supreme court. (1921, c. 58; C. S. 858(a).)

Discretion of Court Not Reviewable.—Where an appeal

has been taken from a judgment of the Superior Court judge, vacating a restraining order upon the county board of education from transferring a public school from one district to another, a supplementary order providing for the payment of the teachers pending the appeal is within the sound discretion of the trial judge, and not reviewable. *Clark v. McQueen*, 195 N. C. 714, 143 S. E. 528.

Cited in *Boyd v. Brooks*, 197 N. C. 644, 647, 150 S. E. 178.

Art. 38. Receivers.

§ 1-501. What judge appoints.—Any judge of the superior court with authority to grant restraining orders and injunctions has like jurisdiction in appointing receivers, and all motions to show cause are returnable as is provided for injunctions. (Rev., s. 846; Code, s. 379; C. C. P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; C. S. 859.)

Cross References.—As to corporate receivers, see sections 55-147 to 55-157. As to compensation of receivers, see annotations under section 55-155. As to receiver of ward's estate, see section 33-53. As to what judges have jurisdiction to grant restraining orders and injunctions, see section 1-493. As to receiver in supplemental proceedings, see section 1-363 et seq.

In General.—The provisions of this section and sec. 1-485, in express terms invest the court with very large and comprehensive powers to protect the rights and prevent the perpetration, or the continuance, of wrong in respect to the subject-matter of the action, and to take charge of and protect the property in controversy both before and after judgment, by injunctions and through receivers, pending the litigation; they facilitate and enlarge the authority of the courts in the exercise of these remedial agencies, and do not in any degree abridge the exercise of like general powers that appertain to courts of equity to grant the relief specified, or to grant perpetual injunctions in proper cases, and the like relief. *Roper Lumber Co. v. Wallace*, 93 N. C. 22, 27.

Definition.—A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question, pending the suit, where it does not seem reasonable to the court that either party should do it. See *Booth v. Clark*, 17 How. 322, 331, 15 L. Ed. 164.

Purpose.—It is perfectly manifest that this section, with a view to prevent the inconvenience of parties, intended to fix the place where, rather than the persons before whom, such orders should be made returnable, and that the judges were denominated in the order in which we find them because it was supposed that one or the other of them would at all times be within the district of the action. *Galbreath v. Everett*, 84 N. C. 546, 549.

An Inherent Power.—The power to appoint a receiver is necessarily inherent in a court which possesses equitable jurisdiction. *Skinner v. Maxwell*, 66 N. C. 45, 47.

Discretion of Judge.—The appointment of a receiver is not a matter of positive right, but rests in the sound legal discretion of the judge, who will take into consideration the nature of the property and the effect of granting or refusing such an application upon the material interests of the respective parties to the controversy. *Whitehead v. Hale*, 118 N. C. 601, 24 S. E. 360.

Same—Necessary Number.—The court should not appoint more receivers than are necessary. *Battery Park Bank v. Western Carolina Bank*, 126 N. C. 531, 36 S. E. 39.

Necessity That Judge "Find the Facts."—Upon an application for an injunction and receiver it is not necessary for the judge to "find the facts" further than to examine the affidavits and determine whether sufficient cause is shown for the ancillary relief. *City Nat. Bank v. Bridges*, 114 N. C. 381, 19 S. E. 642, citing *Jones v. Boyd*, 80 N. C. 258.

Effect on Both Parties Considered.—It is the duty of the court, in passing upon a motion for an injunction or the appointment of a receiver, to consider the consequences of such action upon both parties. *Venable v. Smith*, 98 N. C. 523, 4 S. E. 514, citing *Hanna v. Hanna*, 89 N. C. 68. See also, *Lewis v. Roper Lumber Co.*, 99 N. C. 11, 5 S. E. 19, 20.

Order without Prejudice.—Where it appears from verified pleadings that there is a bona fide controversy between the parties, the mortgagor's order temporarily restraining the foreclosure of the mortgage is properly continued to the final hearing, without prejudice to the right of the mortgagees to move for the appointment of a receiver. *Bennett v. Mortgage Service Corp.*, 206 N. C. 902, 173 S. E. 22.

What Judge Appoints.—Ordinarily the motion for a receiver must be made before the resident judge of the district, or one assigned to the district or holding the courts thereof by exchange, at the option of the mover. *Corbin v. Berry*, 83 N. C. 28; *Worth v. Piedmont Bank*, 121 N. C. 343, 347, 28 S. E. 488.

Or, at most, in analogy to the granting of restraining orders, if the motion for a temporary receiver is granted by any other judge than one of those just named, the order must be made returnable before one of such judges. *Galbreath v. Everett*, 84 N. C. 546; *Hamilton v. Icard*, 112 N. C. 589, 17 S. E. 519, *Worth v. Piedmont Bank*, 121 N. C. 343, 347, 28 S. E. 488.

Clerk Cannot Appoint.—The clerk cannot appoint a receiver as that power is reserved to the judge alone. *Parks v. Sprinkle*, 64 N. C. 637, 639.

Operation and Effect of Appointment.—The utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled but not to change the title, or even the right of possession in the property. *Quincy, etc., R. Co. v. Humphreys*, 145 U. S. 82, 97, 12 S. Ct. 787, 36 L. Ed. 632.

An Officer of Court.—A receiver is an officer of the court, and his possession of the property is the possession of the court. He holds it as a custodian until the rightful claimant is ascertained by the court, and then for such claimant. *Battle v. Davis*, 66 N. C. 252.

Nature of Office.—A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed. He is the right arm of the jurisdiction invoked. *Union Bank v. Kansas City Bank*, 136 U. S. 223, 236, 10 S. Ct. 1013, 34 L. Ed. 341.

Powers and Duties.—A receiver is an officer of the court and subject to its directions and orders. He has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court. *Stuart v. Boulware*, 133 U. S. 78, 81, 10 S. Ct. 242, 33 L. Ed. 568.

Title Relates Back.—"The title of the receiver dated back to the time of granting the order, even though preliminary conditions must be performed, and he remains out of possession pending such performance." *Beach on Rec. Sec.*, 200. *Worth v. Piedmont Bank*, 121 N. C. 343, 349, 28 S. E. 488.

Place of Hearing.—The hearing to a receiver may be held outside of the county where the main action is pending. *Parker v. McPhail*, 112 N. C. 502, 504, 16 S. E. 848.

The interest of the owner is in no wise changed by the appointment of a receiver. The legal title and possession are held by him for the owner and the property is to be administered under the orders of the court. *Southern Pants Co. v. Rochester German Ins. Co.*, 150 N. C. 78, 80, 74 S. E. 812.

Necessary Allegations.—Where the appointment of a receiver is sought as an ancillary remedy the plaintiffs must allege and show that they are entitled to the main relief, and must then show their equity entitling them to the ancillary relief in aid of their main relief. *Witz, etc., Co. v. Gray*, 116 N. C. 48, 20 S. E. 1019.

Security Omitted.—An order appointing a receiver is not void by reason of an omission of the court to require adequate security. *Nesbitt & Bro. v. Turrentine*, 83 N. C. 536.

Matter of Record.—The appointment of receivers is matter of record, and should be shown by the record. *Person v. Leary*, 126 N. C. 504, 36 S. E. 35.

Conflict of Concurrent Jurisdictions.—The court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its rights to do so because it may not have first obtained physical possession of the property in dispute. *Moran v. Sturges*, 154 U. S. 256, 274, 14 S. Ct. 1019, 38 L. Ed. 981.

Priority Where Two Receivers Appointed.—The test of jurisdiction in a case of two receivers being appointed is not the first issuing of the summons, nor the first preparation and verification of the papers, which are the acts of the parties, nor which receiver first took possession, but which court is first "seized of jurisdiction" by making an order upon legal proceedings exhibited before it. *Worth v. Piedmont Bank*, 121 N. C. 343, 348, 28 S. E. 488.

Same—Date Determines.—Priority as between receivers is determined by reference to the date of appointment since the court will not permit both to act. *High on Rec. Sec.*, 162. *Worth v. Piedmont Bank*, 121 N. C. 343, 349, 28 S. E. 488.

Same—Same—Fractions of a Day.—Where proper proceedings for the appointment of a receiver are begun in two different courts and a different receiver is appointed in each case, the court, in determining the priority of appointment as between the receivers, will take notice of fractions of a day. *Worth v. Piedmont Bank*, 121 N. C. 343, 28 S. E. 488.

Complaint Should Be Verified.—The practice of appointing a receiver upon an unverified complaint and without notice to creditors and other persons interested, is not commended. *Fisher v. Trust Co.*, 138 N. C. 91, 50 S. E. 592.

Proof of Appointment of Foreign Receivers.—Persons suing as receivers of a foreign court should, on their appointment being denied, prove the same by a certified copy of the decree dissolving the corporation and appointing them. *Person v. Leary*, 127 N. C. 114, 37 S. E. 149, reversing on rehearing judgment in 126 N. C. 504, 36 S. E. 35.

Quoted in Essex Inv. Co. v. Pickelsimer, 210 N. C. 541, 187 S. E. 813.

Cited in Hopkins v. Swain, 206 N. C. 439, 174 S. E. 409.

§ 1-502. In what cases appointed.—A receiver may be appointed—

1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court.

2. After judgment, to carry the judgment into effect.

3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

4. In cases provided in chapter entitled Corporations in the article Receivers; and in like cases, of the property within this state of foreign corporations.

The article Receivers, in the chapter entitled Corporations, is applicable, as near as may be, to receivers appointed hereunder. (Rev., s. 847; Code, c. 379; C. C. P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; C. S. 860.)

In General.—This section specifies certain cases in which a receiver may be appointed, but does not materially alter the equitable jurisdiction of our courts upon this subject. *Skinner v. Maxwell*, 66 N. C. 45, 48.

Where the plaintiff makes it properly to appear to the court that he is in imminent danger of loss by the defendant's insolvency, or that he reasonably apprehends that the defendant's property will be destroyed, removed or otherwise disposed of by the defendant pending the action, or that the defendant is insolvent, and it must be sold to pay his debts, or that he is attempting to defraud the plaintiff, a receiver for his property may be appointed before judgment. Other instances pointed out by Walker, J. in *Kelly v. McLamb*, 182 N. C. 158, 108 S. E. 435.

Before Judgment.—Where a party establishes an apparent right to land, and the person in possession is insolvent, a receiver will be appointed to take charge of the rents and profits during the pendency of the action. *McNair v. Pope*, 96 N. C. 502, 2 S. E. 54, citing *Kerchner v. Fairley*, 80 N. C. 24, and cases there cited; *Nesbitt & Bro. v. Turrentine*, 83 N. C. 536, and cases cited; *Oldlam v. Bank*, 84 N. C. 304; *Horton v. White*, 84 N. C. 297; *Roper Lumber Co. v. Wallace*, 93 N. C. 22.

Where property is the subject of an action and is liable to clear equities in a party out of possession, the court may appoint a receiver when it seems just and necessary to keep the property in dispute from the control of either party until the controversy is determined. *Skinner v. Maxwell*, 66 N. C. 45, 48.

In order to appoint a receiver before judgment under this section, it must appear that claimant has an apparent right to property which is the subject of the action and the property or the rents are in danger of being lost, *Witz v. Gray*, 116 N. C. 48, 20 S. E. 1019; *Pearce v. Elwell*, 116 N. C. 595, 21 S. E. 305; and it is generally necessary to show that the party in possession is insolvent, *Fillington v. Currie*, 193 N. C. 610, 137 S. E. 869. In re Penny, 10 F. Supp. 638, 640.

Where an executor's petition to sell lands alleges merely that personalty is insufficient to pay debts, plaintiff execu-

tor is not entitled to the appointment of a receiver for the lands on the ground that the action cannot be tried until a subsequent term, and that the devisee had refused to pay taxes, the allegation merely that the personalty is insufficient failing to show plaintiff executor's apparent right to the relief as required for the appointment of a receiver under the provisions of subsection (1) of this section, especially when the devisee denies the allegation that the personalty is insufficient. *Neighbors v. Evans*, 210 N. C. 550, 187 S. E. 796.

County Court Can Not Appoint Receiver after Judgment Docketed in Superior Court.—After the judgment of a general county court is docketed in the Superior Court of the county the county court has no further jurisdiction of the case and may not thereafter hear a motion for the appointment of a receiver for the judgment debtor. *Essex Inv. Co. v. Pickelsimer*, 210 N. C. 541, 187 S. E. 813.

Discretion of Court.—The appointment of a receiver pendente lite is not a matter of strict right, but rests in the sound discretion of the court. *Hanna v. Hanna*, 89 N. C. 68, 71.

Power of Court to Impose Conditions.—In appointing a receiver the court has a right, within certain recognized limits, to prescribe the terms and conditions of the appointment. See *Bosworth v. St. Louis Terminal R. Ass'n*, 174 U. S. 182, 187, 19 S. Ct. 625, 43 L. Ed. 941.

The power to appoint a receiver is inherent in a court of equity. The change to the Code did not abridge, but enlarged, it. In re Penny, 10 F. Supp. 638, 640.

A receiver will not be appointed where there is a full and adequate remedy at law. In re Penny, 10 F. Supp. 638, 640.

Unless Defense of Adequate Remedy at Law Is Waived.—A simple contract creditor may obtain, in proper cases, equitable relief where answer admits indebtedness and consents to appointment of receiver, waiving the defense of adequate remedy at law. In re Penny, 10 F. Supp. 638, 640, citing *Newberry v. Davison Chemical Co.*, 65 F. (2d) 724; *Harkin v. Brundage*, 276 U. S. 36, 51, 48 S. Ct. 268, 72 L. Ed. 457.

Where the debtor and one small creditor agree to have a receiver appointed and to restrain all other creditors from doing anything, a receivership under such circumstances is an agency for the defendant, and the title of such a receiver to the assets of the bankrupt debtor is merely colorable and he may be required to turn over assets to trustee in bankruptcy. In re Penny, 10 F. Supp. 638, 641.

Contracts and Expenditures.—A receiver is not authorized, without previous direction of the court, to incur any expenses on account of property in his hands beyond what is absolutely essential to its preservation, as contemplated by his appointment. See *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 293, 10 S. Ct. 1019, 34 L. Ed. 408.

Right to Sue.—A receiver is vested with very little discretion, and he must apply to the court for liberty to bring or defend actions. See *Booth v. Clark*, 17 How. 322, 331, 15 L. Ed. 164.

Exhaustion of Remedy at Law.—An objection that a judgment creditor applying for the appointment of a receiver has not exhausted his remedy at law will be disregarded where not raised in time, or where the procedure at law would have been an idle ceremony, or where the objecting party has consented to or acquiesced in the appointment. See *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 10 S. Ct. 604, 33 L. Ed. 1021.

A receiver of defendant's property will not be appointed at the request of a judgment creditor without more being shown where he has the remedy of execution against the property. *Scoggins v. Gooch*, 211 N. C. 677, 191 S. E. 750.

Danger of Loss.—Under this section apparent danger of waste or injury to the property, or loss of the rents and profits because of the insolvency of the adverse party in possession, is the ground for appointing a receiver thereof. *Twitty v. Logan*, 80 N. C. 69; *Rollins v. Henry*, 77 N. C. 467.

Property or funds will not be taken from one entitled to custody thereof, and transferred to a receiver, unless there is imminent danger of loss, *Rheinstein v. Dixby*, 92 N. C. 307, citing *Thompson v. McNair*, 62 N. C. 121.

Same—Examples.—Where plaintiff mortgagor obtained an injunction to restrain the sale of the mortgaged premises until certain counterclaims could be passed upon and the sum really due ascertained, the defendant mortgagee is entitled to have a receiver appointed to take charge of the property and secure the rents and profits where the same are in danger of being lost. *Oldham v. First Nat. Bank*, 84 N. C. 304.

Plaintiff mortgagee was administrator of one of two mortgagors, whose heirs and the other mortgagor were de-

fendants in an action to foreclose a mortgage; the property conveyed was inadequate to pay the debt, and the mortgagor in possession was insolvent; the plaintiff denied an alleged payment of the debt and the existence of assets in his hands applicable thereto: Held, that in such case it was not error in the court on application of the plaintiff to appoint a receiver to secure the rents and profits pending the litigation. *Ten Broeck v. Orchard*, 74 N. C. 409; *Rollins v. Henry*, 77 N. C. 467, cited and approved. *Kerchner v. Fairley*, 80 N. C. 24.

Where lands were devised to two persons, both of whom were appointed executors, charged with the payment of certain debts, and one of the executors, claiming a part of the land under a deed subsequent in date to the execution of the will, had entered thereon and was proceeding to operate it as mining property, and it appeared there was some danger of waste of the property, and the solvency of the vendee-executors was doubtful: Held, to be a proper case for the appointment of a receiver. *Stith v. Jones*, 101 N. C. 360, 8 S. E. 151.

General Allegations Insufficient. — A receiver will not be appointed pendente lite, on a general allegation that loss will ensue from nonpayment, without a full statement of the facts. *Hanna v. Hanna*, 81 N. C. 68, citing *Hughes v. Person*, 63 N. C. 548; *Wood v. Harrell*, 74 N. C. 338. See also, *Southern Flour Co. v. McIver*, 109 N. C. 120, 13 S. E. 905.

Insolvency Alone Insufficient. — The mere insolvency of the party in possession of property, where there is no allegation that the defendant intends to run off with or conceal or destroy the property, is not sufficient ground for the appointment of a receiver. *Whitehead v. Hale*, 118 N. C. 601, 24 S. E. 360.

Property Threatened by Fraud and Insolvency. — Where equity will impress a trust upon property in the hands of one who has obtained it by fraud or covin, and the property or fund is threatened both by his fraud and insolvency, the principles of equity will justify and call for the appointment of a receiver to take charge of the property and conserve it pending the litigation. *Peoples Nat. Bank v. Waggoner*, 185 N. C. 297, 117 S. E. 6.

Same—Question Postponed. — Where an application for a receiver is based on fraud as to creditors in a deed, the question of fraud will not be determined on hearing of the application, but must stand till the final hearing of the case. *Rheinstein v. Bixby*, 92 N. C. 307, citing *Levenson & Co. v. Elson*, 88 N. C. 182.

Fraudulent Confession of Judgment. — A receiver may be appointed under this section, in a suit against a debtor and others to restrain an execution sale, where the debtor has confessed judgment apparently with fraudulent intent, and executions have been levied on the only property of the debtor within the state in favor of nonresident creditors who seek to take the property out of the state. *Stern & Co. v. Austern*, 120 N. C. 107, 27 S. E. 31.

Insolvent Foreign Corporation. — An insolvent corporation, with its property or plant located in this state, is subject to the appointment by our courts of a receiver to take charge of its assets here and administer them as a trust fund for its creditors, though incorporated under the laws of another state, approving *Holshouser v. Copper Co.*, 138 N. C. 248, 50 S. E. 650. *Summit Silk Co. v. Kinston Spinning Co.*, 154 N. C. 421, 70 S. E. 820.

Infant's Estate. — On the principle of protection, a receiver may be appointed of an infant's estate if it be not vested in a trustee, for he is incompetent to take charge of it himself. *Skinner v. Maxwell*, 66 N. C. 45, 48.

To Prevent Suspension of Business. — Where the property and franchise of a city water company were to be sold to satisfy a judgment it was held that in order to prevent all possible risk of the temporary suspension of the business of the water company, it would be proper to appoint a receiver under par. 2 of this section. *McNeal Pipe, etc., Co. v. Howland*, 111 N. C. 615, 625, 16 S. E. 857.

What Property May Be Taken. — Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into the possession of a receiver. See *Davis v. Grav*, 16 Wall. 203, 217, 21 L. Ed. 447.

Who May Apply for a Receiver. — Upon the insolvency of a railroad company a receiver may be appointed upon the application of the holders of the majority of the stock and of the judgment creditors, other persons interested, being made parties and given an opportunity to be heard upon the merits and upon the adjudication and allowance of claims against the property. See *Union Trust Co. v. Illinois Mid. R. Co.*, 117 U. S. 434, 6 S. Ct. 809, 29 L. Ed. 963.

Upon Application for Injunction. — Under the broad terms of this section the court has power to appoint a receiver, upon an application for an injunction where it appears that this action will best serve the interests of both

parties. *Hurwitz v. Carolina Sand, etc., Co.*, 189 N. C. 1, 126 S. E. 171.

Notice to Owner. — Notice to the owner of property should be given before appointment of a receiver therefor. *York v. McCall*, 160 N. C. 276, 76 S. E. 84.

Effect of Instrument Giving Mortgagee Power of Appointment of Trustee. — The appointment of a receiver is an equitable remedy and the provisions of this and the following section enacted before the giving of a deed of trust upon lands may not be entirely supplanted by a provision in the instrument which gives the mortgagee or trustee the unequivocal right to the appointment of a receiver in the event of the happening of certain conditions so as to prevent our courts sitting in their equity jurisdiction from administering the equities to which the mortgagor is entitled under the facts. *Woodall v. North Carolina Joint Stock Land Bank*, 201 N. C. 428, 160 S. E. 475.

Apparently Good Title Sufficient. — Where a party, in this case a defendant, in an action involving the title and possession of land, demands affirmative relief and asks for the appointment of a receiver, it is sufficient if he shows an apparently good title, either not controverted, or not unequivocally denied by his adversary. *Lovett v. Slocumb*, 109 N. C. 110, 13 S. E. 893.

Where Receivership Would Cause Loss. — A receiver will not be appointed, in an action to foreclose a mortgage on a newspaper, when the defendant denies owing anything on the mortgage debt, and it is apparent that, owing to the peculiar nature of the property, the appointment of a receiver would practically destroy its value. *Whitehead v. Hale*, 118 N. C. 601, 24 S. E. 360.

Cited in *Harris v. Hilliard*, 221 N. C. 329, 20 S. E. (2d) 278.

§ 1-503. Appointment refused on bond's being given. — In all cases where there is an application for the appointment of a receiver, upon the ground that the property or its rents and profits are in danger of being lost, or materially injured or impaired, or that a corporation defendant is insolvent or in imminent danger of insolvency, and the subject of the action is the recovery of a money demand, the judge before whom the application is made or pending shall have the discretionary power to refuse the appointment of a receiver if the party against whom such relief is asked, whether a person, partnership or corporation, tenders to the court an undertaking payable to the adverse party in an amount double the sum demanded by the plaintiff, with at least two sufficient and duly justified sureties, conditioned for the payment of such amount as may be recovered in the action, and summary judgment may be taken upon the undertaking. In the progress of the action the court may in its discretion require additional sureties on such undertaking. (Rev., s. 848; 1885, c. 94; C. S. 861.)

In General. — Upon application for a receiver it is proper to allow a defendant to continue in possession of property upon giving a sufficient bond to protect the other claimants. *Frank v. Robinson*, 96 N. C. 28, 1 S. E. 781. See also, *Kron v. Smith*, 96 N. C. 386, 2 S. E. 463; *Godwin v. Watford*, 107 N. C. 168, 11 S. E. 1051.

Where there is danger of loss of rents and profits, instead of appointing a receiver the court may allow the defendant to execute a bond to secure the rents and profits and such damages as may be adjudged the plaintiff, and require an account to be kept. *Durant v. Crowell*, 97 N. C. 367, 2 S. E. 541; *Roper Lumber Co. v. Wallace*, 93 N. C. 22; *Lewis v. Roper Lumber Co.*, 99 N. C. 11, 5 S. E. 19, 20; *Ousby v. Neal*, 99 N. C. 146, 5 S. E. 901.

Opportunity to File Bond. — The court erred in directing a receiver to take possession and control of the mines, and machinery for operating the same, without giving the defendant an opportunity to file a bond to secure the payment over to the receiver of any proceeds therefrom, as the court might subsequently direct. *Stith v. Jones*, 101 N. C. 360, 8 S. E. 151.

Section 1-111 Does Not Apply. — Section 1-111, requiring a defendant in ejectment to give bond before putting in a defense to the action, does not abridge the power of the court to appoint a receiver to secure the rents and profits. *Kron v. Dennis*, 90 N. C. 327; *Durant v. Crowell*, 97 N. C. 367,

374, 2 S. E. 541; Arey v. Williams, 154 N. C. 610, 70 S. E. 931.

Bankruptcy of Defendant.—Where plaintiff in an action in the superior court acquires a lien on defendant's property, which is taken into the custody of the court and released on the giving of a bond under this section, upon the adjudication of the defendant a bankrupt, the state court may order that the cause proceed to trial, any judgment rendered for plaintiff to be collectible, by execution, only from the sureties on the bond, so that the plaintiff or sureties may prove the judgment as a claim in the bankruptcy proceeding. *Gordon v. Calhoun Motors*, 222 N. C. 398, 23 S. E. (2d) 325.

Applied in *Woodall v. North Carolina Joint Stock Land Bank*, 201 N. C. 428, 160 S. E. 475; *Little v. Wachovia Bank, etc.*, 208 N. C. 726, 182 S. E. 491.

§ 1-504. Receiver's bond.—A receiver appointed in an action or special proceeding must, before entering upon his duties, execute and file with the clerk of the court in which the action is pending an undertaking payable to the adverse party with at least two sufficient sureties in a penalty fixed by the judge making the appointment, conditioned for the faithful discharge of his duties as receiver. And the judge having jurisdiction thereof may at any time remove the receiver, or direct him to give a new undertaking, with new sureties, and on the like condition. This section does not apply to a case where special provision is made by law for the security to be given by a receiver, or for increasing the same, or for removing a receiver. (Rev., s. 849; Code, s. 383; C. S. 862.)

Cross References. — As to giving bond in surety company, see sections 109-16 and 109-17. As to clerk's bond liable when clerk appointed receiver, see annotations under section 33-53.

Effect of Failure to Require Bond. — An order appointing a receiver is not void by reason of an omission of the court to require adequate security. *Nesbitt & Bro. v. Turrentine*, 83 N. C. 536.

Breach. — Where the receiver's delinquency is manifest, and he fails to comply with the order of the court in respect to the fund, such failure is a breach of the bond, upon which suit may be brought by leave of the court. *Bank v. Creditors*, 86 N. C. 323.

Same—Must Be Ascertained. — A receiver and his surety can not be sued upon the bond for an alleged breach of his trust, before a default is ascertained—the proper practice being to apply to the court for a rule on the receiver to render his account. *Bank v. Creditors*, 86 N. C. 323; *Atkinson v. Smith*, 89 N. C. 72.

Same—Burden of Proof. — The burden is upon a receiver and his sureties to show that he used due diligence in investing the money in his hands. *Waters v. Melson*, 112 N. C. 89, 16 S. E. 918.

Judgment. — The court will not, by order in a cause in which a receiver has been appointed, direct a judgment to be entered against him and his sureties. The proper practice is upon a report finding the amount due by the receiver, and upon his failing to pay the same, for the court to grant leave to sue upon the bond. *Atkinson v. Smith*, 89 N. C. 72.

Action against Sureties. — The liability of sureties on a receiver's bond can only be enforced by independent action against them and not by motion in the cause. *Black v. Gentry*, 119 N. C. 502, 26 S. E. 43.

Same—Receiver Not a Party. — Where judgment has been recovered against the receiver, he is not a necessary party to an action against the sureties on his bond. *Black v. Gentry*, 119 N. C. 502, 26 S. E. 43.

§ 1-505. Sale of property in hands of receiver. — The resident judge or the judge assigned to hold any of the courts in any judicial district of North Carolina shall have power and authority to order a sale of any property, real or personal, in the hands of a receiver duly and regularly appointed by the Superior Court of North Carolina upon such terms as appear to be to the best interests of the creditors affected by said receivership. (1931, c. 123, s. 1.)

§ 1-506. Confirmation of sales outside county of action; notice to creditors.—Any sale made by a receiver may be confirmed outside of the county in which said action is pending, either by the resident judge or the judge assigned to hold any of the courts of the district in which said sale is made, upon proof of written notice to each creditor who has filed his claim with said receiver of at least ten days prior to the date of confirmation. The said notice shall specify the time and place when application for confirmation shall be made, and an affidavit of the receiver showing that notice was mailed to each creditor at his last known post office address shall be sufficient proof of notice to said creditors. (1931, c. 123, s. 2; c. 267.)

Editor's Note.—Public Laws 1931, c. 267, purported to amend this section by inserting the word "by" in the first line of this section, although the published section already contained such word.

§ 1-507. Validation of sales made outside county of action.—All receiver's sales made prior to March 16, 1931, where orders were made and confirmation decreed or where either orders were made or confirmation decreed outside the county in which said actions were pending by a resident judge or the judge assigned to hold the courts of the district are hereby validated, ratified and confirmed. (1931, c. 123, s. 3.)

Art. 39. Deposit or Delivery of Money or Other Property.

§ 1-508. Ordered paid into court.—When it is admitted by the pleading or examination of a party that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the judge may order it deposited in court, or delivered to such party with or without security, subject to the further direction of the judge. (Rev., s. 850; Code, s. 380; C. C. P., s. 215; C. S. 863.)

Party Entitled May Retain. — The rule is quite well settled that, unless in case of threatened irreparable damage or loss of the fund, it will be suffered to remain in the hands of the party who in law is entitled to its custody and care. *Thompson v. McNair*, 22 N. C. 121; *Levenson & Co. v. Elson*, 88 N. C. 182, 184.

When Court Will Retain. — When a disputed fund is in possession and under the control of the court, and the right of a claimant is doubtful, it will be retained until the determination of the controversy, when it can be ascertained to whom it belongs. *Morris v. Willard*, 84 N. C. 293, and cases there cited; *Ponton v. McAdoo*, 71 N. C. 101; *Levenson & Co. v. Elson*, 88 N. C. 182, 184.

§ 1-509. Ordered seized by sheriff.—When, in the exercise of his authority, a judge has ordered the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the judge, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or property, and deposit, deliver, or convey it, in conformity with the direction of the judge. (Rev., s. 851; Code, s. 381; C. C. P., s. 215; C. S. 864.)

§ 1-510. Defendant ordered to satisfy admitted sum.—When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the judge, on motion, may order the defendant to satisfy that part of the claim, and may enforce the order as it en-

forces a judgment or provisional remedy. (Rev., s. 852; Code, s. 382; C. C. P., s. 215; C. S. 865.)

Claim Not Denied.—Where the complaint in an action on two notes set out each note as a separate cause of action and the defendant answered as to one only, it was error to refuse judgment on the note to which no defense was interposed, and from such refusal, being a denial of a substantial right, an appeal was properly taken. In such case judgment should have been given on the one note and the cause continued as to the other. *Curran v. Kerchner*, 117 N. C. 264, 23 S. E. 177.

Where in an action on a note the defendants admit liability in a certain part thereof but deny liability for the balance: Held, an order directing that plaintiff recover the amount admitted to be due without prejudice to plaintiff's right to litigate the balance of the note is authorized by this section. *Meadows Fert. Co. v. Farmers Trading Co.*, 203 N. C. 261, 165 S. E. 694.

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

Art. 40. Mandamus.

§ 1-511. Begun by summons and verified complaint.—All applications for writs of mandamus must be made by summons and complaint, which must be duly verified. (Rev., s. 822; Code, s. 622; 1871-2, c. 75; C. S. 866.)

I. Historical.

II. Nature.

III. When Mandamus Will Lie.

A. General Rules.

B. Illustrations of Mandamus as Proper Remedy.

C. Illustrations of Mandamus as Improper Remedy.

Cross Reference.

As to mandamus to aid relator in civil action to try title to office, see section 1-528.

I. HISTORICAL.

In England mandamus was a prerogative writ, when no other remedy could be had, with many refinements issuing only at the pleasure of the court. By statute 9 Anne, chap. 20, the remedy was made one of right, and the general rules of pleading and practice were made applicable to mandamus as in other personal actions. At common law the return to a writ of mandamus could not be traversed, and if the matters set forth were sufficient in law, the defendant had judgment to go without day. If the return was false, the remedy of the person aggrieved thereby was an action on the case for making a false return; and if the plaintiff proved the matters of fact false he recovered damages and costs. By 9 Anne, chap. 20 in certain cases all or any of the material facts set forth in the return may be traversed. These sections extend this provision to all cases, and upon a traverse of any of the material facts "the summons, pleading and practice shall be the same as is prescribed for civil actions," and if an issue of fact is raised by the pleadings, it must be decided by a jury. *Tucker v. Justices*, 46 N. C. 451, 459. *Lyon v. Commissioners*, 120 N. C. 237, 241, 26 S. E. 929.

As long ago as Bacon's time it was laid down as a general rule that, where a man is refused to be admitted or wrongfully turned out of any office or franchise that concerns the public or the administration of justice he may be admitted or restored by mandamus. *Rhodes v. Love*, 153 N. C. 468, 473, 69 S. E. 436.

The writ of mandamus was introduced to prevent disorder from a failure of justice and defect of police. See *Labette County Com'rs v. United States*, 112 U. S. 217, 225, 5 S. Ct. 108, 28 L. Ed. 698.

II. NATURE.

Judicial Writ.—The writ of mandamus is a judicial writ, a part of the recognized course of legal proceedings. See *Thompson v. Allen County*, 115 U. S. 550, 558, 61 S. Ct. 140, 29 L. Ed. 472.

A Writ of Right.—There is no further contention that the writ of mandamus is a high prerogative writ, as it was at common law. It is now a writ of right, to be used as an ordinary process, and every one is entitled to it where it is the appropriate process for asserting the right claimed. *Belmont & Co. v. Reilly*, 71 N. C. 260. *Burton v. Furman*, 115 N. C. 166, 168, 20 S. E. 443.

Mandamus is an extraordinary remedy, and the writ will not issue except in cases of necessity, where no other adequate remedy is available; and when an issue of fact is raised by the pleadings the determination of which may

conclude the matter, the issuance of the writ should in the meanwhile be denied. *Edgerton v. Kirby*, 156 N. C. 347, 72 S. E. 365; *Duke v. Turner*, 204 U. S. 623, 631, 27 S. Ct. 316, 51 L. Ed. 652.

Legal Remedy.—The relief granted by mandamus is affirmative, and the remedy is essentially and exclusively a legal remedy, and is unknown to equity. See *Walkley v. Muscatine*, 6 Wall. 481, 18 L. Ed. 930; *Smith v. Bourbon County*, 127 U. S. 105, 111, 8 S. Ct. 1043, 32 L. Ed. 73.

Sufficient Evidence.—Before mandamus can be issued to compel the board of commissioners of a county to levy a tax to pay a judgment against the commissioners, the plaintiff, judgment-creditor, must show affirmatively by the record or other competent evidence that the consideration of the debt, upon which the judgment was obtained, was of such character as to fall under the head of ordinary or necessary county expenses. *Bear v. Commissioners*, 124 N. C. 204, 210, 32 S. E. 558.

Within Judicial Discretion.—The issuance of the writ is within the judicial and not the arbitrary discretion of the court, and where there is a right with no other adequate remedy, this writ should not be denied, if it is the proper remedy. *Edgerton v. Kirby*, 156 N. C. 347, 72 S. E. 365.

Resembles a Civil Action.—While mandamus is in the nature of an execution, it is also in the nature of a civil action, with summons, pleadings, and Code practice. *Bear v. Commissioners*, 124 N. C. 204, 32 S. E. 558.

The motion of the plaintiff in mandamus proceedings, on the pleadings and admissions of the defendant, for a mandamus, is in the nature of a demurrer or *tenuis* to the answer, involving the admission of the facts set out therein. *Barnes v. Commissioners*, 135 N. C. 27, 47 S. E. 737.

Cited in *Leonard v. Sink*, 198 N. C. 114, 115, 150 S. E. 813; *MacRae v. Fayetteville*, 198 N. C. 51, 52, 150 S. E. 810; *Yancey v. North Carolina State Highway, etc.*, Comm., 222 N. C. 106, 22 S. E. (2d) 256; *Brown v. Board of Com'rs*, 222 N. C. 402, 23 S. E. (2d) 315.

III. WHEN MANDAMUS WILL LIE.

A. General Rules.

Mandamus will not lie except to enforce a clear legal right against a party under legal obligation to perform the act sought to be enforced. *Sovereign Camp, W. O. W. v. Board of Com'rs*, 208 N. C. 433, 181 S. E. 339.

Mandamus Will Not Control Discretion of Officers.—It may be said, generally, that if a public officer fails to perform his legal duty to the public, mandamus will lie to compel him to do so, if it is a mandatory one, but not to control the exercise of a discretion given to him, for it is the nature of a discretion in certain persons that they are to judge for themselves, and, therefore, no court can require them to decide in a particular way or review their judgment by way of appeal, or by any proceeding in the nature of an appeal, since the judgment of the persons to whom the discretion is confided by law would not then be their own but that of the court under whose mandate or compulsion they gave it. *Attorney-General v. Justices*, 27 N. C. 315; *Barnes v. Commissioners*, 135 N. C. 27, 47 S. E. 737. *Edgerton v. Kirby*, 156 N. C. 347, 350, 72 S. E. 365.

In *Brown v. Turner*, 70 N. C. 93, we find a very clear statement by Mr. Justice Bynum: "Mandamus will lie when the fact required to be done is imposed by law, is merely ministerial, and the relator has a clear right and is without any other adequate remedy." *Moses on Mandamus*, 68. But it does not lie where judgment and discretion are to be exercised; nor to control the officer in the manner of conducting the general duties of his office. *Burton v. Furman*, 115 N. C. 166, 169, 20 S. E. 443.

"The rule is, that in all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie, either to control the exercise of that discretion or to determine upon the decision which shall be finally given. And whenever public officers are vested with power of a discretionary nature as the performance of any official duty, or, in reaching a given result of official action, they are required to exercise any degree of judgment, while it is proper by mandamus to set them in motion and to require their action upon all matters officially entrusted to their judgment and discretion, the courts will in no manner interfere with the exercise of their discretion nor attempt by mandamus to control or dictate the judgment to be given." *High on Ex. Rem.*, p. 50 Sec. 42, et seq; *Barnes v. Commissioners*, 135 N. C. 27, 37, 47 S. E. 737.

In *Tapping on Mandamus* (Ed. 1853), at star pages 14 and 41, it is stated generally that mandamus will not lie to command the exercise of a discretionary or voluntary act or right, of what kind soever; so neither does it lie to influence nor control the exercise of such a discretionary act,

power or right. It must, however, be clearly understood that, although there may be a discretionary power, yet if it be exercised wrongfully or with manifest injustice, the court is not precluded from commanding its due exercise. So, when one is to act according to his discretion, and he will not act nor consider the matter, the court will by mandamus command him to put himself in motion to do it, that is, to hear and determine or to inquire, so that he may exercise a considerate discretion. *Barnes v. Commissioners*, 135 N. C. 27, 36, 47 S. E. 737.

An Effectual Remedy.—Mandamus by the statute of Anne, chap. 20, is an effectual remedy; First, for refusal of admission where a person is entitled to an office; and Secondly, for a wrongful removal where a person is legally possessed, 3 Bl. Com. 264. *Lyon v. Commissioners*, 120 N. C. 237, 243, 26 S. E. 929.

To Compel the Performance of a Duty.—In *Person v. Doughton*, 186 N. C. 723, 120 S. E. 481, Justice Stacy says: "Mandamus lies only to compel a party to do that which it is his duty to do without it. It confers no new authority. The party seeking the writ must have a clear legal right to demand it, and the party to be coerced must be under a legal obligation to perform the act sought to be enforced." *Lenoir County v. Taylor*, 190 N. C. 336, 342, 130 S. E. 25.

The purpose of this writ of mandamus is to require some superior court, officer, corporation or person to do some particular thing which appertains to their office or duty, and it will not be granted where the law affords to the party aggrieved another and complete specific remedy. *Burton v. Furman*, 115 N. C. 166, 168, 20 S. E. 443.

It is a proceeding to compel a defendant to perform a duty which is owing to the plaintiff, and can be maintained only on the ground that the relator has a present, clear, legal right to the thing claimed, and that it is the duty of the defendants to render it to him. *Brown v. Turner*, 70 N. C. 98; *Lyon v. Commissioners*, 120 N. C. 237, 243, 26 S. E. 929.

The writ of mandamus is a remedy to compel the performance of a duty required by law, where the one seeking relief has no other legal remedy, and the duty sought is clear and indisputable. See *Bayard v. United States*, 127 U. S. 246, 250, 8 S. Ct. 1223, 32 L. Ed. 116.

When Office Is Vacant.—When an office is vacant by reason of a motion, the remedy is mandamus. *Doyle v. Raleigh*, 89 N. C. 133. *Lyon v. Commissioners*, 120 N. C. 237, 242, 26 S. E. 929.

Who Can Exercise.—A mandamus lies only for one who has a specific legal right, and who is without any other adequate legal remedy. 1 Chitty on Gen. Pr., 790; *State v. Justices*, 24 N. C. 430. *Edgerton v. Kirby*, 156 N. C. 347, 351, 72 S. E. 365; *Barnes v. Commissioners*, 135 N. C. 27, 47 S. E. 737; *Lyon v. Commissioners*, 120 N. C. 237, 244, 26 S. E. 929; *Tucker v. Justices*, 46 N. C. 451.

B. Illustrations of Mandamus as Proper Remedy.

For further cases when mandamus is the proper remedy, see annotations under section 1-515.

When Treasurer Refuses to Pay as Lawfully Ordered.—Upon refusal of a county treasurer to pay from the public funds of a county an order made on him by a board of audit and finance for the payment of moneys authorized and prescribed by a legislative enactment, a mandamus will lie. *Southern Audit Co. v. McKensie*, 147 N. C. 461, 61 S. E. 283. See *Martin v. Clark*, 135 N. C. 178, 180, 47 S. E. 397.

Same—Knowledge as to Validity.—It is not within the power of a county treasurer to refuse to pay moneys upon a proper order when he has funds sufficient and applicable, and his knowledge as to whether they were due to the one to whom payment was ordered is immaterial in proceedings for a mandamus to compel him to pay. *Southern Audit Co. v. McKensie*, 147 N. C. 461, 61 S. E. 283; *Martin v. Clark*, 135 N. C. 178, 47 S. E. 397.

To Compel Deposit of Public Funds.—A public officer may be compelled by mandamus to deposit public funds in his hands in the proper depository. *Bearden v. Fullam*, 129 N. C. 477, 40 S. E. 204.

To Compel Ex-Sheriff to Give up County Property.—A mandamus at the suit of the county commissioners will lie to compel a sheriff wrongfully holding over from a preceding term to turn over the county property pertaining to his office to his successor, lawfully appointed, qualified and inducted therein. *Lenoir County v. Taylor*, 190 N. C. 336, 130 S. E. 25.

Commissioners Locating County Site.—Where discretion has been given to commissioners in selecting and locating a site for the seat of justice for a county, and it was sought by mandamus to compel them to change the location already made, the court, said: "If the defendants had neglected or refused to execute the power entrusted to them, we certainly might call upon them to show cause why they had been

so negligent, and upon insufficient return might have issued a peremptory mandamus. Here all we would do would be to command them to select the site for the permanent seat of justice for the county according to law, which under their oaths, they say they have done." *Hill v. Bonner*, 44 N. C. 257; *Barnes v. Commissioners*, 135 N. C. 27, 38, 47 S. E. 737. See also *Young v. Jeffreys*, 20 N. C. at p. 357; *State v. Moore*, 46 N. C. at p. 276, 279; *Taylor v. Comm'rs*, 55 N. C. at p. 141, 145; 64 Am. Dec., 566; *Raleigh & A. R. Co. v. Jenkins*, 68 N. C. 502, 504; *County Board v. State Board*, 106 N. C. 81, 10 S. E. 1002.

C. Illustrations of Mandamus as Improper Remedy.

Granting Liquor License.—Since the justices have a discretion, under circumstances, to refuse a liquor license to the relator, although he be a fit person, he cannot have mandamus. For it is the nature of a discretion in certain persons that they are to judge for themselves, and therefore no power can require them to decide in a particular way, or review their decision by way of appeal, or by any proceeding in the nature of an appeal, since the judgment of the justices would not then be their own, but that of the court under whose mandate they gave it. *Barnes v. Commissioners*, 135 N. C. 27, 34, 47 S. E. 737.

Certificate by Board of Examiners.—The courts cannot by a mandamus compel the board of dental examiners to certify contrary to what they have declared to be the truth. Had the board refused to examine the applicant, upon his compliance with the regulations, the court could by mandamus compel them to examine him, but not to issue him a certificate, when the preliminary qualification required by law, that the applicant shall be found proficient and competent by examining board, is lacking. *Burton v. Furman*, 115 N. C. 166, 20 S. E. 443; *Loughran v. Hickory*, 129 N. C. 281, 40 S. E. 46; *Ewbank v. Turner*, 134 N. C. 77, 83, 46 S. E. 508.

Judgments upon School Order.—Judgments rendered upon school orders against the county commissioners will not be enforced by mandamus, when not for necessary expenses within the purview of Art. VII, section 7 of the Constitution. *Bear v. Commissioners*, 124 N. C. 204, 32 S. E. 558.

Determination of Title to Office.—In Dillon's work on Municipal Corporations, Vol. 2, at sec. 892, it is stated in substance that generally in this country, by adoption from the English law, where one is in the actual possession of an office under a claim by election or commission, and is performing the duties of the office, mandamus is not the proper proceeding in which to try the validity of such election or commission to admit another, but that quo warranto is the remedy. *Lyon v. Commissioners*, 120 N. C. 237, 250, 26 S. E. 929.

High, in his *Extraordinary Legal Remedies*, after discussing mandamus, concludes under this head, sec. 70: "When the writ is sought to compel the restoration of one claiming the right to an office, it is not sufficient for him to show that he is the officer de facto, but it is also incumbent upon him to show a clear legal right, and, failing in this, he is not entitled to the peremptory writ." 1 Chit. Gen. Pr., 791; *Worthy v. Barrett*, 63 N. C. 199. *Lyon v. Board of Commissioners*, 120 N. C. 237, 243, 26 S. E. 929.

As a Writ of Error.—Mandamus cannot be used as a writ of error to revise and reverse erroneous judgments of a subordinate tribunal (in that case a board of health), and the court "will not and cannot look into the evidence of fact upon which the judgment of the board was based for the purpose of determining whether the conclusions drawn from it were correctly or incorrectly formed," quoting from *Kirchegessner v. Board of Health*, 53 N. J. Law, 594. *Ewbank v. Turner*, 134 N. C. 77, 85, 46 S. E. 508.

Compelling Treasurer to Pay Warrants.—Where it is the duty of the county treasurer "to pay all warrants legally drawn on the treasurer by the auditor, and no moneys shall be paid out of the treasury except on the warrant of the auditor," no mandamus will lie to compel the treasurer to pay except upon his refusal to honor a warrant. *Burton v. Furman*, 115 N. C. 166, 171, 20 S. E. 443.

§ 1-512. For money demand.—In applications for a writ of mandamus when the plaintiff seeks to enforce a money demand, the summons, pleadings and practice are the same as prescribed for civil actions. Provided that in all applications seeking a writ of mandamus to enforce a money demand on actions ex contractu against any county, city, town or taxing district within the state, the applicant shall allege and show in the complaint that the claim or debt has been reduced to a final judgment establishing what part of said judgment,

if any, remains unpaid, what resources, if any, are available for the satisfaction of the judgment, including the actual value of all property sought to be subjected to additional taxation and the necessity for the issuing of such writ. (Rev., s. 823; Code, s. 623; 1871-2, c. 75, s. 2; 1933, c. 349; C. S. 867.)

Editor's Note.—By Public Laws 1933, c. 349, the proviso, relating to mandamus against local units to enforce collection of judgments, was added.

The 1933 amendment to this section is constitutional, since it does not impair the obligations of a contract, U. S. Const., Art. 1, sec. 10; N. C. Const., Art. 1, sec. 17, the effect of the statute being merely to alter the method of procedure in which there can be no vested right. *Sovereign Camp, W. O. W. v. Board of Com'rs*, 208 N. C. 433, 181 S. E. 339.

Construed with Following Section.—This and the following section divide the field of application for writs of mandamus between them and must be considered in *pari materia*. *Brown v. Board of Com'rs*, 222 N. C. 402, 404, 23 S. E. (2d) 315.

Necessity for Judgment Prior to Action to Enforce Money Demand.—Where plaintiff alleged ownership of certain county bonds, and sought mandamus to compel the county to levy taxes sufficient to pay same the effect of the action is to enforce a money demand, which can not be maintained under this section as amended by Public Laws 1933, unless the claim has been reduced to judgment. *Sovereign Camp, W. O. W. v. Board of Com'rs*, 208 N. C. 433, 181 S. E. 339.

"Prior to the 1933 amendment, the writ of mandamus was available to compel the levy of taxes and assessments to pay the principal and interest on bonds and liabilities ex contractu which had not been reduced to judgment. *Maryland Cas. Co. v. Leland*, 214 N. C. 235, 238, 199 S. E. 7. But, under chapter 349, Public Laws of 1933, amending § 1-512, the petitioner for mandamus must allege and show that the claim has been reduced to judgment. Quære whether the purpose of the statute might not be satisfied by uniting a cause of action for the recovery of the money and a petition for mandamus to effectuate the judgment in the same action." *Dry v. Board of Drainage Com'rs*, 218 N. C. 356, 359, 11 S. E. (2d) 143.

Purpose in Action for Money Demand.—There is now in this state, Art. IV, sec. 1, Const., but one form of action, and the writ of mandamus is but a process of the court in that action, the purpose of the writ is, in actions for money demands, to give the plaintiff a more speedy and effectual recovery of his debt than could be had in the ordinary way. *Belmont & Co. v. Reilly*, 71 N. C. 260, 262.

Return of Summons.—If the summons is made returnable before the judge at chambers, when it should have been made returnable in the regular way as a civil action, or vice versa, the action should not be dismissed, but a transfer to the proper docket made. *Brown v. Board of Com'rs*, 222 N. C. 402, 23 S. E. (2d) 315.

Examples of a Money Demand.—An application by a holder of North Carolina bonds for a mandamus to be directed to the auditor of the state, commanding him to cause to be levied certain special taxes to pay the accrued interest on the said bonds, is an application "to enforce a money demand," and as such a judge at chambers has no jurisdiction thereof. *Belmont & Co. v. Reilly*, 71 N. C. 260.

When the treasurer of a town school committee seeks a writ of mandamus to compel the treasurer of the county to pay certain money which is alleged to be due by provisions of law, such action is to "enforce a money demand" and this section applies. *Rogers v. Jenkins*, 98 N. C. 129, 3 S. E. 821.

But an action to compel a city to pay over certain fines and penalties to the county board of education was held not an action to enforce a money demand, but an action to compel a public officer to deposit public funds in the proper place. *Bearden v. Fullam*, 129 N. C. 477, 40 S. E. 304.

An action to have a writ of mandamus issue compelling a board of county commissioners to pay from the general county fund, in accordance with a legislative act, the salary of a county officer, is not such a "money demand" as to require the summons, pleadings and practice to be the same as prescribed for civil actions. *Brown v. Board of Com'rs*, 222 N. C. 402, 23 S. E. (2d) 315.

An action to enforce the turning over of public funds by the ex-treasurer of the county to the present financial agents regularly appointed, and who have qualified to act in that capacity according to the terms of valid statutes directly applicable, §§ 155-16, 128-7, 128-10, 14-231, is not in

strictness "a money demand," under this section, but comes under section 1-513. *Tyrrell County v. Holloway*, 182 N. C. 64, 168 S. E. 337.

Waiver by Municipality.—The provisions of this section requiring that in an application for a writ of mandamus to enforce a money demand ex contractu against a municipal corporation the complaint should show that the claim or debt has been reduced to final judgment and should show what resources are available for the satisfaction of the judgment, and the actual value of all property sought to be subjected to additional taxation, and the necessity for the issuance of the writ are provisions for the protection of the municipality which may be waived by it, and where the municipality does not object thereto and agrees that the issues of fact and of law be submitted to the court, it waives the provisions of this section. *Dry v. Board of Drainage Com'rs*, 218 N. C. 356, 11 S. E. (2d) 143.

§ 1-513. For other relief returnable in vacation; issues of fact.—When the plaintiff seeks relief other than the enforcement of a money demand, the summons must be made returnable before a judge of the superior court at chambers, or in term at a day specified in the summons, not less than ten days after the service of the summons and complaint upon the defendant; at which time the court, except for good cause shown, shall hear and determine the action, both as to law and fact. However, when an issue of fact is raised by the pleading, it is the duty of the court, upon the motion of either party, to continue the action until the issue of fact can be decided by a jury at the next regular term of the court. (Rev., s. 824; Code, s. 623; 1871-2, c. 75, s. 3; C. S. 868.)

Cross References.—As to jurisdiction of court in vacation or at term, see § 7-65. As to judgments rendered in vacation, see § 1-218. As to service of summons generally, see section 1-89, and notes thereto.

Demand and Refusal Necessary.—A proceeding in mandamus may be made returnable before the judge at chambers, but it cannot be sustained without demand and refusal, or what is equivalent to a refusal. *Alexander v. Commissioners*, 67 N. C. 330. *Horne v. Commissioners*, 122 N. C. 466, 471, 29 S. E. 581.

Hearing at Term or Chambers.—Tracing the origin of this and the preceding section, it was probably the intention of the law to provide for the hearing at term of cases which, upon the face, might require a jury trial, and those which might involve questions of law only, at chambers—with a saving provision that where issues of fact are raised and a jury trial demanded, the case might be transferred to the civil issue docket in order that these issues might be determined by a jury. *Brown v. Board of Com'rs*, 222 N. C. 402, 23 S. E. (2d) 315. See notes to preceding section.

Necessity for Motion for Jury Trial.—Where neither party move for a trial jury of an issue of fact raised by the pleadings under this section, the issue may be determined by the court. *Cannon v. Wiscasset Mills Co.*, 195 N. C. 119, 126, 141 S. E. 344.

Payment of Dividends—Remand for Proper Procedure.—When proceedings in mandamus have been instituted by stockholders of a private corporation to compel the distribution of a surplus ascertained in accordance with the provisions of § 55-115, before the judge holding the terms of court of the district, and the judge has issued a mandamus to compel the payment of the dividends without evidence of the actual cash value of the assets or taking into his consideration a proper deduction for the depreciation of the plant, the case will be remanded to him to be proceeded with according to law. *Cannon v. Wiscasset Mills Co.*, 195 N. C. 119, 141 S. E. 344.

When There Are Issues of Fact.—If a case is before the judge at chambers, and there are issues of fact appearing upon the pleadings, the cause should not be dismissed, but should be transferred to term for trial before a jury, just as the clerk might so transfer it. For, it would be strange to dismiss an action already in the superior court because before the clerk or the judge at chambers, and tell the plaintiff to come back into the same court at term before the same judge, and the same clerk, by service of another summons upon the same parties. *Ewbank v. Turner*, 134 N. C. 77, 80, 46 S. E. 508.

Where Only Evidentiary Matters Raised.—When the answer

and affidavits of a railroad company in mandamus proceedings by a city to enforce its ordinance requiring the railroad to change from a grade crossing with its street to an underpass, raises only evidentiary matters on the controlling issues, or as to the extent of the dangerous conditions requiring the change, no issues are raised requiring the intervention of the jury, and the judge before whom the proceedings are returnable will determine the matter. *Durham v. Southern R. Co.*, 185 N. C. 240, 117 S. E. 17.

Art. 41. Quo Warranto.

§ 1-514. Writs of sci. fa. and quo warranto abolished.—The writs of scire facias and of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies obtainable in those forms may be obtained by civil actions under this article. (Rev., s. 826; Code, s. 603; C. C. P., s. 362; R. C., c. 26, ss. 5, 25; C. S. 869.)

Quo Warranto—In General.—Although the proceeding by information in the nature of the writ of quo warranto has been abolished, the remedy to be pursued whenever the controversy is as to the validity of an election or the right to hold a public office, is by an action in the nature of a writ of quo warranto. It is not merely an action to redress the grievance of a private person who claims a right to the office, but the public has an interest in the question which the Legislature seems to have considered paramount to that of the private rights of the persons aggrieved: Hence, the requirement that such actions must be brought by the Attorney-General in the name of the people of the state, and upon his own information without the relation of a private person when the person aggrieved does not see proper to assert his right; and when the claimant does seek redress, he must be joined in the action, but still it must be brought by the Attorney-General in the name of the people. Such is the construction which has been given to these sections by numerous decisions of this court. *Patterson v. Hubbs*, 65 N. C. 119; *Hargrove v. Hunt*, 73 N. C. 24; *People v. Hilliard*, 72 N. C. 169; *People v. McKee*, 68 N. C. 429; *Brown v. Turner*, 70 N. C. 93. *Saunders v. Gatling*, 81 N. C. 298, 301.

Same—Historical.—Questions as to the title and possession of offices at common law were determined by the writ of quo warranto, which was the appropriate remedy in such cases. It was originally a high prerogative writ issued out of chancery, and was used by the Crown of Great Britain unjustly and oppressively upon its subjects, until it was modified and stripped of many of its harsher features by what were called the statutes quo warranto; and then, after the justices in eyre were displaced by the judges of the superior courts, it fell into disuse, and the information in nature of a writ of quo warranto obtained in its stead. *Ex Parte Daughtry*, 28 N. C. 155; *State v. Hardie*, 23 N. C. 42. *Saunders v. Gatling*, 81 N. C. 298, 300.

The writ of quo warranto was a common-law writ in the nature of a writ of right by the King against one who usurped or claimed franchises or liberties, to inquire by what right he claimed them, and the first process was summons. See *Ames v. Kansas*, 111 U. S. 449, 461, 4 S. Ct. 437, 28 L. Ed. 482.

The original common-law writ of quo warranto was a civil writ, at the suit of the crown, and not a criminal prosecution. *Id.*

Same—Action Still Called Quo Warranto.—Though for convenience the action of quo warranto is still spoken of, it must be remembered that the action has been specifically abolished, and we have in fact only a civil action in which the subject matter is a trial of the title to an office. *Cozart v. Fleming*, 123 N. C. 547, 561, 31 S. E. 822.

In this country the proceeding is conducted in the name of the state or of the people, according to the local form in indictments, and a departure from this form is a substantial and fatal defect. *Territory v. Lockwood*, 3 Wall. 236, 238, 18 L. Ed. 47.

The right of private relators to bring such actions was not restricted in England by requiring leave of the Crown officer until Statute 9 Anne, Chapter 20; *ibid.*, Section 608. *State v. Hall*, 111 N. C. 369, 371, 16 S. E. 420.

Scire Facias—In General.—Writs of scire facias consisted of two classes; the object of the first class was to remedy defects in or to continue an action; that of the second class to commence some proceeding. *McDowell v. Asbury*, 66 N. C. 444.

Proceedings in the nature of a sci. fa. of the first class are almost indispensable in the administration of justice, and the object of this section was merely to abolish the name and

form of writs of this class and simplify the process into a notice or summons to show cause why further proceedings should not be had to provide further relief in matters where parties had had a day in court, etc., and not to affect the substance of the remedy. *McDowell v. Asbury*, 66 N. C. 444.

On such motion the judge may allow the defendant to make any defense which he could have availed himself of under the old scire facias proceeding. *Id.*

Same—Continuation of Former Suit.—A scire facias on a judgment is not a new action, but is only issued as a continuation of the former suit. *Binford v. Alston*, 15 N. C. 351. *McDowell v. Asbury*, 66 N. C. 444, 447.

Applied in Stephens v. Dowell, 208 N. C. 555, 181 S. E. 629; *Swaringen v. Poplin*, 211 N. C. 700, 191 S. E. 746.

Cited in Bouldin v. Davis, 197 N. C. 731, 150 S. E. 507.

§ 1-515. Action by attorney-general.—An action may be brought by the attorney-general in the name of the state, upon his own information or upon the complaint of a private party, against the parties offending, in the following cases:

1. When a person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state; or,

2. When a public officer, civil or military, has done or suffered an act which, by law, makes a forfeiture of his office.

3. When any person, natural or corporate, has or claims to have or hold any rights or franchises by reason of a grant or otherwise, in violation of the provisions of § 146-14. (Rev., s. 827; Code, s. 607; C. C. P., s. 366; 1911, cc. 195, 201; C. S. 870.)

Cross References.—As to actions in the nature of quo warranto against corporations, by the attorney general, see section 55-126. As to actions by attorney general in the name of the state to vacate land grants, see section 146-69. As to discussion of doctrine of *Hoke v. Henderson* as overruled by *Mial v. Ellington*, see Editor's Note under section 128-1.

In General.—This and the subsequent sections provide for the fullest relief to the rightful claimant, against an unlawful intrusion, and thereby dispenses with the need of recourse to another process, unless those required to induct, still refuse to do so, after the motion of the intruder by the judgment of the court; and then they may be compelled to proceed in the discharge of their duties. As the statutory remedy is ample, so where it can be had and made effectual, it is the only mode of deciding the conflicting claims to office by an adjudication between the contesting parties. *Ellison v. Raleigh*, 89 N. C. 125, 130.

In *Dillon on Municipal Corporations* sec. 680 it is stated that "The adjudged cases in this country agree that quo warranto, or an information or proceeding in the nature of a quo warranto, is the appropriate remedy, when not changed by charter or statute, for an usurpation of a municipal franchise, as well as for unauthorized usurpations and intrusions into municipal offices"; and the author proceeds: "If another is commissioned and in actual discharge of the duties of the office, an adverse claimant to the office is not entitled to a mandamus, but must resort to quo warranto." The wrongful occupant must, however, have entered under color of authority and not be a mere usurper, in the restricted sense of that term, to put the rightful claimant to the necessity of a resort to this remedy. *Ellison v. Raleigh*, 89 N. C. 125, 129.

Who Can Be Complainant.—Actions of this character may be instituted in the name of the state on the relation of the Attorney-General or of any individual who is a citizen and taxpayer of the jurisdiction where the officer is to exercise his duties and powers. *State v. Taylor*, 122 N. C. 141, 29 S. E. 101; *State v. Vann*, 118 N. C. 3, 23 S. E. 932; *State v. Hall*, 111 N. C. 369, 371, 16 S. E. 420; *Saunders v. Gatling*, 81 N. C. 298. *Midgett v. Gray*, 158 N. C. 133, 135, 73 S. E. 791.

Relator Need Not Allege Title.—In a quo warranto brought by a citizen, qualified voter and taxpayer of a municipal corporation, upon leave of the Attorney-General, to try the title of an officer, the chief of police of said corporation, it is not necessary to allege that the relator is entitled to the office or has any interest therein. *State v. Hall*, 111 N. C. 369, 16 S. E. 420.

But the action is none the less personal as to the parties

claiming the office, the issue between them being the right to the same. *Rhodes v. Love*, 153 N. C. 468, 470, 69 S. E. 436; *Ellison v. Raleigh*, 89 N. C. 125, 129.

Interpleader by Judgment Creditor.—Under sections 1-69 and 1-73, a court has power to allow a judgment creditor of a corporation to interplead to an action in the nature of a quo warranto brought by the Attorney-General to annul and vacate the charter of the corporation. *State v. Simonton*, 78 N. C. 57.

Determining Title to Public Office.—Quo Warranto is the remedy in England and this country by which the title to an office can be established by judicial determination. It is the only appropriate and efficacious remedy, sanctioned by an overwhelming current of authority both in this state and in England. High on *Ex. Leg. Rem.*, Secs. 49, 53 and 77; *Ex Parte Daughtry*, 28 N. C. 155; *State v. Hardie*, 23 N. C. 42. *Saunders v. Gatling*, 81 N. C. 298, 300.

Determining Title to Public Office.—One of the chief purposes of quo warranto or an information in the nature of quo warranto is to try the title to an office. This is the method prescribed for settling a controversy between rival claimants when one is in possession of the office under a claim of right and in the exercise of official functions or the performance of official duties; and the jurisdiction of the Superior Court in this behalf has never been abdicated in favor of the board of county canvassers or other officers of an election. *Swaringen v. Poplin*, 211 N. C. 700, 702, 191 S. E. 746, citing *Harkrader v. Lawrence*, 190 N. C. 441, 130 S. E. 35.

Same—Holding Two Offices.—A citizen and tax-payer of a county is entitled to bring an action in the nature of quo warranto to try the right of a person to hold two offices in such county at the same time. *State v. Thompson*, 122 N. C. 493, 29 S. E. 720; *State v. Vann*, 118 N. C. 3, 23 S. E. 932; *State v. Hall*, 111 N. C. 369, 16 S. E. 420.

Same—Allegation of Illegality.—Usually in such actions there is an allegation that the defendant has usurped and is illegally exercising the duties of the office, but section 1-521 does not require such averment. *Cozart v. Fleming*, 123 N. C. 547, 561, 31 S. E. 822.

Same—Mandamus and Injunction Improper.—It is not permissible to try the title to an office by injunction, nor by mandamus—a civil action in the nature of quo warranto, is the appropriate remedy, to be tried before a judge and jury. *Cozart v. Fleming*, 123 N. C. 547, 548, 31 S. E. 822; *Ellison v. Raleigh*, 89 N. C. 125, 131; *Lyon v. Board*, 120 N. C. 237, 242, 26 S. E. 929.

In High on Extraordinary Remedies, it is said that "In cases where relief has been sought to determine disputed questions of title to and possession of public offices, the courts have almost uniformly refused to lend their aid by mandamus, since the remedy by information in the nature of a quo warranto is justly regarded as the most appropriate and efficacious remedy for testing the title to the office." *Lyon v. Board*, 120 N. C. 237, 249, 26 S. E. 929.

The title to a public office in dispute between two rival claimants must be determined by an action in the nature of quo warranto, especially when the defendant is in possession of the office under a claim of right in him to hold it and exercise its function or perform its duties; and a mandamus to compel the surrender of the books and papers will not lie until the claimant has established the disputed title. *Rogers v. Powell*, 174 N. C. 388, 389, 93 S. E. 917, *Burke v. Commissioners*, 148 N. C. 46, 61 S. E. 609.

Same—Examples.—Where the board of county canvassers illegally determined that one who had been elected to the office of register of deeds was not so elected, and that his opponent had been, but the latter failed to qualify and enter upon the duties of the office, whereupon the board of county commissioners declared the office vacant and appointed a third party: Held, that this could not in any wise affect the right of the duly elected officer to have the action of the board of canvassers revised by the courts in an action under this section. *State v. Calvert*, 98 N. C. 580, 4 S. E. 127.

An action against a judge of probate to vacate his office is properly brought by the attorney general under this section. *Patterson v. Hubbs*, 65 N. C. 119; *People v. Heaton*, 77 N. C. 18.

Contested Seat in General Assembly.—The Constitution of our state withdraws from the consideration of our courts the question of title involved in a contest for a seat in the General Assembly, and an action in quo warranto will not lie under this section. *State v. Pharr*, 179 N. C. 699, 103 S. E. 8.

What Is a Public Officer.—An officer, such as properly to come within the legitimate scope of a quo warranto information, may be defined, says a recent author, "as a public position to which a portion of the sovereignty of the county, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the

public." High *Ex. Leg. Rem.*, sec. 620. *Eliason v. Coleman*, 86 N. C. 236, 239.

It is manifest, that the act has reference to such usurping occupants as are exercising public functions or conferred franchises wrongfully, and is confined to an office which, as is said in *Nichols v. McKee*, 68 N. C. 429, "is a part of the government and part of the state policy," and to an officer "who takes part in the government." *Eliason v. Coleman*, 86 N. C. 236, 239.

The true test of a public office is, that it is parcel of the administration of government, civil or military, or is itself created directly by the law-making power; and an information in the nature of a quo warranto only will lie to recover the same. *Eliason v. Coleman*, 86 N. C. 236.

Same—Examples.—It has often been a matter of controversy what shall be said to be a public office. It has, however, long since been decided that a town clerk, recorder, and clerk of the peace, a constable, and even a sexton, a parish clerk, and clerk of the city works, were officers of such a public character as to come within the rule. *Rhodes v. Love*, 153 N. C. 468, 473, 69 S. E. 436.

The office of chief of police is such an office that an action in the nature of a quo warranto may be brought to try the title to it. *State v. Hall*, 111 N. C. 369, 16 S. E. 420.

It is held in *Eliason v. Coleman*, 86 N. C. 236, that this section did not authorize a quo warranto as to the office of chief engineer in a quasi private corporation, namely, the Western North Carolina R. R. Co. *State v. Hall*, 111 N. C. 369, 372, 16 S. E. 420.

The selling of liquor is not an office so that the defendant's right to it shall be tested by an action in the nature of a quo warranto under this section. *Hargett v. Bell*, 134 N. C. 394, 396, 46 S. E. 749.

To Determine Validity of Election.—A civil action in the nature of a writ of quo warranto is the appropriate remedy to test the validity of an election of the right to a public office. Such action must be brought in the name of the people of the state by the attorney-general on the relation of the party aggrieved. *Saunders v. Gatling*, 81 N. C. 298; *Davis v. Moss*, 81 N. C. 303.

Same—Tabulation Prima Facie Correct.—A tabulation of the result of an election by the clerk, in the manner required by law is prima facie correct, and can only be questioned in an action in the nature of a quo warranto proceeding. *Cozart v. Fleming*, 123 N. C. 547, 548, 31 S. E. 822, citing *Swain v. McRae*, 80 N. C. 111; *Gatling v. Boone*, 98 N. C. 573, 3 S. E. 392.

Same—Proper Certificate Ordinarily Conclusive.—"The certificate of election of an officer, or his commission coming from the proper source, is prima facie evidence in favor of the holder, and in every proceeding except a direct one to try the title of such holder it is conclusive; but in quo warranto the court will go behind the certificate or commission, and inquire into the validity of the election or appointment and decide the legal rights of the parties upon full investigation of the facts." *Dillon's Work on Municipal Corporations*, Vol. 2, at sec. 892. *Lyon v. Board*, 120 N. C. 237, 250, 26 S. E. 929.

Same—Ballot Boxes Brought into Courts.—In *Broughton v. Young*, 119 N. C. 915, 27 S. E. 277, it was held that the preservation of the ballots is required that they may be kept as evidence to certify or correct the election returns when impeached, and that on a quo warranto the ballot boxes might be brought into court and the recount made in the presence of the court and jury. *Cozart v. Fleming*, 123 N. C. 547, 557, 31 S. E. 822.

The facts found by the referee as to the result of an election in proceeding in the nature of a quo warranto, and approved by the trial judge, are not subject to review on appeal when supported by competent evidence. *State v. Jackson*, 183 N. C. 695, 110 S. E. 593.

The question of fraud in the returns of the county board of canvassers as to those voting in an election, in proceedings in the nature of a quo warranto, to determine the rights of contestants for a public office, is eliminated on appeal, when the report of the referee, approved by the trial judge, finds the absence of fraud, upon competent evidence. *State v. Jackson*, 183 N. C. 695, 110 S. E. 593.

Quo Warranto Is Not Proper Remedy to Test Validity of Tax.—Quo warranto is the sole remedy to test the validity of an election to public office, but not to test the validity of a tax even though it is levied under the authority of a popular election. *Barbee v. Board of Com'rs*, 210 N. C. 717, 188 S. E. 314.

Applied in *State v. Holmes*, 207 N. C. 293, 176 S. E. 746. Cited in *Bouldin v. Davis*, 197 N. C. 731, 150 S. E. 507.

§ 1-516. Action by private person with leave.—When application is made to the attorney-general by a private relator to bring such an action,

he shall grant leave that it may be brought in the name of the state, upon the relation of such applicant, upon the applicant tendering to the attorney-general satisfactory security to indemnify the state against all costs and expenses which may accrue in consequence of the action. (Rev., s. 828; Code, s. 608; 1874-5, c. 76; 1881, c. 330; C. S. 871.)

As to mandatory dissolution of a corporation at the instance of private persons, see section 55-124.

Section Constitutional.—This section allowing the prosecution of an action in the name of the state to assert the right of a citizen to a public office is not, for that reason, unconstitutional. *McCall v. Webb*, 135 N. C. 356, 47 S. E. 802.

Security Must Be Given.—The section clearly provides that before an action may be instituted or maintained on the relation of a private citizen, such leave shall be obtained and that satisfactory security must be furnished, indemnifying the State against all costs and expenses which may accrue in consequence of bringing the action. *Midgett v. Gray*, 158 N. C. 133, 135, 73 S. E. 791.

Interest of Public Is Paramount.—In proceedings under this and § 1-514 to try title to a public office the interest of the public is involved and is paramount to the rights of the relator, and the consent of the attorney-general, the filing of the bond, etc., as required by this section, is a prerequisite to the right of the relator to maintain the action. *Cooper v. Crisco*, 201 N. C. 739, 740, 161 S. E. 310.

Permission Essential.—The right to proceed by an action in the nature of a quo warranto information is not guaranteed to every citizen, and can only be prosecuted by leave of the Attorney-General. *Ellison v. Raleigh*, 89 N. C. 125, 132.

Same—Second Suit after Voluntary Nonsuit.—Common-law procedure by quo warranto, and proceedings by information in the nature thereof have been abolished by § 1-514 and the remedy in such matters is under the provisions of this section and where the relator has complied with these conditions and takes a voluntary nonsuit and within a year brings another action upon the same subject-matter against the same respondent, but fails to obtain permission to bring the second action or to file bond therefor until the day before judgment is signed, his delay is fatal and the action is properly dismissed, it being necessary that the provisions of the section be again complied with before the bringing of the second action. *Cooper v. Crisco*, 201 N. C. 739, 161 S. E. 310.

Same—Effect of Section 1-518.—This view that leave is essential is strengthened by the subsequent section 1-518, which provided that even after leave is given and action commenced, the same may, under certain conditions be withdrawn and, on certificate to that effect being properly filed, the judge shall, on motion, dismiss the action. *Midgett v. Gray*, 158 N. C. 133, 135, 73 S. E. 791.

May Be Given After Commencement of Suit.—The court has held in *State v. Withers*, 121 N. C. 376, 28 S. E. 522, that it is not absolutely essential that the leave should be had before the suit is commenced, provided it is obtained afterwards and supplied, but it must always be made to appear, pending the proceedings, that the leave of the Attorney-General has been given to prosecute the action. *Midgett v. Gray*, 158 N. C. 133, 135, 73 S. E. 791.

Upon Failure to Show Leave Action Dismissed.—It appearing that, by inadvertence, the record in this action of quo warranto to try the title of office did not show that permission of the Attorney-General was given according to the requirements of this section, it is held that proof of such permission given anterior to the commencement of the action may be offered upon the new trial awarded, and upon failure thereof the action may be dismissed. *State v. Gray*, 159 N. C. 443, 74 S. E. 1050.

Applied in *State v. Holmes*, 207 N. C. 293, 176 S. E. 746.
Cited in *Bouldin v. Davis*, 197 N. C. 731, 150 S. E. 507;
Barbee v. Board of Com'rs, 210 N. C. 717, 188 S. E. 314.

§ 1-517. Solvent sureties required.—The attorney-general, before granting leave to a private relator to bring a suit to try the title to an office, may require two sureties to the bond required by law to be filed to indemnify the state against costs and expenses, and require such sureties to justify, and may require such proof and evidence of the solvency of the sureties as is satisfactory to him. (Rev., s. 829; 1901, c. 595, s. 2; C. S. 872.)

§ 1-518. Leave withdrawn and action dismissed for insufficient bond.—When the attorney-general has granted leave to a private relator to bring an action in the name of the state to try the title to an office, and it afterwards is shown to the satisfaction of the attorney-general that the bond filed by the private relator is insufficient, or that the sureties are insolvent, the attorney-general may recall and revoke such leave, and upon a certificate of the withdrawal and revocation by the attorney-general to the clerk of the court of the county where the action is pending, it is the duty of the presiding judge, upon motion of the defendant, to dismiss the action. (Rev., s. 830; 1891, c. 595; C. S. 873.)

§ 1-519. Arrest and bail of defendant usurping office.—When action is brought against a person for usurping an office, the attorney-general, in addition to the statement of the cause of action, may set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to and by means of his usurpation of the office, an order shall be granted by a judge of the superior court for the arrest of the defendant, and holding him to bail; and thereupon he shall be arrested and held to bail in the same manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest. (Rev., s. 831; Code, s. 609; C. C. P., s. 369; 1883, c. 102; C. S. 874.)

Cross Reference.—As to arrest in civil actions, see §§ 1-409 to 1-439.

§ 1-520. Several claims tried in one action.—Where several persons claim to be entitled to the same office or franchise, one action may be brought against all of them, in order to try their respective rights to the office or franchise. (Rev., s. 832; Code, s. 614; C. C. P., s. 374; C. S. 875.)

§ 1-521. Trials expedited.—All actions to try the title or right to any state, county or municipal office stand for trial at the return term of the summons, if a copy of the complaint was served with the summons at least thirty days before the return day thereof; and it is the duty of the judges to expedite the trial of these actions, and to give them precedence over all others, civil or criminal. It is unlawful to appropriate any public funds to the payment of counsel fees in any such action. (Rev., s. 833; Code, s. 616; 1901, c. 42; 1874-5, c. 173; C. S. 876.)

§ 1-522. Time for bringing action.—All actions brought by a private relator, upon the leave of the attorney-general, to try the title to an office must be brought, and a copy of the complaint served on the defendant, within ninety days after his induction into the office to which the title is to be tried; and when it appears from the papers in the cause, or is otherwise shown to the satisfaction of the court, that the summons and complaint have not been served within ninety days, it is the duty of the judge upon motion of defendant to dismiss the action at any time before the trial, at the cost of the plaintiff. (Rev., s. 834; 1901, c. 519; 1903, c. 556; C. S. 877.)

When Section Does Not Apply.—This provision requiring

a private relator, upon leave of the attorney general, to bring his action within ninety days after the induction of the defendant into the contested office, does not apply where the alleged intruder has occupied the office more than ninety days before the plaintiff's cause of action accrued, or where it is impossible under the circumstances to give the required notice. *Rhodes v. Love*, 153 N. C. 468, 69 S. E. 436.

§ 1-523. Defendant's undertaking before answer.

—Before the defendant may answer or demur to the complaint he must execute and file in the superior court clerk's office of the county wherein the suit is pending, an undertaking, with good and sufficient surety, in the sum of two hundred dollars, which may be increased from time to time in the discretion of the judge, to be void upon condition that the defendant pays to the plaintiff all such costs and damages, including damages for the loss of such fees and emoluments as may or ought to have come into the hands of the defendant, as the plaintiff may recover. (Rev., s. 835; 1895, c. 105; C. S. 878.)

§ 1-524. Possession of office not disturbed pending trial.—In any civil action pending in any of the courts of this state in which the title to an office is involved, the defendant being in the possession of the office and discharging the duties thereof shall continue therein pending the action, and no judge shall make a restraining order interfering with or enjoining such officer in the premises. The officer shall, notwithstanding any such order, continue to exercise the duties of the office pending the litigation, and receive the emoluments thereof. (Rev., s. 836; 1899, c. 33; C. S. 879.)

Purpose of the Section.—An injunction to prevent the exercise of a public office would produce general inconvenience; for instance, an injunction against one who it is alleged has usurped the office of the clerk of a court, forbidding him to discharge the duties of the office, would stop all judicial proceedings and the public would be made to suffer by this mode of contesting the right to the office and to the fees and emoluments. Hence, in this and the like cases, the appropriate remedy is by an action in the nature of a quo warranto, not an injunction. *Patterson v. Hubbs*, 65 N. C. 119, 121.

Title Should Be Determined First.—Individuals claiming to comprise the board of trustees of a school district de jure may not enjoin those in possession under a colorable claim of right as such board from the performance of their duties as such, and require the defendants to turn over to them the school buildings, etc., and thus determine collaterally the question of title, nor would remedy by injunction be permitted in quo warranto proceedings, where the title to office is directly involved, but the parties should first try out the question of title in an action brought directly for the purpose. *Rogers v. Powell*, 174 N. C. 388, 93 S. E. 917.

Stated in *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265.

§ 1-525. Judgment by default and inquiry on failure of defendant to give bond.—At any time after a duly verified complaint is filed alleging facts sufficient to entitle plaintiff to the office, whether this complaint is filed at the beginning of the action or later, the plaintiff may, upon ten days notice to the defendant or his attorney of record, move before the judge resident in or riding the district, at chambers, to require the defendant to give the undertaking specified in § 1-523. It is the duty of the judge to require the defendant to give the undertaking within ten days, and if it is not so given, the judge shall render judgment in favor of plaintiff and against defendant for the recovery of the office and the costs, and a judgment by default and inquiry to be executed at a term for damages, including loss of fees and

salary. Upon the filing of the judgment for the recovery of such office with the clerk, it is his duty to issue and the sheriff's duty to serve the necessary process to put the plaintiff into possession of the office. If the defendant shall give the undertaking, the court, if judgment is rendered for plaintiff, shall render judgment against the defendant and his sureties for costs and damages, including loss of fees and salary. Nothing herein prevents the judge's extending, for cause, the time in which to give the undertaking. (Rev., s. 837; 1899, c. 49; 1895, c. 105, s. 2; C. S. 880.)

As to effect of this section on an independent suit for damages, see editor's note under section 1-530.

§ 1-526. Service of summons and complaint.

The service of the summons and complaint as hereinbefore provided may be made by leaving a copy at the last residence or business office of the defendant or defendants, and service so made shall be deemed a legal service. (Rev., s. 838; 1899, c. 126; C. S. 881.)

If the copy of summons left at defendant's residence be not essentially a true copy of the original, then it would be insufficient under the statute, for only by virtue of this section, is substituted service allowable in this way. *McLeod v. Pearson*, 208 N. C. 539, 540, 181 S. E. 753.

If the copy of summons left at defendant's residence be a true copy of the original, but was neither signed by the clerk nor under seal, it is fatally defective. *Id.*

§ 1-527. Judgment in such actions.—In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party alleged to be entitled, or only upon the right of the defendant, as justice requires. When the defendant, whether a natural person or corporation, against whom the action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that the defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against him. The court may also, in its discretion, fine the defendant a sum not exceeding two thousand dollars. (Rev., ss. 839, 840; Code, ss. 610, 615; R. C., c. 95; C. C. P., ss. 370, 375; Const., Art. IX, s. 5; C. S. 882.)

Discretion of Court as to Fine.—Where the defendant went into office under the authority of an unconstitutional appointment by the general assembly, the court presumed that there was no criminal intent and did not impose the fine. *Nichols v. McKee*, 68 N. C. 429, 440.

§ 1-528. Mandamus to aid relator.—In any civil action brought to try the title or right to hold any office, when the judgment of the court is in favor of the relator in the action, it is the duty of the court to issue a writ of mandamus or such other process as is necessary and proper to carry the judgment into effect, and to induct the party entitled into office. (Rev., s. 841; 1885, c. 406, s. 1; C. S. 883.)

As to mandamus in general, see sections 1-511 to 1-513.

§ 1-529. Appeal; bonds of parties.—No appeal by the defendant to the supreme court from the judgment of the superior court in such action shall stay the execution of the judgment, unless a justified undertaking is executed on the part of the appellant by one or more sureties, in a sum to be fixed by the court, conditioned that the appellant will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellant by virtue or under color

of the office. In no event shall the judgment be executed pending appeal, unless a justified undertaking is executed on the part of the appellee by one or more persons in a sum to be fixed by the court, conditioned that the appellee will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellee by virtue or under color of office during his occupancy thereof. (Rev., s. 842; 1885, c. 406, s. 2; C. S. 884.)

§ 1-530. Relator inducted into office; duty.—If the judgment is rendered in favor of the person alleged to be entitled, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office. It is his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody, or within his power, belonging to the office from which he has been excluded. (Rev., ss. 843, 844; Code, ss. 611, 613; C. C. P., ss. 371, 373; C. S. 885.)

Editor's Note.—It was held, under this section, that compensation in damages for the loss of the fees and emoluments of the office could be recovered from the intruder who had received the same, in an action brought after the rendition of the judgment for money had and received to the relator's use. *Swain v. McRae*, 80 N. C. 111; *State v. Jones*, 80 N. C. 127; *State v. Tate*, 70 N. C. 161.

In *McCall v. Webb*, 135 N. C. 356, 47 S. E. 802, the question as to the recovery of damages in an independent action again came up and the court discussed the effect of section 1-525 as amended in 1895 and 1899. The court said: these amendments in regard to the method of recovering damages in such cases do not provide for a cumulative remedy, but it was intended by them to substitute the remedy by inquiry in the action brought to recover the office for the former remedy by separate action on the undertaking, which was given by section 613 of The Code; and besides the amendments are inconsistent with the provisions of section 1-233, and the latter is therefore repealed by them. *McCall v. Webb*, 135 N. C. 356, 364, 47 S. E. 802. See also *Morganton Graded School v. McDowell*, 157 N. C. 316, 72 S. E. 1083.

Person Entitled Has Property.—A person who is rightfully entitled to an office, although not in the actual possession thereof, has a property therein, and may maintain an action for money had and received against a mere intruder who may perform the duties of such office for a time and receive the fees arising therefrom; and such intruder cannot retain any part of the fees as a compensation for his labor. *State v. Tate*, 70 N. C. 161; *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265.

Oath and Bond.—Where defendant alleges that he refused to surrender the office because he was entitled thereto, his motion to amend his answer to allege, as a further reason for refusal, that the relator had not filed bond or taken the oath of office, is properly denied, since such further allegations do not constitute a defense, the filing of bond and the taking of oath not being required of relator when defendant refuses to surrender the office on the ground that he is the de jure officer, because in such circumstances such action would be a vain thing which the law does not require, and it being expressly provided by this section, that if judgment is rendered in favor of the relator he shall be entitled to take over the office after taking oath and executing the official bond, and the fact that the motion is made after defendant has surrendered the office and the relator has filed bond and taken the oath, does not alter this result, the defense not being germane on the question of the right to the emoluments of the office between the time of relator's election and his actual induction into office. *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265.

Court Can Enforce Demand for Documents.—When the relator has taken office and made the demand for the books and papers belonging to the office, the court can issue any appropriate process to enforce compliance with such demand by a refractory or contumacious defendant. *Rhodes v. Love*, 153 N. C. 468, 474, 69 S. E. 436.

Complying with Induction Requirements Not Prerequisite to Action to Try Title.—It is the intention of the law-making power that one who is rightfully entitled to an

office which another wrongfully claims and withholds shall not be required, as a condition precedent to an action to try title to that office, to do the vain thing of going through the formality of complying with the requirements for induction into the office. *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265.

§ 1-531. Refusal to surrender official papers misdemeanor.—If a person against whom a judgment has been rendered in an action brought to recover a public office shall fail or refuse to turn over, on demand, to the person adjudged to be entitled to such office, all papers, documents and books belonging to such office, he shall be guilty of a misdemeanor. (Rev., s. 3601; Code, s. 612; C. C. P., 372; C. S. 886.)

§ 1-532. Action to recover property forfeited to state.—When any property, real or personal, is forfeited to the state, or to any officer for its use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer in any superior court. (Rev., s. 845; Code, s. 621; C. C. P., s. 381; C. S. 887.)

Art. 42. Waste.

§ 1-533. Remedy and judgment.—Wrongs, remediable by the old action of waste, are subjects of action as other wrongs; and the judgment may be for damages, forfeiture of the estate of the party offending, and eviction from the premises. (Rev., s. 853; Code, s. 624; C. C. P., s. 383; C. S. 888.)

Editor's Note.—In England the clearing of land by a life-tenant was waste. In *Shine v. Wilcox*, 21 N. C. 631 the court says "While our ancestors brought over to this country the principles of common law, these were nevertheless accommodated to their new condition. It would have been absurd to hold that the clearing of the forest, so as to fit it for the habitation and use of man, was waste." And in *King v. Miller*, 99 N. C. 583, 6 S. E. 660, the court says "While in its essential elements waste is the same in this country and in England . . . yet in respect to acts which constitute waste, the rule that governs in a new and unopened land covered largely with primeval growth must be different." *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588.

Definition.—Waste is a spoiling or destroying of the estate, with respect to buildings, wood or soil, to the lasting injury of the inheritance; but the acts done or permitted which constitute such injury differ according to the condition of the country. *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588.

Nature of Action.—An action for wrongs in the nature of waste is not necessarily an action "for penalties," or "for damages merely vindictive"; on the contrary, the action is generally used to recover actual and substantial damages. And that an action survives when such is its purpose, either to or against the personal representative, is well established. *Butner v. Keelhn*, 51 N. C. 60; *Ripsey v. Miller*, 33 N. C. 247; *Collier v. Arrington*, 61 N. C. 356; *Peebles v. N. C. R. Co.*, 63 N. C. 238; *Shuler v. Millsaps*, 71 N. C. 297, *Shields v. Lawrence*, 72 N. C. 43, 44.

Discretion of Jury.—It must be left, in large measure, to the discretion of the jury to say whether the destruction of timber, or giving up a cultivated field and permitting bushes to grow and take possession of it, in the light of the evidence in the case, has proved a lasting injury to the inheritance. *Sherrill v. Connor*, 107 N. C. 630, 633, 12 S. E. 588. *King v. Miller*, 99 N. C. 583, 6 S. E. 660.

To Determine Liability.—In ascertaining whether a given act or omission falls within the rule, and subjects the tenant to liability, the condition of the land when dower was assigned should be compared with its state during the period for which damage is claimed. *Sherrill v. Connor*, 107 N. C. 630, 634, 12 S. E. 588.

Cited in *Batten v. Corporation Commission*, 199 N. C. 460, 154 S. E. 748.

§ 1-534. For and against whom action lies.—In all cases of waste, an action lies in the superior court at the instance of him in whom the right is, against all persons committing the waste, as well

tenant for term of life as tenant for term of years and guardians. (Rev., s. 854; Code, s. 625; R. C., c. 116, s. 1; 52 Hen. III, c. 23; 6 Edw. I, c. 5; 20 Edw. I, st. 2; 11 Hen. VI, c. 5; C. S. 889.)

No Action Unless Plaintiff Has Estate.—The writ of waste is founded upon principles, peculiar to itself, and more especially dependent upon a privity between the reversioner and tenant. No one shall have the action of waste, unless he hath the immediate estate of inheritance; and between the heir of the reversioner and the tenant, who commits waste, there is no privity, the waste being committed in the lifetime of the reversioner. *Browne v. Blick*, 7 N. C. 511.

Contingent Remainderman Cannot Sue.—A contingent remainderman can not sue for waste, but, for the protection of his right, he must resort to equity for the protection of his interest. *Richardson v. Richardson*, 152 N. C. 705, 68 S. E. 217. *Latham v. Lumber Co.*, 139 N. C. 8, 51 S. E. 780. *Gordon v. Lowther*, 75 N. C. 193.

No Application to Judgment Creditor.—The judgment creditor is in no sense like a remainderman or reversioner. He cannot bring "the old action of waste," as it was at common law, nor is he embraced in any one of the classes "for and against whom an action of waste lies" under this section. *Jones v. Britton*, 102 N. C. 166, 173, 9 S. E. 554.

Right To Restrain Included.—The right to sue for waste includes the right to restrain its commission. *Morrison v. Morrison*, 122 N. C. 598, 599, 29 S. E. 901; *Hinson v. Hinson*, 120 N. C. 400, 27 S. E. 80.

Holder of a Vested Estate for Life.—In the case of *Gordon v. Lowther*, 75 N. C. 193, the court said, in effect, that while persons holding a vested estate for life, coupled with contingent interest, are not liable in an action for waste, they and their tenants may be restrained from further despoiling and injuring the inheritance, where it appears that they have been removing from the land timber trees not cut down in the course of prudent husbandry. That case was cited with approval in the later case of *Jones v. Britton*, 102 N. C. 166, 9 S. E. 554; *Farabow v. Green*, 108 N. C. 339, 343, 12 S. E. 1003.

Conflicting Evidence as to Title.—In an action of trespass and damages for the unlawful cutting and removing of timber upon the plaintiff's lands, there was evidence of the plaintiff's and defendant's chain of title from a common source, and that one of the deeds under which the defendant claims was only of a life estate, but that through inadvertence or mutual mistake this should have conveyed the fee. The defendant was in possession and claimed title by adverse possession under color of this deed. It was held that the defendant's motion as of nonsuit under the conflicting evidence was improperly allowed upon the principle that if a life estate were outstanding, his possession, during its continuance, would not be adverse to the plaintiff; and the action should be retained under the provisions of this section. It was held further, that while the evidence in this case as to location of the land was meager it was sufficient. *Howell v. Shaw*, 183 N. C. 460, 112 S. E. 38.

§ 1-535. Tenant in possession liable.—Where a tenant for life or years grants his estate to another, and still continues in the possession of the lands, tenements, or hereditaments, an action lies against the said tenant for life or years. (Rev., s. 855; Code, s. 626; R. C., c. 116, s. 2; 11 Hen. VI, c. 5; C. S. 890.)

§ 1-536. Action by tenant against cotenant.—Where a joint tenant or a tenant in common commits waste, an action lies against him at the instance of his cotenant or joint tenant. (Rev., s. 856; Code, s. 627; R. C., c. 116, s. 4; 13 Edw. I, c. 22; C. S. 891.)

Section Changes the Common Law Rule.—One of the settled rules at common law in England, was that one tenant in common could not sue his co-tenant, except for partition, and our Legislature, feeling the practical difficulties at an early date, enacted that one tenant in common might maintain an action for waste against his co-tenant or joint tenant. *Morrison v. Morrison*, 122 N. C. 598, 599, 29 S. E. 901. And the tenant can also restrain his co-tenant from the commission of waste. *Id.*

Cutting Trees.—Under this section, one tenant in common may sue his co-tenant for waste for cutting down trees to be sold as cross ties and hauled off the land. *Hinson v. Hinson*, 120 N. C. 400, 27 S. E. 80.

Applied in *Daniel v. Tallassee Power Co.*, 204 N. C. 274, 168 S. E. 217.

§ 1-537. Action by heirs.—Every heir may bring action for waste committed on lands, tenements, or hereditaments of his own inheritance, as well in the time of his ancestor as in his own. (Rev., s. 857; Code, s. 628; R. C., c. 116, s. 5; 6 Edw. I, c. 5; 20 Edw. I, st. 2; 11 Hen. VI, c. 5; C. S. 892.)

Heirs Cannot Set up Damages for Waste as Counterclaim.—In a suit by a widow against the heirs to recover payments allowed to her as dower and made a charge on the land, the heirs cannot set up by way of counterclaim damages for waste committed by the widow but must proceed under the statute. *Hybart v. Jones*, 130 N. C. 227, 41 S. E. 293.

Cited in *State v. Palmer*, 212 N. C. 10, 192 S. E. 896.

§ 1-538. Judgment for treble damages and possession.—In all cases of waste, when judgment is against the defendant, the court may give judgment for treble the amount of the damages assessed by the jury, and also that the plaintiff recover the place wasted, if the damages are not paid on or before a day to be named in the judgment. (Rev., s. 858; Code, s. 629; R. C., c. 116, s. 3; 6 Edw. I, c. 5; 20 Edw. I, st. 2; C. S. 893.)

In General.—Under this section a tenant in dower, or other life-tenant, who, by neglect or wantonness, occasions permanent waste or injury to the inheritance, whether voluntary or permissive, thereby subjects himself to liability to pay the actual damages, or treble damages, at the discretion of the judge, and also to forfeit the place wasted on a day to be fixed by the judge, if he should in the meantime fail to pay the damages recovered of him. *Sherrill v. Connor*, 107 N. C. 630, 636, 12 S. E. 588.

Section Changes Former Law.—This section is substantially the same as the law in force before the enactment of the Code except for two important changes. The word "may" has been substituted for "shall" in the old statute of Gloucester, and, by a qualification added to it, the judgment for the place wasted must be conditional, and can take effect only upon the failure of the defendant to pay the actual damages before a day certain. So that it is left within the sound discretion of the judge who tries the action to determine whether he will give treble or single damages, as well as to fix a day after which a writ of possession may issue for the place wasted, if the damage allowed shall not have been in the meantime actually paid. The old statute was, manifestly, amended when the Code was enacted, for the purpose of vesting a discretionary power in the court in reference to the amount of the judgment, and fixing the time for forfeiture of the place wasted on failure to pay the amount recovered. *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588.

Prospective Damages Not Allowed.—The jury cannot allow prospective damages, where the roof of a building has become decayed, for the value of the whole building, on the supposition that the tenant will suffer the decay to continue till the structure shall have rotted and fallen down. *Sherrill v. Connor*, 107 N. C. 630, 637, 12 S. E. 588.

Where Damages Insignificant.—In an action for waste, where the jury find insignificant damages, judgment will be arrested. *Sheppard v. Sheppard*, 3 N. C. 382.

Judgment for Damages Only.—It is not error for the judgment in an action of waste to be for the damages only, and not also for the place wasted. *Bright v. Wilson*, 1 N. C. 251.

New Action for Subsequent Injury.—If the life-tenant should allow the inheritance to sustain further injury after the time of trial, damage may be recovered in another action. *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588.

Appeal.—This section says the court may give judgment for treble damages and the place wasted, and on appeal the court will not make such discretionary power obligatory. *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588.

Art. 43. Nuisance.

§ 1-539. Remedy for nuisance.—Injuries remediable by the old writ of nuisance are subjects of action as other injuries; and in such action there may be judgment for damages, or for the removal of the nuisance, or both. (Rev., s. 825; Code, s. 630; C. C. P., s. 387; C. S. 894.)

Cross Reference.—As to injunction against nuisance, see sec. 1-485 and annotations thereunder.

Editor's Note.—Nuisances consist of two general classes,

public and private. A public nuisance exists when a right or privilege, common to all the citizens of the community, is interfered with, even though no actual damage to any individual is caused. In such cases in order to maintain a civil action under this section the plaintiff must show special damages differing both in degree and in kind from that suffered by the general public.

A private nuisance exists where the right or privilege interfered with is essentially a private one. If the offense is so general as to affect a number of citizens in the neighborhood the aggravation of offenses will amount to a public wrong and may be the subject of a public prosecution. But in such a case the individual can still maintain a civil action, and he need not show that his particular damage differs in kind and degree from that of the other individuals affected. See *McManus v. Southern Ry. Co.*, 150 N. C. 655, 660, 64 S. E. 766.

When the alleged nuisance would constitute a private wrong, by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. See *Farmer, etc., Mfg. Co. v. R. R.*, 117 N. C. 579, 23 S. E. 43; *Pruitt v. Bethell*, 174 N. C. 454, 457, 93 S. E. 945.

That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. See *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 329, 2 S. Ct. 719, 27 L. Ed. 739.

An Adequate Remedy.—Where a nuisance has been established, working harm to the rights of an individual citizen, the law of our state is searching and adequate to afford an injured person ample redress, both by remedial and preventive remedies, as will be readily seen by reference to numerous decisions of the court on the subject. *Cherry v. Williams*, 147 N. C. 452, 61 S. E. 267; *Reyburn v. Sawyer*, 135 N. C. 328, 47 S. E. 761; *Raleigh v. Hunter*, 16 N. C. 12; *Bell v. Blount*, 11 N. C. 384; *McManus v. Southern Ry. Co.*, 150 N. C. 655, 661, 64 S. E. 766.

Purpose of Damages.—Damages in nuisance should be such as to lead to the abatement of the nuisance. *Bradley v. Amis*, 3 N. C. 399.

Appreciable Damage Must Be Suffered.—To sustain an action for a nuisance, public or private, which does not involve the physical invasion of the property of another, it is always required to be shown that some appreciable damage has been suffered, or that some serious or irreparable injury is threatened, and unless this is made to appear a right to nominal damages does not arise. *McManus v. Southern R. Co.*, 150 N. C. 655, 64 S. E. 766.

When Special Damage Necessary.—No person can maintain an action (on a public nuisance) unless he sustains a special damage therefrom differing from that sustained by the rest of the public. *McManus v. Southern Ry. Co.*, 150 N. C. 655, 664, 64 S. E. 766; *Pedrick v. R. R.*, 143 N. C. 485, 55 S. E. 877.

But an action by an individual to abate a nuisance cannot be successfully resisted on the ground that no special damage to the plaintiff has been shown, when it appears that the nuisance complained of was the fact that the defendant caused water to flood adjoining lands, which bred fever carrying mosquitoes, thereby, inflicting sickness on the plaintiff and his family, although others in the community suffered sickness from the same cause. *Pruitt v. Bethell*, 174 N. C. 454, 93 S. E. 945.

Diminution of Damage.—In an action for damages from a permanent nuisance, the suit being in the nature of a proceeding to condemn the plaintiff's property, it was held, that special benefits arising out of the establishment of the nuisance may be set off in diminution of damages. *Brown v. Virginia-Carolina Chemical Co.*, 162 N. C. 83, 77 S. E. 1102.

Injunction Lies.—One suffering peculiar damages from a public nuisance is not restricted but may sue for an injunction. *Reyburn v. Saw. er*, 135 N. C. 328, 47 S. E. 761.

Same—No Permanent Damage.—Permanent damages for the depreciation of property can not be recovered. The owners may enjoin commission of the acts constituting the nuisance and recover such temporary damages as their property has sustained thereby. *Taylor v. Seaboard, etc., Railway*, 145 N. C. 400, 59 S. E. 129.

Proximate Cause.—In order to recover damages the maintenance of a public nuisance must be the proximate cause of the injuries. *McGhee v. Norfolk, etc., R. Co.*, 147 N. C. 142, 60 S. E. 912.

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

Art. 44. Compromise.

§ 1-540. By agreement receipt of less sum is discharge.—In all claims, or money demands, of whatever kind, and howsoever due, where an agreement is made and accepted for a less amount than that demanded or claimed to be due, in satisfaction thereof, the payment of the less amount according to such agreement in compromise of the whole is a full and complete discharge of the same. (Rev., s. 859; Code, s. 574; 1874-5, c. 178; C. S. 895.)

I. Edit--'s Note.

II. In General.

III. Effect of Compromise.

IV. Application of Section.

V. Procedure.

I. EDITOR'S NOTE.

It has been a long established doctrine of the English, and most American courts, that the payment of a portion of a specific or liquidated demand or claim in the same manner as the whole liquidated demand or claim ought to be paid, is part payment only. This is true even though there is an express agreement between the parties that the lesser sum shall extinguish the greater. The reason assigned for the rule is that the agreement to give up the residue is without consideration. One of the most famous of the cases so holding is *Sibree v. Tripp*, 15 M. & W. 22, in which *Alderson, B.*, said:

"If you substitute for a sum of money a piece of paper, or a stick of sealing wax, it is different, and the bargain may be carried out in its full integrity. A man may give in satisfaction of a debt of \$100, a horse of the value of five pounds, but not five pounds."

The illustrations thus put by Baron Alderson show the glaring absurdity and extreme technicality of the distinctions made by the courts. As in the English case referred to, *supra*, courts have come to question the good sense of such technical distinctions, nevertheless, it is a settled doctrine. *Currie v. Kennedy*, 78 N. C. 91; *Koonce v. Russell*, 103 N. C. 179, 9 S. E. 316; *Bank v. Commissioners*, 116 N. C. 339, 21 S. E. 410. But when we come to the case of a true compromise, the state of the law is different. In *Barnawell v. Threadgill*, 56 N. C. 50, 58, *Battle, J.*, citing *Leonard v. Leonard*, 2 Ball. & Best, 178, and quoting the words of Lord Chancellor *Manners*, says: "In the case of a compromise as distinguished from a release, both parties are ignorant of their rights, and the agreement is founded on that ignorance, and the party surrendering may, in truth, have nothing to surrender; and whether the uncertainty rests upon a doubt in point of fact or a doubt in point of law, if both parties are in the same ignorance, the fairness of the compromise cannot be affected by a subsequent investigation and result." And in *Williams v. Alexander*, 39 N. C. 207, 209, the court thus refers to the subject: "While the title is thus in contestation, or while he (the defendant) is claiming them as his property, and the plaintiff holding them as hers, they agree, in order to put an end to the dispute, to divide the property. The compromise of a doubtful right, fairly entered into, with due deliberation, will be sustained in a court of equity. It is reasonable and proper that it should be so; parties must be at liberty to settle their own controversies by dividing the property in controversy, and public policy upholds the right." *Mayo v. Gardner*, 49 N. C. 359, is also directly in point on this phase of the question.

However, the Legislature took cognizance of the situation in 1874-5 and enacted, ch. 178, this section, which is a substantial enactment and extension of the holding of the cases dealing with the compromise of doubtful claims, to "all claims or money demands, of whatever kind, and howsoever due." Thus the evils necessarily flowing from the technical distinctions pointed out in the first part of this note, are now removed by the wise enactment of this beneficial section. *York v. Westall*, 143 N. C. 276, 280, 55 S. E. 724; *Mathis v. Bryson*, 49 N. C. 508; *Findly v. Ray*, 50 N. C. 125; *Petit v. Woodlief*, 115 N. C. 120, 126, 20 S. E. 208; 1 *Parson on Contracts* (5 Ed.) 438, 439.

II. IN GENERAL.

Cross Reference.—For a discussion of the law of contracts in relation to this section, see 13 N. C. Law Rev. 45.

Definition.—A compromise has been defined by the United States Supreme Court to be "an agreement between two or

more persons, who, in order to stop or put an end to a law suit, adjust their differences by mutual consent in the manner which they agree on, and which any one of them prefers to the hope of gaining balanced by the danger of losing." See *New Orleans v. Warner*, 180 U. S. 199, 21 S. Ct. 353, 45 L. Ed. 493.

Essentials of Compromise.—Thus, as in the case of other contracts, mutuality is essential to a valid compromise. There must be a meeting of minds upon every feature and element of such agreement. See *Horn v. Detroit, etc., Co.*, 150 U. S. 610, 14 S. Ct. 214, 37 L. Ed. 1199.

The agreement, in order to be binding upon the parties, must have been executed voluntarily and without duress, or undue influence, in good faith, deliberately and understandingly. *Hennessy v. Bacon*, 137 U. S. 78, 11 S. Ct. 17, 34 L. Ed. 605.

Conclusiveness.—It is held in the Supreme Court of the United States that it is of the very essence of the compromises or settlements entered into in adjustment of disputes that the contest should be closed, and they are held to be final and conclusive as to the interested parties. *Oglesby v. Attrill*, 105 U. S. 605, 26 L. Ed. 1186.

In order to be thus conclusive, however, there must have been an actual compromise or settlement, and not merely negotiations for a settlement, or facts from which such an agreement might be inferred. *Swift, etc., Co. v. United States*, 111 U. S. 22, 4 S. Ct. 244, 28 L. Ed. 341.

Constitutionality of Section.—The section is constitutional. *Wittkowsky v. Baruch*, 127 N. C. 313, 315, 37 S. E. 449; *Koonce v. Russell*, 103 N. C. 179, 9 S. E. 316.

What Constitutes Accord and Satisfaction.—When at a sale under a deed of trust, it was agreed between the creditor and debtor that the former would bid for the property, and if it brought less than the debt he would accept it in satisfaction of the sums due him, and the debtor was thereby induced not to bid or procure others to do so, and the property was bid off by the creditor for a less sum than his debt. Held, that there was a sufficient consideration to support the agreement and the debtor was discharged from his obligation. *Jones v. Wilson*, 104 N. C. 9, 10 S. E. 79.

When a debtor pays a sum supposed by him to be the balance due on his bond, and the creditor refuses to give up the bond, but says that he will credit the amount paid, it does not amount to a compromise and satisfaction of the bond, although the debtor intends it as such. *King v. Phillips*, 94 N. C. 555.

Where the plaintiff's damages, caused by the defendant's breach of contract, are based upon two distinctive items, the plaintiff's agreeing upon and receiving compensation for the first item does not preclude a recovery upon the second one, when it appears that the settlement had been made in contemplation of the first item alone. *Garland v. Improvement Co.*, 184 N. C. 551, 115 S. E. 164.

Same—Tort and Contract Actions.—Accord and satisfaction is a method of discharging a contract or settling a cause of action arising either from a contract or tort, by the parties compromising the matter in dispute between them, and accepting its benefits. *Walker v. Burt*, 182 N. C. 325, 109 S. E. 43.

Same—Mistake as to Amount.—Where the plaintiff agreed to accept a lesser sum in discharge of a larger, which he thought was the amount of the debt, but was mistaken and later found that the debt was larger, there was no compromise as to the amount of the mistake. *Holden v. Warren*, 118 N. C. 326, 24 S. E. 770.

Same—Money Paid into Court.—Money tendered and deposited into court by the defendant with costs accrued, "in full tender of all indebtedness of defendant to plaintiffs," if withdrawn by the plaintiffs, pending the litigation, it amounts to a satisfaction of their claims, and subjects the plaintiffs to all subsequently accruing costs. *Cline v. Rudisill*, 126 N. C. 523, 36 S. E. 36.

Slight Irregularities Do Not Vitiare.—Where a plea in accord and satisfaction, has been made in bar to an action that defendant had paid an agreed amount and costs into the clerk's office, the fact that a witness ticket of a small amount, which the plaintiff had refused to receive, was not taxed in the costs, will not affect the validity of the tender. *McAuley v. Sloan*, 173 N. C. 80, 91 S. E. 701.

Where a creditor agrees to accept a lesser amount in satisfaction of his debt, the lesser amount to include advertising, the amount of which was to be agreed upon by the creditor, the failure of the debtor to pay the amount of the compromise, the creditor having refused to state the amount of advertising he would take, does not invalidate the compromise. *Ramsey v. Browder*, 136 N. C. 251, 48 S. E. 651.

Offer and Acceptance by Telegram.—Offer and acceptance by telegram to pay a sum certain in full settlement of a claim in dispute, followed by immediate payment by the debtor, constitutes a valid compromise in full satisfaction

of the claim. *Pruden v. R. R. Co.*, 121 N. C. 509, 28 S. E. 349.

III. EFFECT OF COMPROMISE.

Acts as Complete Discharge.—The receipt of a part in satisfaction of the whole is now as effective as if the whole amount of the debt had been paid. *Wittkowsky v. Baruch*, 127 N. C. 313, 314, 37 S. E. 449; *Tiddy v. Harris*, 101 N. C. 589, 593, 8 S. E. 227.

Precludes Further Action Thereon.—Where a plaintiff agreed to accept a certain sum by way of compromise in full satisfaction of his claim, and having been paid that amount by the defendant, he cannot maintain an action thereon. *Pruden v. R. R. Co.*, 121 N. C. 509, 512, 28 S. E. 349.

Extinguishes Cause of Action.—A valid compromise and settlement extinguishes the cause of action, and where a party is willing to yield something for the sake of a settlement, he cannot afterwards maintain a suit for which he voluntarily surrendered. See *Boffinger v. Tuyes*, 120 U. S. 198, 205, 7 S. Ct. 529, 30 L. Ed. 699.

Checks Accepted as Settlement in Full.—Under a uniform construction of this section, as announced in a long line of decisions, it is held that where two parties are in dispute as to the correct amount of an account, and one sends the other a check, or makes a payment, clearly purporting to be in full settlement of the claim, and the other knowingly accepts it upon such condition, this will amount to a full and complete discharge of the debt. *Blanchard v. Peanut Co.*, 182 N. C. 20, 21, 108 S. E. 332. *DeLoache v. DeLoache*, 189 N. C. 394, 127 S. E. 419. *Mercer v. Lumber Co.*, 173 N. C. 49, 54, 91 S. E. 588.

Where an employee was discharged and received and cashed a check for \$125, on which was written, "In full for services," which amount was less than claimed, he cannot recover more, although he attempted to qualify his acceptance of the proceeds of the check by writing across the check, above his signature, the words, "Accepted for one month's services." *Kerr v. Sanders*, 122 N. C. 635, 29 S. E. 943.

IV. APPLICATION OF SECTION

Incorporated in Contract.—Where agreements to receive a part in lieu of the whole debt due have been made since the enactment of this section, they are deemed to have been entered into in as full contemplation of its provisions as though it had been incorporated into the contract. *Bank v. Commissioners*, 116 N. C. 339, 363, 21 S. E. 410; *Koonce v. Russell*, 103 N. C. 179, 9 S. E. 316.

Must Be Compromise.—The section is not applicable where the payment is not intended as a compromise of the whole, or any part of the debt, but as a payment in full. *Smith v. Richards*, 129 N. C. 267, 269, 40 S. E. 5.

When Creditor Remitted to Original Rights.—If the debtor, as in *Hunt v. Wheeler*, 116 N. C. 422, 425, 21 S. E. 915, repudiates the agreement or unreasonably delays to execute it, the creditor is remitted to his rights under the original contract, for payment of the sum agreed to be paid under the new contract is essential to a discharge of the old contract. *Ramsey v. Browder*, 136 N. C. 251, 253, 48 S. E. 651.

Right to Demand Acceptance.—When a proposal to pay a given sum, provided that the payment shall operate to relieve one of three judgment debtors, is accepted by the creditor, and the debtor within a reasonable time tenders the amount, he has the right to demand that it shall be received and applied in discharge of his obligation to make any further payment. *Boykin v. Buie*, 109 N. C. 501, 503, 13 S. E. 879.

When Payer is Entitled to Restitution.—Where one pays a certain sum upon a contested debt in compromise thereof in case it shall afterwards be established, a finding by the jury that it never existed will entitle the payer to a restitution for the money advanced by him. *Fickey v. Merriam*, 79 N. C. 585.

Principal Bound by Acts of Agent.—A principal may not repudiate the act of his agent in compromising a debt due, and receive the benefit of the consideration therefor. *Cashmar Supply Co. v. Down*, 146 N. C. 191, 195, 59 S. E. 685.

When the sum paid under an indemnity insurance policy is the only sum due at the time, the language of the receipt will be restricted to the amount due, and will not be construed as a compromise of the whole claim of indemnity for future sickness. *Moore v. Casualty Co.*, 150 N. C. 153, 154, 63 S. E. 675.

Where one of several makers of a note agree with the payee that they shall be released from their obligations by giving a new note in a smaller sum, subject to the same conditions of warranty as the old one, the giving of a new note is valid as a compromise under this section, and the warranty in the former transaction is a part of the consideration for the new one, and is enforceable. *Bank v. Walser*, 162 N. C. 53, 54, 77 S. E. 1006.

V. PROCEDURE.

Discretion of Court.—Where, among other defenses to an action, the defendant pleads accord and satisfaction, the discretionary power of the trial judge in submitting this issue to the jury before submitting the other issues upon the merits will not be reversed on appeal. *McAuley v. Sloan*, 173 N. C. 80, 91 S. E. 701.

Landlord and Cropper.—Where the cropper sues for damages arising from the breach by the landlord of his contract in several particulars, and there is evidence on the trial of full accord and satisfaction between them, the submission of the one issue as to the compromise and settlement will not be considered for error when the case has thereunder been presented to the jury, without prejudice to any of the appellant's rights. *Walker v. Burt*, 182 N. C. 325, 109 S. E. 43.

Compromise Pending Writ of Error.—Where there has been a decision in the lower court, a valid compromise of the matter in dispute may be made while a writ of error is pending. See *Dakota County v. Glidden*, 113 U. S. 222, 5 S. Ct. 428, 28 L. Ed. 981.

§ 1-541. Tender of judgment.—The defendant, at any time before the trial or verdict, may serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer, and gives notice thereof in writing within ten days, he may file the summons, complaint, and offer, with an affidavit of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance is not given, the offer is deemed withdrawn, and cannot be given in evidence; and if the plaintiff fails to obtain a more favorable judgment he cannot recover costs, but must pay the defendant's costs from the time of the offer. If the defendant sets up a counterclaim in his answer to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, then the plaintiff may serve upon the defendant an offer in writing to allow judgment to be taken against him for the amount specified, or to allow the counterclaim to the amount specified, with costs. If the defendant accepts the offer, and gives notice thereof in writing within ten days, he may enter judgment as above for the amount specified, if the offer entitles him to judgment, or if the amount specified in the offer is allowed him in the trial of the action. If the notice of acceptance is not given, the offer is deemed withdrawn, and cannot be given in evidence; and if the defendant fails to recover a more favorable judgment, or to establish his counterclaim for a greater amount than is specified in the offer, he cannot recover costs, but must pay the plaintiff's costs from the time of the offer. (Rev., s. 860; Code, s. 573; C. C. P., s. 328; C. S. 896.)

As to tender of judgment in justice's court, see Rule 14, sec. 7-149.

Nature of Offer Required.—An offer of compromise to be sufficient under the statute must be in a form that will enable the plaintiff, if he accepts it, to have judgment entered by the clerk conformably to the offer. It must consequently come from all the defendants, or their common attorney at law, since otherwise the clerk would not be authorized to enter judgment against all. *Williamson v. Canal Co.*, 84 N. C. 629, 630.

The defendant would have no right, under the provisions of the section to force the plaintiff to accept the property, when it might have been injured or rendered worthless after conversion, or pay the costs, on refusal to do so, even if the action had been brought to recover the specific property tendered, unless the offer had also included with the proposed delivery of articles tendered in kind a proposal to pay an amount as damages for detention not less than that ultimately assessed by the jury. Citing *Stephens*

v. Koonce, 103 N. C. 266, 269, 9 S. E. 315. *Wood's Mayne on Damages*, secs. 520, 521.

Unaccepted Tender of Judgment.—The purpose of the section can be best subserved by holding according to its language that a tender of judgment unaccepted "cannot be given in evidence," and can only be used after verdict before the judge, to enable him to adjudge who shall pay the costs. *Blanton Grocery Co. v. Taylor*, 162 N. C. 307, 313, 78 S. E. 276.

In *Blanton Grocery Co. v. Taylor*, 162 N. C. 307, 313, 78 S. E. 276, it was said: "The statute authorizing a tender of judgment says that the tender, when not accepted, is to be deemed withdrawn, and cannot be given in evidence, and while this provision is primarily for the protection of the one making the tender, and to prevent its introduction against him, the statute is a part of the wholesome scheme devised to encourage compromises and settlements, before and after action commenced."

When defendants tender judgment for a smaller amount on another and different liability from that alleged in the complaint, and plaintiff does not accept as provided by this section, the tender is thereby withdrawn, and upon judgment of nonsuit on the cause alleged, plaintiff is not entitled to judgment for the amount tendered, there being no admission of liability in any amount upon the cause alleged. *Doggett Lbr. Co. v. Perry*, 213 N. C. 533, 196 S. E. 831.

Tender Sufficient to Stop Costs.—A tender of payment under the section, to stop the costs and the accrual of interest on a judgment subsequently rendered, must be in writing, signed by the party making it, and contain an offer of judgment for the amount tendered. *Medicine Co. v. Davenport*, 163 N. C. 294, 295, 79 S. E. 602.

Costs—When Taxed on Plaintiff.—Where a plaintiff is given judgment for no more than the amount tendered by the defendant, costs from the time the tender was made should be taxed on the plaintiff. *Cowles v. Assurance Society*, 170 N. C. 368, 377, 87 S. E. 119.

Where defendant tenders judgment in its answer for the amount recovered by plaintiff, which tender is refused by plaintiff upon her claim that she is entitled to recover a larger amount, the costs are properly taxed against plaintiff. *Webster v. Wachovia Bank, etc., Co.*, 208 N. C. 759, 182 S. E. 333.

Same—When Taxed on Defendant.—Where, in a justice's court, judgment was rendered against two defendants, and one appealed, and, pending the appeal, tendered in cash as a satisfaction of the judgment as to himself a less sum than the amount of the justice's judgment, but more than that ultimately rendered in the superior court, the plaintiff was entitled to costs. *Wyatt v. Wilson*, 152 N. C. 276, 67 S. E. 501.

Error to Dismiss.—Where on the admissions in the pleadings the plaintiff is entitled to recover any amount it is error for the trial court to dismiss the action as in case of nonsuit, and the fact that the defendant had tendered the amount admitted to be due with interest and cost to the time of filing answer, and had paid it into court subject to the plaintiff's order does not vary this result. *Penn v. King*, 202 N. C. 174, 162 S. E. 376.

Cited in *Doggett Lbr. Co. v. Perry*, 212 N. C. 713, 194 S. E. 475; *Long v. Townsend*, 215 N. C. 723, 3 S. E. (2d) 13.

§ 1-542. Conditional tender of judgment for damages.—In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing, that if he fails in his defense, the damages be assessed at a specified sum; and if the plaintiff signifies his acceptance thereof in writing, ten days before the trial, and on the trial has a verdict, the damages shall be assessed accordingly. If the plaintiff does not accept the offer, he must prove his damages, as if it had not been made, and may not introduce it in evidence. If the damages assessed in his favor do not exceed the sum mentioned in the offer, the defendant shall recover his expenses incurred in consequence of any necessary preparation or defense in respect to the question of damages. This expense shall be ascertained at the trial. (Rev., ss. 861, 862; Code, ss. 575, 576; C. C. P., ss. 329, 330; C. S. 897.)

As to costs, see sec. 1-541, and annotations thereto.

Tender Should Accompany Answer.—A tender may accompany an answer, and this alone is its proper place.

ing so far as a pleading is concerned, or in reply to a counterclaim; it will not be permitted as an aid to a defective demurrer. *Hall v. Telegraph Co.*, 139 N. C. 369, 873, 52 S. E. 50.

Agreement as Evidence Fixing Damages.—Where, pending an action to recover for damages done to a lot of tobacco which the plaintiff had bought and paid for under a guarantee of soundness by the defendants, an agreement was entered into adjusting the amount of damage per pound which the plaintiff should recover, if entitled to recover at all, said agreement to be without prejudice to either party; Held, that such an agreement was not an offer of compromise in the meaning of this section and was admissible on the trial of the action to determine the amount of the plaintiff's recovery. *Garrett v. Pegram*, 120 N. C. 288, 26 S. E. 778.

§ 1-543. Disclaimer of title in trespass; tender of judgment.—In actions of trespass upon real estate, the defendant in his answer may disclaim any title or claim to the lands on which the trespass is alleged by the complaint to be done, may allege that the trespass was by negligence or involuntary, and may make a tender or offer of sufficient amends for the trespass. If the plaintiff controverts such answer or a part thereof, and at the trial verdict is found for the defendant, or if the plaintiff is nonsuited, he is barred from the said action and all other suits concerning the same. (Rev., s. 863; Code, s. 577; Rev. Code, c. 31, s. 79; 1715, c. 2, s. 7; C. S. 898.)

Involuntary Trespass.—Where a person occupying land adjoining another and in ignorance of the true boundaries of the tracts, trespasses upon the land of the adjacent owner, but disclaims title and tenders reasonable amends before the suit was brought, such trespasser is protected by this section. *Blackburn v. Bowman*, 46 N. C. 442.

Effect of Disclaimer Generally.—If a defendant is sued for the recovery of land, a part of which he does not claim or about which he does not intend to litigate with the plaintiff, he should enter a disclaimer; and when he does so, he cannot be taxed with any costs relating to that part of the land; but when, instead of doing so, he takes issue with plaintiff as to all of the land, and the plaintiff recovers any part of it, he is entitled to recover his costs, although he may have failed to recover the other tract. *Swain v. Clemmons*, 175 N. C. 240, 95 S. E. 498.

Art. 45. Arbitration and Award.

§ 1-544. Agreement for arbitration.—Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this article, any controversy existing between them at the time of the agreement to submit. Such an agreement shall be valid and enforceable, and neither party shall have the power to revoke the submission without the consent of the other party or parties to the submission save upon such grounds as exist in law or equity for the rescission or revocation of any contract. (1927, c. 94, s. 1.)

Editor's Note.—This statute is a verbatim enactment of the uniform arbitration act proposed to the states for adoption by the American Bar Association in 1924 and 1925. North Carolina is among the first states to adopt it. This act is based upon the arbitration acts of the various states and several sections of it are restatements of the corresponding sections of various state laws. In 1925, this act was adopted by the National Conference of Commissioners on Uniform State Laws.

This is North Carolina's first arbitration statute; prior to this time the common law arbitration has been in use. While the statute changes the common law in many instances, it is an enactment of it in others. A discussion of the changes wrought will be found under each section where the prior North Carolina cases which are pertinent are cited and the probable effect upon them is indicated.

The question of costs was left by the proposed act to the various states adopting it.

The reference statute, sec. 1-188 et seq., did not affect common law arbitration (see cases cited under sec. 1-188)

and it is likewise probable that this statute does not affect that statute.

This and following sections do not exclude the common-law remedy of arbitration, but is cumulative and concurrent thereto, and the act does not prevent the parties to a controversy from contracting by parol to submit their differences to arbitration in cases where a parol agreement on the subject matter would be enforceable, and an award reached under the parol agreement to arbitrate will not be invalidated by reason of failure to follow in all respects the method and procedure prescribed by the statute. *Copney v. Parks*, 212 N. C. 217, 193 S. E. 21.

Same—Distinction Between Arbitration and Reference.—There are several distinctions between arbitration and references under the code. While a reference may be by consent of the parties it may also be compelled by the judge in certain instances (see sec. 1-189); but an arbitration under this act is always by consent. It would seem that in a reference the referee must report the facts upon which his conclusions are based—the finding of facts may be the extent of his duty—and state them separately from the conclusions of law; but the arbitrator is not required to report the facts but only his award or conclusion which must be done in writing. Referees are required to conduct a trial according to the rules of court and have the same power generally as judges (see sec. 1-192) but there are no rules restricting the arbitrators to any particular mode or manner of trial, they are not even required to decide according to law and their award may be general. The proceedings for setting aside, vacating, confirming, and entering judgment are also different. For distinctions between reference and common law award, see *Keener v. Goodson*, 89 N. C. 273, 276.

Arbitrator Defined.—“An arbitrator is a person selected by the mutual consent of the parties, to determine matters in controversy between them, whether they be matters of law or fact. He is invested with judicial functions, limited by the terms of the submission, [and this statute since its passage] and he must be incorrupt and impartial, and not exceed or fall short of his duty, and if he acts otherwise, his award may be set aside.” *Crisp v. Love*, 65 N. C. 126, 127.

Liberal Construction.—This statute will probably be given a liberal construction, because, looking to the purpose of arbitration, it is the policy of the law to encourage the settlement of litigation or controversy with as much speed and as little expense as the exigencies of the case will permit, not to sacrifice justice. Pursuing this policy, arbitration has always been encouraged. See the Editor's Note to sec. 1-188.

Applicability to Agreement Respecting Future Controversies.—Attention is called to the fact that this section limits the agreement to arbitrate “to any controversy existing between the parties at the time of the agreement to submit”. These terms do not expressly extend to and include agreements to submit controversies arising in the future, for it clearly appears from the debates of the committee which framed this act that it should not extend to such agreements. See “Handbook on the National Conference of Commissioners on Uniform State Laws” and the Proceedings of the 35th. Annual Meeting of 1925, pp. 63, 754.

It seemed to be the opinion of the committee that this section does not apply to and will not affect the law respecting contracts to arbitrate future controversies since it is expressly limited to controversies existing at the time of contract and that the prior law as to future disputes remains as it was prior to the passage. If this be the proper construction then, under the law of this state as it now exists, future contracts to arbitrate which classify as conditions precedent are valid but those classifying as collateral stipulations are invalid. The test applied to the contract being whether it ousts the court of jurisdiction over the contract generally; if it does, it is invalid. See *Swain v. Swaim*, 14 N. C. 24.

The following North Carolina cases discuss the rule and illustrate the application of it as to future disputes.

“The original doctrine, with its modifications, is well summed up by Justice Manning in *Kelly v. Trimont Lodge*, 154 N. C. 97, 100, 69 S. E. 764; ‘Our court has uniformly held to the doctrine that when a cause of action has arisen, the courts cannot be ousted of their jurisdiction by agreements, previously entered into, to submit the liabilities and rights of the parties to the determination of other tribunals named in the agreement; but it has been also generally held that the agreement to submit the particular question of the amount of loss or damage of the assured under an insurance policy is not against public policy and is sustained. That is simply a method for the ascertainment of a single fact, and not the determination of the legal liability of the insurer,’ citing *Mfg. Co. v. Assur. Co.*, 106 N. C. 28, 19 S. E.

1057, and in *Braddy v. Ins. Co.*, 115 N. C. 354, 20 S. E. 477. Justice Avery says the proposition is well settled that an agreement to submit to arbitration the single question of the amount of loss by fire is valid." *Nelson v. Atlantic R. Co.*, 157 N. C. 194, 201, 72 S. E. 998.

"It is generally accepted that it is competent to contract that the amount of damages may be recovered, or the existence of any fact which may enter into the right to recover, shall be submitted to arbitration, provided the right of action is not embraced in the agreement." *Nelson v. Atlantic Coast Line R. Co.*, 157 N. C. 194, 199, 72 S. E. 998.

Although an agreement to arbitrate the entire controversy is not enforceable, and prior to the award either party may revoke the agreement, if he fails to do so, and enters upon the arbitration, and an award is made, he is bound. *Nelson v. Atlantic Coast Line R. Co.*, 157 N. C. 194, 202, 72 S. E. 998; *Williams v. Mfg. Co.*, 154 N. C. 205, 208, 70 S. E. 290.

The law of this state is in accord with the law of the majority of the American States (See 5 C. J. pp. 43 et. seq., sections 69-72), but it may be of interest to note that a very recent school of thought has given rise to the doctrine that all contracts to arbitrate future contracts are valid and enforceable. This is made statutory in several jurisdictions including New York (passing the first of such statutes in 1920), New Jersey, Massachusetts, Oregon, California and the Federal Government. See the discussion in the Handbook, cited supra in this note.

Arbitration Pending Reference.—Where a cause has been referred, and pending the reference the parties agree to an arbitration and that the referee's conclusions of law should be based on the arbitrators' findings, the arbitration is not one submitted in accordance with this section and its provisions do not apply. *Andrews v. Jordan*, 205 N. C. 618, 172 S. E. 319.

Arbitration as Matter of Contract.—It will be observed that this statute makes the right of arbitration a matter of contract; and it is only by agreement of the parties that a proceeding under it may be had. This is but the adoption of the common law in this respect for it has been held uniformly in this state that a submission to arbitration was a contract resulting from the agreement to refer, and that it was governed by the general law concerning contracts. *Sprinkle v. Sprinkle*, 159 N. C. 81, 74 S. E. 739.

Same—Claim Which May Be Arbitrated.—It is to be observed that this statute permits the submission of any controversy existing. It makes no express exception of controversies involving the right or title to real estate. It has been said by some of the standard authorities that arbitration statutes usually prohibit, either expressly or by necessary implication, such controversies. While it is a fact that the statutes of many of the states expressly prohibit the submission to arbitration of questions involving the title of freehold estates in land, it is doubtful whether statutes silent upon the subject or which use language that is broad enough to include disputes concerning the title to such estates are construed as prohibiting their submission. Nevertheless the case of *Fowler v. Bigelow*, 8 Mass. 1, so construed a statute using the words "disputes of what nature soever" but placed the decision upon the ground that another provision that the party found indebted may discharge himself by paying the sum awarded indicated an intention of the legislature to limit arbitration to personal demands. But there is a vigorous criticism of this holding in the footnotes to the case which submits that the statute is not so limited and that even if it were the arbitration should have been held good at common law.

It would seem that there are no words in the present statute which so limit its application.

While at old common law such cases could not be arbitrated because of the restriction upon the alienation of realty under feudal tenure, under the later common law such questions could be submitted to arbitration provided the submission was in writing. Oral submissions were invalid because they fell within the statute of frauds. This was the law of this state prior to this statute (see *Fort v. Allen*, 110 N. C. 183, 14 S. E. 685; *Crissman v. Crissman*, 27 N. C. 498); and it would seem that this statute, since it requires a written submission, would extend to all disputes existing, including those involving title to land.

It has been held as a general rule that claims arising out of illegal contracts or transactions cannot be submitted to arbitration, (it has so been held in Virginia, Georgia, Tennessee, Mississippi, Massachusetts and Pennsylvania), although the decisions of some of the states hold otherwise (Alabama and New Hampshire). As to whether such disputes may be arbitrated under this statute, quære.

Same—Sufficiency of Contract.—Since under this statute the submission of a dispute to arbitration is a contract, it is but reasonable to suppose that such contracts must have

all the elements necessary to a binding contract. See the general discussion in 5 C. J. [§ 15 et seq.] 23.

Thus, the parties thereto must have the legal capacity to enter into it. The general rule is that if they have the capacity to contract or release their rights generally they may agree to arbitrate, otherwise they cannot. While there are no decisions, as yet, so construing this statute, this has always been the general rule and it is but reasonable to suppose that the framers of this statute intended to leave it unchanged.

A party having this capacity cannot act through an agent or attorney in the same manner as was always possible. See 2 C. J. [§ 302] 655; 6 C. J. [§ 158] 650 et seq.

The consideration supporting the contract of arbitration is the mutual promises and this is sufficient. See *Mayo v. Gardner*, 49 N. C. 359.

Who May Make Contract.—This section provides that "Two or more parties may agree." It does not specify whether the parties may do so by their general agents or by their attorneys. Prior to this act it was held under the common law practice that the attorneys might make such an agreement and this without the consent of the clients (*Millsaps v. Estes*, 134 N. C. 486, 46 S. E. 988, and citations); it would seem that a party could have made the contract by agent in the same manner that any other contract could have been made. It is to be presumed that the word "parties" as here used is given the meaning ordinarily ascribed to the word in legal terminology and that about the same latitude will be given the parties in making the agreement that they have always had. As has always been the case, administrators (see sec. 28-111, and *McLeod v. Graham*, 132 N. C. 473, 43 S. E. 935), trustees, guardians and other representatives may no doubt represent the estates or their wards, cestui que trusts, etc., in this capacity.

It was held prior to this section, following the ordinary rule of contracts, that an agreement made by an infant was voidable. It was also held that a guardian ad litem could not bind the infant by a submission to arbitration, even though the submission was made the rule of the court. *Millsaps v. Estes*, 137 N. C. 535, 536, 50 S. E. 227.

Necessity of Controversy Being Litigated.—It is not necessary, it would seem, that the controversy be pending in a court before it can be arbitrated, for any existing controversy might be arbitrated. See *Parrish v. Strickland*, 52 N. C. 504. A cause that is pending may be arbitrated (See *Islay v. Steward*, 20 N. C. 297); this was true at common law and under all the statutes, it would seem, unless the contrary is expressly provided for. See 5 C. J., p. 26, secs. 22-24.

Same—Consent of Court.—It was a rule at common law that where a pending case is submitted the consent of the court is a prerequisite.

Necessity for Writing.—Prior to this act, the necessity of the agreement being in writing depended upon the law of general contracts so that some of such contracts had to be in writing and others did not, depending upon whether they fell within the statute. See *Fort v. Allen*, 110 N. C. 183, 189, 14 S. E. 685; *Crissman v. Crissman*, 27 N. C. 498.

Power to Revoke.—Since the word "submission" means to agree to refer the matter in dispute (See Words and Phrases, title "Submission" and see 56 C. J. [§ 19] p. 21), this section denies the right to revoke a contract to submit an existing controversy to arbitration after it is once made. It changes the prior rule in this state which permitted a revocation by either party at any time before the rendition of the award [for prior law see *Long v. Cromer*, 181 N. C. 354, 107 S. E. 217; *Williams v. Mfg. Co.*, 153 N. C. 7, 68 S. E. 902 and citations], or thereafter, even when it has been made a rule of the court, with the consent of the judge (see *Tyson v. Robinson*, 25 N. C. 333, for the prior law).

Effect of Death of Party.—While prior to this act the death of one of the parties before the award automatically revoked the contract to arbitrate, (see *Whitfield v. Whitfield*, 30 N. C. 163; *Williams v. Branning Mfg. Co.*, 153 N. C. 7, 68 S. E. 902) this section changes the rule so that now the effect of such death upon contract is the same as it is upon an ordinary contract.

Number of Arbitrators.—Notwithstanding that section 1-547 provides that in case the agreement fails to prescribe a method for appointment of the arbitrators the judge shall appoint three, there are no provisions prescribing the number of arbitrators the parties may appoint. If an even number should be appointed by the parties and they should divide evenly as to what the award should be, no method of determining the tie is prescribed. Under the prior law the arbitrators could appoint an umpire (See *Stevens v. Brown*, 82 N. C. 460; *Lusk v. Clayton*, 70 N. C. 185); as to whether this would be permissible in the absence of an agreement to that effect, quære.

Notice to Arbitrators of Appointment.—See annotations under sec. 1-547.

Cited in *In re Reynolds' Estate*, 221 N. C. 449, 20 S. E. (2d) 348.

§ 1-545. Statement of questions in controversy.—The arbitration agreement must state the question or questions in controversy with sufficient definiteness to present one or more issues or questions upon which an award may be based. (1927, c. 94, s. 2.)

§ 1-546. "Court" defined.—The term "court" when used in this article means a court having jurisdiction of the parties and of the subject matter. (1927, c. 94, s. 3.)

§ 1-547. Cases where court may appoint arbitrator; number of arbitrators.—Upon the application in writing of any party to the arbitration agreement and upon notice to the other parties thereto, the court shall appoint an arbitrator or arbitrators in any of the following cases:

(a) When the arbitration agreement does not prescribe a method for the appointment of arbitrators, in which case the arbitration shall be by three arbitrators.

(b) When the arbitration agreement does prescribe a method for the appointment of arbitrators, and the arbitrators, or any of them, have not been appointed and the time within which they should have been appointed has expired.

(c) When any arbitrator fails or is otherwise unable to act, and his successor has not been appointed in the manner in which he was appointed.

Arbitrators appointed by the court shall have the same power as though their appointment had been made in accordance with the agreement to arbitrate. (1927, c. 94, s. 4.)

As to number of arbitrators generally, see note to sec. 1-544.

Editor's Note.—Prior to this act the appointments must have been made by the parties in pursuance of the agreement if the controversy was not pending. But if it were pending the appointment might have been made by the court with the consent of the parties. See the note under sec. 1-544.

Notice of Appointment to Arbitrators.—There was no necessity that the arbitrators under the former law be informed of their appointment by a formal or written notice. It was sufficient if they were appointed, met and made an award. *Allison v. Bryson*, 65 N. C. 44. This will probably apply to appointments made under the present law whether by the parties or the courts. Ed. note.

§ 1-548. Application in writing; hearing.—Any application made under authority of this article shall be made in writing and heard in a summary way in the manner and upon the notice provided by law or rules of court for the making and hearing of motions, except as otherwise herein expressly provided. (1927, c. 94, s. 5.)

§ 1-549. Notice of time and place of hearing.—The arbitrators shall appoint a time and place for the hearing, and notify the parties thereof, and may adjourn the hearing from time to time as may be necessary, and, on application of either party, and for good cause, may postpone the hearing to a time not extending beyond the date fixed for making the award. (1927, c. 94, s. 6.)

Former Law.—It may be stated as a general rule that the parties had a right to a notice of the time and place of hearing if the judgment of the arbitrators may have been influenced or enlightened by evidence. *Grimes v. Brown*, 113 N. C. 154, 18 S. E. 87; *Zell v. Johnston*, 76 N. C. 302. This probably extended to adjourned meetings, except that no notice of a final meeting to make up and sign the

award was ever necessary. *Zell v. Johnston*, supra; 5 C. J. [§181], 87.

Right to Notice.—A party to an arbitration agreement has the right, both at common law and by this section, to notice and an opportunity to present evidence as to all matters submitted, and in the absence of notice the award is not binding upon him and does not estop him from instituting action in the superior court. *Grimes v. Home Ins. Co.*, 217 N. C. 259, 7 S. E. (2d) 557.

§ 1-550. Hearing if party fails to appear.—If any party neglects to appear before the arbitrators after reasonable notice the arbitrators may nevertheless proceed to hear and determine the controversy upon the evidence which is produced before them. (1927, c. 94, s. 7.)

§ 1-551. Award within sixty days.—If the time within which the award shall be made is not fixed in the arbitration agreement, the award must be made within sixty days from the time of the appointment of the arbitrators, and an award made after the lapse of sixty days shall have no legal effect unless the parties extend the time in which said award may be made, which extension or ratification shall be in writing. (1927, c. 94, s. 8.)

Former Law.—Under the former law, the time given in which to submit the award was fixed either by the agreement or the order of the court submitting the question by the consent of the parties. See 5 C. J. [§ 288] 123.

Provisions Subject to Waiver.—Where hearings are held before the arbitrators more than sixty days after the submission to arbitration, and all parties are present or represented by counsel, the unsuccessful party may not wait until after the award has been made and then set up for the first time his contention that the award was of no effect because not made within sixty days after the submission, the provisions of this section being subject to waiver, and the award as rendered is binding on the parties. *Andrews v. Jordan*, 205 N. C. 618, 172 S. E. 319.

§ 1-552. Representation before arbitrators.—No one other than a party to said arbitration, or a person regularly employed by such party for other purposes, or a practicing attorney-at-law, shall be permitted by the arbitrator or arbitrators to represent before him or them any party to the arbitration. (1927, c. 94, s. 9.)

§ 1-553. Requirement of attendance of witnesses.—The arbitrator or arbitrators, or a majority of them, may require any person to attend before him or them as a witness, and to bring with him any book or writing or other evidence.

The fees for such attendance shall be the same as the fees of witnesses in the Superior Court.

Subpoenas shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrator or arbitrators, or a majority of them, and shall be directed to the person and shall be served in the same manner as subpoenas to testify before a court of record in this State; if any person so summoned to testify shall refuse or neglect to obey such subpoenas, upon petition the court may compel the attendance of such person before the said arbitrator or arbitrators, or punish said person for contempt in the same manner now provided for the attendance of witnesses or the punishment of them in the courts of this State. (1927, c. 94, s. 10.)

Editor's Note.—At common law the arbitrators could not of themselves compel the attendance of witnesses. And where they heard evidence they were not compelled to administer oaths, though they could do so. (See *Pierce v. Perkins*, 17 N. C. 250; *McCrae v. Robeson*, 6 N. C. 127). The mode of hearing testimony must have been fair and im-

partial to the parties. See *Pierce v. Perkins*, supra. *Hurdle v. Stallings*, 109 N. C. 6, 13 S. E. 720.

§ 1-554. Depositions. — Depositions may be taken with or without a commission in the same manner and for the same reasons as provided by law for the taking of depositions in suits pending in the courts of record in this State. (1927, c. 94, s. 11.)

Editor's Note. — There was no method of taking depositions in arbitration proceedings at common law.

§ 1-555. Orders for preservation of property. — At any time before final determination of the arbitration the court may upon application of a party to the submission make such order or decree or take such proceeding as it may deem necessary for the preservation of the property or for securing satisfaction of the award. (1927, c. 94, s. 12.)

§ 1-556. Questions of law submitted to court; form of award. — The arbitrators may, on their own motion, and shall by request of a party to the arbitration,

(a) At any stage of the proceedings submit any question of law arising in the course of the hearing for the opinion of the court, stating the facts upon which the question arises, and such opinion when given shall bind the arbitrators in the making of their award;

(b) State their final award in the form of a conclusion of fact for the opinion of the court on the questions of law arising on the hearing. (1927, c. 94, s. 13.)

§ 1-557. Award in writing and signed by arbitrators. — The award of the arbitrators, or a majority of them, shall be drawn up in writing and signed by the arbitrators or a majority of them; the award shall definitely deal with all matters of difference in the submission requiring settlement, but the arbitrators may, in their discretion, first make a partial award which shall be enforceable in the same manner as the final award; upon the making of an award, the arbitrators shall deliver a true copy thereof to each of the parties thereto, or their attorneys, without delay. (1927, c. 94, s. 14.)

Prior Law—Necessity for Writing. — It would seem that under the prior law the award need be in writing only when required by the agreement or come within the general statutes of fraud. See *Crissman v. Crissman*, 27 N. C. 498, 503; *Gaylord v. Gaylord*, 48 N. C. 368, 369. See also 5 C. J. [§ 262] 114.

Same—Signature of Arbitrators. — In order for an award to have been available, as evidence under the prior law it was necessary that it be signed by the arbitrators. *Morrison v. Russell*, 32 N. C. 273. The signature by persons other than the arbitrators has been held not to vitiate the award when it is properly signed by a majority of the arbitrators. *Carter v. Sams*, 20 N. C. 321.

Same—Dealing with All Matters Submitted. — It has always been necessary for arbitrators to pass on all the points particularly referred to them; *Osborne v. Calvart*, 83 N. C. 365; otherwise the award was entirely void. But if the submission covered all matters in difference without specifying them, the arbitrators could make an award of only such things as they had notice, and the award was good. *Walker v. Walker*, 60 N. C. 255.

"The award on its face ought to show that the arbitrators have acted upon all the matters submitted." *Crisp v. Love*, 65 N. C. 126, 127.

Same—Matters Not Submitted. — Matters passed on by the arbitrators not submitted to them rendered the award void in the absence of waiver as by the voluntary introduction of evidence on matters not submitted. *Robertson v. Marshall*, 155 N. C. 167, 71 S. E. 67. The power of the arbitrators is derived from the submission and the award

must be made in strict accordance with it, and must not go beyond what is embraced in it. *Cullifer v. Gilliam*, 31 N. C. 126; *Cutler v. Cutler*, 169 N. C. 482, 86 S. E. 301.

However, if the decision of submitted questions involved the decision of other questions not submitted, the decision of the latter was not error. *Zell v. Johnston*, 76 N. C. 302.

Same—Copy and Delivery of Award. — Under the prior law it was not necessary, in the absence of agreement to that effect, that a copy of the award be given to the parties. All that was necessary was that the parties have notice of the award as by being present when it was agreed upon and signed. With full understanding as to its meaning a demand for a copy should have been made at the time of rendition if the parties wanted it. See *Crawford v. Orr*, 84 N. C. 246; *Morrison v. Russell*, 32 N. C. 273.

Form of Award. — There has never been any requirement in this state as to the form of the award, this having been left to the choice of the arbitrators unless the agreement specified a form. *Ball Thrash Co. v. McCormack*, 172 N. C. 677, 90 S. E. 916.

Award Liberally Construed. — Under the prior law it was held that the court will always intend everything in favor of an award and will give such construction to it that it may be supported if possible. *Carter v. Sams*, 20 N. C. 321.

§ 1-558. Time for application for confirmation.

— At any time within three months after the award is made, unless the parties shall extend the time in writing, any party to the arbitration may apply to the court for an order confirming the award, and the court shall grant such an order unless the award is vacated, modified, or corrected, as provided in §§ 1-559 and 1-560. Notice in writing of the motion must be served upon the adverse party, or his attorney, five days before the hearing thereof. (1927, c. 94, s. 15.)

Effect upon Prior Law. — This section provides the method of enforcing an award after it is made.

The practice in this state regarding the enforcement of this award depended upon whether or not the matter submitted was pending in court. If it were, and the agreement was made in court, then the arbitrators reported the award to the court when it became a rule of the court if confirmed. If the controversy was pending but the agreement was made out of court, then the award had to be submitted to the court for confirmation in order that it may be effective to settle the controversy and become the judgment of the court. The court had no power to make submissions to arbitration rules of court except when the subject matter was a pending suit. See *Alexander v. Burton*, 21 N. C. 469. If the cause were not pending then the award could be enforced in court only by a suit upon it as if it were a contract. Under this section the award operates as a verdict of the jury irrespective of whether the cause was pending, and upon application to the court as prescribed, judgment is entered thereon.

§ 1-559. Order vacating award. — In any of the following cases the court shall after notice and hearing make an order vacating the award, upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud or other undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Where an award is vacated and the time, within which the agreement required the award to be made, has not expired, the court may, in its dis-

cretion, direct a rehearing by the arbitrators. (1927, c. 94, s. 16.)

As to effect of exceeding or imperfectly exercising powers under prior law, see note to sec. 1-557.

Editor's Note.—It was proposed to the committee which framed this act [see note to sec. 1-544] by one of its members that the word "either" in sub-section (b) should be changed to "any"; and that the words "signing the award" should be added so that corruption or partiality on the part of a minority of the arbitrators should not oblige the court to vacate the award. The committeeman contended that as the language now stands, it would oblige the court to vacate the awards. His suggestion was not adopted because the section, when construed with the prior section of the act, would be given the interpretation which he contends should be placed upon it.

The language of this section follows the language used in the same section in the law of several of the states.

§ 1-560. Order modifying or correcting award.—In any of the following cases the court shall, after notice and hearing make an order modifying or correcting the award, upon the application of any party to the arbitration:

(a) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property, referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them.

(c) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.

The order must modify and correct the award, so as to effect the intent thereof. (1927, c. 94, s. 17.)

§ 1-561. Notice of motion to vacate, modify or correct award within three months.—Notice of a motion to vacate, modify or correct an award shall be served upon the adverse party, or his attorney, within three months after an award is filed or delivered, as prescribed by law for service of notice of a motion in an action. For the purposes of the motion any judge who might make an order to stay the proceedings, in an action brought in the same court, may make an order to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award. (1927, c. 94, s. 18.)

§ 1-562. Judgment or decree entered.—Upon the granting of an order, confirming, modifying, correcting or vacating an award, judgment or decree shall be entered in conformity therewith. (1927, c. 94, s. 19.)

See editor's note under § 1-558 as to when judgment may have been entered under prior law.

§ 1-563. Papers to be filed on motion relating to award.—The party moving for an order confirming, modifying, correcting or vacating an award, shall at the time such motion is filed with the clerk, file, unless the same have theretofore been filed, the following papers with the clerk:

(a) The written contract or a verified copy thereof containing the agreement for the submission; the selection or appointment of the arbitrator or arbitrators, and each written extension of the time, if any within which to make the award.

(b) The award.

(c) Every notice, affidavit and other paper used upon an application to confirm, modify, correct or vacate the award, and each order made upon such an application.

The judgment or decree shall be entered (or docketed) as if it were rendered in an action. (1927, c. 94, s. 20.)

§ 1-564. Force and effect of judgment or decree.—The judgment or decree so entered (or docketed) shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to a judgment or decree; and it may be enforced, as if it had been rendered in the court in which it is entered. (1927, c. 94, s. 21.)

Force and Effect under Prior Law.—"Ordinarily, if their award be within their powers and unaffected by fraud, mistake, surprise or irregularity, the judge has no power over it except to make it a rule of court and enforce it according to the course of the court." *Lusk v. Clayton*, 70 N. C. 185, 188.

Same—Agreement to Become Rule of Court.—"An agreement that an award shall be a rule (or judgment) of Court is merely an agreement to confess judgment according to the award when it shall be made. If such agreement be made by persons having no suit in court respecting the matters referred, a court (in this state at least) will not compel performance of the agreement by attachment because the parties have not put themselves under its jurisdiction, but will leave them to their remedy by action on the agreement. *Alexander v. Burton*, 21 N. C. 469. If, however, such an agreement is made between the parties to a suit, the court having jurisdiction over the persons and the subject-matter will compel the parties by attachment to perform the agreement by confessing judgment according to the award, or, as a more direct way to the same end, will (in this state at least) enter judgment according to the award." *Cunningham v. Howell*, 23 N. C. 9; *Lusk v. Clayton*, 70 N. C. 185, 188.

Effect of Arbitrators Attempting to Decide by Law.—Where it appears that the arbitrators intended to decide according to law, if they clearly mistake the law, the judge may set aside the award, and perhaps in some cases give such judgment as they ought in law to have given. *Lusk v. Clayton*, 70 N. C. 185, 188.

§ 1-565. Appeal.—An appeal may be taken from the final judgment or decree entered by the court. (1927, c. 94, s. 22.)

Editor's Note.—This section was taken from the law of Illinois, which was passed by the acts of 1893, sec. 15.

This section is specific in that it is limited to the final judgment or decree entered by the court, and cannot be taken from the arbitration directly. In other words it may be taken in accordance with sections 1-557 and 1-559.

Notwithstanding that in many states an appeal can be had only in cases of fraud or some matter that goes to the very essence of the thing, this section gives the right of appeal in all cases. See "Handbook on the National Conference of Commissioners on Uniform State Laws" and the proceedings of the 35th annual meeting of 1925, pages 63, 701.

Presumption on Appeal.—Where parties to an action in ejectment consent to arbitration on questions of boundaries and an order is made accordingly under this and the following sections, but the record discloses no evidence upon which the arbitrators based their decision, the courts will assume that there was evidence to support their action. *Bryson v. Higdon*, 222 N. C. 17, 21 S. E. (2d) 836.

§ 1-566. Uniformity of interpretation.—Interpretation of article.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1927, c. 94, s. 23.)

§ 1-567. Citation of article.—This article may be cited as the uniform arbitration act. (1927, c. 94, s. 24.)

Art. 46. Examination of Parties.

§ 1-568. Action for discovery abolished.—No action to obtain discovery under oath, in aid of the prosecution or defense of another action, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in

the manner prescribed by this article. (Rev., s. 864; Code, s. 579; C. C. P., s. 332; C. S. 899.)

As to inspection of documents, see sec. 8-89; as to examination of corporations, see sec. 1-569.

Editor's Note.—In 1851 Parliament passed what was known as Lord Denman's Act, which provided that in all actions or proceedings and at all stages, before any person having authority to hear evidence, "the parties thereto and the persons in whose behalf any such suit or action or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either viva voce or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action or other proceeding."

In section 6 of Lord Denman's Act it was also provided that in all actions pending in the superior courts of common law the right to compel the production of, to inspect and take copies of the papers of an adversary party should be confined to those cases where a discovery might have been obtained at the instance of the moving party by a bill or other proceeding in a court of equity. 14 and 15 Vic., 91 Stat. at Large, ch. 99, §§ 2 to 6, inclusive; 2 Taylor on Ev., sec. 1217. See Harper v. Pinkston, 112 N. C. 293, 296, 17 S. E. 161.

At the time this Act was passed, the various courts of law and chancery were still maintained with the established procedure in each. When the courts of equity were abolished in this State, Lord Denman's Act was practically incorporated into the C. C. P. These provisions were carried forward in the Code of 1883 as sections 578 to 584, both inclusive, and section 588 in *utidem verbis*, except the proviso to sec. 580. With few variations, Battle's Revisal, ch. 17, sections 332 to 341 are the same as the sections of the Code referred to.

With some exceptions and additions, these provisions were carried forward in a substantial form, and constituted sections 899 to 907 of the Code. The Code of New York, Voorhees, section 389 to 397, both inclusive, contains practically the same provisions as are found in our statutes. Harper v. Pinkston, 112 N. C. 293, 17 S. E. 161; McLeod v. Bulard, 84 N. C. 516.

Substitute for Bill of Discovery.—This article abolishes and is a substitute for the old equitable bill of discovery. Dunn v. Johnson, 115 N. C. 249, 257, 20 S. E. 390; Helms v. Green, 105 N. C. 251, 261, 11 S. E. 470; Harper v. Pinkston, 112 N. C. 293, 297, 17 S. E. 161; Hudson v. Jordan, 108 N. C. 10, 13, 12 S. E. 1029. See McGraw v. Southern Ry. Co., 209 N. C. 432, 184 S. E. 31.

Same—Rules Governing.—In Harper v. Pinkston, 112 N. C. 293, 301, 17 S. E. 161. Avery, J., quoting 1 Pomeroy, Jur., sec. 194, says: "The principles and doctrines relating to discovery, which have been settled by the courts of equity and which determine what facts parties can be compelled to disclose and what documents to produce, and under what circumstances the disclosures or productions can be obtained, will still continue to be recognized by the courts and to regulate their action in enforcing the examination of parties and the production of writings by means of the more summary statutory proceedings. The abolition or discontinuance of technical 'discovery' has not abrogated those principles and doctrines. Recurring to the language of the statutes for the purpose of giving my own construction we find that the legislature may be said to have discontinued the formal bill of discovery, but to have retained the right to compel similar disclosures in the manner prescribed."

Applied in Enloe v. Charlotte Coca-Cola Bottling Co., 210 N. C. 262, 186 S. E. 242.

Cited in McGraw v. Southern Ry. Co., 209 N. C. 432, 184 S. E. 31; O'Briant v. Bennett, 213 N. C. 400, 196 S. E. 336.

§ 1-569. Adverse party examined.—A party to an action may be examined as a witness at the instance of any adverse party, and for that purpose may be compelled, in the same manner and subject to the same rules of examination as any other witness, to testify, either at the trial or conditionally or upon commission. Where a corporation is a party to the action, this examination may be made of any of its officers or agents. (Rev., s. 865; Code, s. 580; C. C. P., s. 333; 1907, c. 799; C. S. 900.)

Cross References.—As to examination of parties and witnesses in supplemental proceedings, see sec. 1-356; as to examination before trial, see sec. 1-570 and annotations thereto.

Construction.—This section is remedial, and should be liberally construed to advance the remedy afforded. Ab-

bitt v. Gregory, 196 N. C. 9, 11, 144 S. E. 297. See McGraw v. Southern Ry. Co., 209 N. C. 432, 439, 184 S. E. 31; Douglas v. Buchanan, 211 N. C. 664, 191 S. E. 736.

Purpose of Examination under This and Following Section.—The purpose of this and the following section is twofold: first, to procure information in framing the complaint, and second, to procure evidence for trial. Where the complaint has been filed the order granting the commission to examine the adverse party was not obtained for the first purpose, and where the answer has not been filed it is obvious that the application for the order for the second purpose is premature, since no issues have yet been joined. Ogburn v. Sterchi Bros. Stores, 218 N. C. 507, 11 S. E. (2d) 460.

Substitute for Bill of Discovery.—This section is a substitute for a bill of discovery. Abbit v. Gregory, 196 N. C. 9, 144 S. E. 297; Bohannon v. Wachovia Bank, etc., Co., 210 N. C. 679, 188 S. E. 390; Douglas v. Buchanan, 211 N. C. 664, 191 S. E. 736.

Order for Bill of Particulars.—The fact that a defendant might have proceeded under this section and the following section for an examination of the adverse party does not render the granting of his motion to require plaintiff to make his complaint more definite and certain as provided by § 1-153, or file a bill of particulars under § 1-150, improvident as a matter of law, and the trial court's action in striking out such order on the ground that it was improvidently entered is reviewable and will be held for error. Temple v. Western Union Tel. Co., 205 N. C. 441, 171 S. E. 630.

Leave of Court Unnecessary.—It is not necessary that a party to an action, who desires to examine an adverse party, as authorized by this section, shall first obtain leave from the court to make such examination. Abbit v. Gregory, 196 N. C. 9, 10, 144 S. E. 297; Douglas v. Buchanan, 211 N. C. 664, 191 S. E. 736.

Nonresidence.—The right to make such examination, is not affected by the nonresidence of the adverse party when he has submitted to the jurisdiction of the court by filing pleadings. Abbit v. Gregory, 196 N. C. 9, 144 S. E. 297.

Where an order striking an answer under § 1-572 was void because of an alternative condition attached the question of whether the court had the power to order the individual defendant, who had moved to another state, to appear under this section is not presented for decision. Hagedorn v. Hagedorn, 210 N. C. 164, 185 S. E. 768.

Premature Appeal.—Where an order for an examination of an adverse party in order to obtain evidence is granted in an action in which the pleadings have been filed, an appeal from such order prior to the examination is premature, and will be dismissed. Abbit v. Gregory, 196 N. C. 9, 144 S. E. 297.

An appeal from an order for the examination of the agents of the defendant corporation under this section in order to obtain information upon which to base the complaint, is premature and will be dismissed. Johnson v. Mills, 196 N. C. 93, 144 S. E. 534.

Appeal from Refusal to Set Aside Order for Examination Is Not Premature.—An appeal from the refusal of the court to set aside an order of the clerk for the examination of an adverse party under this section was held not premature, the appeal presenting the question of whether plaintiff's affidavit upon which the order was made states facts sufficient to constitute a cause of action. Bohannon v. Wachovia Bank, etc., Co., 210 N. C. 679, 188 S. E. 390.

Joinder with Order for Inspection of Writings.—An examination of an adverse party under this section may be joined with an order under § 8-89 for an inspection of writings. Abbit v. Gregory, 196 N. C. 9, 11, 144 S. E. 297.

Manner of Examination.—Where the court has entered an order that an adverse party answer questions he had refused to answer before a commissioner appointed under the provisions of sec. 1-570, a further provision that the party would be deemed to have complied if he thereafter filed answer under oath, deprives the examining party of his right to be present for cross-examination, etc., and is contrary to the provisions of this section requiring that such examination must be in the same manner and subject to the same rules as applicable to other witnesses, etc. Cartwright v. Southern, etc., R. Co., 176 N. C. 36, 96 S. E. 647.

County of Examination.—An examination under this and following sections of the article may be had in any county wherein the witness resides or where he may be found within the state. Commissioners v. Lemly, 85 N. C. 342, 347.

Directors of Corporation Examined.—In an action by a stockholder of a corporation to set aside as fraudulent an assignment of a contract by the corporation, the directors may be compelled to disclose information to enable the plaintiff to frame his complaint even though their evidence

may result in pecuniary injury. *Holt v. Southern Finishing, etc., Co.*, 116 N. C. 480, 21 S. E. 919.

Same—Appeal Does Not Lie from Order.—An appeal does not lie (being premature) from an order directing the examination of directors of a corporation under the provisions of this section in an action by a stockholder against the corporation, or from a refusal to discharge such order. *Holt v. Southern Finishing, etc., Co.*, 116 N. C. 480, 21 S. E. 919.

Answers as Evidence.—Where a defendant has been examined after the filing of the complaint in the action, but before trial in accordance with this section, his answers to the questions propounded on the examination are competent as evidence at the trial. *Swayne v. Great Atlantic, etc., Tea Co.*, 204 N. C. 713, 169 S. E. 618.

Right to Cross-Examine Witnesses Is Available Only at Time of Examination.—Where the examination of witnesses prior to trial is had under the provisions of this and the following sections and the testimony elicited from the witnesses read at the trial, the party against whom such evidence is introduced is not entitled as a matter of right to cross-examine such witnesses, although they are present at the trial, the right to object to the competency of the evidence and cross-examine the witnesses being available to the party only at the time the examination of the witnesses is had. *McGraw v. Southern Ry. Co.*, 209 N. C. 432, 184 S. E. 31.

Applied in *Fox v. Asheville Army Store*, 215 N. C. 187, 1 S. E. (2d) 550.

Stated in *Rivenbark v. Shell Union Oil Corp.*, 217 N. C. 592, 8 S. E. (2d) 919.

Cited in *Gudger v. Robinson Bros. Contractors*, 219 N. C. 251, 13 S. E. (2d) 414.

§ 1-570. Before trial in his own county.—The examination, instead of being had at the trial, as provided in § 1-569, may be had at any time before the trial, at the option of the party claiming it, before a judge, commissioner duly appointed to take depositions, or clerk of the court, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless for good cause shown the judge or court orders otherwise. (Rev., s. 866; Code, s. 581; 1893, c. 114; C. C. P., s. 334; 1899, c. 65, s. 1; C. S. 901.)

See section immediately preceding and annotations thereto.

Examination at Option of Party Claiming.—The examination is treated as a right to be exercised before trial at the option of the party claiming it. *Vann v. Lawrence*, 111 N. C. 32, 33, 15 S. E. 1031; *McGraw v. Southern Ry. Co.*, 209 N. C. 432, 184 S. E. 31.

Examination Must Be Necessary to Secure Order.—To obtain an order for the examination of the defendant to discover necessary information to file his complaint under this section, it is necessary for the plaintiff to show under oath that in good faith the information sought is not otherwise available to him, and its necessity in such detail as will enable the court to pass thereon, and when upon an appeal from the refusal of the order this has not been done, the decision of the lower court will not be disturbed. *Chesson v. Washington County Bank*, 190 N. C. 187, 129 S. E. 403.

The court is not bound to order an examination of a defendant for the purpose of preparing a complaint, unless it is made to appear under oath of the mover that such an order is necessary, that the evidence sought to be elicited is material, and that the application is made in good faith. *Bailey v. Matthews*, 156 N. C. 78, 72 S. E. 92.

Same—Appeal from Order.—An affidavit in support of a motion in the cause to allow the plaintiffs to examine the defendant adversely under the provisions of this section, showing that the defendant had assumed to manage the estate of a deceased person of whom the plaintiffs were the heirs at law under a paper purporting to be a will, but which had been set aside by the court upon caveat entered, and that this was the only available way in which certain information necessary in the action could be obtained, is sufficient to sustain the order of examination allowed by the clerk and approved by the judge of the superior court, and the defendant's appeal is accordingly dismissed in the Supreme Court. *Jones v. Union Guano Co.*, 180 N. C. 319, 104 S. E. 653, cited and distinguished. *Whitehurst v. Hinton*, 184 N. C. 11, 113 S. E. 500.

A party cannot appeal from an order to appear before the clerk to be examined under oath concerning the matters set out in the pleadings. *Pender v. Mallett*, 122 N. C. 163, 30 S. E. 324.

An appeal will not lie directly to the Supreme Court from

an order of the superior court judge affirming the action of the clerk in ordering the examination of the defendant to elicit certain information, alleged to be not otherwise obtainable, and material to the filing of the complaint, when it does not appear that the defendant will be prejudiced or injured thereby. *Monroe v. Holder*, 182 N. C. 79, 108 S. E. 359.

Defendant Examined to Aid in Framing Complaint.—Under this section the defendant may be examined before the pleadings are filed to procure information in framing the complaint. *Pender v. Mallett*, 122 N. C. 57, 60, 31 S. E. 351.

The plaintiff in an action for injuries by alleged neglect of a physician may, under this section providing that an examination of a defendant may be had at any time before the trial, have an examination of the defendant to aid him in filing his complaint, where he alleges that he knows the facts generally and substantially, but that the defendant has the precise knowledge necessary for proper proceedings. *Smith v. Wooding*, 177 N. C. 546, 94 S. E. 404.

Upon application to examine a defendant before the clerk of the superior court, prior to trial and to aid in preparing the complaint, such facts as will entitle the movant to the order must be made to appear by affidavit; but after filing a verified complaint setting out a cause of action, the plaintiff has a right to the order for examination, and the leave of the court is unnecessary. *Ward v. Martin*, 175 N. C. 287, 95 S. E. 621.

Examination—Before Commissioner.—The party may be examined before a commissioner appointed to take the examination, but the commission must issue out of the court in which the cause is pending. *Vyne v. Fogle Bros. Co.*, 176 N. C. 351, 352, 97 S. E. 147.

Same—Before Clerk.—When a party elects to have the examination before the clerk it would seem that the mode of conducting it must be in all respects the same as if had before the judge. *Harper v. Pinkston*, 112 N. C. 293, 303, 17 S. E. 161.

Under this section the clerk is clothed with precisely the same authority as the judge. *Bradley Fertilizer Co. v. Taylor*, 112 N. C. 141, 147, 17 S. E. 69.

Same—Not Part of Pleadings.—The examination of the defendant filed in the record should not be taken as part of the answer for the purpose of passing upon a demurrer. The examination is not intended by the law to be a part of the pleading, but is in its very nature simply evidence which can be used by the plaintiff in support of his allegations and which may be rebutted by the defendant. *Whitaker v. Jenkins*, 138 N. C. 476, 481, 51 S. E. 104.

Sufficiency of Petition for Examination.—A petition for the examination of a codefendant which is not in the form of an affidavit, and further fails to allege the facts upon which petitioner bases his allegation that the examination of respondent is necessary to enable it to prepare its defense, is insufficient to support an order for examination. *Gudger v. Robinson Bros. Contractors*, 219 N. C. 251, 13 S. E. (2d) 414.

In order to justify the examination provided for in this article, the verified application must state facts which will show the nature of the cause of action, and that the information sought is material and necessary and not otherwise accessible to the applicant, and further that the motion is meritorious and made in good faith. The court will not permit a party to spread a dragnet for an adversary to gain facts upon which to sue him, or to harass him under the guise of a fair examination. *Washington v. Safe Bus*, 219 N. C. 856, 858, 15 S. E. (2d) 372, and cases cited therein.

Sufficiency of Application.—An application for an order for the examination of an adverse party under this section must contain positive averments, and must not be argumentative, and mere statements that the examination is necessary and material is not sufficient, but the statute will not be construed so as to preclude an examination of an adverse party when the affidavit shows good faith, necessity, and materiality, and where it is alleged that the necessary information cannot be had from any person except the adverse party because all other persons with such information are outside the jurisdiction, the application is sufficient, and an order based thereon will be upheld. *Bell v. Murchison National Bank*, 196 N. C. 233, 145 S. E. 241.

Notice.—The provision, "unless for good cause shown, the judge or court orders otherwise," applies to the length of notice which he can make less than the five days prescribed. *Vann v. Lawrence*, 111 N. C. 32, 33, 15 S. E. 1031.

Applied in *Fox v. Asheville Army Store*, 215 N. C. 187, 1 S. E. (2d) 550.

Cited in *Bonhannon v. Wachovia Bank, etc., Co.*, 210 N. C. 679, 188 S. E. 390; *Knight v. Little*, 217 N. C. 681, 9 S. E. (2d) 377.

§ 1-571. Compelling attendance of party for examination before trial.—The party to be examined, as provided in § 1-570, may be compelled to attend in the same manner as a witness who is to be examined conditionally; but he shall not be compelled to attend in any county other than that of his residence or where he may be served with a summons for his attendance. The examination shall be taken and filed by the judge, clerk or commissioner, as in case of witnesses examined conditionally, and may be read by either party on the trial. (Rev., ss. 866, 867; Code, ss. 581, 582; C. C. P., ss. 334, 335; 1899, c. 65, s. 2; C. S. 902.)

Either Party May Subject Other to Examination.—Either plaintiff or defendant may subject the adversary party or person adversely interested in the action to examination before the clerk or judge, or a commissioner appointed by the court for the purpose of eliciting evidence in support of his contention in the controversy. *Bradley Fertilizer Co. v. Taylor*, 112 N. C. 141, 144, 17 S. E. 69.

Claim of Privilege against Self-Crimination.—An order to examine a defendant will not be denied on the ground that the answers of the defendant will tend to incriminate him, in an action wherein the complaint has been filed alleging that the defendant had misappropriated the plaintiff's money while acting as his bookkeeper and accountant, the answers of the defendant not necessarily having to show a criminal intent, etc., and the time for his refusal to answer being when such incriminating questions are asked on the examination. *Ward v. Martin*, 175 N. C. 287, 95 S. E. 621.

An order to examine the party to an action under this section may not be revoked on motion made on written notice of his attorney, stating that the answers sought to be elicited will tend to incriminate him. *Ward v. Martin*, 175 N. C. 287, 95 S. E. 621.

County of Examination.—An examination of the defendant to discover facts necessary to be obtained in preparing a complaint must be made in the county of his residence. *Bailey v. Matthews*, 156 N. C. 78, 72 S. E. 92.

Proceedings to examine an adverse party before the clerk or upon commission must be instituted after summons has been issued and action commenced, and on motion before the clerk of the superior court of the same county or the judge presiding over that court, or holding the courts of the district; and a clerk of another county, where the action is not pending, is without jurisdiction over the proceedings, and his order made therein will be quashed. *Vyne v. Fogle Bros. Co.*, 176 N. C. 351, 97 S. E. 147.

Same—Appeal.—An appeal to the Supreme Court will directly lie from the refusal of the superior court judge to vacate an order of the clerk of that court to examine an adversary party to an action pending in another county; and there being no cause therein in which an exception may be noted and preserved, an objection that the appeal is fragmentary cannot be sustained. *Vyne v. Fogle Bros. Co.*, 176 N. C. 351, 97 S. E. 147.

May Be Read by Either Party.—The examination of an adverse party, as this section provides, may be read by either party on the trial, and is, like a deposition, *de bene esse*, in that it becomes "the evidence of the law." So to speak, it is "canned evidence," kept in cold storage, for it cannot be altered. In both, the testimony is subject to all valid objections taken at the time, and there is stronger reason for its competency at the trial, for, besides the express authority without any exception, that such testimony can be read "by either party at the trial," in the case of evidence *de bene esse* the deposition is taken in favor of the party offering it, while in a bill of discovery it is taken at the instance of the adversary party. *Phillips v. Interstate Land Co.*, 174 N. C. 542, 546, 94 S. E. 12; *Beck v. Wilkins-Ricks Co.*, 186 N. C. 210, 119 S. E. 235. See *McGraw v. Southern Ry. Co.*, 209 N. C. 432, 184 S. E. 31.

Party Examining Not Compelled to Use Testimony.—The fact that the plaintiff examined the defendant under this section did not compel the plaintiff to use that testimony on the trial, nor did it make that defendant in any sense the plaintiff's witness. *Shober v. Wheeler*, 113 N. C. 370, 376, 18 S. E. 328.

Death Does Not Render Inadmissible.—In *Phillips v. Interstate Land Co.*, 174 N. C. 542, 546, 94 S. E. 12, quoting *Rowland v. Pickney*, 8 Miss. 458, it is said: "The deposition of a witness, taken before the death of one of the parties, is not inadmissible on the trial."

Entire Examination Must Be Read.—Where a party reads in evidence an examination of an adverse party

had under the provisions of § 1-568 et seq., he must read the whole of the examination, and the admission in evidence of the direct examination of such party while omitting the cross-examination is reversible error. *Enloe v. Charlotte Coca-Cola Bottling Co.*, 210 N. C. 262, 186 S. E. 242.

Cited in *O'Briant v. Bennett*, 213 N. C. 400, 196 S. E. 336.

§ 1-572. Party's refusal to testify; penalty.—If a party refuses to attend and testify, as provided in the preceding sections, he may be punished as for a contempt, and his pleadings may be stricken out. (Rev., s. 869; Code, s. 584; C. C. P., s. 337; C. S. 903.)

In *Hagedorn v. Hagedorn*, 210 N. C. 164, 165, 185 S. E. 768, the court was precluded from deciding the power to strike out an answer under authority of this section, because of the alternative condition attached to the order, which rendered it void.

§ 1-573. Rebuttal of party's testimony.—The examination of the party thus taken may be rebutted by adverse testimony. (Rev., s. 868; Code, s. 583; C. C. P., s. 336; C. S. 904.)

Editor's Note.—It is a well settled rule of law that one who offers and examines a witness will not be heard to impeach his character and veracity; a party is not to take and use evidence and then directly impeach the source from which it comes. To give these sections, providing for the examination of adverse parties, such a meaning would certainly introduce a novel feature into the law and practice, and subvert this ancient and time honored rule in the conduct of civil suits. It is laid down, as a clear rule, in a line of cases reaching from the early days of English jurisprudence down to the present time, that a party has no right to put a witness into the box, as a witness of credit, and when he gives unfavorable evidence, to call a witness to discredit him. Such would be fraud of the rankest kind upon the jury. While a party is not permitted to produce general evidence to discredit his own witness, but, if the witness prove facts in a cause which make against the party who called him, the party may call other witnesses to prove that the facts were otherwise. This has nothing to do with the integrity of the witness, but merely shows that, as any man might be, he is mistaken as to certain facts.

This section seems to fall within the general rule, and preclude the party who takes and introduces the examination as evidence in his own behalf from discrediting or impeaching the witness himself, except as that result may be incidental to proof of a different state of facts. By calling his adversary, a party makes him so far his own witness that he cannot impeach or disparage his general credibility. In *Strudwick v. Broadnax*, 83 N. C. 401, 405, it was said that we should hesitate to ascribe to the rebuttal "by adverse testimony," authorized by this section, which is defined by Worcester as "a driving or beating back, a repelling or opposing by argument or evidence," an effect so sweeping as to break down a principle so long and thoroughly established and acted on in judicial practice, without some more clear and distinct manifestation of the legislative will than is furnished by the word employed to express it. *Hice v. Cox*, 34 N. C. 315, citing *Holdsworth v. Dartmouth*, 2 M. & Rob. 153; *Spencer v. White*, 23 N. C. 236; *Shelton v. Hampton*, 28 N. C. 216; *Wilson v. Derr*, 69 N. C. 137.

May Rebut Deposition on Trial.—A plaintiff can rebut the defendant's deposition on trial by adverse testimony. *Hudson v. Jordan*, 108 N. C. 10, 13, 12 S. E. 1029.

May Contradict but Can Not Impeach.—A party who puts his adversary on the stand gives him an opportunity to testify on his own behalf on cross-examination, and waives his right of impeaching him by attacking his credibility, but retains the privilege of contradicting him by testimony of other witnesses inconsistent with his. *Helms v. Green*, 105 N. C. 251, 262, 11 S. E. 470; *Coates v. Wilkes*, 92 N. C. 377, 382.

Quoted in *McGraw v. Southern Ry. Co.*, 209 N. C. 432, 184 S. E. 31.

§ 1-574. Irresponsive answers may be met by party's own testimony.—A party examined by an adverse party, as provided in this article, may be examined in his own behalf, subject to the same rules of examination as other witnesses. But if he testifies to any new matter, not respon-

sive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto or to discharge himself when his answers would charge himself, the adverse party may offer himself and must be received as a witness in his own behalf in respect to the new matter, subject to the same rules of examination as other witnesses. (Rev., s. 870; Code, ss. 583, 585; C. C. P., ss. 336, 338; C. S. 905.)

§ 1-575. Real party in interest examined.—A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination, as if he was named as a party. (Rev., s. 871; Code, s. 586; C. C. P., s. 339; C. S. 906.)

As to examination of officers and agents of a corporation, see sec. 1-569.

The testimony sought must be that of a person immediately interested in the action. *Strudwick v. Broadnax*, 83 N. C. 401, 403.

§ 1-576. Examination of coplaintiff or codefendant.—A party may be examined on behalf of his coplaintiff or codefendant as to any matter in which he is not jointly interested or liable with such coplaintiff or codefendant, and as to which a separate and not joint verdict or judgment can be rendered. He may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken cannot be used in behalf of the party examined. When one of several plaintiffs or defendants who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself, and must be received, as a witness to the same cause of action or defense. (Rev., s. 872; Code, s. 587; C. C. P., s. 340; C. S. 907.)

As to production of writings, see sec. 8-89 et seq.

A party may be compelled to attend court, and be examined in behalf of a coplaintiff, or a codefendant, "as to any matter in which he is not jointly interested or liable," etc.; and in such a case he is entitled to pay as a witness. *Penny v. Brink*, 75 N. C. 68.

Where one of defendants sued as joint tort-feasors alleges, among other defenses, that plaintiff's injuries resulted solely from the negligence of its codefendant, such codefendant is not entitled to an examination of respondent defendant, since, even though the defenses of defendants are antagonistic in regard to this defense, they are jointly interested in the defense of the action and a joint verdict and judgment against both is possible. *Gudger v. Robinson Bros. Contractors*, 219 N. C. 251, 13 S. E. (2d) 414.

Art. 47. Motions and Orders.

§ 1-577. Definition of order.—Every direction of a court or judge, made or entered in writing, and not included in a judgment, is an order. (Rev., s. 873; Code, s. 594; C. C. P., ss. 344, 345; C. S. 908.)

An appeal from an order continuing in force a former order made in the cause will be dismissed. *Childs v. Martin*, 68 N. C. 307.

§ 1-578. Motions; when and where made.—An application for an order is a motion. Motions may be made to a clerk of a superior court, or to a judge out of court, except for a new trial on the merits. Motions must be made within the district in which the action is triable. A motion to vacate or modify a provisional remedy, and an appeal from an order allowing a provisional remedy, have preference over all other motions.

(Rev., s. 874; Code, s. 594; C. C. P., ss. 344, 345; C. S. 909.)

Cross Reference.—As to motions in civil actions heard at criminal terms, see § 7-72.

Editor's Note.—A motion in general relates to some incidental question collateral to the main object of the action. A motion is not a remedy in the sense of the Code, but is based upon some remedy, and is always connected with the principal remedy. It is to furnish relief in the progress of the action or proceeding in which it is made, and generally relates to matters of procedure, although it may be used to secure some right in consequence of the determination of the principal remedy.

Form of Motion.—A motion must be in writing. *Cotton Oil Co. v. Grimes*, 183 N. C. 97, 99, 112 S. E. 598.

On appeal to the Supreme Court a statement of record that the defendant filed a written motion to dismiss, negatives the exception that it was an oral motion, not in conformity with the requirements of the statute. *Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598.

While it is the better form for one making a written motion, as an attorney at law and in fact, to first state the names of those he represents and then that he is acting for them in the capacity of attorney, the error in stating that he appears as attorney at law and in fact for certain named parties, etc., is merely informal and harmless, and therefore good against a demurrer, it clearly appearing that the attorney is not claiming any interest in the lands for himself, but is acting solely in a representative capacity for the persons named. *Hartsfield v. Bryan*, 177 N. C. 166, 98 S. E. 379.

Where Motions Must Be Made.—Except by consent or in those cases specially permitted by statute the judge can make no orders in a cause outside of the county in which the action is pending. *Parker v. McPhail*, 112 N. C. 502, 504, 16 S. E. 848; *McNeill v. Hodges*, 99 N. C. 248, 6 S. E. 127; *Bynum v. Powe*, 97 N. C. 374, 2 S. E. 170; *Gatewood v. Leak*, 99 N. C. 363, 6 S. E. 706.

As to injunctions, attachments, and arrest and bail, authority is granted to hear and pass on motions to vacate or modify such orders out of the county. *Parker v. McPhail*, 112 N. C. 502, 504, 16 S. E. 848.

When Procedure Must Be by Motion.—It is well established in this state that no party to a suit is permitted by a new and independent action praying for an injunction to seek any relief which he might obtain by a motion in the original action. *Mason v. Miles*, 63 N. C. 564; *Jarman v. Saunders*, 64 N. C. 367; *Faison v. McIlwaine*, 72 N. C. 312, 313.

An action is inadmissible as a mode of obtaining relief against an execution for irregularity the proper relief is, as formerly, by motion to set it aside. *Foard v. Alexander*, 64 N. C. 69.

A proceeding by a motion supported by affidavits after a notice to the opposite party, to have satisfaction of a judgment entered of record upon the ground that it has been paid since its rendition, is the appropriate remedy in such a case, but is neither a special proceeding nor a civil action. It is only a motion in a cause still pending. *Foreman v. Bibb*, 65 N. C. 128.

Power of Judge.—After leaving the bench for a term of the superior court to expire by limitation, the judge cannot hear motions or other matters outside of the courtroom except by consent, unless, they are such as are cognizable at chambers. *May v. Insurance Co.*, 172 N. C. 795, 90 S. E. 890.

An order to stay proceedings, made without notice by a judge out of court for a longer time than twenty days, is irregular, and a demurrer to the complaint in the action in which such order was made may be treated as a motion to vacate. *Foard v. Alexander*, 64 N. C. 69.

Same—To Continue Motions, etc.—The judge below has no power to continue motions for judgments or to set aside verdicts to be passed upon by him at a subsequent term of court, without the consent of the parties litigant. *Oak Hall Clothing Co. v. Bagley*, 147 N. C. 37, 60 S. E. 648.

Such consent should certainly appear in a writing signed by the parties or their counsel, or the judge should recite the fact of consent in the order or judgment he directs to be entered of record—which is the better way; or such consent should appear by fair implication from what appears in the record. *Godwin v. Monds*, 101 N. C. 354, 355, 7 S. E. 793.

Same—Can Not Reverse Another.—One superior court judge cannot reverse or set aside an order of another. *Henry v. Hilliard*, 120 N. C. 479, 487, 27 S. E. 130.

When Refused by Judge without Jurisdiction.—The refusal of a judge to grant a motion for want of jurisdiction is no bar to an entertainment of the motion by a judge

having jurisdiction. *First National Bank v. Wilson*, 80 N. C. 200.

Motions Which May Be Renewed.—Motions made in the progress of a cause to facilitate the trial, but which involves no substantial right, and the decision of which is not subject to an appeal to the Supreme Court, may be renewed as subsequent events require, and are not obstructed by the former action of the court. *Sanderson v. Daily*, 83 N. C. 68, 70; *Roulhac v. Brown*, 87 N. C. 1; *Henry v. Hilliard*, 120 N. C. 479, 487, 27 S. E. 130.

Res Adjudicata.—If a decision affects a substantial right, and may be reviewed and corrected on appeal, and the complaining party acquiesces, the doctrine of *res adjudicata* applies. *Sanderson v. Daily*, 83 N. C. 68, 69.

§ 1-579. Affidavit for or against, compelled.—

When a party intends to make or oppose a motion in a court of record, and it is necessary for him to have the affidavit of any person who has refused to make it, the court may, by order, appoint a referee to take the affidavit or deposition of such person. The person may be subpoenaed and compelled to attend and make an affidavit before such referee, as before a referee to whom an issue is referred for trial. (Rev., s. 875; Code, s. 594; C. C. P., ss. 344, 345; C. S. 910.)

The matter of reference, under the section, rests in the discretion of the court. In *Re Brown*, 168 N. C. 417, 424, 84 S. E. 690.

§ 1-580. Motions determined in ten days.—

When a motion is made in a cause or proceeding in any of the courts to obtain an injunction order, order of arrest, or warrant of attachment, granted in any such case or proceeding, or to vacate or modify the same, it is the duty of the judge before whom the motion is made to render his decision within ten days after the day on which the motion was submitted to him for decision. (Rev., s. 876; Code, s. 594; C. C. P., ss. 344, 345; C. S. 911.)

§ 1-581. Notice of motion.—When notice of a motion is necessary, it must be served ten days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time. (Rev., s. 877; Code, s. 595; C. C. P., s. 346; C. S. 912.)

As to notice in supplemental proceedings, see sec. 1-352 and annotations thereto.

Editor's Note.—By section 346 of the C. C. P. only eight days notice was required. However, this was changed by section 595 of the Code of 1883 to ten days, which was unchanged in the Revisal, section 877, and was brought forward by the revisers of this section. See *Branch v. Walker*, 92 N. C. 87, 89.

Compliance with Section Required.—Notice of a motion to set aside a judgment must ordinarily be given as required by this section, and the pleadings in an action to reform a deed of trust upon allegations of mutual mistake are insufficient as notice of a motion to set aside the decree of foreclosure for irregularity and surprise, etc., the pleadings in the suit for reformation containing no allegations of irregularities in the foreclosure or of surprise. *Virginia-Carolina Joint Stock Bank v. Alexander*, 201 N. C. 453, 160 S. E. 462.

When Notice Required—When Heard Out of Term.—Notice of a motion applies only when such motion is heard out of term; parties are fixed with notice of all motions or orders made during the term of court in causes pending therein. *Jones v. Jones*, 173 N. C. 279, 283, 91 S. E. 960; *Hemphill v. Moore*, 104 N. C. 379, 10 S. E. 313.

Same—Proceedings before Clerk.—A party is not fixed with notice of orders before the clerk. *Blue v. Blue*, 79 N. C. 69; *State v. Johnson*, 109 N. C. 852, 855, 13 S. E. 843.

Same—Appeal from Justice of the Peace.—In an appeal from a justice of the peace to the superior court, notice must be served by an officer (unless service is accepted or the appeal is taken at the trial), and within ten days both upon the justice who tried the case and upon the appellee. *State v. Johnson*, 109 N. C. 852, 13 S. E. 843.

Same—New Trial for Newly Discovered Evidence.—When

a motion for a new trial for newly discovered evidence in the Supreme Court is contemplated, notice of such motion should always be given the other side. The appellant should give notice at least ten days before the beginning of the call of the district to which the cause belongs, unless the information comes to him after that time, when the court may shorten the notice. *Herndon v. R. R.*, 121 N. C. 498, 499, 28 S. E. 144.

Failure to Give Notice in Proceedings under § 1-83.—Where a judgment by default final has been entered against a defendant for the want of an answer, and it appears that the defendant lodged his motion in apt time for a change of venue, in accordance with section 1-83, which has not been determined, the failure or inability of the defendant to have given the plaintiff ten days notice of his motion, required of this section before time for answering has expired, will not affect his rights to have the judgment by default against him vacated. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

Orders in Fieri during Term.—Judgments and orders are in fieri during the term they are rendered, and motions may be made to set them aside without notice; but after that term such motions can only be heard after due notice. *Harper v. Sugg*, 111 N. C. 324, 16 S. E. 173.

Ten Days Notice Required.—Notice of all motions and orders made out of term must be given, and the time is fixed at ten days, but the judge is authorized to shorten the time. *Jones v. Jones*, 173 N. C. 279, 284, 91 S. E. 960.

Unless a verbal or written motion to amend a complaint after time for filing answer has expired be made at the trial term of the action, previous notice of ten days must be given the defendant unless the time is shortened by the court, and an order allowing the amendment to be made, entered without such notice, is irregular. *Carolina Discount Corp. v. Butler*, 200 N. C. 709, 158 S. E. 249.

When No Provision Made for Notice.—When a statute confers power upon a judicial tribunal or an administration agency to render judgment or make an order affecting rights of a person or property, and no provision is made for notice, the court will require a reasonable notice. *Bank v. Hotel Co.*, 147 N. C. 594, 601, 61 S. E. 570.

§ 1-582. Orders without notice, vacated.—An order made out of court, without notice to the adverse party, may be vacated or modified without notice by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made. (Rev., s. 514; Code, s. 546; C. C. P., s. 297; C. S. 913.)

When Judge May Vacate or Modify.—A judge of the superior court has the power to vacate or modify orders made in a cause at any time before final judgment. *Welch v. Kingsland*, 89 N. C. 178.

In *Sledge v. Blum*, 63 N. C. 374, 376, *Pearson, C. J.*, speaking for the court, said: "Where a judge acting on the complaint without notice to the defendant grants an injunction, he may afterwards, acting on the complaint alone, without notice to the plaintiff modify or vacate the injunction as irregularly or improvidently granted. But if he goes out of the complaint and takes into consideration the answer and the affidavits filed for the defendants the plaintiff is then entitled to notice, and may meet the affidavit by counter-affidavits."

Motion for Change of Venue before Clerk.—The power to entertain a demand of the defendant to remove an action to the proper venue under the provisions of this section, is now conferred upon the clerk, subject to the right of appeal to the judge, when the motion shall be heard and passed on *de novo*. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

Where a defendant has made a motion before the clerk to remove the action to the proper venue, the question is then a matter of substantial right, and the clerk is without power to proceed further in essentials until the right to remove is considered and passed upon. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

§ 1-583. Orders by clerk on motion to remove; right of appeal; notice.—All motions to remove as a matter of right shall be made before the clerk, who is authorized to make all necessary orders, and an appeal shall lie from such order upon such motion to the judge at chambers, or at the next term, who shall hear and pass upon such motion *de novo*. But no such motion shall be heard until ten days notice thereof shall first have been given to the opposing party or his

attorney. (Ex. Sess. 1921, c. 92, s. 15; 1925, c. 282, s. 1; C. S. 913(a).)

Editor's Note.—The provision authorizing the clerk to hear all motions to remove as a matter of right and make the necessary orders therein, allowing for an appeal therefrom, was enacted by the Legislature, Acts 1921, c. 92, sec. 15. It was amended by Acts 1925, c. 282, sec. 1, by writing in the words "at chambers or" after the word "judge," and before the words "at the next term" and adding the sentence allowing ten days notice.

This act is a part of the legislation to restore to the clerk the power originally given him by the C. C. P. but taken away by the suspension acts.

During the suspension period the defendant was authorized to apply to the Court in term for a removal. By the Public Laws of 1919, 1920, restoring the power, the motion was filed before the clerk and after the answer was filed all the papers were transferred to the court in term time and by him heard and acted upon. Thus this section changed the law by permitting the clerk to hear the motion but giving right of appeal. See *Southern Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598.

Change of Venue under Section 1-83 Affected by Section.—The power to entertain a demand of defendant to remove an action to the proper venue under the provisions of sec. 1-83, is now conferred by this section upon the clerk, subject to the right of appeal to the judge at the next term, when the motion shall be heard and passed upon de novo. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

Effect of Motion upon Further Proceedings.—Where defendant has made his motion before the clerk to remove the action to the proper venue, the question is then a matter of substantial right, and the clerk is without power to proceed further in essentials until the right to remove is considered and passed upon. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

When the defendant has proceeded by motion to have the action removed to the proper county before the time for filing the answer has expired, a judgment by default final for the want of answer is contrary to the practice of the courts, and will be set aside, and the cause remanded for the clerk to consider and pass upon defendant's motion for a change of venue. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

Motion to Dismiss as Affecting Removal.—Where the defendant moves the clerk to dismiss the action for want of proper venue, but the clerk upon his own motion orders a removal, and upon appeal the judge at term orders the cause removed, the fact that the motion to dismiss was made is immaterial as affecting the judge's power to order a removal. *Southern Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598.

Removal by Judge Valid.—The act of the judge in ordering a removal, where the defendant has complied with all the requirements of the law as to filing a motion in apt time, is a valid exercise of jurisdictional authority. *Southern Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598.

Removal Not Matter of Right.—This section refers only to motions to remove as a matter of right. Motions for removal, which may be allowed or disallowed, in the discretion of the court, should be made before the judge, at any time during a term of the court. *Howard v. Hinson*, 191 N. C. 366, 131 S. E. 748. The clerk is without power, under the statute, to remove an action, upon the ground that the convenience of witnesses and the ends of justice would be promoted by the removal. The motion for removal upon this ground can be made only before the judge, during a term of the superior court. *Causey v. Morris*, 195 N. C. 532, 142 S. E. 783.

Effect of Motion on Other Proceedings.—See note under § 1-220.

On appeal from order of clerk transferring a cause to another county as a matter of right, on the ground that the action involves an interest in lands under § 1-76 the matter should be heard de novo during the term of court. *Causey v. Morris*, 195 N. C. 532, 142 S. E. 783.

Applied in *Miller v. Miller*, 205 N. C. 753, 172 S. E. 493; *White v. Rankin*, 206 N. C. 104, 173 S. E. 282.

§ 1-584. Motions to remove to federal court; notice.—Motions to remove to the federal court shall be made before the clerk, and an appeal shall lie from his order to the judge at chambers, or at the next term, who shall hear and pass upon such motion de novo. But no such motion shall be heard until ten days notice thereof shall first have been given to the opposing party or his at-

torney. (Ex. Sess. 1921, c. 92, s. 16; 1925, c. 282, s. 2; C. S. 913(b).)

Editor's Note.—The provision for motions for removal to the federal court to be made before the clerk, and allowing an appeal therefrom to the judge, was enacted by the Legislature 1921, c. 92, sec. 16. The provision was amended by the Acts 1925, c. 282, sec. 2, by writing in the words "at chambers," after the word "judge," and before the words "at the next term." The sentence allowing ten days' notice was also added by this section.

Effect of Improper Order.—An order of the clerk of the Superior Court, having jurisdiction of a motion to remove a cause under this section, that the cause be removed as prayed by the defendants, meeting the requirements of the Federal statutes relating thereto, and made in apt time, when improperly made is erroneous and not void. Such order is effective until reversed on appeal or until remanded by the Federal court. *Abbott v. Gregory*, 195 N. C. 203, 141 S. E. 587.

Art. 48. Notices.

§ 1-585. Form and service.—All notices must be in writing, and notices and other papers may be served on the party or his attorney personally, where not otherwise provided in this chapter. (Rev., ss. 878, 879; Code, s. 597; C. C. P., ss. 349, 353; C. S. 914.)

Cross References.—As to service on Sunday, see sec. 103-3; as to service of summons, see sec. 1-88 et seq.

Form of Notice Required.—When a statute requires notice to be given, it must be given in writing, addressed to the proper person, contain the substance, intelligently and sufficiently expressed, of the information to be communicated, signed by the party giving it, or his attorney, and served in such way so that the court can see and learn that it has been served, and, it, or a copy of it, must be returned into court, properly authenticated unless it shall in some way be waived, as by the appearance of the party to be affected by it. *Allen v. Strickland*, 100 N. C. 225, 228, 6 S. E. 780; *Harper v. Sugg*, 111 N. C. 324, 327, 16 S. E. 173, 174.

Section Should Be Strictly Observed.—The service of notice, made in a way and manner recognized and sanctioned by the law, is an essential requisite of it; without this it is ineffectual for the purpose intended and void. Unless it is given as the law directs or allows, the party to whom it is given is not bound to recognize or act upon it; nor, indeed, is it notice. It is the legal sanction that gives the notice, in sufficient form and substance, life and efficacy. *Allen v. Strickland*, 100 N. C. 225, 229, 6 S. E. 780. Citing *Wade on Notice*, sections 1293, 1295, 1335, 1342.

Applicable to Cases on Appeal.—The statute regulating the manner of service of notices is applicable to service of cases on appeal and exception thereto. *State v. Price*, 110 N. C. 599, 15 S. E. 116.

Verbal Notice Insufficient.—A motion heard upon verbal notice given on the day of the hearing is irregular, and should have been dismissed. *Harper v. Sugg*, 111 N. C. 324, 326, 16 S. E. 173.

Notice Not Required—Road Duty.—A summons to a person liable to road duty does not fall within the purview of this article, and need not be in writing. *State v. Telfair*, 130 N. C. 645, 40 S. E. 976.

Same—Sureties on Sheriff's Bond.—Notice to sureties on an indemnity bond that the sheriff has been sued for the wrongful levy of an execution need not be in writing. *Martin v. Buffalo*, 128 N. C. 305, 38 S. E. 902.

Service Made on Attorney.—The counsel is responsible to the court and his client, and generally, the court recognizes him as having charge of the action, and authorized and bound to take notice of all motions and proceedings in it. This is so upon general principles that govern courts ordinarily in the administration of justice; and under this section, in respect to notices and the filing and service of papers, expressly provides that service may be made on the party or his attorney. *Branch v. Walker*, 92 N. C. 87, 89.

Plaintiff is not entitled to have notice of motion to strike out served on her by an officer, under this section, where reason for such service is rendered nugatory by a finding that notice was mailed to and received by plaintiff's attorneys within the time allowed. *Hefner v. Jefferson Standard Life Ins. Co.*, 214 N. C. 359, 199 S. E. 293.

Personal Notice.—Where notice of appeal was served on the plaintiff by leaving a copy with him, another notice of the same appeal served the next day by reading it to the plaintiff was unnecessary under this section. *Sondley v. Asheville*, 110 N. C. 84, 89, 14 S. E. 514.

Same—Determined by Clerk.—The fact that personal notice was given to the defendant is determined affirmatively by the clerk in making the order. *Surratt v. Crawford*, 87 N. C. 372, 375.

Service Must Be by Officer.—Service of all papers, except subpoenas, and in cases where service by publication is authorized, must be by an officer, or acceptance of service. *Smith v. Smith*, 119 N. C. 314, 318, 25 S. E. 878.

Same—Case on Appeal.—A case on appeal, unless service is accepted, can be served only by an officer. *Forte v. Boone*, 114 N. C. 176, 177, 19 S. E. 632; *State v. Johnson*, 109 N. C. 852, 13 S. E. 843.

Same—Appeal from Justice of the Peace.—The notice of appeal from a justice of the peace, when the notice is not given on the trial, must be served by an officer. *Clark v. Manufacturing Co.*, 110 N. C. 111, 14 S. E. 518.

Qualifications of Officer Serving.—Service of notices must be made by an officer authorized generally and by virtue of his office to serve process of the court having jurisdiction of the action in which the notice is given. *Cullen v. Absher*, 119 N. C. 441, 26 S. E. 33.

Same—Town Constable.—A town constable can not serve a notice to take a deposition in an action pending in the superior court. *Cullen v. Absher*, 119 N. C. 441, 26 S. E. 33; *Forte v. Boone*, 114 N. C. 176, 177, 19 S. E. 632.

Same—Chief of Police or Marshal.—Where a town charter provides for the appointment of a chief of police or marshal and declares that, in the execution of process, he shall have the same power, etc., which sheriff and constables have, the service by such officer of a summons directed to "the sheriff of W. county or town constable of W. town" is valid. *Lowe v. Harris*, 121 N. C. 287, 28 S. E. 535.

Cited in Roth v. Greensboro News Co., 214 N. C. 23, 197 S. E. 569.

§ 1-586. Service upon attorney.—Notice upon an attorney may be served during his absence from his office, by leaving a copy of the paper with his clerk, or a person having charge of the office; or, when there is no person in the office, by leaving it, between the hours of six a. m. and nine p. m., in a conspicuous place in the office; or, if it is not open so as to admit of such service, then by leaving it at the attorney's residence with some person of suitable age and discretion. (Rev., s. 880; Code, s. 597; C. C. P., ss. 349, 353; C. S. 915.)

Notice to Attorney is Notice to Client.—In *Ladd v. Teague*, 126 N. C. 544, 548, 36 S. E. 45, quoting from *United States v. Currey*, 6 Howard (U. S.) 106, it was said:

"No attorney or solicitor can withdraw his name after he has once entered it on the record without the leave of the court. And while his name continues there, the adverse party has the right to treat him as the authorized attorney or solicitor, and the service of notice on him is as valid as if served on the party himself." See also *Branch v. Walker*, 92 N. C. 87; *Walton v. Sugg*, 61 N. C. 93.

Notice of Motion.—A notice of a motion to set aside a judgment may be properly served on the attorney of record of the opposing party. *Branch v. Walker*, 92 N. C. 87.

§ 1-587. Service upon a party.—Notice upon a party may be served by leaving a copy of the paper at his residence, between the hours of six a. m. and nine p. m., with some person of suitable age and discretion. (Rev., s. 881; Code, s. 597; C. C. P., ss. 349, 353; C. S. 916.)

Notice Left with Wife.—Notice may be duly served by leaving a copy thereof at the residence of the person sought to be served, with his wife, she being of suitable age and discretion. *Turner v. Holden*, 109 N. C. 182, 185, 13 S. E. 713.

Compliance with Section Sufficient.—Service made under the section is sufficient. The court has jurisdiction in cases like this of the party to the action, and it is deemed sufficient to give him notice in the way prescribed for any motion or proceeding in the action. It is the duty of parties to actions to be on the alert at all times, until the same shall be completely ended. *Turner v. Holden*, 109 N. C. 182, 185, 13 S. E. 731.

§ 1-588. Service by publication.—Notice upon a person who cannot be found after due diligence, or who is not a resident of this state, may be served by its publication once a week for four successive weeks in a newspaper published in the

county from which the notice is issued; and if no newspaper is published therein, then in some newspaper published within the judicial district; and the proof of service is the same as is required by law in the case of service of summons by publication. (Rev., s. 882; Code, s. 597; C. C. P., ss. 349, 353; C. S. 917.)

Cross References.—As to service by publication generally, see secs. 1-98, 1-99 and annotations thereto; as to when service by publication is complete, see sec. 1-100 and annotations thereto.

Substitute for Ten Days Personal Notice.—The publication "once a week for four successive weeks" is a substitute for and stands in lieu of the "ten days," which is allowed to a party personally served. *Guilford v. Georgia Co.*, 109 N. C. 310, 313, 13 S. E. 861.

Form of Publication.—It is sufficient if the publication contains the substantial elements of the summons, and the fact that it is not a literal copy will not render the service void. *Guilford v. Georgia Co.*, 109 N. C. 310, 13 S. E. 861.

§ 1-589. Service by telephone or registered mail on witnesses and jurors.—Sheriffs, constables and other officers charged with service of such process may serve subpoenas for witnesses and summonses for jurors by telephone or by registered mail, and such service shall be valid and binding on the person served. When such process is served by telephone the return of the officer serving it shall state it is served by telephone. When served by registered mail a copy shall be mailed and a written receipt demanded and such receipt shall be filed with the return and be a necessary part thereof. (1915, c. 48; 1925, c. 98; C. S. 918.)

Editor's Note.—The last sentence of this section providing for service by registered mail is new with the Laws of 1925, c. 98. The words "or by registered mail," immediately following the word telephone, in the first sentence, are also new with the Act.

If served by registered mail a written receipt must be demanded and filed with the return, such receipt being a necessary part thereof. While the meaning of this provision is by no means clear, it would seem to refer to a written receipt given for the registered letter by the postmaster. This seems a more logical interpretation of the legislative meaning than to say that it refers to a written receipt signed by the addressee, showing that he had received the letter. See 3 N. C. Law Rev. 129.

§ 1-590. Subpoena, service and signature.—Service of a subpoena for witnesses may be made by a sheriff, coroner or constable, and proved by the return of such officer, or the service may be made by any person not a party to the action, and proved by his oath. A subpoena for witnesses need not be signed by the clerk of the court, and is sufficient if subscribed by the party or by his attorney. (Rev., s. 884; Code, s. 597; C. C. P., ss. 349, 353; C. S. 919.)

As to issuance by the clerk, see sec. 8-59.

A subpoena may be served by any person not a party to the action, and proved by his oath. *State v. Johnson*, 109 N. C. 852, 853, 13 S. E. 843; *Smith v. Smith*, 119 N. C. 314, 318, 25 S. E. 878.

§ 1-591. Application of this article.—This article does not apply to the service of a summons, or other process (except summonses for jurors, as provided in § 1-589), or of any paper to bring a party into contempt. (Rev., s. 885; Code, s. 597; C. C. P., ss. 349, 353; C. S. 920.)

Article Applies Where Papers Not Excepted.—It seems clear that the article applies to all papers except those excepted by this section. *State v. Price*, 110 N. C. 599, 601, 15 S. E. 116.

The exceptions provided for in this section do not include the service of cases and counter-cases on appeal. *State v. Price*, 110 N. C. 599, 601, 15 S. E. 116.

§ 1-592. Officer's return evidence of service.—When a notice issues to the sheriff, his return thereon that the same has been executed is sufficient evidence of its service. (Rev., ss. 886, 1529; Code, s. 940; R. C., c. 31, s. 123; 1799, c. 537; C. S. 921.)

Officer's Return is Prima Facie Correct.—In *Caviness v. Hunt*, 180 N. C. 384, 386, 104 S. E. 763, it was said: "While this is one of the states in which the return on the process is not conclusive, even between the parties and privies to the action, still, under this section, and the authorities, such return is prima facie correct and cannot be set aside unless the evidence is clear and unequivocal."

The sheriff's return is taken as prima facie correct, and may not be successfully attacked by motion in the cause, except by clear and unequivocal evidence, requiring the testimony of more than one person to overturn the official return of the officer. *Commissioners v. Spencer*, 174 N. C. 36, 93 S. E. 435; *Penley v. Rader*, 208 N. C. 702, 704, 182 S. E. 337.

Where the sheriff's return was regular upon its face, but each plaintiff testified that service was not made on him, but did not testify as to whether service was made on the other plaintiff, and there was no evidence corroborating plaintiffs' testimony, defendant sheriff's motion for judgment as of nonsuit was properly granted. *Penley v. Rader*, 208 N. C. 702, 182 S. E. 337.

Where the officer's return shows service it is deemed prima facie correct under this section and the remedy of defendant asserting nonservice is by motion in the cause upon a showing of nonservice by clear and unequivocal proof. *Dunn v. Wilson*, 210 N. C. 493, 187 S. E. 802.

Same—Service on Infant.—Where service of process has been served upon the general guardian of the infant, and it appears from the officer's return of notice that service has been executed upon the infant, such return is sufficient evidence of its service upon the infant to take the case to the jury upon the question involved in the issue. *Long v. Rockingham*, 187 N. C. 199, 121 S. E. 461.

Imports Verity.—Where the summons in an action has been duly served on a party defendant by a proper officer, it imports verity, and will not be set aside and a judgment vacated in the absence of clear and unequivocal proof that the summons had not in fact been served, and such proof must be more than the one affidavit by the defendant. *Raleigh, etc., Trust Co. v. Nowell*, 195 N. C. 449, 142 S. E. 584.

Sheriff's Signature Acted on without Proof.—The official returns of the sheriff are acted on without proof of his signature in a court in which he is an officer. *McDonald v. Carson*, 94 N. C. 497, 502.

"Executed by Delivery."—The term used in a return, "executed by delivering copy," necessarily implies a delivery to each of those to whom the notice is addressed, as otherwise it would be but a partial and uncompleted service. *McDonald v. Carson*, 94 N. C. 497, 502.

Executed.—The word "executed" in the return of a process *ex vi termini* carries with it the idea of a full performance of all that the law requires. *Isley v. Boon*, 113 N. C. 249, 18 S. E. 174.

Cited in *Adams v. Cleve*, 218 N. C. 302, 10 S. E. (2d) 911.

Art. 49. Time.

§ 1-593. How computed.—The time within which an act is to be done, as provided by law, shall be computed by excluding the first and including the last day. If the last day is Sunday or a legal holiday, it must be excluded. (Rev., s. 887; Code, s. 596; C. C. P., s. 348; C. S. 922.)

Uniform Rule.—The cases all go to establish one uniform rule, whether the question arises upon the practice of the courts, or the construction of a statute, and the rule is to exclude the first day from the computation. *Cook v. Moore*, 95 N. C. 1, 3; *Burgess v. Burgess*, 117 N. C. 447, 23 S. E. 336; *Walker v. Scott*, 104 N. C. 481, 10 S. E. 523.

"From the Day of the Date."—"From the day of the date" and "from the date" signify the same thing, and according to the intent are either inclusive or exclusive. *Houser v. Reynolds*, 2 N. C. 114, 1 Am. Dec. 551, cited in notes in 49 L. R. A. 200, 201.

Actions on Judgments.—Where a judgment was rendered on October 20, 1873, and an action was brought on the judgment on October 20, 1883, it was held that the statute barring actions on judgments in ten years was a defense. *Cook v. Moore*, 95 N. C. 1, cited in note in 49 L. R. A. 214.

Time for Filing Appeal.—In calculating the five days after the end of the term within which the case on appeal must be filed, the first day on which the court adjourned, is to be excluded. *Turrentine v. Richmond, etc., R. Co.*, 92 N. C. 642.

Petition for Rehearing.—Under the rule requiring petitions to rehear to be filed within twenty days after the commencement of the succeeding term, the first day of the period allowed is to be excluded from the count. *Barcroft v. Roberts*, 92 N. C. 250, cited in note in 49 L. R. A. 226.

Service of Case.—Where thirty days were allowed by agreement within which to serve a case on appeal, and the court adjourned on October 31st, the time for service expired on November 30th, the last day not being Sunday, the service on December 1st was a nullity. *Zell Guano Co. v. Hicks*, 120 N. C. 29, 26 S. E. 650.

Bill and Notes.—A note drawn payable one day after date is due the second day after its execution without demand. *Baucom v. Smith*, 66 N. C. 537.

Limit of Option.—An option given February 7th, provided no better offer was received that day by mail, to close "by 8 February," includes the latter day. *Blalock v. Clark*, 133 N. C. 306, 45 S. E. 642, cited in note in 15 L. R. A., N. S. 688.

When Loss of Time Not Imputed to Appellant.—Where appellant's counsel, five days after the adjournment of court, mailed by registered letter notice of appeal, etc. to the sheriff of the county so as to leave ample time for service on appellee's counsel, the failure of the sheriff to take the notice, etc., from the postoffice until after the ten days allowed for service cannot be imputed to the appellant as his laches. *Arrington v. Arrington*, 114 N. C. 113, 19 S. E. 105.

When Last Day is Sunday.—The last day for service of a case on appeal being Sunday, service on the following day was legal. *Pittsburg Lumber Co. v. Rowe*, 151 N. C. 130, 65 S. E. 750.

In computing the time wherein a case on appeal may be served under an agreement, when, by excluding the first, the last day falls on Sunday, service on the next succeeding day is sufficient. *Pittsburg Lumber Co. v. Rowe*, 151 N. C. 130, 65 S. E. 750; *Sondley v. Asheville*, 110 N. C. 84, 14 S. E. 514.

Sunday Excluded Only When Last Day.—The section excludes Sunday only when it is the last day of the time limited. *Glanton v. Jacobs*, 117 N. C. 427, 428, 23 S. E. 335, cited in note in 49 L. R. A. 242.

The Legislature has not written the words "Sundays excluded" into the statute, and the court has no authority to do so. The Revisal, sec. 887, by providing that, in computing time, if the last day is Sunday it shall be excluded, shows that, except when Sunday is the last day, it shall be counted in the time "provided by law." *Davis v. Atlantic etc., R. Co.*, 145 N. C. 207, 211, 59 S. E. 53.

Same—Cases on Appeal and Counter-Cases.—Appeals must be taken in ten days, cases on appeal served in ten days, counter-cases in five days, under penalty of loss, yet the court has not extended the time by writing in the statute "Sundays not counted," though lawyers are no more expected to work on Sundays than freight trains. *Davis v. Atlantic etc., R. Co.*, 145 N. C. 207, 212, 59 S. E. 53.

Same—Execution of Ca. Sa.—In *Drake v. Fletcher*, 50 N. C. 411, in construing the statute which allowed twenty days in which a ca. sa. must be executed, the court held that Sundays must be counted, though the statute forbade service of such process on Sunday, the court saying that when Sundays are to be excluded the Legislature so declares in express terms. In *Barcroft v. Roberts*, 92 N. C. 250, the court held, as to the twenty days allowed in which a petition to rehear could be filed, that the first day is to be excluded from the count, and the last day is to be counted unless Sunday, and counted all other Sundays in the twenty days. *Davis v. Atlantic etc., R. Co.*, 145 N. C. 207, 211, 59 S. E. 53.

Same—Transportation of Freight.—Though freight trains are prohibited from running on Sunday within certain hours, Sundays are not excluded from the reasonable time in which railroads are given to transport freight, except when Sunday is the last day in computing the time. *Davis v. Atlantic, etc., R. Co.*, 145 N. C. 207, 59 S. E. 53.

Applied in Pettit v. Wood-Owen Trailer Co., 214 N. C. 335, 199 S. E. 279.

Cited in *Adcock v. Fuquay Springs*, 194 N. C. 423, 425, 140 S. E. 24.

§ 1-594. Computation in publication.—The time for publication of legal notices shall be computed so as to exclude the first day of publication and

include the day on which the act or event of which notice is given is to happen, or which completes the full period required for publication. (Rev., s. 888; Code, s. 602; C. C. P., s. 359; C. S. 923.)

Cross References.—As to manner of publication generally, see sec. 1-99; as to service and content of notice of attachment, see sec. 1-448; as to publication of warrant of attachment obtained from a justice of the peace, see sec. 1-452.

Art. 50. General Provisions as to Legal Advertising.

§ 1-595. Advertisement of public sales.—When a statute or written instrument stipulates that an advertisement of a sale shall be made for any certain number of weeks, a publication once a week for the number of weeks so indicated is a sufficient compliance with the requirement, unless contrary provision is expressly made by the terms of the instrument. (1909, cc. 794, 875; C. S. 924.)

Cross References. — As to manner of publication generally, see sec. 1-99; as to advertisement and newspaper publication, see sec. 1-325; as to advertisement of resale, see sec. 1-326; as to sale days, see sec. 1-331; as to sale hours, see sec. 1-333; as to postponement, see sec. 1-334; as to personal property, notice and place of sale, see sec. 45-23.

Notice of Sale under Mortgage. — Powers of sale in a mortgage are contractual, and it is essential to the validity of a sale under a power to comply fully with the requirements of giving notice of the sale. *Jenkins v. Griffin*, 175 N. C. 184, 186, 95 S. E. 166.

Where a mortgage of lands provides that notice of the sale under the power thereof given in the conveyance shall be published in a newspaper, etc., "for a time not less than thirty days prior to the date of the sale," by the agreement the advertisement should be inserted in the newspaper once a week for four consecutive weeks, and not consecutively for thirty days, and an allowance made in the superior court for an advertisement for thirty consecutive days was erroneous. *Saving Bank, etc., Co. v. Leach*, 169 N. C. 706, 86 S. E. 701.

Burden of Proof. — However, "the presumption of law is in favor of the regularity in the execution of the power of sale; and if there was any failure to advertise properly, the burden was on defendant (here on plaintiffs) to show it." *Jenkins v. Griffin*, 175 N. C. 184, 186, 95 S. E. 166.

§ 1-596. Charges for legal advertising. — The publication of all advertising required by law to be made in newspapers in this state shall be paid for at not to exceed the local commercial rate of the newspaper selected. Any public or municipal officer of board created by or existing under the laws of this state that is now or may hereafter be authorized by law to enter into contracts for the publication of legal advertisements is hereby authorized to pay therefor prices not exceeding said rates. Nothing herein shall apply to contracts or agreements for legal advertising in this state existing at the time this section takes effect.

No newspaper in this state shall accept or print any legal advertising until said newspaper shall have first filed with the clerk of the superior court of the county in which it is published a sworn statement of its current commercial rate for the several classes of advertising regularly carried by said publication, and any owner or manager of a newspaper violating the provisions of this section shall be guilty of a misdemeanor. (1919, c. 45, ss. 1, 2; C. S. 2586.)

§ 1-597. Regulations for newspaper publication of legal notices, advertisements, etc.—Whenever a notice or any other paper, document or legal advertisement of any kind or description shall be authorized or required by any of the laws of the

state of North Carolina, heretofore or hereafter enacted, or by any order or judgment of any court of this state to be published or advertised in a newspaper, such publication, advertisement or notice shall be of no force and effect unless it shall be published in a newspaper with a general circulation to actual paid subscribers which newspaper at the time of such publication, advertisement or notice, shall have been admitted to the United States mails as second class matter in the county or political subdivision where such publication, advertisement or notice is required to be published, and which shall have been regularly and continuously issued in the county in which the publication, advertisement or notice is authorized or required to be published, at least one day in each calendar week for at least twenty-five of the twenty-six consecutive weeks immediately preceding the date of the first publication of such advertisement, publication or notice; provided that in the event that a newspaper otherwise meeting the qualifications and having the characteristics prescribed by §§ 1-597 to 1-599, should fail for a period not exceeding four weeks in any calendar year to publish one or more of its issues such newspaper shall nevertheless be deemed to have complied with the requirements of regularity and continuity of publication prescribed herein. Provided further, that where any city or town is located in two or more adjoining counties, any newspaper published in such city or town shall, for the purposes of §§ 1-597 to 1-599, be deemed to be admitted to the mails, issued and published in all such counties in which such town or city of publication is located, and every publication, advertisement or notice required to be published in any such city or town or in any of the counties where such city or town is located shall be valid if published in a newspaper published, issued and admitted to the mails anywhere within any such city or town, regardless of whether the newspaper's plant or the post office where the newspaper is admitted to the mails is in such county or not, if the newspaper otherwise meets the qualifications and requirements of §§ 1-597 to 1-599. This provision shall be retroactive to May first, one thousand nine hundred and forty, and all publications, advertisements and notices published in accordance with this provision since May first, one thousand nine hundred and forty, are hereby validated. (1939, c. 170, s. 1; 1941, c. 96.)

§ 1-598. Annual statements filed with clerk; violation a misdemeanor.—Every newspaper in this state which shall publish any such legal notice or other legal advertisement, as mentioned in § 1-597, shall, in each calendar year, file with the clerk of the superior court of the county in which it is published a sworn statement that such newspaper is a newspaper meeting the qualifications of §§ 1-597 to 1-599, which sworn statement, when filed, shall be prima facie evidence of the qualification of such newspaper under §§ 1-597 to 1-599 during such calendar year, and any such legal notice or other legal advertisement published in any such newspaper filing such sworn statement as herein provided shall be valid; and any owner, publisher or manager of a newspaper who shall violate the provisions of this section, or any person who shall make or file a statement as required by this section which shall be false at the

time of such statement, shall be guilty of a misdemeanor. (1939, c. 170, s. 1½.)

§ 1-599. Application of two preceding sections.—The provisions of §§ 1-597 to 1-599 shall not apply in counties wherein only one newspaper is published, although it may not be a newspaper

having the qualifications prescribed by § 1-597; nor shall the provisions of §§ 1-597 to 1-599 apply in any county wherein none of the newspapers published in such county has the qualifications and characteristics prescribed by § 1-597. (1939, c. 170, ss. 2, 4½; 1941, c. 49.)

Chapter 2. Clerk of Superior Court.

Sec. Art. 1. The Office.

- 2-1. Judge of probate abolished; clerk acts as judge.
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- 2-26. Fees of clerk of superior court.
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- 2-28. Fees for probating and recording federal crop liens and chattel mortgages.
- 2-29. Advance court costs.
- 2-30. Advance costs on appeal from justice of the peace.
- 2-31. Fee for cross-indexing names of parties.
- 2-32. Fee for docketing judgment.
- 2-33. Fee for auditing annual accounts of receivers, executors, etc.
- 2-34. Fee for auditing final accounts of receivers, executors, etc.

Art. 1. The Office.

§ 2-1. Judge of probate abolished; clerk acts as judge.—The office of probate judge is abolished, and the duties heretofore pertaining to clerks of the superior court as judges of probate shall be

Sec.

- 2-35. Fee for auditing final accounts of trustees, etc., selling real estate under foreclosure proceedings.
- 2-36. Certain counties not subject to sections 2-29—2-35.
- 2-37. To keep fee bill posted.
- 2-38. To furnish blank process, bonds and undertakings.
- 2-39. To file papers in proceedings.
- 2-40. To keep records of his office; obtaining originals or copies.
- 2-41. To endorse date of issuance on process.
- 2-42. To keep books; enumeration.
- 2-43. To notify commissioners of insolvency of surety company in which county officer bonded.

Art. 5. Reports.

- 2-44. List of justices to secretary of state.
- 2-45. List of attorneys-at-law to commissioner of revenue.

Art. 6. Money in Hand; Investments.

- 2-46. Public funds to be reported to county commissioners.
- 2-47. Approval, registration, and publication of report.
- 2-48. Report compelled by commissioners.
- 2-49. Payment to persons entitled.
- 2-50. Unclaimed fees of jurors and witnesses paid to school fund.
- 2-51. Use by public until claimed.
- 2-52. Payment of sum due minor insurance beneficiary.
- 2-53. Payment of money for indigent children and persons non compos mentis.
- 2-54. Limitation on investment of funds in clerk's hands.
- 2-55. Investments prescribed; use of funds in management of lands of infants, incompetents.
- 2-56. Securing bank deposits.
- 2-57. Inspection of records by local government commission; report to solicitor of mismanagement.
- 2-58. Inspection and audit by county auditors or accountants; reports of audits.
- 2-59. Liquidation of present funds within year.
- 2-60. Violation of sections 2-54 to 2-59 a misdemeanor.

performed by the clerks of the superior court as clerks of said court. (Rev., s. 889; Code, s. 102; C. S. 925.)

Cross Reference.—As to powers and jurisdiction generally, see §§ 1-7, 1-13, 1-393, 1-406, and 2-16.

Editor's Note.—The office of probate judge was created

by the constitution of 1868. The powers of the probate judge were extensive and his jurisdiction embraced many of the vital transactions of the business community. It covered the proof of wills, deeds, and official bonds; the appointment and revocation of guardians of infants and lunatics; the granting and revocation of letters testamentary and of administration; the auditing of the accounts of guardians, executors, and administrators; he could bind out apprentices, cancel indentures, and exercise jurisdiction in many other matters which might be prescribed by law. Although the office has now been abolished by the Constitution of 1883, the Legislature has seen fit, on the score of economy and practical administration, to shift the jurisdiction of matters of probate, plus certain other specified matters, to the clerk of the superior court.

Jurisdiction.—Under this section the duties of the probate judge devolve upon the clerk of the superior court, and in such case he has a special jurisdiction which is distinct and separate from his general duties as clerk. *Brittain v. Mull*, 91 N. C. 498; *Helms v. Austin*, 116 N. C. 751, 753, 21 S. E. 556.

The clerk acts not as the servant or ministerial officer of the superior court or as and for the court, but as an independent tribunal of original jurisdiction. *Edwards v. Cobb*, 95 N. C. 5.

The exercise of judicial powers by the "clerk of the court" is the exercise of them by the "court" through the clerk; and the action of the clerk stands as that of the court, if not excepted to and reversed or modified on appeal. *Brittain v. Mull*, 91 N. C. 498.

The clerk has jurisdiction of a proceeding by a ward against his guardian for an account. *McNeill v. Hodges*, 105 N. C. 52, 11 S. E. 265. See also *Rowland v. Thompson*, 65 N. C. 110.

The clerks of superior courts have jurisdiction of proceedings for the removal of executors and administrators. *Edwards v. Cobb*, 95 N. C. 5.

Although the clerks of the Superior Courts have no equity jurisdiction, they are given probate jurisdiction by this section, and in the exercise of their probate jurisdiction they may hear and rule on a petition of an executor for authorization to operate the estate's farms to preserve the property pending the determination of caveat proceedings. *Hardy & Co. v. Turnage*, 204 N. C. 538, 168 S. E. 823.

Stated in Ex parte Wilson, 222 N. C. 99, 22 S. E. (2d) 262 (con. op.).

§ 2-2. Election; term of office.—A clerk of the superior court for each county shall be elected by the qualified voters thereof, at the time and in the manner prescribed by law for the election of members of the general assembly. Clerks of the superior court shall hold office for four years. (Rev., s. 890; Const., Art. 4, ss. 16, 17; C. S. 926.)

Cross Reference.—See also § 163-4.

Appointee.—When there is a vacancy and the judge appoints one to fill that vacancy, such appointee holds office only until the next election at which members of the General Assembly are chosen. *Rodwell v. Rowland*, 137 N. C. 617, 50 S. E. 319. (*DeLoatch v. Rogers*, 86 N. C. 358, overruled.)

§ 2-3. Clerk's bond.—At the first meeting of the board of commissioners of each county after the election or appointment of any clerk of a superior court it is the duty of the clerk to deliver to such commissioners a bond with sufficient sureties, to be approved by them, in a penalty of not less than ten thousand dollars, and not more than twenty-five thousand dollars, payable to the state of North Carolina, and with a condition to be void if he shall account for and pay over, according to law, all moneys and effects which have come or may come into his hands, by virtue or color of his office, or under an order or decree of a judge, even though such order or decree be void for want of jurisdiction or other irregularities, and shall diligently preserve and take care of all books, records, papers and property which have come or may come into his possession, by virtue or color of his office, and shall in all things faithfully perform the duties of his office as they are

or thereafter shall be prescribed by law: Provided that in counties having a population in excess of fifty thousand inhabitants, the penalty of the clerk's bond shall be not less than ten thousand dollars, and not more than fifty thousand dollars. (Rev., s. 295; Code, s. 72; C. C. P., s. 137; 1889, c. 7; 1891, c. 385; 1895, cc. 270, 271; 1899, c. 54, s. 52; 1901, c. 32; 1903, c. 747; 1931, c. 170; 1943, c. 713; C. S. 927.)

Local Modification.—Camden, Hyde, Tyrrell: 1939, c. 30; Carteret, Currituck, Pamlico: C. S. 929; Chowan: 1939, c. 299; Jones: 1925, c. 10; Mecklenburg: 1925, c. 184; Washington: Pub. Loc. 1935, c. 6.

Cross References.—As to liability and action on bond, see §§ 2-4, 109-34, 109-36. As to interest, see § 24-5. As to cemeteries, see § 65-11. As to surety by mortgage, see § 109-28.

Editor's Note.—The Act of 1931 increased the maximum penalty of the bond required by this section from fifteen thousand to twenty-five thousand dollars.

Session Laws 1943, c. 713, applicable only to counties having a population in excess of fifty thousand inhabitants, increased the maximum penalty of the bond from twenty-five thousand to fifty thousand dollars.

Purpose.—In *Thomas v. Connelly*, 104 N. C. 342, 346, 10 S. E. 520, it was said, "The purpose of this provision is very broad and comprehensive. It requires every clerk of the superior courts to give bond, with sufficient sureties, to secure the faithful discharge of his official duties, and especially, among other things, to secure the accounting for and paying over according to law of all moneys and effects that may be or come into his hands 'by virtue or color of his office'."

"Color of His Office."—"Color of his office," has been construed to embrace all cases where the officer receives the money in his official capacity, when he is not authorized or required to receive the same. *Presson v. Boone*, 108 N. C. 78, 12 S. E. 897; *Sharpe v. Connelly*, 105 N. C. 87, 11 S. E. 177; *Thomas v. Connelly*, 104 N. C. 342, 10 S. E. 520; *Ex Parte Cassidy*, 95 N. C. 225; *Brown v. Cable*, 76 N. C. 391; *Greenlee v. Sudderth*, 65 N. C. 470. See also *Cox v. Blair*, 76 N. C. 78; *McNeill v. Morrison*, 63 N. C. 508.

Scope of Bond.—This section requires only one bond to be given by the clerks, and the condition is extensive enough to cover every possible default in office. *Hunter v. Routledge*, 51 N. C. 216, 220.

An official bond given by a clerk, upon his entry into office, covers his whole official term, whether a new bond be given afterwards or not. *Hunter v. Routledge*, 51 N. C. 216.

The clerk's bond embraces receiverships and incidental liabilities growing out of them. *Presson v. Boone*, 108 N. C. 78, 83, 12 S. E. 897; *Syme v. Bunting*, 91 N. C. 48; *Waters v. Melson*, 112 N. C. 89, 16 S. E. 918.

The bond also covers funds which have come into the hands of the clerk under a statute enacted subsequent to the execution of the bond. *Wilmington v. Nutt*, 78 N. C. 177, and 80 N. C. 266; *Presson v. Boone*, 108 N. C. 78, 83, 12 S. E. 897. See also, *State v. Bradshaw*, 32 N. C. 229; *Cameron v. Campbell*, 10 N. C. 285.

Cumulative Security.—The clerk's bonds are cumulative security for the performance of official duties. *Darden v. Blount*, 126 N. C. 247, 35 S. E. 479.

Liability on the Bond.—The surety bond of a clerk of the superior court is fixed as to amount in the sum of five thousand dollars [in Pamlico county], and to that extent a surety is responsible for the defalcation of his principal, including 6 per cent interest from the time of notice given it, except from judgment thereon, when a different principle applies and the surety is liable for 6 per cent interest on the judgment until it is paid. *State v. Martin*, 188 N. C. 119, 123 S. E. 631; *Presson v. Boone*, 108 N. C. 78, 87, 12 S. E. 897.

A clerk and his sureties are liable on his bond as an insurer for money that comes into his hands, and not merely for the exercise of good faith in regard to such money. *Smith v. Patton*, 131 N. C. 397, 42 S. E. 849. See generally, *Bd. of Education v. Bateman*, 102 N. C. 52, 11 Am. St. 708, 8 S. E. 882; *Morgan v. Smith*, 95 N. C. 396; *Havens v. Lathene*, 75 N. C. 505.

Where a defaulting clerk succeeds himself, and has given the required bond for each term, with the same surety, and continues his defalcation, the surety is liable only to the amount of the bond given for each term. *State v. Martin*, 188 N. C. 119, 123 S. E. 631.

And the burden is on the sureties of the bond in force.

when the money was received by the clerk to show that he paid it over to himself as his own successor. *Morgan v. Smith*, 95 N. C. 396, 397.

The clerk is liable on his bond for failure to pay over funds paid to him by commissioners in partition. *Smith v. Patton*, 131 N. C. 396, 42 S. E. 849.

Where a clerk of the Superior Court has forged the signatures of Confederate pensioners to warrants issued by the State Auditor and sent to him for payment to the persons entitled, and has witnessed such signatures, cashed the warrants, and converted the funds to his own use, such sums are received by him by virtue of and under color of his office, and come within the terms of his bonds given under the provisions of this section, and the surety thereon is liable within the penalty of the bonds for the amount so embezzled. *State v. Gant*, 201 N. C. 211, 159 S. E. 427.

Same—Negligence.—A clerk who is negligent in issuing an execution was held to be liable in damages for whatever sum the plaintiff might show he had sustained by such non-feasance. *McIntyre v. Merritt*, 55 N. C. 558.

Action on the Bond.—No action can be maintained on the bond given by a clerk conditioned for the faithful performance of his duty, except where there has been such damages sustained as would give the party a right to maintain an action on the case for the neglect of his official duty. *Jones v. Biggs*, 46 N. C. 364.

In an action on an official bond, or failure of a defendant to answer, a judgment entered against him on default cannot be final, since the action is not for the breach of an express or implied contract to pay a definite sum of money fixed by the terms of the bond or ascertainable therefrom, but must be "by default and inquiry." *Battle v. Baird*, 118 N. C. 854, 24 S. E. 668. See also *Morgan v. Bunting*, 86 N. C. 67, 68.

A demand is necessary before bringing an action upon the bond of a clerk for moneys, payable to private individuals, received under color of his office, and the statute of limitations will not begin to run in his favor until after such demand is made. But it is otherwise if he has converted the money, or if it is public money. *Furman v. Timberlake*, 93 N. C. 66.

Same—Proper Parties.—Under this section, claimants of a fund arising from a partition sale are the proper parties to sue on the bond of the clerk for failure of the clerk to pay funds by the commissioners in partition. *Smith v. Patton*, 131 N. C. 396, 42 S. E. 849.

Where a clerk wrongfully prefers one judgment creditor over another in issuing executions, the wronged party has a remedy upon the official bond of the clerk for the actual loss sustained by his misconduct. *Bank v. Jones*, 17 N. C. 84.

Same—Evidence.—In an action against a clerk and one of the sureties on his official bond, the record of a judgment against the clerk and others of his sureties, in a previous action against them for the same demand, and on the same bond, but in which action the surety in the present action was not a party, is competent evidence to fix the amount due by the clerk. *Morgan v. Smith*, 95 N. C. 396.

Effect Where Penalty of Bond Exceeds Amount Prescribed.—Although this section is directory and prescribes the penalty on the bond of a clerk of the Superior Court, both the clerk and his surety are presumed to know the provisions of the statute, and where the clerk has voluntarily executed a bond in a greater sum, and the surety has accepted premiums based on a bond in this amount, the surety is estopped to deny the validity of the bond, and the plaintiff may recover of the surety, upon a proper showing, to the full amount of the penalty of the bond. *State v. Gant*, 201 N. C. 211, 159 S. E. 427.

Clerical Error.—An error in reciting the term of office in the bond which is clearly clerical and inadvertent, does not invalidate the bond, but will be treated as surplusage. *Battle v. Baird*, 118 N. C. 854, 24 S. E. 668. See also, *Sprinkle v. Martin*, 69 N. C. 175.

Guarantors of Funds Received by Virtue of Office.—Clerks of the superior court are insurers and guarantors of funds coming into their hands by virtue or color of their offices. *Thacker v. Fidelity, etc., Co.*, 216 N. C. 135, 4 S. E. (2d) 324.

§ 2-4. Clerk's bond; approval, acknowledgments and custody.—The approval of said bond by the board of commissioners, or a majority of them, shall be recorded by their clerk. The said bond shall be acknowledged by the parties thereto, or proved by a subscribing witness, before the clerk of said board of commissioners, or their presiding officer, registered in the register's office in

a separate book to be kept by him for the registration of official bonds; and the original, with the approval thereof endorsed, deposited with the register for safe keeping. The like remedies shall be had upon said bond as are or may be given by law on official bonds. (Rev., s. 296; Code, s. 73; C. C. P., s. 138; C. S. 928.)

Cross Reference.—As to bond, approval and custody, see §§ 109-11, 109-12. See annotations to §§ 109-34, 109-36.

Proof—Evidence.—Such a bond may be proved, as at common law, without being subjected to the strict rules of evidence, and if there is a subscribing witness it may be proved by other witnesses, as if there was no subscribing witness. *Battle v. Baird*, 118 N. C. 854, 24 S. E. 668.

A duly certified copy of the record of the registered bond is competent evidence of its provisions. *Battle v. Baird*, supra.

Same—Presumption.—The clerk of the superior court being required to give a bond for the discharge of the duties of his office, etc., it will be presumed, in the trial of an action on such bond, that he did so; and any such bond found in the keeping of the proper custodian will be presumed to have been properly given and accepted as such. *Battle v. Baird*, 118 N. C. 854, 24 S. E. 668.

§ 2-5. Oath of office.—The clerks of the superior court, before entering on the duties of their office, shall take and subscribe before some officer authorized by law to administer an oath, the oaths prescribed by law, and file such oaths with the register of deeds for the county. (Rev., 891; Code, s. 74; C. C. P., s. 139; C. S. 930.)

Cross References.—As to oath, see §§ 11-6, 11-7, 11-11. See also, § 14-229; § 2-5. As to oath of deputy, see § 2-13.

§ 2-6. Vacancy; judge of district fills.—1. Otherwise than by expiration. In case the office of clerk of a superior court for a county becomes vacant otherwise than by the expiration of the term, and in case of a failure by the people to elect, the judge of the superior court for the county shall appoint to fill the vacancy until an election can be regularly held.

2. Failure to qualify. In case any clerk fails to give bond and qualify as required by law, the presiding officer of the board of commissioners of his county shall immediately inform the resident judge of the judicial district thereof, who shall thereupon declare the office vacant and fill the same, and the appointee shall give bond and qualify.

3. Resignations. Any clerk of the superior court may resign his office to the judge of the superior court residing in the district in which is situated the county of which he is clerk, and said judge shall fill the vacancy. (Rev., ss. 892, 893, 895; Code, ss. 76, 78; C. C. P., s. 140; Const., Art. 4, s. 29; C. S. 931.)

Cross References.—As to failure to give satisfactory bond, see § 109-8. As to bond of successor, see § 109-9. As to willfully failing to discharge duties as ground for removal, see § 14-230.

Commissioners' Duty.—A failure on the part of the clerk to give bond must be ascertained by the commissioners before the judge is authorized to declare a vacancy. And in accepting or rejecting the bond tendered, the court cannot interfere in the exercise of their discretion. *Buckman v. Commissioners*, 80 N. C. 121.

Conflicting Claimants.—Where there are conflicting claimants for a vacant office a court must act upon the prima facie evidence of right and admit the one possessing it, leaving the other to pursue the proper legal remedy for the recovery of possession. *Clark v. Carpenter*, 81 N. C. 309.

§ 2-7. Removal for cause.—Upon the conviction of any clerk of the superior court of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he

shall be disqualified from holding or enjoying any office of honor, trust or profit under this state. (Rev., s. 894; Code, s. 123; 1868-9, c. 201, s. 53; C. S. 932.)

Cross References.—See Constitution, Art. VI, sec. 8; Art. XIV, sec. 7. As to restoration of citizenship, see § 13-1.

§ 2-8. Office and equipment furnished.—The requisite stationery, records, furniture and filing cases and devices for official use must be furnished to the clerk by the board of commissioners; and to each of such books there must be attached an alphabetical index securely bound in the volume, referring to the entries therein by the page of the book, unless there is a cross-index of such book required by law to be kept. These books must, at all proper times, be open to the inspection of any person. (Rev., s. 896; Code, ss. 82, 84, 113; C. C. P., s. 428; C. S. 933.)

§ 2-9. Solicitor to examine and report on office.—The Solicitor of the Judicial District shall inspect the office of the clerk as often as he shall deem it necessary, and shall make written report of his inspection to the court. (Rev., s. 897; Code, s. 88; C. C. P., s. 147; 1917, c. 81, s. 1; 1935, c. 423; C. S. 934.)

Editor's Note.—Prior to the amendment of 1935 the section required an inspection at every regular term and also provided the penalty in case the solicitor neglected or failed to perform his duty.

Art. 2. Assistant Clerks.

§ 2-10. Appointment; oath; powers and jurisdiction; responsibility of clerks.—Each clerk of the superior court, by and with the written consent and approval of the superior court judge resident in his district, may appoint an assistant clerk of the superior court, who before entering upon his duties shall take and subscribe the oath prescribed for clerks: Provided, that no more than one such assistant clerk shall hold office in any county at one time. Upon compliance with the provisions of this article such assistant clerk shall be as fully authorized and empowered to perform all the duties and functions of the office of clerk of the superior court as the clerk himself, and all the acts, orders, and judgments of such assistant clerk shall be entitled to the same faith and credit as those of such clerk. Such assistant clerks shall be subject in all respects to all laws which apply to the clerks. The several clerks of the superior court shall be held responsible for the acts of their assistant clerks, and the official bonds of such clerks as now provided by law shall be written to and shall cover the acts of their assistant clerks. (1921, c. 32, s. 1; C. S. 934(a).)

Local Modification.—Forsyth: 1937, c. 331; Guilford: 1937, c. 331; 1941, c. 91; Hanover: 1943, c. 514.

Funds of minors paid into the hands of the assistant clerk of the Superior Court, appointed guardian, were not paid into court, and the surety on the guardianship bond may not successfully contend that the clerk's bond was liable therefor. *State v. Royal Indemnity Co.*, 203 N. C. 420, 166 S. E. 327.

While the clerk of the superior court is a constitutional officer, the duties of clerks are prescribed by statute, and the legislature may prescribe that such duties may be performed by assistant clerks as in this and the following sections, and an attack upon the appointment of a guardian by an assistant clerk on the ground that the statute delegating the powers of clerks to assistant clerks is unconstitutional is untenable. *In re Barker*, 210 N. C. 617, 188 S. E. 205.

§ 2-11. Certificate of appointment; confirma-

tion; revocation of appointment; compensation.—Any clerk of the superior court desiring to appoint such an assistant clerk shall present a formal written certificate of such appointment to the superior court judge residing in his district, and such judge, if he concurs in and approves such appointment, shall in writing enter his consent and approval upon such certificate and confirm such appointment. Said certificate of appointment, and approval of the judge, together with the oath subscribed by the appointee, shall thereupon be entered in full upon the minute docket of the court, and shall be recorded and cross-indexed in the office of the register of deeds for such county. The appointment of any such assistant clerk may be revoked at any time by the clerk who appointed him or by the superior court judge resident in the district, by the entry of the word "revoked" and the date thereof, with the signature of such clerk or judge, upon the margin of the records of such appointment in the offices of the clerk of the superior court and the register of deeds; and all such appointments shall expire by limitation when the clerk making same ceases to hold office. Nothing in this article shall increase the fees or compensation now allowed by law to the clerks or deputy clerks of the superior court of the several counties of the state. (1921, c. 32, s. 2; C. S. 934(b).)

§ 2-12. Clerks not relieved from duties; deputies.—This article shall not in anywise excuse or relieve the clerk of the superior court from giving to the performance of his duties the same time, care, and attention as is now required of such clerks by law, nor shall it change or amend the present laws with reference to deputy clerks of the superior court: Provided, that one person may be appointed both as assistant clerk and as deputy. (1921, c. 32, s. 3; C. S. 934(c).)

Art. 3. Deputies.

§ 2-13. Appointment.—Clerks of the superior court may appoint deputies, who shall take and subscribe the oath prescribed for clerks. (Rev., s. 898; Code, s. 75; R. C., c. 19, s. 15; 1777, c. 115, s. 86; C. S. 935.)

Purpose.—In *Miller v. Miller*, 89 N. C. 402, 404, it was said: "The purpose of creating the office of 'deputy clerk' was to help the dispatch of public business, and to provide for the same when the clerk might be necessarily absent from his office, or unable for any cause to give personal attention to his official duties."

Section Provides Only Method of Appointment.—Deputy clerks can be appointed only in the manner prescribed by this section. *Shepherd v. Lane*, 13 N. C. 148. And are required to take the same oaths before entering upon their duties which are required of their principals. *Jackson v. Buchanan*, 89 N. C. 75, 76.

The certificate of probate of a deed by a deputy clerk, expressly authorized by statute to acknowledge, etc., the deed having been duly registered, was prima facie evidence of his appointment and qualification. *Piland v. Taylor*, 113 N. C. 2, 18 S. E. 70.

Scope of Authority.—Deputy clerks may do all the acts which the clerk may do, except such as are judicial in their character, or such as a statute may require specially to be done by the clerk himself. *Miller v. Miller*, 89 N. C. 402, 404; *Piland v. Taylor*, 113 N. C. 3, 18 S. E. 70.

Deputies are expressly authorized to take acknowledgment and proof of deeds, and in exercising such functions a deputy acts by force of the statute alone, and not as the agent of or by a delegation of authority from the clerk. *Piland v. Taylor*, 113 N. C. 2, 18 S. E. 70.

The probate of a deed of trust or mortgage by one acting as deputy clerk, but who had not been duly appointed, nor

qualified by taking the prescribed oath, is invalid. *Suddereth v. Smyth*, 35 N. C. 452.

Women as Deputies.—It would seem that women are not disqualified under the constitution nor any statute from holding the office of deputy clerk. See *Bank v. Redwine*, 171 N. C. 559, 569, 572, 88 S. E. 878; *Preston v. Roberts*, 183 N. C. 62, 110 S. E. 586; *State v. Bateman*, 162 N. C. 588, 77 S. E. 768, referred to in *Bank v. Redwine*, *Supra*, 171 N. C. 569, 572, 88 S. E. 878.

§ 2-14. Record of appointment and discharge; copies.—Each clerk of a superior court shall make a record of the appointment of each deputy he may appoint, on the special proceedings docket of his court, giving the name of such appointee and the date of such appointment, and make a cross-index of the same, and shall furnish to the register of deeds of his county a transcript of such record; and such register of deeds shall record the same in the records of deeds in his office and make a cross-index thereof on the general index in his office. When any such deputy clerk is removed from his office the clerk of the superior court by whom he was appointed shall write on the margin of the record of such appointment in his office, and on the margin of the record of such appointment in the office of the register of deeds, the word "Revoked" and the date of such revocation, and sign his name thereto. A duly certified copy of such appointment and of such revocation, under the hand and official seal of the register of deeds, shall be deemed prima facie evidence of the regularity of such appointment and revocation, and shall be admitted as evidence in all the courts. (Rev., s. 899; 1899, c. 235, s. 3; C. S. 936.)

§ 2-15. Responsibility of clerk for deputy's acts.—The several clerks of the superior court shall be held responsible for the acts of their deputies. Deputies shall be subject in all respects to all laws which apply to the clerks. (Rev., s. 900; 1899, c. 235, s. 2; C. S. 937.)

Liability for Acts.—Both deputy and clerk are liable for an unlawful act committed by the deputy under color of the office. *Coltraine v. McCain*, 14 N. C. 308. See also, *Bank v. Redwine*, 171 N. C. 559, 569, 88 S. E. 878.

Deputy's Bond.—This section does not require any bond of a deputy clerk; but, as the clerk is liable for the defaults and misfeasance of his deputies, common prudence dictates that he require bonds of them for his own protection. Such a bond, not being required by law, is not an official bond in the strict sense of that term. When given, however, it is valid as a common-law bond, the clerk individually, and not the public, being the obligee in interest thereunder. The fact that it runs in the name of the clerk as clerk is immaterial. *Fidelity, etc., Co. v. Hoyle*, 64 F. (2d) 413, 415.

Art. 4. Powers and Duties.

§ 2-16. Powers enumerated.—Every clerk has power—

1. To issue subpoenas to compel the attendance of any witness residing or being in the state, or to compel the production of any bond or paper, material to any inquiry pending in his court.
2. To administer oaths and take acknowledgments, whenever necessary, in the exercise of the powers and duties of his office.
3. To issue commissions to take the testimony of any witness within or without this state.
4. To issue citations and orders to show cause to parties in all matters cognizable in his court, and to compel the appearance of such parties.
5. To enforce all lawful orders and decrees, by execution or otherwise, against those who fail to comply therewith or to execute lawful process.

Process may be issued by the clerk, to be executed in any county of the state, and to be returned before him.

6. To exemplify, under seal of his court, all transcripts of deeds, papers or proceedings therein, which shall be received in evidence in all the courts of the state.

7. To preserve order in his court and to punish contempts.

8. To adjourn any proceeding pending before him from time to time.

9. To open, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court, in the same manner as courts of general jurisdiction.

10. To enter judgment in any suit pending in his court in the following instances: judgment of voluntary nonsuit in any case where judgment is permitted by law; and judgment in any suit by consent of parties.

11. To award costs and disbursements as prescribed by law, to be paid personally, or out of the estate or fund, in any proceeding before him.

12. To compel the return to his office by each justice of the peace, on the expiration of the term of office of such justice, or, if the justice be dead, by his personal representative, of all records, papers, dockets and books held by such justice by virtue or color of his office, and to deliver the same to the successor in office of such justice.

13. To take proof of deeds, bills of sale, official bonds, letters of attorney, or other instruments permitted or required by law to be registered.

14. To take proof of wills and grant letters testamentary and of administration.

15. To revoke letters testamentary and of administration.

16. To appoint and remove guardians of infants, idiots, inebriates and lunatics.

17. To audit the accounts of executors, administrators, collectors, receivers, commissioners and guardians.

18. To exercise jurisdiction conferred on him in every other case prescribed by law. (Rev., s. 901; Code, ss. 103, 108; C. C. P., ss. 417, 418, 442; 1901, c. 614, s. 2; 1919, c. 140; C. S. 938.)

Cross References.—As to acknowledgments, see § 47-1. As to depositions, see §§ 8-71 to 8-84. As to process, see §§ 1-303, 1-305, 1-307, 1-313. As to use of copies of court papers in evidence, see § 8-34. As to probate, see §§ 28-1, 28-2, 47-1, 47-14, 47-37, 31-17. As to revocation of letters testamentary and of administration, see §§ 28-31, 28-32, 28-46. As to guardians, see §§ 33-1 to 33-62. As to accounts of executors, etc., see §§ 28-117, 28-121, 28-135, 28-136, 1-406, 33-41. As to reports to commissioner of revenue, see § 105-22. As to power of clerk to discharge insolvent debtors when convicted in justice of peace court, see § 23-25. As to duty of clerk to name successor to trustee in a deed of assignment for benefit of creditors, see § 23-4. For section requiring the clerk to be present at the opening of lock boxes of decedents and prescribing a fee and mileage therefor, see § 105-24. For "color of his office" construed, see annotations to § 2-3. As to clerks acting as notaries, see § 10-3.

Legislature May Take Away or Modify Powers.—The powers and duties of clerks enumerated in this section are given and fixed by legislative enactment, and there is no constitutional barrier to the legislature's taking away, adding to, or modifying them; or authorizing them to be exercised and performed by another. In re *Barker*, 210 N. C. 617, 619, 188 S. E. 205.

Jurisdiction—Limited.—The clerk is a court of very limited jurisdiction—having only such jurisdiction as is given by statute. It has no common law or equitable jurisdiction. *McCauley v. McCauley*, 122 N. C. 288, 292, 30 S. E. 344.

Same—Corrections.—The clerk has the jurisdiction to correct a mistake in a partition proceeding. *Little v. Duncan*, 149 N. C. 84, 62 S. E. 770; *Wahab v. Smith*, 82 N. C. 232.

Or in a proceeding to subject real estate to sale for assets, after a report of the sale is returned and confirmed, he has the right to set aside the sale and order a resale by showing proper cause. *Lovinin v. Pearce*, 70 N. C. 168.

Same—Administrators.—The clerk has the power, for good and sufficient cause, to remove an administrator; or for like cause, as necessarily equivalent, to permit him to resign his trust. *Tulburt v. Hollar*, 102 N. C. 406, 409, 9 S. E. 430; *Murrill v. Sandlin*, 86 N. C. 54, 55.

It is thus incumbent on the probate judge (now the clerk) to make inquiry, and ascertain for himself the facts upon which the legal discretion reposed in him to remove an incompetent or unfaithful officer is to be exercised. *Murrill v. Sandlin*, supra.

Same—Accounts.—The jurisdiction for auditing accounts of executors, administrators, etc., conferred upon the clerk is an ex-parte jurisdiction of examining the accounts and vouchers of such persons, allowing them commissions, etc., as formerly practiced, and does not conclude legatees, etc., or affect suits inter partes upon the same matters. *Heilig v. Foard*, 64 N. C. 710.

The words, "audit the account of executors, administrators and guardians," have reference to the duty of examining accounts filed by executors, etc., to see that the account of charges corresponds with the inventories, passing upon the vouchers and striking a balance, after allowing commissions, as under the existing laws. *Heilig v. Foard*, 64 N. C. 710, 713.

Appeals.—In appeals from the clerk, in that class of cases of which he has jurisdiction in his capacity as clerk, as given under this section, it is not necessary that he should prepare and transmit to the judge any statement of the case on appeal. *Ex Parte Spencer*, 95 N. C. 271.

Applied in *Braddy v. Pfaff*, 210 N. C. 248, 186 S. E. 340. Cited in *Edwards v. McLawhorn*, 218 N. C. 543, 11 S. E. (2d) 562.

§ 2-17. Disqualification to act.—No clerk can act as such in relation to any estate, proceeding or civil action—

1. If he has, or claims to have, an interest by distribution, by will, or as creditor, or otherwise.

2. If he is so related to any person having or claiming such interest that he would, by reason of such relationship, be disqualified as a juror; but the disqualification on this ground ceases unless the objection is made at the first hearing of the matter before him.

3. If he or his wife is a party or a subscribing witness to any deed of conveyance, testamentary paper or nuncupative will; but this disqualification ceases when such deed, testamentary paper, or will has been finally admitted to or refused probate by another clerk, or before the judge of the superior court.

4. If he or his wife is named as executor or trustee in any testamentary or other paper; but this disqualification ceases when the will or other paper is finally admitted to or refused probate by another clerk, or before the judge of the superior court.

5. If he shall renounce the executorship and endorse the same on the will or on some paper attached thereto, before it is propounded for probate, in which case the renunciation must be recorded with the will if admitted to probate. (Rev., s. 902; Code, s. 104; C. C. P., s. 419; 1871-2, c. 196; 1935, c. 110, s. 1; C. S. 939.)

Cross References.—As to clerk's disqualification to be appointed to sell real estate, see § 46-31. As to probate where clerk is a party, see § 47-7. As to validation of orders of registration, see § 47-61.

Editor's Note.—As to the purpose of the 1935 amendment, see 13 N. C. L. Rev. 370. Section 31-12 provides for probate of wills when clerk is a devisee or legatee, or has an interest in the property thereby disposed of. It is there provided that wills in such cases may be probated by the clerk of the adjoining county, upon a petition filed before

him by interested parties. The petition and probate, along with a certified copy of the will shall be returned to, and filed with, the clerk of the original county and there properly recorded. Thereupon, the clerk of the original county is authorized to issue the necessary letters to the personal representative of the deceased. Then the personal representative is entitled to qualify and administer the estate, and the title to the property shall, in all respects, be as valid as if the will had been originally probated in such county.

The legislative intent was to provide a speedy, yet sound and practical method of admitting a will to probate in cases where the clerk is disqualified. This has been accomplished.

The amendment of 1935 effected only one change in this section. Prior to the amendment the opening statement read: "No clerk can act as such in relation to any estate or proceeding."

Clerk Interested.—The clerk is disqualified, both by common law rules and by this section, to act in any cause wherein he is interested. *Gregory v. Ellis*, 82 N. C. 225, 226; *Land Co. v. Jennett*, 128 N. C. 3, 37 S. E. 954; *White v. Connelly*, 105 N. C. 65, 72, 11 S. E. 177.

And probate of a deed by a clerk interested therein is a nullity. *Land Co. v. Jennett*, supra.

And where he is personally interested in the commissions to be allowed the executors, he is excluded from jurisdiction. *Barlow v. Norfleet*, 72 N. C. 535, 539.

Same—Judicial and Ministerial Acts.—The act of "admitting to probate" is a judicial act, and a clerk is prohibited from acting on a deed or deed of trust in which he is grantor or grantee. *White v. Connelly*, 105 N. C. 65, 69, 11 S. E. 177; *Freeman v. Person*, 106 N. C. 251, 10 S. E. 1037; *Piland v. Taylor*, 113 N. C. 2, 18 S. E. 70; *Norman v. Ausbon*, 193 N. C. 791, 138 S. E. 162.

But the issuing of a warrant in attachment, or an order for seizure of property in claim and delivery, are ministerial acts, and can be performed by a deputy, or even by the clerk, in a case to which he is a party. *White v. Connelly*, supra; *Evans v. Etheridge*, 96 N. C. 42, 1 S. E. 633.

Nor is a clerk incompetent to take acknowledgment of the execution of a deed because he is a subscribing witness to the document. He cannot take proof of a deed of which he is the subscribing witness, because he cannot administer oath to himself. *Trenwith v. Smallwood*, 111 N. C. 132, 134, 15 S. E. 1030.

And it has been the practice in this state for clerks to issue process either for or against themselves. *Evans v. Etheridge*, 96 N. C. 42, 1 S. E. 633.

Clerk Related to Party.—A clerk is prohibited from acting as such in relation to any estate or proceeding if he is so related to any person having, or claiming to have, such interest that he would by reason of such relationship be disqualified as a juror. *Land Co. v. Jennett*, 128 N. C. 3, 37 S. E. 954.

But probate and private examination taken before an officer are not invalid simply because he is related to the parties. *McAllister v. Purcell*, 124 N. C. 264, 32 S. E. 715.

§ 2-18. Prior orders and judgments validated.—In all cases where the Clerk was disqualified to act in relation to a civil action, in which the procedure as prescribed and set out by §§ 2-19, 2-20 and 2-21 was followed, all Orders and Judgments rendered in such civil actions by the Judge or other Clerk are hereby validated as fully and to the same extent as if this section had at such time been in force; Provided, this section shall not apply in such cases if an action has prior to March 20, 1935, been instituted attacking such Order or Judgment. (1935, c. 110, s. 3.)

§ 2-19. Waiver of disqualification.—The parties may waive the disqualification specified in subdivisions one, two, three and five of section 2-17 and upon filing in the office such waiver in writing, the clerk shall act as in other cases. (Rev., s. 903; Code, s. 105; C. C. P., s. 420; C. S. 940.)

Written Waiver.—The waiver must be in writing and made when the opposing parties are present and capable of objecting. *White v. Connelly*, 105 N. C. 65, 71, 11 S. E. 177.

Probate a Nullity.—When the probate of a deed is a nullity because the clerk was disqualified to act, the defect is not cured by the approval of the final decree, under which it

is made, by the judge of the superior court. *Land Co. v. Jennett*, 128 N. C. 3, 37 S. E. 954.

§ 2-20. Disqualification unwaived; cause removed or judge acts.—When any of the disqualifications specified in this chapter exist, and there is no waiver thereof, or when the disqualification does not permit of waiver, any party in interest may apply to the judge of the district or to the judge holding the courts of such district for an order to remove the proceedings to the clerk of the superior court of an adjoining county in the same district; or may apply to the judge to make and render either in vacation or term time all necessary orders and judgments in any proceeding where the clerk is disqualified, and the judge in such cases is hereby authorized and empowered to make and render any and all necessary orders and judgments as if he had the same original jurisdiction as the clerk over such proceeding. (Rev., s. 904; Code, s. 106; C. C. P., s. 421; 1913, c. 70, s. 1; C. S. 941.)

§ 2-21. Disqualification at time of election; judge acts.—In all cases where the clerk of the superior court is executor, administrator, collector or guardian of any estate at the time of his election to office, in order to enable him to settle such estate, the judge of the superior court mentioned in the preceding section is empowered to make such orders as may be necessary in the settlement of the estate; may audit the accounts or appoint a commissioner to audit the accounts of such executor or administrator, and report to either of said judges for his approval, and when the accounts are so approved, it is his duty to order the proper record to be made by the clerk, and the accounts to be filed in court. (Rev., s. 905; Code, s. 107; 1871-2, c. 197; C. S. 942.)

Action.—The proper practice, in a proceeding against an administrator who at the time was elected clerk, seems to be to make the summons returnable before him, and then, transfer the whole proceeding before the district judge, who will make the necessary orders in the premises. *Wilson v. Abrams*, 70 N. C. 324.

§ 2-22. Custody of records and property of office.—1. Receipt from Predecessor. — Immediately after he has given bond and qualified, the clerk shall receive from the late clerk of the superior court all the records, books, papers, moneys and property of his office, and give receipts for the same, and if any clerk refuses or fails within a reasonable time after demand to deliver such records, books, papers, moneys and property, he is liable on his official bond for the value thereof.

2. Transfer to Successor; Penalty.—Upon going out of office for any reason, any clerk of the superior, inferior, or criminal court shall transfer and deliver to his successor (or to such person, before his successor in office may be appointed, as the court may designate) all records, documents, papers, and money belonging to the office. And the judge appointing any clerk to a vacancy in the clerkship of the superior court may give to such person an order for the delivery to him, by the person having the custody thereof, of the records, documents, papers and moneys belonging to the office, and he shall deliver the same in obedience to such order. In case any clerk going out of office as aforesaid, or other person

having the custody of such records, documents, papers, and money as aforesaid, fails to transfer and deliver them as herein directed, he shall forfeit and pay to the state one thousand dollars, which shall be sued for by the prosecuting officer of that court. (Rev., ss. 906, 907; Code, ss. 81, 124; C. C. P., s. 142; R. C., c. 19, s. 14; C. S. 943.)

Cross Reference.—As to failure to deliver as a misdemeanor, see § 14-231.

Order and Demand.—A person, duly elected clerk of the superior court by the people, needs no order from any person or authority to demand from his predecessor the property of all kinds belonging to the office, nor is it necessary for a retiring superior court clerk to be ordered to pay over to his successor, whether elected or appointed, the funds, etc., of the officer. *Peebles v. Boone*, 116 N. C. 58, 21 S. E. 187.

But where the judge places some person temporarily in charge of the office until the regular appointment is made, it is then necessary for the new clerk to have an order from the judge, directing the person temporarily in charge, to deliver the possession of his office to such clerk. *Peebles v. Boone*, 116 N. C. 58, 21 S. E. 187.

Right of Action.—The right of clerk of a superior court to bring an action against his predecessor on the latter's official bond to recover the records, money, etc., in his hands, does not rest on any injury done to the plaintiff, but on the ground that the law requires that each successive clerk shall receive from his predecessor all the records, money and property of his office. *Peebles v. Boone*, 116 N. C. 58, 21 S. E. 187.

Remedy.—When an out-going clerk fails to deliver the property of his office, as herein provided, the successor's remedy is by attachment and suit for the penalty. *O'Leary v. Harrison*, 51 N. C. 338, 341.

When Liability Ceases.—When a former clerk delivers to his successors all the proceeds, etc., of his office, his official duties, powers, and liabilities cease. *Gregory v. Morisey*, 79 N. C. 559, 562.

§ 2-23. Unperformed duties of outgoing clerk.—1. Performance Secured. — When, upon the death or resignation, removal from office, or at the expiration of his term of office, any clerk has failed to discharge any of the duties of his office, the court, if practicable, shall cause the same to be performed by another person, who shall receive for such services, and as a compensation therefor, the fees allowed by law to the clerk.

2. Liability on Outgoing Clerk's Bond.—Such portion thereof as may be paid by the county may be recovered by the county, by suit on the official bond of the defaulting clerk, to be brought on the relation of the board of commissioners of the county. (Rev., s. 908; Code, s. 87; R. C., c. 19, s. 19; 1844, c. 5, s. 6; C. S. 944.)

Proceeding Recorded.—Where an outgoing clerk has failed to record a proceeding, the court has the power, and it is its duty, on the application of an interested party, to have such proceeding recorded as of its proper date. *Foster v. Woodfin*, 65 N. C. 29, 30.

§ 2-24. Location of and attendance at office.—The clerk shall have an office in the courthouse or other place provided by the board of commissioners, in the county town of his county. He shall give due attendance, in person or by deputy, at his office daily, Sundays and holidays excepted, from nine o'clock a. m. to three o'clock p. m., and longer when necessary for the dispatch of business; and personally every Monday for the transaction of probate business, and on each succeeding day till such matters are disposed of; and upon his failure to do so, unless caused by sickness or other urgent necessity or unless leave of absence is obtained by law, he shall forfeit an amount not exceeding two hundred dollars, said amount to be fixed and determined by the resident

judge of his district or the judge presiding in said district upon the complaint of any citizen. Provided, however, that the board of county commissioners of each county may fix by order to be entered on their records at what hours of each Saturday of each week, (in no event to be less than three hours nor more than nine hours on said day, holidays excepted) the clerk of the superior court of their respective counties shall attend at his office in person or by assistant or by deputy, and he or his assistant or deputy shall give his attendance accordingly. (Rev., s. 909; Code, ss. 80, 114, 115; C. C. P., s. 141; 1871-2, c. 136; 1939, c. 82; 1941, c. 329; C. S. 945.)

Local Modification.—Currituck, Moore, Richmond: 1939, c. 82, s. 3.

Editor's Note.—The 1939 amendment, which provides that it shall not apply to the counties of Currituck, Moore and Richmond, struck out the words "he shall forfeit his office" formerly appearing at the end of the second sentence and inserted in lieu thereof the present forfeiture provision. The amendment also added the proviso.

The 1941 amendment struck out the words "except in Cumberland county in no event to be less than six hours nor more than nine hours on said day, holidays excepted," formerly appearing in the parentheses in the proviso.

Forfeiture of Office.—A single failure on the part of a clerk to keep his office open on Monday from 9 a. m. to 4 p. m., for the transaction of probate business (unless such failure is caused by sickness), is a distinct and complete cause for forfeiture of his office. *People v. Heaton*, 77 N. C. 18.

Quo Warranto.—The forfeiture of office incurred by a superior court clerk as herein provided by failing to keep open his office on Monday, can only be enforced by proceedings in the nature of quo warranto. *State v. Norman*, 82 N. C. 687, 689; *People v. Heaton*, 77 N. C. 18, 20.

§ 2-25. Obtaining leave of absence from office.—Upon application of any clerk of the superior court to the judge of the superior court residing in the district in which the clerk resides, the judge of the superior court riding the district or judge of superior court presiding in the county of said clerk, showing good and sufficient reason for the clerk to absent himself from his office, the judge may issue an order allowing him to absent himself from his office for such time as the judge may deem proper. But he shall at all times leave a competent deputy in charge of his office during his absence. The order of the judge granting leave of absence shall be filed and recorded in the office of the clerk of the county in which the clerk resides. (Rev., s. 910; 1903, c. 467; 1935, c. 348; C. S. 946.)

Editor's Note.—The amendment of 1935 makes the section applicable when application is made by "the judge of the superior court riding the district or judge of superior court presiding in the county of said clerk."

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

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

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

Appeal from justice of the peace, fifty cents.

Appeal from the clerk to the judge, fifty cents.

Appeal to the supreme court, including certificate and seal, two dollars.

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

Apprenticing infant, including indenture, one dollar.

Attachment, order in, fifty cents.

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

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

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

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

Bond or undertaking, including justification, sixty cents.

Cancelling notice of lis pendens, twenty-five cents.

Capias, each defendant, one dollar.

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

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

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

Commission, issuing, seventy-five cents.

Continuance, thirty cents.

Docketing ex parte proceedings, fifty cents.

Docketing indictment, twenty-five cents.

Docketing liens, twenty-five cents.

Docketing judgment, twenty-five cents.

Docketing summons, twenty-five cents.

Execution and return thereon, including docketing, fifty cents; and certifying return to clerk of any county where judgment is docketed, twenty-five cents.

Filing all papers, ten cents for each case.

Guardian, appointment of, including taking bond and justification, one dollar.

Impaneling jury, ten cents.

Indexing judgment on cross-index book, ten cents for the judgment, regardless of number of parties.

Indexing liens on lien book, ten cents.

Indictment, each defendant in the bill, sixty cents.

Injunction, order for, including taking bond or undertaking and justification, one dollar.

Judgment, final, in term-time, civil action, one dollar.

Judgment, final, against each defendant, in criminal actions, one dollar.

Judgment, final, before the clerk, fifty cents.

Judgment by confession, without notice, all services, three dollars.

Judgment in favor of widow for year's support, fifty cents.

Judgment nisi, entering against a defaulting witness or juror, on bail bond or recognizance, twenty-five cents.

Juror ticket, including jurat, ten cents.

Justification of sureties on any bond or undertaking, except as otherwise provided, fifty cents.

Letters of administration, including bond and justification of sureties, one dollar.

Motions, entry and record of, twenty-five cents.

Notices, twenty-five cents, and for each name over one in same paper, ten cents additional.

Notifying solicitors of removal of guardian, one dollar.

Order enlarging time for pleading, and all interlocutory orders, in special proceedings and civil actions, twenty-five cents.

Order of arrest, one dollar.

Order for appearance of apprentice, on complaint of master, one dollar; for appearance of master on complaint of apprentice, one dollar.

Order for the registration of a deed or other writing, which has been proved or acknowledged in another county, or before a judge, justice, notary or other officer, except a chattel mortgage, twenty-five cents.

Postage, actual amount necessarily expended.

Presentment, each person presented, ten cents.

Probate of a deed or other writing, proved by a witness, including the certificate, twenty-five cents.

Probate of a deed or other writing, acknowledged by the signers or makers, including all except married women, who acknowledged at the same time, with the certificate thereof, twenty-five cents.

Probate of a deed, or other writing, executed by a married woman, for her acknowledgment and private examination, with the certificate thereof, twenty-five cents.

Probate of limited partnership, fifty cents.

Probate of will in common form and letters testamentary, one dollar.

Qualifying justice of the peace, to be paid by the justice, twenty-five cents.

Qualifying members of the board of commissioners, to be paid by the commissioners, twenty-five cents.

Recognizance, each party where no bond is taken, twenty-five cents.

Recording and copying papers, per copy-sheet, ten cents.

Recording appointment of process agent for nonresident, fifty cents.

Recording names, qualification, and expiration of term of office of justices of the peace, five cents for each name.

Registering trained nurses, including certificate of registration, fifty cents.

Recording certificates of incorporation of corporations, three dollars.

Recording names of jurors as required by law, five cents for each name.

Resignation of guardian, relinquishment of right to administer, or to qualify as executor, receiving, filing and noting same, twenty-five cents.

Seal of office, when necessary, twenty-five cents.

Subpoena, each name, fifteen cents.

Summons, in civil actions or special proceedings, including all the names therein, one dollar, and for every copy thereof, twenty-five cents.

Transcript of judgment, twenty-five cents.

Transcript of any matter of record or papers on file, per copy-sheet, ten cents.

Trial of any cause, or stating an account, as referee, pursuant to order of the judge, such allowance as the judge may make.

Witness ticket, including jurat, ten cents.

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

Provided, that in such counties of the State where the clerk of superior court is now or may hereafter be paid a salary in lieu of fees, that such clerk of superior court shall not charge and collect a fee for juror ticket, including jurat, or witness ticket, including jurat, as herein prescribed. (Rev., s. 2773; Code, ss. 229, 1789, 3109, 3739; 1885, c. 199; 1893, c. 52, s. 4; 1897, c. 68; 1899, c. 17, s. 2; 1899, c. 247, s. 3; 1899, cc. 578, 261; 1901, c. 121; 1901, c. 614, s. 3; 1903, c. 359, s. 6; 1905, c. 360, s. 3; 1917, c. 198, s. 6; 1919, c. 329; 1927, c. 247; 1929, cc. 45, 214; 1933, c. 91; C. S. 3903.)

Local Modification.—Carteret: 1943, c. 697; Franklin: 1927, c. 137; Harnett: 1933, c. 75; Johnston: 1943, c. 653; Northampton: 1931, c. 11; Wilson: 1935, c. 241.

Cross References.—As to compensation and liability of clerk in setting an estate, see § 28-171. As to fees of clerk for recording certificate of incorporation, see § 55-159. As to costs of appeal generally, see § 6-33 and annotations. As to costs of transcript on appeal taxed in supreme court, see § 6-34. As to costs of appeal from justices of the peace, see § 6-35. As to new provision relating to fees for docketing judgments and for auditing accounts, not applicable in certain counties, see §§ 2-32 to 2-35.

Editor's Note.—The 1927 amendment added the proviso to this section. That act provided that it should not apply to Chatham County; however, by Public Laws of 1929, c. 214, the 1927 act was amended to make it applicable to Chatham County. Public Laws 1933, c. 91, repealed the provision of Public Laws 1929, c. 45, which provided for fees in Halifax County.

Appeal from Justices of the Peace.—When a defendant is bound over to the superior court by a justice of the peace, the clerk of the superior court is not entitled to the fee of 50 cents allowed for appeal from justice of the peace. *Guilford v. Commissioners*, 120 N. C. 23, 27 S. E. 94.

The fee taxable for "appeal and docketing in Supreme Court" is two dollars only. *State v. Simmons*, 120 N. C. 19, 26 S. E. 649.

Appeal.—An appeal lies to this court from the erroneous taxation of items in bill of costs in the superior court. *State v. Simmons*, 120 N. C. 19, 26 S. E. 649.

The fees for continuances of cases allowed to the clerk of the superior court must be for such continuance as is made by the judge upon motion, and such as must be recorded in the minutes of the clerk, and not those affected by a crowded docket or the inability for that reason of reaching the cause for trial. *Luther v. Southern R. Co.*, 154 N. C. 103, 69 S. E. 762.

Motion for Judgment.—The fee of twenty-five cents for motion for judgment can only be taxed when the motion is a motion in the cause, in writing, and required to be recorded. *State v. Simmons*, 120 N. C. 19, 26 S. E. 649.

Filing Papers.—The fee of 10 cents allowed the clerk of the superior court for "filing papers," is for filing all the papers in an action after final judgment, and not for filing each paper in a case. *Guilford v. Commissioners*, 120 N. C. 23, 27 S. E. 94.

Transcript on Appeal When Fees Unpaid.—The clerk of

the court below is entitled to receive his fees before being required to send up a transcript on appeal, and therefore a writ of certiorari will be refused where it appears from the affidavit of the clerk that the transcript was not sent up because the appellant failed, after repeated demands, to pay the fees, and in his reply to the answer setting forth the clerk's affidavit the petitioner did not tender the fees. *Saunders v. Thompson*, 114 N. C. 282, 19 S. E. 225.

Same—When Incomplete.—Where the clerk of the superior court fails to send up as a part of the transcript the drawing and swearing in of the grand jury who found the indictment, he will not be allowed his costs for making and sending up the transcript of the record. *State v. Cameron*, 122 N. C. 1074, 29 S. E. 418.

Settlement of Estate.—Where the clerk of the court was appointed a commissioner of the courts to sell certain lands and invest the proceeds, etc., and it appearing that he had rendered services of value, with no indication of conversion, misapplication, or commingling of funds, it was held that he was entitled to his commissions in the settlement of the estate. *Hannah v. Hyatt*, 170 N. C. 634, 87 S. E. 517.

Section 6-36 a Proviso.—The true construction of this section regulating the fees of clerks, is had by reading as a proviso at the end thereof section 6-36. *Coward v. Commissioners*, 137 N. C. 299, 301, 49 S. E. 207.

Recording in the Minute Docket.—The clerk of the superior court is not entitled to a specific fee for recording the proceedings of a cause in the minute docket of the court. *Guilford v. Commissioners*, 120 N. C. 23, 27 S. E. 94.

Clerk's Allowance for Stating Account Disallowed.—Where the plaintiff recovered judgment in the court below and it was ordered that an allowance be made to the clerk for stating an account, one-half to be paid by the plaintiffs and the other half by the defendants it was held to be error. *Wall v. Covington*, 76 N. C. 150.

Nolle Prosequi.—The clerk of the court is not entitled to any fee for entering a judgment of nolle prosequi in a criminal action. *State v. Johnson*, 101 N. C. 711, 8 S. E. 360.

When Judgment Is against State or County.—Costs are not allowed for docketing, filing and indexing a judgment against the State or county, since no lien can be acquired by such docketing. *State v. Simmons*, 120 N. C. 19, 26 S. E. 649.

The State and county are liable for costs only in the cases expressly provided by statute. *Guilford v. Commissioners*, 120 N. C. 23, 27 S. E. 94.

A county cannot be taxed, under section 6-36 with any part of the fees of the clerk or other officers in criminal actions if the grand jury returns "not a true bill." *Guilford v. Commissioners*, 120 N. C. 23, 27 S. E. 94.

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

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

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

In Forsyth county the clerk shall receive fifteen cents for the probate of a deed or other writing, acknowledged by the signers or makers, including all except married women who ac-

knowledge at the same time, with the certificate thereof. He shall also receive fifteen cents for the probate of a deed or other writing, proved by a witness, including the certificate. (P. L. 1913, c. 626; C. S. 3904.)

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

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

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

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

Local Modification.—Harnett: 1933, c. 75; Johnston: 1943, c. 653.

Editor's Note.—Public Laws 1933, c. 84, amended by Public Laws 1939, c. 300, s. 2, inserted Scotland in the list of counties appearing in the first paragraph.

§ 2-28. Fees for probating and recording federal crop liens and chattel mortgages.—The fee to be charged by the clerk of the superior court for the probate of a federal crop lien or a federal chattel mortgage given to secure a seed and fertilizer loan from the United States government, or crop production loans, live stock loans, and/or other loans made by the regional agriculture credit corporation of Raleigh, North Carolina and/or production credit associations in North Carolina as provided for by the Farm Credit Act of Congress of one thousand nine hundred and thirty-three, or the North Carolina Rural Rehabilitation Corporation or other relief organizations by relief clients, shall be limited to twenty-five cents for each probate; and the fee of the register of deeds for registering said instrument shall be limited to fifty cents for each lien or chattel mortgage: Provided that this section shall not apply to Brunswick, Caswell, Harnett, Haywood, Hertford, Macon, Moore, Person, Polk, Richmond, Stokes, Surry and Wilson counties. (1933, cc. 160, 176, 266, 281, 326, 393, 429, 479, 514; 1935, cc. 120, 260, 369; 1939, c. 211.)

Local Modification.—Gates, Jones, Moore, Perquimans, Richmond, Rowan, Wilson: 1935, c. 120, s. 2; Stanly: 1935, c. 260; Wilson: 1935, c. 388.

Editor's Note.—This section was originally enacted by Public Laws 1933, c. 160. Public Laws 1933, c. 176 struck Caswell from the list of counties exempted from the operation of this act. Public Laws 1933, c. 266 added the material beginning with "or crop" in line six, and ending with "Raleigh, North Carolina" in line eight. Public Laws 1933, c. 281 inserted the counties of Haywood, Jackson, and Macon in the list of counties exempted from the operation of this act. Public Laws 1933, c. 326 inserted Brunswick in the list of counties exempted from the operation of this section. Public Laws 1933, c. 393 added the counties of Harnett, Johnston, Polk, Moore, and Wilson to the list of counties exempted from the operation of this section. Public Laws 1933, c. 429 added Stokes to the list of counties exempted from the operation of this section. Public Laws 1933, c. 479 added Caswell, Hertford, and Person counties

to the list of counties exempted from the operation of this act. Public Laws 1933, c. 514 added Surry to the list of counties exempted from the operation of this section. Public Laws 1935, c. 120 added the material beginning with "and/or production" in line nine and ending with "relief clients" in line 14. Section two of this act provided that it should not apply to the counties of Rowan, Gates, Jones, Moore, Perquimans, Richmond, and Wilson. Public Laws 1935, c. 260 added Stanley to the list of counties exempted from the operation of Public Laws 1935, c. 120. Public Laws 1935, c. 369 struck Johnston county from the list of counties exempted from the operation of this act. Public Laws 1939, c. 211 struck Jackson from the list of counties exempted from the operation of this act.

§ 2-29. Advance court costs.—The clerk of the superior court is hereby authorized to collect as advance court cost on all suits started in any court the sum of seven dollars and fifty cents (\$7.50) for one defendant, and one dollar and a half for each additional defendant, which fees shall include any process tax or tax on suits and sheriff fees. (1935, c. 379, s. 2.)

Local Modification.—Catawba: 1939, c. 62.

§ 2-30. Advance costs on appeal from justice of the peace.—The clerk of the superior court is authorized to collect from the appellant in all cases in appeals from justices of the peace court to the superior court four dollars as advance cost to be applied on the court cost including the process tax. (1935, c. 379, s. 1.)

§ 2-31. Fee for cross-indexing names of parties.—The fee for cross-indexing the name of each party to any action or proceeding required to be cross-indexed by law shall be ten cents for each name entered upon the cross-index records. (1935, c. 379, s. 3.)

§ 2-32. Fee for docketing judgment.—The fee for docketing any judgment shall be ten cents per copy sheet, minimum charge twenty-five cents. (1935, c. 379, s. 4.)

§ 2-33. Fee for auditing annual accounts of receivers, executors, etc.—For auditing annual accounts of receivers, executors, guardians, administrators, administrators with will annexed, trustees for incompetents, trustees under wills, surviving partner, where the total receipts and disbursements do not exceed eleven thousand dollars, the fee shall be twenty-five cents for each one hundred dollars on receipts and disbursements or a fraction thereof through one thousand dollars. If the receipts and disbursements exceed one thousand dollars, the fee shall be for the receipts and disbursements above one thousand dollars five cents on each one hundred dollars or a fraction thereof through eleven thousand dollars. When the receipts and disbursements exceed eleven thousand dollars, the fee for the amount of same above eleven thousand dollars shall be one-tenth of one per cent on the amount of receipts and disbursements in excess of eleven thousand dollars, but in no event shall the fee be less than one dollar nor more than twenty-five dollars. (1935, c. 379, s. 5.)

§ 2-34. Fee for auditing final accounts of receivers, executors, etc.—For auditing final accounts of receivers, executors, administrators, administrators with will annexed, collectors, trustees for incompetents, trustees under wills, guardians or surviving partner, the fee shall be fifty cents for each one hundred dollars or a fraction thereof of the total receipts and disbursements through

one thousand dollars, and ten cents per each one hundred dollars or a fraction thereof on everything above one thousand dollars, but in no event shall the fee be less than two dollars: Provided, that when stocks, bonds or any other personal property is delivered to any heir or distributee without converting the same into cash, these fees shall be computed and charged on the same just as though they had been converted into cash; the value of said stocks, bonds, etc., to be fixed as of the date of death, or qualification of the fiduciary. (1935, c. 379, s. 6.)

Local Modification.—Beaufort: 1939, c. 103.

§ 2-35. Fee for auditing final accounts of trustees, etc., selling real estate under foreclosure proceedings.—For auditing final accounts of trustees, mortgagees, commissioners, or other persons, firms, or corporations selling real estate under foreclosure proceeding required to render such final report, the fee shall be twenty-five cents on each one hundred dollars of receipts and disbursements through one thousand dollars and ten cents on each one hundred dollars for everything above one thousand dollars, provided that the minimum fee shall be one dollar and fifty cents and the maximum fee shall not exceed twenty-five dollars. (1935, c. 379, s. 7.)

§ 2-36. Certain counties not subject to sections 2-29—2-35.—Sections 2-29—2-35 shall not apply to the counties of: Cabarrus, Chowan, Cleveland, Columbus, Franklin, Iredell, Lincoln, Martin, Mecklenburg, Montgomery, Moore, New Hanover, Pitt, Richmond, Robeson, Rockingham, Surry, Union, Jackson, Swain, Buncombe, Rowan, Orange, Avery, Wayne, Nash, Wilson, Bladen, Cumberland, Ashe, Edgecombe, Tyrrell, Person, Duplin, Vance, Davie, Guilford, Onslow, Washington, Alleghany, Haywood, Davidson, Burke, Stokes, Franklin, Catawba, Lenoir, Jones, Pamlico, Caldwell, Caswell. Provided, that section 2-29 shall apply to Iredell county. (1935, c. 379, s. 8; 1935, c. 494; 1937, cc. 148, 149, 290.)

Editor's Note.—The 1937 amendments struck out Bertie and Yancey from the list of counties in this section, and added the proviso as to Iredell county.

§ 2-37. To keep fee bill posted.—Every clerk shall keep posted in his office in some conspicuous place the fee bill, for public inspection and reference, under a penalty of one hundred dollars for such neglect, to be paid to any person who will sue for same. (Rev., s. 2774; Code, s. 3740; C. S. 947.)

§ 2-38. To furnish blank process, bonds and undertakings.—Clerks of courts shall furnish to parties printed copies of the formal parts of all process required to be issued by them, with convenient blank spaces for the insertion of written matter; and also the blank forms of such bonds and undertakings as are required to be taken by them. (Rev., s. 911; Code, s. 3761; C. C. P., s. 559; 1868-9, c. 279, s. 558; C. S. 948.)

§ 2-39. To file papers in proceedings.—The clerk must file and preserve all papers in proceedings before him, or belonging to the court; and shall keep the papers in each action in a separate roll or bundle, and at its termination attach them together, properly labeled, and file them in the order of the date of the final judgment. All

such papers and the books kept by him belong to, and appertain to, his office, and must be delivered to his successor. (Rev., s. 912; Code, ss. 86, 111; C. C. P., ss. 146, 426; C. S. 949.)

Cross Reference.—As to custody and transfer to successor, see § 2-22.

Filing Papers.—The fee allowed the clerk for "filing papers," is allowed for the single act of filing all the papers when the case is closed, as herein provided. *Guilford v. Commissioners*, 120 N. C. 23, 27 S. E. 94.

§ 2-40. To keep records of his office; obtaining originals or copies.—He shall keep in bound volumes a complete and faithful record of all his official acts, and give copies thereof to all persons desiring them, on payment of the legal fees. He shall be answerable for all records belonging to his office, and all papers filed in the court, and they shall not be taken from his custody, unless by special order of the court, or on the written consent of the attorneys of record of all the parties; but parties may at all times have copies upon paying the clerk therefor. (Rev., s. 913; Code, s. 82; C. C. P., s. 143; 1868-9, c. 159, s. 4; C. S. 950.)

Clerk's Record.—Clerks are required to keep a record, in which shall be recorded all orders and decrees passed in their office, which they are required to make in writing. *Gulley v. Macy*, 81 N. C. 356, 359.

§ 2-41. To endorse date of issuance on process.—The clerk shall note on all precepts, process and executions the day on which the same shall be issued; and the sheriff or other officer receiving the same for execution shall in like manner note thereon the day on which he shall have received it, and the day of the execution; and every clerk, sheriff or other officer neglecting so to do shall forfeit and pay one hundred dollars. (Rev., s. 914; Code, s. 100; C. S. 951.)

Cross Reference.—As to who may sue for and recover penalties, see § 1-58.

Action in Name of State.—An action brought against a sheriff, for the penalty herein provided for neglecting to note upon process the day on which it was received, should be in the name of the state as plaintiff. *Duncan v. Philpot*, 64 N. C. 479, 480.

Final Process.—This section has no reference to the final process. *Wyche v. Newsom*, 87 N. C. 144, 145. See also, *Person v. Newsom*, 87 N. C. 142.

§ 2-42. To keep books; enumeration.—Each clerk shall keep the following books, which shall be open to the inspection of the public during regular office hours:

1. Summons docket, which shall contain a docket of all writs, summonses or other original process issued by him, or returned to his office, which are made returnable to a regular term of the superior court; this docket shall contain a brief note of every proceeding whatever in each action, up to the final judgment inclusive.

2. Judgment docket, which shall contain a note of the substance of every judgment and every proceeding subsequent thereto.

3. Civil issue docket, which shall contain a docket of all issues of fact joined upon the pleadings, and of all other matters for hearing before the judge at a regular term of the court, a copy of which shall be furnished to the judge at the commencement of each term.

4. Cross-index to judgments, which shall contain a direct and reverse alphabetical index of all final judgments in civil actions rendered in the court, with the dates and numbers thereof, and

also of all final judgments rendered in other courts and authorized by law to be entered on his judgment docket. Pending the docketing of judgments in the judgment docket and cross-indexing the same as herein provided for, the clerk shall keep a temporary index to all judgments entered in his said court or received in his court from any court for docketing; and he shall immediately index all judgments rendered in his court or received in his court for docketing, and index the names of all parties against whom judgments have been rendered or entered alphabetically in said temporary index, and which temporary index shall be preserved and open to the public until said judgments shall have been docketed in the judgment docket and cross-indexed in the permanent cross-index to judgments, as herein provided for.

5. Cross-index of Parties to Actions.—The clerk shall keep an alphabetical index and cross-index of all parties to all actions and special proceedings. Upon the issuance of summons or commencement of an ex parte proceeding he shall forthwith index and cross-index the names of all parties to such action or proceeding. When an order is made that any new or additional party be brought into an action or proceeding his name shall forthwith be indexed and cross-indexed by the clerk. The index shall be so arranged that beside each name shall appear a reference to the book and page whereon the action or proceeding will be found upon the summons docket, civil issue docket, special proceeding docket, and judgment docket, or such of said dockets as carry reference to said action or proceeding; and immediately upon said action or proceeding being entered upon any of said dockets the clerk shall cause said index to carry reference thereto upon the index and cross-index as to every party.

6. Record of lis pendens, which shall contain the names of the parties to the action, place where such notice, whether formal or in the pleadings, is filed, the object of the action, the date of indexing, and a sufficient description of the land to be affected, and which shall be cross-indexed.

7. Criminal docket, which shall contain a note of every proceeding in each criminal action.

8. Minute docket of superior court, which shall contain a record of all proceedings had in the court during term, in the order in which they occur, and such other entries as the judge may direct to be made therein.

9. Special proceedings docket, which shall contain a docket of all writs, summonses, petitions, or other original process issued by him, or returnable to his office, and not returnable to a regular term; this docket shall contain a brief note of every proceeding, up to the final judgment inclusive.

10. Minute docket of proceedings before clerk, which shall contain a record of all proceedings had before the clerk, in actions or proceedings not returnable to a regular term of the court.

11. Record of wills, which shall contain a record of all wills, with the certificate of probate thereof.

12. Record of appointments, which shall contain a record of appointments of executors, administrators, guardians, and collectors, with rev-

ocations of all such appointments; and on which shall be noted all subsequent proceedings relating thereto.

13. Record of orders and decrees, which shall contain a record of all orders and decrees passed in his office, which he is required to make in writing, and not required to be recorded in some other book.

14. Record of accounts, which shall contain a record of accounts, in which must be recorded inventories and annual accounts of executors, administrators, collectors, trustees under assignments for creditors, and guardians, as audited by him from time to time.

15. Record of settlements, which shall contain a record of settlements, in which must be entered the final settlements of executors, administrators, collectors, commissioners, trustees under assignments for creditors, and guardians.

16. Record of jurors, which shall contain a list of all persons who serve as grand, petit, and tales jurors in his court; which shall be properly indexed.

17. Record of justices of the peace, which shall contain a complete list of the justices of the peace of the county, by townships, giving the date of election or appointment, qualification, and expiration of term of office of each; and whenever a vacancy occurs it shall be noted therein. These books shall at all times show a complete list of the justices of the peace of the county and who was the predecessor of each justice and the succession in office.

18. Record of books, which shall contain the date of delivery to each justice of the peace of any dockets, records, and books; and the date of the receipt by him to any justice of the peace, or to the personal representative of a deceased justice of the peace, for any dockets, records, and books returned to him.

19. Cross-index of wills, which shall contain a general alphabetical cross-index of all wills filed or recorded in the office of the clerk of the superior court, and devising real estate or any interest therein, whether such devise appears on the face of said will or not, showing the full name of each deviser, and all devisees as they are given in the will, together with the date of the probate of such will.

20. Cross-index of executors and administrators, which shall contain a general alphabetical cross-index of the appointment of all executors and administrators made by the courts of their county, showing the name of the appointee, the name of the decedent, and date of appointment.

21. Cross-index of guardians, which shall contain a general alphabetical cross-index of the appointment of all guardians made by the courts of their county, showing the name of the guardian, the names of the wards, and date of appointment.

22. Record of fines and penalties, which shall contain an itemized and detailed statement of the respective amounts received by him in the way of fines, penalties and forfeitures, and paid over to the county treasurer.

23. Lien docket, which shall contain a record of all notices of liens filed in his office, properly indexed, showing the names of the lienor and lienee.

24. Record of appointment of receivers, which

shall contain a record of all appointments of receivers, and all inventories, reports, and accounts filed by them; which shall be properly indexed.

25. Record of corporations, which shall contain a record of the certificate of incorporation of all corporations chartered under general law, with principal office or place of business in his county.

26. Accounts of indigent orphans, which shall contain a record of all receipts from persons for money paid for indigent children.

27. Register of physicians and surgeons, which shall contain a list of the names and places of residence, with date of registration, of all persons registered by him as physicians and surgeons.

28. Register of dentists, which shall contain a registration of certificates of all persons entitled to practice dentistry in his county.

29. Register of chiropodists, which shall contain a list of the names and places of residence, with date of certificate, of all persons registered by him as chiropodists.

30. Register of trained nurses, which shall contain the name, residence and date of registration of all trained nurses duly licensed in his county.

31. Permanent roll of registered voters, which shall contain an alphabetical list by townships of all persons entitled to permanent registration, giving the name and age of each, the name of the person from whom he was descended, unless he himself was a voter on July 1, 1867, or prior thereto, the state in which he was such voter and the date he applied for registration.

32. Lunacy docket, which shall contain a record of all the examinations of persons alleged to be insane, a brief summary of the proceedings, and his findings, and a record of all proceedings in lunacy transmitted to him by justices of the peace.

33. Record of county treasurer's report, which shall contain an itemized statement of all fines and penalties paid to the county treasurer; which said itemized statement of fines and penalties received by the county treasurer shall be by him reported to the clerk on the first day of January, April, July and October, respectively, of each and every year.

34. Nol. pros. with leave record, which shall contain a record of all cases in which a nolle prosequi with leave is entered in criminal actions, with the term of court at which the order is made, and which shall be cross-indexed.

35. Record of permits to purchase weapons, which shall contain the name, date, place of residence, age, former place of residence, etc., of each person, firm or corporation to whom or which a permit is issued to purchase deadly weapons. (Rev., s. 915; Code, ss. 83, 95, 96, 97, 112, 1789; 1887, c. 178, s. 2; 1889, c. 181, s. 4; 1893, c. 52; 1899, c. 1, s. 17; 1899, cc. 82, 110; 1901, c. 2, s. 9; 1901, c. 89, s. 13; 1901, c. 550, s. 3; 1903, c. 51; 1903, c. 359, s. 6; 1905, c. 360, s. 2; 1919, c. 78, s. 7; 1919, cc. 152, 314; 1919, c. 197, s. 4; 1937, c. 93; C. S. 952.)

Local Modification.—Caldwell: Pub. Loc. 1927, c. 43; Durham: 1929, c. 88.

Cross Reference.—For provisions similar to paragraph 35, see § 14-405.

Editor's Note.—The 1937 amendment added the second sentence of subsection 4.

By virtue of the amendment, searchers of real property titles may examine the temporary index of judgments and

ascertain in advance whether or not judgments have been rendered which, when docketed will affect the title to the realty in which their clients are interested. The new law will thus tend to facilitate real estate loans and transfers. 15 N. C. L. Rev., p. 337.

Purpose.—The clerk's proceedings are summary in their nature, and should always be put in such shape as to present all that he does in the course of a proceeding, including his orders and judgments, intelligently, and so that the same may be distinctly seen and understood. To this end, he is required to keep certain permanent records of proceedings before him. *Edwards v. Cobb*, 95 N. C. 4, 8.

Notice of Judgment Docket.—The law prescribes what shall be recorded on the judgment docket, and everybody has notice that he may find there whatever ought to be there recorded, if indeed it exists. He is not required to look elsewhere for such matters. But he is required and bound to take notice in proper connections of what is there. The law charges him with such notice. *Dewey v. Sugg*, 109 N. C. 328, 333, 13 S. E. 923; *Holman v. Miller*, 103 N. C. 118, 120, 9 S. E. 429.

Civil Issue Docket.—Not only issues of fact joined upon the pleadings, but also all other matters for hearing before the judge at a regular term of the court are to be put upon the civil issue docket. *Brown v. Rhinehart*, 112 N. C. 772, 776, 16 S. E. 840. See also, *Brittain v. Mull*, 91 N. C. 498; *Walton v. McKesson*, 101 N. C. 428, 7 S. E. 566.

Minute Docket.—The minute docket is intended to and should contain a record of all the proceedings of the court, and such other entries as the judge may direct to be therein made. *Walton v. McKesson*, 101 N. C. 428, 7 S. E. 566; *Guilford v. Commissioners*, 120 N. C. 23, 28, 27 S. E. 94.

When Minute Docket Prevails.—While in the absence of entries on the minute docket those made on the civil issue docket should not be disregarded, yet where there is a conflict between them, nothing else appearing, those on the former must prevail. *Walton v. McKesson*, 101 N. C. 428, 7 S. E. 566.

Record of Fiats.—Clerks are required to record in general order books copies of all fiats made by them. *Perry v. Bragg*, 111 N. C. 159, 164, 16 S. E. 10.

Evidence of Appointment.—The record of appointments is admissible as evidence to show a guardian's appointment. *Topping v. Windley*, 99 N. C. 4, 5 S. E. 14.

Sufficient Notice of Lien.—A notice of a lien filed on the lien docket should go into details sufficiently so as to give reasonable notice to all persons of the character of the claim and the property upon which the lien is attached. *Fulp v. Power Co.*, 157 N. C. 157, 160, 72 S. E. 867. See also *Cook v. Cobb*, 101 N. C. 68, 70, 7 S. E. 700; *Cameron v. Lumber Co.*, 118 N. C. 266, 24 S. E. 7.

Treasurer's Report as Evidence.—The record of county treasurer's report is competent evidence against the sureties upon the official bond of such officer, and is prima facie evidence of the correctness of statements therein made. *Davenport v. McKee*, 98 N. C. 500, 4 S. E. 545.

Recording of Verified Report Purports Verity.—Plaintiff, purchaser of the real property at execution sale of a judgment against the devisee, offered in evidence, as proof of payment and that title had vested in the devisee, a special report, duly verified, filed by the executrix stating that the devisee had paid the estate the amount stipulated by the will. This special, verified report of the executrix was a document authorized and required to be recorded, was relevant to the issue, and was competent in evidence, its recording purporting verity and objection to its admission on the ground of hearsay in that it contained a declaration of a person not a party to the action is untenable, the recorded, verified report being more than a mere declaration by the executrix. *Braddy v. Pfaff*, 210 N. C. 248, 186 S. E. 340.

Cited in *State v. Willis Barber, etc., Shop*, 219 N. C. 709, 15 S. E. (2d) 4; *Massachusetts Bonding, etc., Co. v. Knox*, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438 (dis. op.).

§ 2-43. To notify commissioners of insolvency of surety company in which county officer bonded.—Every clerk of the superior court shall furnish the chairman of the board of county commissioners with all notifications furnished him, in accordance with § 58-117 under the article Fidelity Insurance of the Chapter Insurance, by the insurance commissioner, that any surety company in which any officer of the county is bonded is insolvent or in imminent danger of insolvency. (Rev., 295; C. S. 953.)

Cross Reference.—See also, § 109-18.

Art. 5. Reports.

§ 2-44. List of justices to secretary of state.—The clerk of the superior court of each county in which justices of the peace are not elected by the qualified voters thereof on the first Monday in January preceding each regular session of the general assembly shall certify to the secretary of state a correct list of all justices of the peace in office in his county, the township in which each resides, the term of office of each, time of election or appointment, and when the respective terms of office of each expire. He shall also report the names of those elected or appointed justices of the peace, but who have failed to qualify, and when their terms of office began and the length thereof. (Rev., s. 916; Code, s. 89; 1901, c. 37, s. 2; 1881, c. 326; C. S. 954.)

§ 2-45. List of attorneys-at-law to commissioner of revenue.—It shall be the duty of the Clerk of the Superior Court in each county of the State on or before the first day of May of each year to certify to the Commissioner of Revenue of the State of North Carolina the names and addresses of all Attorneys-at-Law located within the county and engaged in the practice of law. (1931, c. 290.)

Art. 6. Money in Hand; Investments.

§ 2-46. Public funds to be reported to county commissioners.—On the first Monday in December of each and every year, or oftener, if required by order of the board of commissioners or any other lawful authority upon ten days' written notice, clerks of the superior courts shall make an annual report of all public funds which may be in their hands. The report shall be made to the board of county commissioners and addressed to the chairman thereof. It shall give an itemized statement of said funds so held, the date and source from which they were received, the person to whom due, how invested and where, in whose name deposited, the date of any certificate of deposit, the rate of interest the same is drawing, and other evidence of investment of said fund; and it shall include a statement of all funds in their hands by virtue or color of their office, and which may belong to persons or corporations. The report shall be subscribed and verified by the oath of the party making it before any person allowed to administer oaths. (Rev., s. 918; 1891, c. 580; 1931, c. 156; C. S. 956.)

Local Modification.—*Bertie*: Pub. Loc. 1941, c. 39; *Carteret*: 1941, c. 316; *Forsyth*: 1941, c. 109; *Greene*: 1943, c. 146; *Rockingham*: 1943, c. 378; *Union*: 1941, c. 316; *Wake*: 1943, c. 523; *Wayne*: 1939, c. 92.

Editor's Note.—The Act of 1931 inserted the words: "upon ten days' written notice" in the first sentence of this section. For construction of "color of his office," see § 2-3 and annotations.

Method of Procedure.—Where a clerk has admitted money to be due in the manner prescribed by this section, he can only be proceeded against on motion for a summary judgment for money that has remained in his hands for three years. *Summey v. Johnston*, 60 N. C. 98.

Prima Facie Case of Correctness.—This section raises a prima facie case of the correctness of the annual report of the clerk only when the statute is substantially complied with. *Gilmore v. Walker*, 195 N. C. 460, 142 S. E. 579.

§ 2-47. Approval, registration, and publication of report.—The board of commissioners shall refer all itemized statements made by the clerks of

the superior courts to a special committee of their board, who shall compare the same with the records of the clerk's office from which the report is made and certify the same to the board as correct, and if approved the board shall cause the same to be registered in the office of the register of deeds, in a book to be furnished to said register by the board of county commissioners, which book shall be styled Record of Official Reports, with a proper index of all reports recorded therein, and each original report shall, if approved by the chairman of the board, be endorsed with the word "Approved," the date of approval and the endorsement signed by the chairman, and when recorded by the register of deeds he shall endorse thereon the date of registration, the page of the Record of Official Reports upon which the same is registered, sign the same and file it in his office. The register shall also cause a copy of the report to be published one time in some newspaper of general circulation published in the county of the register and also posted at the courthouse door within twenty days after filing the reports; and if no newspaper is published in the county the posting of the report at the courthouse door shall be a sufficient publication. The cost of publishing the report shall be paid by the county. (Rev., s. 919; Code, s. 90; 1891, c. 580, s. 3; 1893, c. 14, s. 3; 1874-5, c. 151; 1876-7, c. 276; C. S. 957.)

Cited in *Gilmore v. Walker*, 195 N. C. 460, 142 S. E. 579.

§ 2-48. Report compelled by commissioners.—If any clerk fails to report, or if after a report has been made the board of county commissioners have reason to believe that any report is incorrect, the board shall take legal steps to compel a proper report to be made by suit on the bond of such clerk, or by reporting the fact to the solicitor of the district to which the county of said board may belong for his action. (Rev., s. 920; Code, s. 92; 1891, c. 580, s. 2; 1874-5, c. 151, s. 3; 1876-7, c. 276; C. S. 958.)

§ 2-49. Payment to persons entitled.—The said clerks shall, on or before the first day of January in every year after the statements required in the foregoing sections are made, account with and pay to the persons entitled to receive the same all such balances reported as aforesaid to be in their hands. (Rev., s. 921; Code, s. 1865; R. C., c. 73, s. 2; 1823, c. 1186, s. 2; 1831, c. 3, ss. 1, 3; 1893, c. 14, s. 1; C. S. 959.)

Account.—"Account" means a statement in writing of debts and credits, or of receipts and payments, and when payments or settlement is intended, additional words are used. *State v. Dunn*, 134 N. C. 663, 668, 46 S. E. 949.

§ 2-50. Unclaimed fees of jurors and witnesses paid to school fund.—All moneys due jurors and witnesses which remain in the hands of any clerk of the superior court on the first day of January after the publication of a third annual report of the said clerk showing the same shall be turned over to the county treasurer for the use of the school fund of the county, and it is the duty of said clerk to indicate in his report any moneys so held by him for a period embracing the two annual reports. (Rev., s. 922; 1891, c. 580, s. 4; 1893, c. 14, s. 3; C. S. 960.)

Local Modification.—Wayne: 1941, c. 70.

Cross Reference.—See also, § 115-183.

§ 2-51. Use by public until claimed.—The money aforesaid, while held by the clerks, shall be paid, on application, to the person entitled thereto; and after it ceases to be so held, it may be used as other revenue, subject, however, to the claim of the rightful owner. (Rev., s. 923; Code, s. 1869; R. C., c. 73, s. 6; 1828, c. 41, s. 1; C. S. 961.)

Cross Reference.—See also, § 115-184.

§ 2-52. Payment of sum due minor insurance beneficiary.—Where a minor is named as beneficiary in a policy or policies of insurance issued in a sum not exceeding five hundred (\$500.00) dollars, and the insured dies prior to the majority of such beneficiary, any sums due on such policy may be paid to the public guardian or clerk of the superior court of the county wherein such beneficiary resides, to be administered by such clerk or public guardian for the benefit of said minor, and the receipt of the clerk or public guardian in such cases shall be a full and complete discharge of the company or association for any sums due under such policy or policies. (1937, c. 201.)

§ 2-53. Payment of money for indigent children and persons non compos mentis.—When any moneys in the amount of three hundred dollars or less are paid into court for any minor, indigent or needy child or children for whom no one will become guardian, upon satisfactory proof of the necessities of such minor, child or children, the clerk may upon his own motion or order pay out the same in such sum or sums at such time or times as in his judgment is for the best interest of said child or children, or to some discreet and solvent neighbor of said minor, to be used and faithfully applied for the sole benefit and maintenance of such minor indigent and needy child or children. The clerk shall take a receipt from the person to whom any such sum is paid and shall require such person to render an account of the expenditure of the sum or sums so paid, and shall record the receipt and the accounts, if any are rendered by order of the clerk, in a book entitled, Record of Amounts Paid for Indigent Children, and such receipt shall be a valid acquittance for the clerk. In all cases where a minor child is now or may hereafter be the beneficiary of any policy of life insurance and the sum due to said minor child by virtue of any such policy does not exceed three hundred dollars, the insurance company which issued said policy may pay the sum due thereunder to the clerk of the superior court of the county where said minor child resides whose duty it shall be to receive it, and said clerk shall issue and deliver to such insurance company his receipt for the sum so paid, which shall be a complete release and discharge of said company from any and all liability to said minor child under and by virtue of any such policy of insurance. Moneys so paid to said clerk shall be held and disbursed by him in the manner and subject to the limitations provided by this section. This section shall also apply to incompetent or insane persons, and it shall be the duty of any person or corporation having in its possession \$300.00 or less for any minor child or indigent child, or incompetent or insane person to pay same in the office of the clerk of the superior court, and the clerk of the superior court is

hereby authorized and empowered to disburse the sum thus paid into his office, upon his own motion or order, without the appointment of a guardian. (Rev., s. 924; 1899, c. 82; 1911, c. 29, s. 1; 1919, c. 91; Ex. Sess. 1924, c. 1, s. 1; 1927, c. 76; 1929, c. 15; 1933, c. 363; C. S. 962.)

Editor's Note.—This section was amended by the Laws 1924, c. 1 to apply to all funds contemplated by it, which are now, or may come into the hands of the clerk of the superior court, when the amount thereof does not exceed one hundred dollars (\$100) for each child who may be entitled to share therein. The Act of 1927 added a proviso relating to persons non compos mentis which was struck out by the Act of 1929. The latter Act changed the word "one" formerly appearing in line two to "three." See note under sec. 2-54.

The last sentence of the section, relating to payment of \$300 or less held for a "minor child or indigent child, or incompetent or insane person," was added by Public Laws 1933, c. 363.

§ 2-54. Limitation on investment of funds in clerk's hands.—It shall be unlawful for the clerk of the superior court of any county in the State of North Carolina receiving any money by color of his office to apply or invest any of said money except as specifically authorized by law. (1931, c. 281, s. 1.)

Local Modification.—Cleveland: 1933, c. 110.

Editor's Note.—The act from which this and the six following sections are codified, was apparently intended to supply the need indicated in *William v. Hooks*, 199 N. C. 489, 154 S. E. 828, wherein the court held that "there is no mandatory requirement of law imposing upon the clerk of the Superior Court the express duty of investing funds in his hands belonging to minors." The act is broader than that, however, and applies to all funds held by the clerk as such or as receiver or trustee for any infant or person non compos mentis. It should be read in connection with §§ 2-46, 28-166 and 65-10. See 9 N. C. L. Rev. 399, 400.

§ 2-55. Investments prescribed; use of funds in management of lands of infants, incompetents.—The clerk of the superior court of any county in the State may in his discretion invest moneys secured by color of his office or as receiver in any of the following securities:

(a) By loaning the same upon real estate security, such loans not to exceed fifty per cent (50%) of the assessed tax value; and said loans when made to be evidenced by a note, or notes, of the borrower and secured by first mortgage or deed of trust.

(b) United States Government bonds.

(c) United States Government Postal Savings Certificates.

(d) North Carolina State bonds.

(e) North Carolina county or municipal bonds which are approved by the Local Government Commission.

(f) Certificates of deposit for time deposit or savings accounts with any bank or trust company where such protection is furnished as required in § 2-56.

(g) When the clerk of the superior court as receiver or trustee for any infant or non compos mentis shall come into the possession of any lands for the use of such person and it shall be necessary to make investments of the funds of such person to manage or cultivate said lands, the clerk may make such investments as are necessary for said purposes: Provided, the same is approved by the resident judge of the superior court or the judge holding the court of the district. (1931, c. 281, s. 2; 1937, c. 188; 1939, c. 110.)

Local Modification.—Cleveland: 1933, c. 110.

Cross References.—For section authorizing investment of

funds in building and loan associations, see § 36-3. As to section authorizing investments in bonds issued or guaranteed by the United States government, see § 53-44.

Editor's Note.—In the investment of funds of infants or persons non compos mentis used in the management or cultivation of lands held for them by the clerk as receiver or trustee, he is unlimited by the items mentioned in this section. 9 N. C. Law Rev. 399.

The 1937 amendment substituted "local government commission" for "sinking fund commission" formerly appearing in subsection (e). The 1939 amendment inserted the words "or savings accounts" in subsection (f).

§ 2-56. Securing bank deposits.—It shall be the duty of the clerk of the superior court of any county in the State to require of any bank or trust company, wherein he may deposit money placed with him in trust, a corporate surety bond in an amount sufficient to protect such deposits, but in lieu of such corporate surety bond, the clerk may require such bank to furnish bonds of the United States Government, North Carolina State bonds, or North Carolina county or municipal bonds which have been approved by the Local Government Commission; provided, however, that to the extent of the amount which may be insured by the federal deposit insurance corporation or other federal agency insuring bank deposits the said insurance shall be deemed and considered ample security, and the clerk of the superior court shall not require corporate surety bond or any of the bonds above specified for that amount of the deposit insured by deposit insurance. (1931, c. 281, s. 3; 1939, c. 86; 1943, c. 543.)

Editor's Note.—The 1939 amendment added the proviso to this section.

The 1943 amendment struck out the words "Sinking Fund Commission" in the twelfth line and inserted in lieu thereof the words "Local Government Commission."

§ 2-57. Inspection of records by local government commission; report to solicitor of mismanagement.—The Local Government Commission, or its successors, is hereby authorized and empowered to inspect the records of any clerk of the superior court in the State for the purpose of ascertaining that such clerk is complying with the requirements of §§ 2-54 to 2-60 and if, in the course of such inspection, it is found that such clerk has failed to comply with the requirements of §§ 2-54 to 2-60, it shall be the duty of the Local Government Commission, or its successors, to report such findings to the solicitor of the district in which the county is located and said solicitor shall proceed to prosecute as hereinafter provided. (1931, c. 281, s. 4; c. 60.)

§ 2-58. Inspection and audit by county auditors or accountants; reports of audits.—It shall be the duty of the County Auditor or County Accountant of any county to inspect and audit the records and accounts of the Clerk of the Superior Court of the county for the purpose of ascertaining that such clerk is complying with the requirements of §§ 2-54 to 2-60 and that such clerk is properly safeguarding and accounting for all funds of every nature and character which have come into his hands by virtue of his office; such audits to be made and a report thereof made by the County Auditor or County Accountant to the board of county commissioners of the county and to the Local Government Commission or such other governmental agency as shall succeed to the rights and duties of the Local Government Commission. (1931, c. 281, ss. 6, 60.)

§ 2-59. Liquidation of present funds within year.—It shall be the duty of the clerk of the superior court of any county in the State, who shall have funds invested other than as provided for in §§ 2-54 to 2-60 to liquidate same within one year from the passage of §§ 2-54 to 2-60: Provided, however, that upon approval of the resident judge of his district, the clerk may extend from time to time, the time for sale or collection of any such investments; that no one extension shall be made to cover a period of more

than one year from the time the extension is made. (1931, c. 281, s. 7.)

§ 2-60. Violation of §§ 2-54 to 2-59 a misdemeanor.—The clerk of the superior court of any county in the State who shall have violated the provisions of §§ 2-54 to 2-59 shall be guilty of a misdemeanor, punishable by fine or imprisonment or both in the discretion of this court. (1931, c. 281, s. 5.)

Chapter 3. Commissioners of Affidavits and Deeds.

Sec.

3-1. Appointment by governor; term; oath.

3-2. Record of appointments; certified copies evidence.

3-3. List of appointments prepared and published by secretary of state.

Sec.

3-4. Published list conclusive.

3-5. Powers of such commissioners.

3-6. Fees of commissioners of affidavits.

3-7. Powers of clerks of courts in other states.

3-8. Clerks and notaries to take affidavits.

§ 3-1. Appointment by governor; term; oath.—The governor is authorized to appoint and commission one or more commissioners in any foreign country, state or republic, and in such of the states of the United States, or in the District of Columbia, or any of the territories, colonies or dependencies as he may deem expedient, who shall continue in office for two years from the date of their appointment, unless sooner removed by the governor. Before such commissioner proceeds to perform any duty by virtue of this chapter, he shall take and subscribe an oath before a justice of the peace in the city or county in which he resides well and faithfully to execute and perform all the duties of such commissioner, according to the laws of North Carolina; which oath shall be filed in the office of the secretary of state. (Rev., ss. 926, 927; Code, ss. 632, 633; C. S. 963.)

appointment of such commissioners, to certify the same to the several clerks of the superior courts of the State, and, in like manner, to certify to the said clerks all removals of commissioners, and of all whose commissions have expired. *Evans v. Etheridge*, 99 N. C. 43, 5 S. E. 386, 388.

§ 3-3. List of appointments prepared and published by secretary of state.—The secretary of state shall prepare and cause to be printed in each volume of the public laws a list of all persons who since the preceding publication in the public laws have been appointed commissioners of affidavits and to take the probate of deeds in any foreign country and in the several states and territories of the United States and in the District of Columbia, under this chapter, setting forth the state, territory or district or foreign country for which such persons were appointed and the dates of their respective appointments and term of office; and he shall add to each of said lists a list of all those persons whose appointments have been renewed, revoked, or have resigned, removed or died since the date of the list previously published, as far as the same may be known to him, with the dates of such revocation, resignation, removal or death. (Rev., s. 929; Code, ss. 635, 636, 637, 639; C. S. 965.)

§ 3-4. Published list conclusive.—The list of commissioners so published in any volume of the public laws shall be conclusive evidence in all courts of the appointments therein stated, and of the dates thereof. (Rev., s. 930; Code, s. 638; C. S. 966.)

§ 3-5. Powers of such commissioners.—The commissioners have authority to take the acknowledgment or proof of any deed, mortgage, or other conveyance of lands, tenements, or hereditaments lying in this state, and to take the private examination of married women, parties thereto, or any other writings to be used in this state. Such acknowledgment or proof, taken or made in the manner directed by the laws of this state, and certified by the commissioner, shall have the same force and effect for all purposes as if made or taken before any competent authority in this state. The commissioners also

Cross Reference.—For general provisions relating to proof and acknowledgment of instruments, and the taking of affidavits in other jurisdictions, see §§ 10-4, 47-2, 47-3, 47-6, 47-44, 47-45.

§ 3-2. Record of appointments; certified copies evidence.—It is the duty of the governor to cause to be recorded by the secretary of state the names of the persons who are appointed and qualified as commissioners, and for what state, territory, county, city, or town; and the secretary of state, when the oath of the commissioner is filed in his office, shall forthwith certify the appointment to the several clerks of the superior courts of the state, who shall record the certificate of the secretary at length. All removals of commissioners by the governor, and the names of all commissioners whose commissions have expired by law, and which have not been renewed, shall be recorded and certified in like manner. A certified copy thereof from the clerk, or a certificate of the appointment or removal aforesaid from the secretary of state, shall be sufficient evidence of the appointment or removal of such commissioner. (Rev., s. 928; Code, s. 634; C. S. 964.)

It is the duty of the Secretary of State forthwith upon the

have full power and authority to administer an oath or affirmation to any person willing or desirous to make it before him, to take depositions, and to examine the witnesses under any commission emanating from the courts of this state, relating to any cause depending or to be brought in said courts. Every deposition, affidavit, or affirmation made before him is as valid as if taken before any proper officer in this state. (Rev., ss. 926, 927; Code, ss. 632, 633; C. S. 967.)

Editor's Note.—In the case of *De Courcy, etc., Co. v. Barr*, 45 N. C. 181, the court, construed section 2, chapter 21, of the Revised Statutes, as empowering commissioners of affidavits to take the acknowledgments of nonresidents only, upon the ground that the section declared that the acknowledgment should have "the same power and effect," etc., as if the same had been made "before some of the judges of supreme jurisdiction in any other state." Section 5, chapter 37, of the Revised Statutes, authorizes judges of courts of supreme jurisdiction in other states to take the acknowledgment of grantors residing "in any of the United States other than this state." The Revised Code was enacted at the next session of the General Assembly held after that decision was rendered, and the law (as embodied in section 2, chapter 21, Rev. Code) seems to have been drawn with the purpose of enlarging the powers of commissioners of affidavits, and enabling them to take and certify acknowledgments of grantors of deeds, whether they were nonresidents, or residents of this state temporarily absent from the state. The section last mentioned has been in force since its enactment by the Legislature of 1854-55, being almost the same as section 633 of the Code. The latter gives to acknowledgments, taken before commissioners of affidavits, "the same force and effect, for all purposes, as if the same had been made or taken before any competent authority in this state." It does not seem that any serious doubt has been entertained as to the true meaning of the law now in force since the case of *Simmons v. Gholson*, 50 N. C. 401, was decided. It has been considered as conferring upon a commissioner of affidavits the same authority to take the proof of executions or the acknowledgment of grantors, who may be in the state for which they were appointed (whether there temporarily or as residents), as to the execution of deeds conveying land or other property located in this state that are required or allowed by law to be registered—that is, given by law to the clerk of the superior court of the county in which the land lies but the clerk has power to adjudge that the execution has been properly proven and order the registration, while the commissioner is *functus officio*, as to any given deed, when he has attached to it his certificate as to proof or acknowledgment of its execution. *Evans v. Etheridge*, 99 N. C. 43, 5 S. E. 386; *James, etc., Co. v. Pegram*, 102 N. C. 540, 543, 9 S. E. 412.

Scope of Commissioner's Authority.—Under the section commissioners of affidavits have full authority to take the acknowledgment, within the states for which they are appointed, of the grantors to any deed or conveyance of lands in this state, and to take the private examination of *femes covert*. *James, etc., Co. v. Pegram*, 102 N. C. 540, 9 S. E. 412; *Maphis v. Pegram*, 107 N. C. 505, 12 S. E. 235.

Commissioners of affidavits are empowered by the section to take acknowledgments of deeds in other states, by residents of both this state and that for which such commissioners are appointed. *Barcello v. Hapgood*, 118 N. C. 712, 717, 27, 24 S. E. 124.

Acknowledgments of Residents Visiting in Another State.—Where a man and his wife, being residents of this state, duly acknowledged a deed before a commissioner in Virginia, where they had gone on a visit merely, and the certificate of the commissioner, being in due form, was approved by the clerk of the superior court of the county in which the

land was situated, and the deed duly recorded, the registration was valid. *James, etc., Co. v. Pegram*, 102 N. C. 540, 9 S. E. 412; *Maphis v. Pegram*, 107 N. C. 505, 12 S. E. 235.

Seal Unnecessary.—A commissioner of deeds for this state, residing in another state, is not required to affix his seal to the certificate acknowledging the execution of a deed conveying land in this state. *Johnson v. Duvall*, 135 N. C. 642, 47 S. E. 611; *Sluder v. Wolf Mountain Lumber Co.*, 181 N. C. 69, 106 S. E. 215.

Acknowledgment a Judicial Act.—In this state it is settled law that an acknowledgment of a deed by the husband and privy examination of the wife taken before a commissioner is a judicial, or at least a quasi judicial, act. This was laid down by *Pearson, J.*, in *Decourcy, etc., Co. v. Barr*, 45 N. C. 181; *Long v. Crews*, 113 N. C. 256, 257, 18 S. E. 499.

Sufficient Verification.—An affidavit upon which an application for a provisional remedy is based is sufficiently verified when made before a commissioner for this state resident in another state and authenticated by his official signature and seal. *Young v. Rollins*, 85 N. C. 485.

§ 3-6. Fees of commissioners of affidavits.—Commissioners of affidavits, and those who are authorized by law to act as such, shall receive the following fees, and no other, namely: for an affidavit taken and certified, forty cents; affixing his official seal, twenty-five cents. (Rev., s. 2796; Code, s. 3741; C. S. 3924.)

Cross Reference.—As to fees of notaries, see § 10-8.

§ 3-7. Powers of clerks of courts in other states.—Every clerk of a court of record in any other state has full power as a commissioner of affidavits and deeds as is vested in regularly appointed commissioners of affidavits and deeds for this state. (Rev., s. 931; Code, s. 640; C. S. 968.)

Cross Reference.—As to probate and registration by officials of the United States, foreign countries, and sister states, see §§ 47-2, 47-3, 47-44, 47-45.

Authority of Clerks to Act.—The section confers upon clerks of courts of record in other states the powers both of commissioners of affidavits and of deeds and of commissioners regularly appointed by the courts, and the courts will take judicial notice of their seals. *Barcello v. Hapgood*, 118 N. C. 712, 727, 24 S. E. 124; *Hinton v. Life Ins. Co.*, 116 N. C. 22, 21 S. E. 201.

§ 3-8. Clerks and notaries to take affidavits.—The clerks of the supreme and superior courts and notaries public are authorized to take and certify affidavits to be used before any justice of the peace, judge or court of the state; and the affidavits so taken by a clerk shall be certified under the hands of the said clerk, and if to be used out of the county where taken, also under the seal of the court of which they are respectively clerks, and, if by a notary, under his notarial seal. (Rev., s. 925; Code, s. 631; C. S. 969.)

Judicial Notice of Seals.—Courts take judicial notice of the seal of the courts of other states, for the purpose of determining the validity of a verification of a pleading, just as they do of the seals of foreign courts of admiralty and notaries public. *Hinton v. Life Ins. Co.*, 116 N. C. 22, 21 S. E. 201.

Verification of Pleadings Before Clerk.—A verification of a pleading made before the clerk of the Hustings Court of Richmond, Virginia, and authenticated by his seal, is valid. *Hinton v. Life Ins. Co.*, 116 N. C. 22, 21 S. E. 201.

Chapter 4. Common Law.

Sec.

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

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

All such parts of the common law as were heretofore in force and use within this state, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this state and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this state. (Rev., s. 932; Code, s. 641; R. C., c. 22; 1715, c. 5, ss. 2, 3; 1778, c. 133; C. S. 970.)

General Considerations.—The common law includes those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. Kent, Vol. 1, p. 471; *Kansas v. Colorado*, 206 U. S. 46, 96, 27 S. Ct. 655, 51 L. Ed. 956.

As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs, immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs. *Black Law Dict.*, p. 232; *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 102, 21 S. Ct. 561, 45 L. Ed. 765.

The term "common law" refers to the common law of England and not of any particular state. *Eidman v. Martinez*, 184 U. S. 578, 22 S. Ct. 515, 46 L. Ed. 697.

So much of the common law as is in force by virtue of this section may be modified or repealed, but those parts of the common law which are imbedded in the Constitution are not subject to control. *State v. Mitchell*, 202 N. C. 439, 444, 163 S. E. 581.

Extent of Common Law.—So much of the common law as is not destructive of, repugnant to, or inconsistent with our form of government, and which has not been repealed or abrogated by statute or become obsolete, is in full force and effect in this jurisdiction. *State v. Hampton*, 210 N. C. 283, 186 S. E. 251.

Vested Rights in Common Law.—A person has no property, no vested interest, in any rule of common law. *Hurtado v. California*, 110 U. S. 516, 532, 4 S. Ct. 111, 292, 28 L. Ed. 232.

Reference to Debts Due to State Abrogated.—The English common law which gave a debt due to the sovereign a preference over the debts due to others, is abrogated by this section, and is not in force as applied to a debt due to this state. This on the principle that the rule as it existed at common law is antagonistic to the spirit of our governmental institutions. *Corp. Com. v. Trust Co.*, 193 N. C. 513, 137 S. E. 587.

Right of Bail in Capital Cases.—At common law bail might be granted in capital cases only by a high judicial officer upon thorough scrutiny of the facts and great caution. This right though once modified by the old constitution against its existence in capital offenses where the proof was evident and the presumption was great, now prevails in this state as it existed at common law, since that Constitution is superseded by the present Constitution which contains no provisions which qualify the right. In England the power to bail was exercised by the King's superior courts of justice; and in this state the power is conferred upon the justices of the Supreme Court, judges of the superior and criminal courts. *State v. Herndon*, 107 N. C. 934, 941, 12 S. E. 268.

Exemption of Attorneys from Arrest.—The common law exemption of an attorney from arrest in a civil action,

should, under our institutions and because of absoluteness by nonusage, not prevail, except where the attorneys are actually in attendance upon court in the due course of their employment as attorneys. *Greenleaf v. Bank*, 133 N. C. 292, 296, 45 S. E. 638.

Mediate Jury.—The statute, 28 Ed., III, ch. 13, in England, giving a jury de medietate, is not in force in this state. *State v. Antonio*, 11 N. C. 200.

Percolating Waters.—The owner of lands is only entitled to the reasonable use of percolating waters collected in subterranean channels on his own lands; and the English common law doctrine to the contrary is inapplicable under this section. *Rouse v. Kinston*, 188 N. C. 1, 123 S. E. 482.

Habeas Corpus.—It is an admitted principle of common law that every court of record of superior jurisdiction has the power to issue the writ of habeas corpus. This power is preserved in this state and can be exercised by all courts of record of superior jurisdiction. *In re Bryan*, 60 N. C. 1, 42.

Forfeiture for felony, which was the established rule at common law, has had no force in this state since 1778. *White v. Fort*, 10 N. C. 251, 264.

Exemption from Civil Process.—The common law privilege of the exemption of nonresidents from service of civil process while attending upon litigation in the courts of this state, as suitors or witnesses, was not repealed by implication by sections 8-64, 9-18. *Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947.

Survivorship; Husband and Wife Tenants by Entireties.—The common law doctrine of survivorship between husband and wife as tenants by entireties has not been changed by statute and is in force in this state. *Dorsey v. Kirkland*, 177 N. C. 520, 99 S. E. 407.

Presumption as to Common Law in Sister States.—Where there is no evidence to the contrary, the presumption is that the common law is in force in a sister state. *Hipps v. Southern R. Co.*, 177 N. C. 472, 99 S. E. 335.

Presumption of Death.—The doctrine of the common law as to presumptive death is not repealed or affected by statute, and obtains in our courts. *Steele v. Metropolitan Life Insurance Co.*, 196 N. C. 408, 145 S. E. 787.

Limitation Over in Personal Property.—The common-law rule that there can be no limitation over in personal property after reservation of a life estate therein is in force in this state, under this section, and has been recognized by judicial decision and by statutory implication. *Speight v. Speight*, 208 N. C. 132, 179 S. E. 461.

Champery is an offense at common law, and prevails in this state, being retained under this section. *Merrell v. Stuart*, 220 N. C. 326, 330, 17 S. E. (2d) 458.

Barratry.—The common-law offense of barratry obtains in this state, since it has never been the subject of legislation in North Carolina and is not repugnant nor inconsistent with our form of government. *State v. Batson*, 220 N. C. 411, 17 S. E. (2d) 511, 139 A. L. R. 614.

The solicitation of another to commit a felony is a crime, although the solicitation is of no effect, and the crime is not committed, the common law rule being in effect and controlling. *State v. Hampton*, 210 N. C. 283, 186 S. E. 251.

Implied Warranty in Sale of Food.—The common law rule of implied warranty in the sale of food by a retailer to a consumer, even though the food may be sold in a sealed container, has not been rendered obsolete by the changes in the manner and method of the manufacture, preparation and distribution of food. *Rabb v. Covington*, 215 N. C. 572, 2 S. E. (2d) 705.

Applied in Wells v. Guardian Life Ins. Co., 213 N. C. 178, 195 S. E. 394, 116 A. L. R. 130.

Cited in Hinton v. Hinton, 196 N. C. 341, 342, 145 S. E. 615; *Rhodes v. Collins*, 198 N. C. 23, 26, 150 S. E. 492; *Grantham v. Grantham*, 205 N. C. 363, 366, 171 S. E. 331; *Wachovia Bank, etc., Co. v. Jones*, 210 N. C. 339, 186 S. E. 335 (dissenting opinion). See also, *Price v. Slagle*, 189 N. C. 757, 128 S. E. 161.

Chapter 5. Contempt.

Sec.

- 5-1. Contempts enumerated; common law repealed.
- 5-2. Appeal from judgment of guilty.
- 5-3. Solicitor or attorney-general to appear for the court.
- 5-4. Punishment.

§ 5-1. Contempts enumerated; common law repealed.—Any person guilty of any of the following acts may be punished for contempt:

1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.
2. Behavior of the like character committed in the presence of any referee or referees, while actually engaged in any trial or hearing pursuant to the order of any court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceeding authorized by law.
3. Any breach of the peace, noise or other disturbance directly tending to interrupt the proceedings of any court.
4. Willful disobedience of any process or order lawfully issued by any court.
5. Resistance willfully offered by any person to the lawful order or process of any court.
6. The contumacious and unlawful refusal of any person to be sworn as a witness, or, when so sworn, the like refusal to answer any legal and proper interrogatory.
7. The publication of grossly inaccurate reports of the proceedings in any court, about any trial, or other matter pending before said court, made with intent to misrepresent or to bring into contempt the said court; but no person can be punished as for a contempt in publishing a true, full and fair report of any trial, argument, decision or proceeding had in court.
8. Misbehavior of any officer of the court in any official transaction.

The several acts, neglects and omissions of duty, malfeasances, misfeasances, and nonfeasances, above specified and described, shall be the only acts, neglects and omissions of duty, malfeasances, misfeasances and nonfeasances which shall be the subject of contempt of court. And if there are any parts of the common law now in force in this state which recognized other acts, neglects, omissions of duty, malfeasances, misfeasances and nonfeasances besides those specified and described above, the same are hereby repealed and annulled. (Rev., s. 939; Code, s. 648; 1905, c. 449; C. S. 978.)

- I. General Consideration.
- II. Subdivision I.
- III. Subdivision II.
- IV. Subdivision IV.
- V. Subdivision V.
- VI. Subdivision VI.
- VII. Subdivision VII.
- VIII. Subdivision VIII.

I. GENERAL CONSIDERATION.

Editor's Note.—It is essential for an effective adminis-

Sec.

- 5-5. Summary punishment for direct contempt.
- 5-6. Courts and officers empowered to punish.
- 5-7. Indirect contempt; order to show cause.
- 5-8. Acts punishable as for contempt.
- 5-9. Trial of proceedings in contempt.

tration of justice in an orderly and efficient way that the court possess certain powers to enforce its mandate. A legislative interference to the extent of depriving the courts of these powers is tantamount to depriving the judicial department of the means of self-preservation and cannot be constitutionally justified. See *Snow v. Hawkes*, 183 N. C. 365, 111 S. E. 621; *Ex parte McCown*, 139 N. C. 95, 107, 51 S. E. 957.

These powers, however, as they existed at common law, while they may not be abrogated, may be reasonably regulated by legislation. See *In re Robinson*, 117 N. C. 533, 23 S. E. 453. Thus, this and the following sections are regulatory legislation upon the subject, and being in accord with modern doctrine, cannot be assailed on the ground of unconstitutionality. See *In re Brown*, 168 N. C. 417, 84 S. E. 690; *In re Oldham*, 89 N. C. 23, 26.

The enumeration of the acts punishable for contempt under this section is exhaustive; hence no other act than those specifically designated may be the subject matter of contempt proceedings. See *In re Odum*, 133 N. C. 250, 252, 45 S. E. 569.

For a masterly opinion on the history, nature, and extent of the power of courts to punish for contempt, see *In re Brown*, 168 N. C. 417, 84 S. E. 690, and *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957.

See 12 N. C. L. Rev. 260.

Construed Strictly.—This section should be strictly construed as a criminal statute. *West v. West*, 199 N. C. 12, 13, 153 S. E. 600. See also *In re Hege*, 205 N. C. 625, 630, 172 S. E. 345.

Definition.—Contempt is a willful disregard of the authority of a court of justice, or a legislative body or disobedience to its lawful orders. *Black Law Dict.*

Nature and Purpose of Proceedings.—The purpose of contempt proceedings is to uphold the power of the court and also to secure to suitors therein the rights by it awarded. *In The Matter of Lewis*, 202 U. S. 614, 26 S. Ct. 767, 50 L. Ed. 1172.

Punishments for contempt of court have two aspects, namely: 1. To vindicate the dignity of the court from disrespect shown to it or its orders. 2. To compel the performance of some order or decree of the court which it is in the power of the party to perform and which he refuses to obey. See *In re Chiles*, 22 Wall. 157, 22 L. Ed. 819; *Besette v. Conkey Co.*, 194 U. S. 324, 337, 24 S. Ct. 665, 48 L. Ed. 997.

Nature of Offense.—A contempt proceeding is sui generis. It is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty, is punished. Yet it may be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action. *In The Matter of Lewis*, 202 U. S. 614, 26 S. Ct. 767, 50 L. Ed. 1172.

Criminal contempt is the commission of an act tending to interfere with the administration of justice, while civil contempt is the remedy for the enforcement of orders in the equity jurisdiction of the court, and the willful refusal to pay alimony as ordered by the court is civil contempt. *Dyer v. Dyer*, 213 N. C. 634, 197 S. E. 157.

Facts Must Be Found and Filed.—In contempt proceedings the facts upon which the contempt is based must be found and filed, especially the facts concerning the purpose and object of the contemnor, and the judgment must be founded on those findings. *In re Odum*, 133 N. C. 250, 252, 45 S. E. 569.

Inherent Powers Incident to Punish for Contempt.—This and the following sections regulating proceedings for contempt confer on the courts all the inherent powers to attach for contempt that were recognized by the common law as essential to the due and orderly exercise of their jurisdiction and functions. *State v. Little*, 175 N. C. 743, 94 S. E. 680.

The power to punish for contempt is inherent in all courts. *Ex parte Terry*, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405.

Not Repugnant to Principle of Due Process.—Summary proceedings for contempt, in which there is no right of appeal or trial by jury or removal before another judge, are not within the constitutional prohibition contained in the due process clause. The power to punish summarily for contempt has existed at common law "as far as the annals of the law extend." *State v. Little*, 175 N. C. 743, 748, 94 S. E. 680.

Cited in *Vaughan v. Vaughan*, 213 N. C. 189, 195 S. E. 351.

II. SUBDIVISION I.

Must Be in Presence of the Court.—A willful disobedience of the process or order of the superior court to desist from obstruction of a public road is not a contempt committed within the immediate presence or view of the court. In *re Parker*, 177 N. C. 463, 99 S. E. 342. But see clause 4 of this section.

Nature of the Acts Punishable for Contempt.—Acts which are punishable under this section include all cases of disorderly conduct, breaches of the peace, noise and other disturbance near enough, designed and reasonably calculated to interrupt the proceedings of the court then engaged in the administration of justice and the dispatch of the business presently before it. *State v. Little*, 175 N. C. 743, 94 S. E. 680.

Protection Extended to Officers of Court, Witnesses, etc.—It is an act of contempt to interfere with the functioning of the business not only of the judge but also of all the officers of the court, and persons such as attorneys, jurors and witnesses, who in the line of their duty are assisting the court in the dispatch of its business. *State v. Little*, 175 N. C. 743, 94 S. E. 680; *Snow v. Hawkes*, 183 N. C. 365, 111 S. E. 621.

Assaulting the Judge during Recess of Court.—Where the respondent visited the judge at his boarding house during a recess of the court, before the adjournment of the term and assaulted the judge, it was held that this conduct was a direct contempt of the court as much as if the assault had been committed in the court during trial. *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957.

Appeal.—Actions of judge in respect to contempts committed in the presence of the court are not reversible on appeal except for gross abuse of discretion. See *State v. Nowell*, 156 N. C. 648, 72 S. E. 590; In *re Davis*, 81 N. C. 72, 75; *Ex parte Biggs*, 64 N. C. 202. As to contempts not committed in the presence of the court, however, an appeal lies. In *re Deaton*, 105 N. C. 59, 11 S. E. 244.

Fighting in Courthouse Yard.—In *State v. Woodfin*, 27 N. C. 199, fighting in the yard of the courthouse, before the courthouse door, constituted the basis of the offense of contempt.

III. SUBDIVISION II.

Punishment by Court Making the Reference.—When, in the course of supplementary proceedings before a referee, a contempt is committed by refusing to answer the questions, it must be punished by the court making the reference. *LaFontaine v. Southern Underwriters*, 83 N. C. 133.

IV. SUBDIVISION IV.

Cross References.—As to contempt in failure of personal representative to file account, see § 28-118. As to failure to obey judgment, see § 1-302. As to failure to obey a court order in supplementary proceedings, see § 1-368. As to acts punished as for contempt, see §§ 5-8, 5-9.

"Willful" and "Unlawful" Distinguished.—"The word 'willful,' when used in a statute creating an offense, implies the doing of the act purposely and deliberately in violation of law." "The term 'unlawfully' implies that an act is done, or not done as the law allows, or requires; while the term 'willfully' implies that the act is done knowingly and of stubborn purpose." In *re Hege*, 205 N. C. 625, 630, 172 S. E. 345, citing *West v. West*, 199 N. C. 12, 153 S. E. 600.

Refusal to Deliver Note.—In *Thompson v. Onley*, 96 N. C. 9, 14, 1 S. E. 620, it was held that a refusal to obey the order requiring the surrender of a note, whether amounting to contempt or not, warranted a commitment as a means of forcing a compliance.

Disavowal of Disrespectful Intent.—The willful disobedience of a restraining order by the party on whom it had been served, and who was aware of its meaning and import, is in itself an act of contempt under this section, from which he may not purge himself by disavowing a disrespectful intent. In *re Parker*, 177 N. C. 463, 99 S. E. 342.

Impossibility to Comply with the Order or Process.—Where the disobedience to the process or order is due to circumstances which make it impossible for the contemnor to obey such an order or process, he may not be punished for contempt. Thus where the clerk issued a notice to the respondent to produce a certain will which was in the cus-

tody of some other clerk, it was held the order to adjudge the respondent guilty of contempt was reversible on appeal. In *re Scarborough Will*, 139 N. C. 423, 51 S. E. 931. But where the impossible circumstances are removed prior to the arrest for contempt the defendant will not be excused. *Shooting Club v. Thomas*, 120 N. C. 334, 26 S. E. 1007. The excuse is sufficient where the defendant has been unable to pay money according to an order. *Kane v. Haywood*, 66 N. C. 1; *Boyett v. Vaughan*, 89 N. C. 27; *Smith v. Smith*, 92 N. C. 304.

Where the husband, in proceedings against him for contempt for disobeying an order to pay moneys for the support of his child, shows by the uncontradicted testimony of himself and witness that he had no property nor income except what he could earn, and that he had been unable to obtain employment and was therefore unable to comply with the terms of the order, the evidence fails to show that the disobedience was willful, and he may not be adjudged in contempt of court and a sentence imposed upon him. *West v. West*, 199 N. C. 12, 153 S. E. 600.

Failure to Pay Alimony, etc.—Upon the hearing of an order to show cause why defendant should not be attached for contempt for failure to pay alimony and counsel fees as required by the prior judgment, defendant pleaded his inability to pay. The court found defendant had earned \$140.00 since the original order, and adjudged defendant to be in contempt and the judgment for contempt was not dated and fails to show the length of time during which defendant earned the sum stated, and fails to find any facts on the defendant's plea of disavowal, the record and findings are insufficient to support a judgment for contempt for "willful disobedience" of a court order. *Berry v. Berry*, 215 N. C. 339, 1 S. E. (2d) 871.

The mere fact that defendant, ordered to pay a certain sum monthly for the necessary subsistence of his wife and child, has a right to move at any time for modification of the order does not support the conclusion that defendant's failure to comply with the order is willful. *Smithwick v. Smithwick*, 218 N. C. 503, 11 S. E. (2d) 455.

Order Void Ab Initio.—Where an order is void ab initio, one may not be held for contempt for disobeying such order, and the fact that he did not appeal from the granting of the order does not affect his liability, the order not being one "lawfully issued" as provided by this section. In *re Longley* 205 N. C. 488, 171 S. E. 788.

Advice of Counsel No Excuse.—The failure to obey the order of the court placing property in possession of a receiver is, under this clause, a direct contempt, even though the contemnor acted under an advice of counsel. Such advice is no protection to the intentional violation of the order. *Delozier v. Bird*, 123 N. C. 689, 694, 31 S. E. 834. In such a case the counsel himself may be subjected to contempt proceedings. Id. This fact, however, will be considered by the judge in imposing the punishment. *Weston v. Roper Lumber Co.*, 158 N. C. 270, 73 S. E. 799. See *Green v. Griffin*, 95 N. C. 50.

Disobeying Order of Clerk.—Where, in supplementary proceedings, the defendant has willfully disobeyed an order of the clerk of the superior court having jurisdiction, in disposing of his property, he is guilty of contempt of court under the provisions of this section. *Bank v. Chamblee*, 188 N. C. 417, 124 S. E. 741.

Must Be Able to Obey.—The defendant must have been able to obey the order, and in spite of his ability must have disobeyed it. Inability to obey is a good excuse—for example payment of money. *Kane v. Haywood*, 66 N. C. 1; *Boyett v. Vaughan*, 89 N. C. 27; *Smith v. Smith*, 92 N. C. 304.

Other Actions Held to Constitute Contempt.—Disobeying an injunction or restraining order such as cutting timber after injunction against the same. *Weston v. Roper Lumber Co.*, 158 N. C. 270, 73 S. E. 799; In *re Carolina R. Co.*, 151 N. C. 467, 66 S. E. 438; *Fleming v. Patterson*, 99 N. C. 404, 6 S. E. 396. Failure to pay alimony, *Zimmerman v. Zimmerman*, 113 N. C. 433, 18 S. E. 334. Failure of clerk to make transcript of record, *Worth v. Bank*, 121 N. C. 343, 344, 28 S. E. 483. See also generally *Murray v. Berry*, 113 N. C. 46, 18 S. E. 78. Failure to deliver property, *McLean v. Douglass*, 28 N. C. 233. Failure to return process, *Ex parte Summers*, 27 N. C. 149. Failure to settle estates by public administrator, In *re Brinson*, 73 N. C. 278.

Applied in *Dyer v. Dyer*, 212 N. C. 620, 194 S. E. 278.

V. SUBDIVISION V.

Willfully Preventing Receiver from Taking Possession.—A judgment debtor, fixed with knowledge as a party upon whom notice was served, is guilty of contempt of court in willfully preventing the receiver from taking possession of

the property in conformity with a lawful order of the court, even though the order may be erroneous, if no appeal therefrom was perfected by him. *Nobles v. Roberson*, 212 N. C. 334, 193 S. E. 420.

VI. SUBDIVISION VI.

Commissioner May Ask Aid of Judge; Declaration of Power.—The commissioner before whom the witness had refused to answer, may invoke the aid of the judge to punish for contempt. *Bradley Fertilizer Co. v. Taylor*, 112 N. C. 141, 17 S. E. 69. But the judge has no right to delegate the judicial power to punish for contempt to an executive officer. *Id.*

Self-Incrimination No Defense.—Witness may not refuse to answer on the ground that his answer may tend to incriminate him. *LaFontaine v. Southern Underwriters*, 83 N. C. 133.

Other Actions Held to Constitute Contempt.—Refusal to testify before a commissioner, *Bradley Fertilizer Co. v. Taylor*, 112 N. C. 141, 17 S. E. 69. Refusal to testify before a referee, *LaFontaine v. Southern Underwriters*, 83 N. C. 133.

VII. SUBDIVISION VII.

In General.—To state that the judges of the Supreme Court singly or en masse moved from the path of judicial propriety because of political zeal, subjected the party so stating to liability under this clause of the section. *In re Moore*, 63 N. C. 396, 397.

Publication after Adjournment of Court.—For constructive contempt by publication of false matter relating to the conduct of the presiding judge, published after the adjournment of the court, the judge must seek redress by the ordinary method and bring his cause before an impartial tribunal. He may not proceed to determine the matter summarily without the intervention of a jury. *In re Brown*, 168 N. C. 417, 84 S. E. 690.

Publication of Past Matter.—There no longer exists the power to punish summarily for defamatory reports and publications about a matter which is past and ended. To justify contempt proceedings the publication must have been pendente lite. *In re Brown*, 168 N. C. 417, 84 S. E. 690.

Trial of Issue by the Court instead of the Jury.—If on the face of the publication there is nothing to show that it was grossly incorrect or calculated to bring the court into contempt, the respondent is entitled to have the issue tried not by a jury but by a court. *In re Robinson*, 117 N. C. 533, 23 S. E. 453.

Cited in *State v. Pelley*, 221 N. C. 487, 20 S. E. (2d) 850.

VIII. SUBDIVISION VIII.

Cross References.—As to contempt in failure of personal representative to file account, see § 28-118. As to failure to obey judgment, see § 1-302. As to failure to obey a court order in supplementary proceedings, see § 1-368. As to acts punished as for contempt, see §§ 5-8, 5-9.

Attorneys failure to pay the costs of cases in which they have been guilty of gross negligence is a sort of contempt, and the court may order them to pay. *Ex parte Robins*, 63 N. C. 310.

Quoted, in dissenting opinion, in *State v. Perry*, 210 N. C. 796, 188 S. E. 639.

Cited in *In re Adams*, 218 N. C. 379, 11 S. E. (2d) 163.

§ 5-2. Appeal from judgment of guilty.—Any person adjudged guilty of contempt under the preceding section has the right to appeal to the supreme court in the same manner as is provided for appeals in criminal actions, except for the contempts described and defined in subsections one, two, three, and six. Nor shall the right of appeal lie under subsections four and five if such contempt is committed in the presence of the court. (Rev., s. 939; Code, s. 648; 1905, c. 449; C. S. 979.)

Cross Reference.—As to appeals in criminal actions, see § 15-190 et seq.

Finding of Fact Not Disturbed.—Where the judge has found sufficient facts to attach the defendant for direct contempt of court, upon imposing punishment therefor, the finding will not be disturbed by appeal. *State v. Little*, 175 N. C. 743, 94 S. E. 680; *In re Deaton*, 105 N. C. 59, 62, 11 S. E. 244. Nor will the finding of fact by the judge be disturbed upon an appeal on an indirect contempt. *In re Parker*, 177 N. C. 463, 99 S. E. 342.

It is otherwise however on appeals from a subordinate court to the superior court. In such a case the facts as

well as the law will be reviewed, and even additional testimony may be heard. *In re Deaton*, 105 N. C. 59, 63, 11 S. E. 244.

Habeas Corpus and Not Appeal.—Where the defendant, punished for direct contempt, contends that his legal rights have been denied, and it is made to appear that the court had no jurisdiction, his remedy is not by appeal, but by habeas corpus proceedings which, if necessary, may be carried up by a writ of certiorari. *State v. Little*, 175 N. C. 743, 94 S. E. 680.

As to contempts not committed in the presence of the court, an appeal lies. *In re Deaton*, 105 N. C. 59, 62, 11 S. E. 244; *In re Davis*, 81 N. C. 72; *In re Walker*, 82 N. C. 95; *Cromartie v. Commissioners*, 85 N. C. 211.

§ 5-3. Solicitor or attorney-general to appear for the court.—In all cases where a rule for contempt is issued by any court, referee, or other officer, the solicitor shall appear for the court or other officer issuing the rule, and in case of appeal to the supreme court, the attorney-general shall appear for the court or other officer by whom the rule was issued. (Rev., s. 939; Code, s. 648; 1905, c. 449; C. S. 980.)

§ 5-4. Punishment.—Punishment for contempt for matters set forth in the preceding sections shall be by fine not to exceed two hundred and fifty dollars, or imprisonment not to exceed thirty days, or both, in the discretion of the court. (Rev., s. 940; Code, s. 649; C. S. 981.)

Imprisonment for 60 days and a fine of \$2000 were held illegal under this section. *In re Patterson*, 99 N. C. 407, 6 S. E. 643. See also *In re Walker*, 82 N. C. 95.

Imprisonment for Debt.—The abolishment of imprisonment for debt does not include commitment under attachments for failure to comply with an order of court. *Wood v. Wood*, 61 N. C. 538.

Punishment for civil contempt is not limited to thirty days' imprisonment, this section not being applicable to civil contempt, and a petition for release from imprisonment for willful refusal to pay alimony on the ground that the court exceeded its authority in not limiting the imprisonment to thirty days, is properly refused, but defendant need not serve indefinitely and may obtain his discharge upon a proper showing under appropriate proceedings. *Dyer v. Dyer*, 213 N. C. 634, 197 S. E. 157.

Commitment until Alimony Paid.—A judgment for commitment until alimony is paid was held valid. *Green v. Green*, 130 N. C. 578, 41 S. E. 784.

Imprisonment until the order is complied with is valid. *Cromartie v. Commissioners*, 85 N. C. 211; *Thompson v. Onley*, 96 N. C. 9, 5 S. E. 120; *Delozier v. Bird*, 123 N. C. 689, 694, 31 S. E. 834.

A fine for contempt goes to the State, being a punishment for a wrong to the State, and should not be directed to be paid to a party to the suit. *In re Rhodes*, 65 N. C. 518; *Morris v. Whitehead*, 65 N. C. 637.

Punishment by Working on Road.—A person sentenced to jail as for contempt of court can not be worked on the roads. *State v. Moore*, 146 N. C. 653, 61 S. E. 463.

Punishment Immediate.—The punishment in contempt cases, must be immediate, or it would be ineffectual, as it is designed to suppress an outrage, which impedes the business of the court. *State v. Yancy*, 4 N. C. 133.

No Defense to Criminal Prosecution.—The fact that a person has been punished for contempt of court, is no defense to a criminal indictment for the act constituting the contempt. *State v. Yancy*, 4 N. C. 133. *In re Griffin*, 98 N. C. 225, 3 S. E. 515.

Power of Industrial Commission.—The Industrial Commission proceeding under the Workmen's Compensation Act, being expressly given the authority to subpoena witnesses and have them give evidence at the hearing, acts in a judicial capacity in adjudging in contempt a witness who refuses to give material evidence, and has power to punish by a fine or imprisonment under the provisions of this section. *In re Hayes*, 200 N. C. 133, 134, 156 S. E. 791.

§ 5-5. Summary punishment for direct contempt.—Contempt committed in the immediate view and presence of the court may be punished summarily, but the court shall cause the particulars of the offense to be specified on the record, and a copy of the same to be attached to every

committal, attachment or process in the nature of an execution founded on such judgment or order. (Rev., s. 941; Code, s. 650; C. S. 982.)

Remedy by Habeas Corpus.—This section, providing that the court shall find the facts constituting the contempt and have them spread upon the record, does not have the effect of giving the right to an appeal nor to a writ of certiorari in direct contempts. But such facts when spread upon the record may authorize a revising tribunal, on a habeas corpus, to discharge the party. In re Deaton, 105 N. C. 59, 62, 11 S. E. 244.

Jury Trial.—It is well settled that the defendant, in contempt proceedings, is not entitled to a jury trial upon the controverted facts. In re Deaton, 105 N. C. 59, 64, 11 S. E. 244.

Assaulting Judge During Adjournment.—For assaulting a judge in his house pending an adjournment of the court the petitioner was properly punished for contempt by attachment in summary proceedings. Ex parte McCown, 139 N. C. 95, 51 S. E. 957.

§ 5-6. Courts and officers empowered to punish.—Every justice of the peace, referee, commissioner, clerk of the superior court, inferior court, criminal court, or judge of the superior court, or justice of the supreme court, or board of commissioners of each county, or the utilities commission, has power to punish for contempt while sitting for the trial of causes or engaged in official duties. (Rev., s. 942; Code, ss. 651, 652; 1933, c. 134, s. 8; 1941, c. 97; C. S. 983.)

Authority of Mayor to Punish.—The authority given under this section to a justice of the peace to punish for contempt is extended to mayors by sections 160-13, 160-14. State v. Aiken, 113 N. C. 671, 18 S. E. 690; In re Deaton, 105 N. C. 59, 65, 11 S. E. 244.

Referee.—Acts constituting contempt committed before a referee in supplementary proceedings are to be punished by the court making the reference. LaFontaine v. Southern Underwriters, 83 N. C. 133.

Authority of Commissioner Not Exclusive.—The power of a commissioner, appointed by the court, to commit for refusal to testify is not given exclusively, if at all; but he may invoke the power of the judge, even though he may be given concurrent authority, under statute. Bradley Fertilizer Co. v. Taylor, 112 N. C. 141, 17 S. E. 69.

A judge of the district court has no authority, except in his own district, to punish for contempt. In re Rhodes, 65 N. C. 518; Morris v. Whitehead, 65 N. C. 637.

Nisi Prius Judge.—The right of a nisi prius judge to order a witness or anyone else into immediate custody for a contempt committed in the presence of the court in session is unquestioned. State v. Ownby, 146 N. C. 677, 61 S. E. 630; State v. Dick, 60 N. C. 440; State v. Swink, 151 N. C. 726, 728, 66 S. E. 448.

§ 5-7. Indirect contempt; order to show cause.—When the contempt is not committed in the immediate presence of the court, or so near as to interrupt its business, proceedings thereupon shall be by an order directing the offender to appear, within reasonable time, and show cause why he should not be attached for contempt. At the time specified in the order the person charged with the contempt may appear and answer, and, if he fail to appear and show good cause why he should not be attached for the contempt charged, he shall be punished as provided in this chapter. (Rev., s. 943; Code, s. 653; C. S. 984.)

In the cases of contempts out of the presence of the court the practice is to have a foundation laid by facts shown forth, by affidavit or otherwise, constituting a prima facie case, and then by a rule to put the accused to show cause against the attachment by an answer denying the alleged facts of which he had notice in the rule or on the record, or excusing his conduct, or, where the gravamen of the charge rested on intention, by a disavowal of the imputed purpose. 4 Blik., 286; 3 Whar. Cr. Law, 3449, 50; In re Moore, 63 N. C. 396, 397. In re Walker, 82 N. C. 95, 97. Cited in In re Adams, 218 N. C. 379, 11 S. E. (2d) 163.

§ 5-8. Acts punishable as for contempt.—

Every court of record has power to punish as for contempt when the act complained of was such as tended to defeat, impair, impede, or prejudice the rights or remedies of a party to an action then pending in court—

1. Any clerk, sheriff, register, solicitor, attorney, counselor, coroner, constable, referee, or any other person in any manner selected or appointed to perform any ministerial or judicial service, for any neglect or violation of duty or any misconduct by which the rights or remedies of any party in a cause or matter pending in such court may be defeated, impaired, delayed, or prejudiced, for disobedience of any lawful order of any court or judge, or any deceit or abuse of any process or order of any such court or judge.

2. Parties to suits, attorneys, and all other persons for the nonpayment of any sum of money ordered by such court, in cases where execution cannot be awarded for the collection of the same.

3. All persons for assuming to be officers, attorneys or counselors of the court, and acting as such without authority, for receiving any property or person which may be in custody of any officer by virtue of any order or process of the court, for unlawfully detaining any witness or party to any suit, while going to, remaining at, or returning from the court where the same may be set for trial, or for the unlawful interference with the proceedings in any action.

4. All persons summoned as witnesses in refusing or neglecting to obey such summons to attend, be sworn, or answer, as such witness.

5. Parties summoned as jurors for impropriety, conversing with parties or others in relation to an action to be tried at such court or receiving communication therefrom.

6. All inferior magistrates, officers and tribunals for disobedience of any lawful order of the court, or for proceeding in any matter or cause contrary to law, after the same shall have been removed from their jurisdiction.

7. All other cases where attachments and proceedings as for contempt have been heretofore adopted and practiced in courts of record in this state to enforce the civil remedies or protect the rights of any party to an action. (Rev., s. 944; Code, ss. 654, 656; C. S. 985.)

Cross References.—As to punishment for using profanity within hearing of justice of peace, see § 7-128. As to punishment of witness refusing to testify in action against a railroad before a justice of peace, see § 7-146.

Editor's Note.—See 12 N. C. Law Rev., 260, for comment on this and other sections dealing with contempt.

For a discussion of this section and its relation to the preceding sections, see Cromartie v. Commissioners, 85 N. C. 211.

Applicable to Civil Actions.—The provisions of this section, except subsections 4, 5, and 6, apply only to civil actions. In re Deaton, 105 N. C. 59, 64, 11 S. E. 244.

Jury Trial.—Respondents in proceedings as for contempt are not entitled to a jury trial. In re Gorham, 129 N. C. 481, 40 S. E. 311.

Persuading Witness.—Where a defendant in a criminal action tried to persuade the state's witness to leave the state and not to appear against him, it was held that he was subject to proceedings as for contempt. In re Young, 137 N. C. 552, 50 S. E. 220.

Refusal to effectuate an agreement to sign a consent judgment may not be made the basis for contempt proceedings by this section where it does not appear that the parties ever agreed to the exact terms of such judgment. State v. Clark, 207 N. C. 657, 178 S. E. 119.

Under clause 3 a person may be punished as for contempt, for unlawful interference with proceedings in any action. In re Gorham, 129 N. C. 481, 40 S. E. 311.

Suggesting to Witness Not to Attend.—Suggesting to a material witness not to attend court, etc., with apparent intent to prevent the attendance of the witness, is under this clause an unlawful interference with the process and proceedings of the court. *State v. Moore*, 146 N. C. 653, 61 S. E. 463.

Juror Improperly Influenced.—Under subdivision 5 a juror may be punished as for contempt for allowing himself to be improperly influenced. *In re Gorham*, 129 N. C. 481, 40 S. E. 311.

Applied.—*Bradley Fertilizer Co. v. Taylor*, 112 N. C. 141, 17 S. E. 69.

Cited in *Dyer v. Dyer*, 213 N. C. 634, 197 S. E. 157.

§ 5-9. Trial of proceedings in contempt.—Proceedings as for contempt shall be prosecuted and carried on as provided in provisional remedies. In all proceedings for contempt and in proceedings

as for contempt, the judge or other judicial officer who issues the rule or notice to the respondent may make the same returnable before some other judge or judicial officer. When the personal conduct of the judge or other judicial officer or his fitness to hold his judicial position is involved, it is his duty to make the rule or notice returnable before some other judge or officer. Nothing herein contained shall apply to any act or conduct committed in the presence of the court and tending to hinder or delay the due administration of the law, nor to proceedings for the disobedience of a judicial order rendered in any pending action. (Rev., s. 945; Code, s. 655; 1915, c. 4; C. S. 986.)

Chapter 6. Costs.

Sec. Art. 1. Generally.

- 6-1. Items allowed as costs.
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- 6-20. Costs allowed or not, in discretion of court.
- 6-21. Costs allowed either party or apportioned in discretion of court.
- 6-22. Petitioner to pay costs in certain cases.
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- 6-24. Suits in forma pauperis; no costs unless recovery.
- 6-25. Party seeking recovery on usurious contracts; no costs.
- 6-26. Costs in special proceedings.
- 6-27. Fees and disbursements in supplemental proceedings.
- 6-28. Costs of laying off homestead and exemption.
- 6-29. Costs of reassessment of homestead.

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- 6-30. Costs against infant plaintiff; guardian responsible.
- 6-31. Costs where executor, administrator, trustee of express trust, or person authorized by statute a party.
- 6-32. Costs against assignee after action brought.

Art. 4. Costs on Appeal.

- 6-33. Costs on appeal generally.
- 6-34. Costs of transcript on appeal taxed in supreme court.
- 6-35. Costs on appeal from justices of the peace.

Art. 5. Liability of Counties in Criminal Actions.

- 6-36. County to pay costs in certain cases; if approved, audited and adjudged.
- 6-37. Local modification as to counties paying costs.
- 6-38. Liability of county when defendant acquitted in supreme court.
- 6-39. County where offense committed liable for costs.
- 6-40. Liability of counties, where trial removed from one county to another.
- 6-41. Statement of costs against county to be filed with commissioners.
- 6-42. Expenses in conveying prisoner to another county; provision for payment.
- 6-43. Cost of investigating lynchings.
- 6-44. Costs due credited on taxes due by payee.

Art. 6. Liability of Defendant in Criminal Actions.

- 6-45. Costs against defendant convicted, confessing, or submitting.
- 6-46. Defendant imprisoned not discharged until costs paid.
- 6-47. Judgment confessed; bond given to secure fine and costs.
- 6-48. Arrest for nonpayment of fine and costs.

Art. 7. Liability of Prosecutor for Costs.

- 6-49. Prosecutor liable for costs in certain cases; court determines prosecutor.
- 6-50. Imprisonment of prosecutor for nonpayment of costs, if prosecution frivolous.

Art. 8. Fees of Witnesses.

- 6-51. Not entitled to fees in advance.
- 6-52. Fees and mileage of witnesses.

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- 6-53. Witness to prove attendance; action for fees.
- 6-54. Witness tickets to be filed; only two witnesses for single fact.
- 6-55. Fees of witnesses before jury of view, commissioner, etc.
- 6-56. Fees of witnesses before grand jury.
- 6-57. Pay of state's witnesses.
- 6-58. County to pay state's witnesses in certain cases.
- 6-59. County to pay defendant's witnesses in certain cases.
- 6-60. Fees of state witnesses; two only in misdemeanors; one fee for day's attendance.

Art. 1. Generally.

§ 6-1. **Items allowed as costs.**—To either party for whom judgment is given there shall be allowed as costs his actual disbursements for fees to the officers, witnesses, and other persons entitled to receive the same. (Rev., s. 1249; Code, s. 528; C. S. 1225.)

Cross Reference.—As to prosecution bonds for costs, see § 1-109 et seq.

Editor's Note.—In general this section states the rule that costs follow the judgment, a rule which is founded on policy and natural justice, designed to prevent the unsuccessful litigant from escaping the consequence ensuing from the unfavorable termination of a suit, and which, to a great extent, acts as deterrent to the prosecution or appeal of promiscuous and frivolous litigation. Criminal actions and civil suits alike are controlled by the principle: In *State v. Horne*, 119 N. C. 853, 26 S. E. 36, Clark, J., says: "There is no exception in State cases to the rule prevailing in civil cases that the costs follow the result of the final judgment." The true and only test of liability for costs depends upon the nature of the final judgment, and the party cast in the suit is the one upon whom the costs must fall. *Kincaid v. Graham*, 92 N. C. 154; *Williams v. Hughes*, 139 N. C. 17, 51 S. E. 790; *Smith v. Lumber Co.*, 148 N. C. 334, 62 S. E. 416; *Kinston Cotton Mills v. Rocky Mount Hosiery Mills*, 154 N. C. 462, 70 S. E. 910; *Ritchie v. Ritchie*, 192 N. C. 538, 541, 135 S. E. 458.

This basic rule of costs is underlying throughout and apparent from the other provisions of this chapter, and, as stated in *Costin v. Baxter*, 29 N. C. 111, 115, "in no instance found in the books has the losing party recovered his costs or any part of them."

In General.—For a discussion of costs generally, see *State v. Massey*, 104 N. C. 877, 10 S. E. 608.

Partial Recovery.—See § 6-18 and annotations thereto.

Costs of Witnesses.—See sections 6-51 et seq., and the notes thereto.

Dependent upon Statutes.—At common law neither party to a civil action could recover costs. *Chadwick v. Life Ins. Co.*, 158 N. C. 380, 74 S. E. 115; *Costin v. Baxter*, 29 N. C. 111; *State v. Massey*, 104 N. C. 877, 10 S. E. 608; *Waldo v. Wilsen*, 177 N. C. 461, 100 S. E. 182. And it has been frequently held that costs are entirely creatures of legislation, without which they do not exist. *Clerk's Office v. Commissioners*, 121 N. C. 29, 30, 27 S. E. 1003. See also *Lowe v. Kansas*, 163 U. S. 81, 16 S. Ct. 1031, 41 L. Ed. 78; *Day v. Woodworth*, 13 How. 362, 363, 14 L. Ed. 182.

The whole matter of costs, including the party to or against whom they may be given, the items or sums to be allowed, etc., is and always has been within the regulation and control of the legislature. See *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 17 S. Ct. 255, 41 L. Ed. 666.

Jurisdiction Essential.—Where a court has no jurisdiction of a case, it cannot award costs, or order execution to issue for them. See *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 4 S. Ct. 510, 28 L. Ed. 462.

An action upon a contract sounding in damages is one at law, and the costs are taxable under this section, and are not in the discretion of the court as an equity proceeding controlled by section 6-20. *Cotton Mills v. Knitting Co.*, 194 N. C. 80, 90, 138 S. E. 428.

Where the supreme court allows improvements claimed in partition proceedings, claimant is not to be taxed with the costs of trial in the superior court involving her claim. *Jenkins v. Strickland*, 214 N. C. 441, 199 S. E. 612.

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- 6-61. On appeal from justice only two witnesses bound over.
- 6-62. Solicitor to announce discharge of state's witnesses.
- 6-63. Witnesses not paid without certificate; court's discretion.

Art. 9. Criminal Costs before Justices, Mayors, County or Recorders' Courts.

- 6-64. Liability for criminal costs before justice, mayor, county or recorder's court.
- 6-65. Imprisonment of defendant for nonpayment of fine and costs.

§ 6-2. **Summary judgment for official fees.**—If any officer, to whom fees are payable by any person, fails to receive them at the time the service is performed, he may have judgment therefor on motion to the court in which the action is or was pending, upon twenty days' notice to the person to be charged, at any time within one year after the termination of the action in which the same was performed. If the motion for judgment be in behalf of the clerk of the superior court, it shall be made to the judge of the court in or out of term. (Rev., s. 1250; Code, s. 3760; 1868-9, c. 279, s. 561; C. S. 1226.)

Advance Fees for Docketing Transcript.—This section impliedly authorizes the clerk of the Supreme Court to refuse to docket the transcript when the prescribed fee is not paid in advance. Section 138-2 specifically authorizes the refusal. *Dunn v. Clerk's Office*, 176 N. C. 50, 96 S. E. 738; *Andrews v. Whisnart*, 83 N. C. 446, 447.

When Cause Is Still Pending.—This section is not applicable to the claim of a referee for payment of services rendered in a cause which is still pending in the courts upon exceptions to his report. *Farmers Bank v. Merchants & Farmers Bank*, 204 N. C. 378, 168 S. E. 221.

Time of Motion to Re-tax.—This section permits a motion to re-tax costs to be made in favor of any officer within one year after termination of the action. In *re Smith*, 105 N. C. 167, 10 S. E. 982.

Judgment Becomes a Lien.—A judgment under this section becomes a lien on the lands of the defendants. *Sheppard v. Bland*, 87 N. C. 163.

Where, as a condition of a continuance, the plaintiff in an action was required to pay the accrued costs and they were taxed, docketed and paid, and a judgment was subsequently entered in the action directing the repayment of such costs by the defendant, it was held, that such costs became a part of the judgment already ascertained by reference to the docket as for so much money paid by the plaintiff for the defendant's benefit, and hence, there was no necessity for a re-taxation of the costs. *Owen v. Paxton*, 122 N. C. 770, 30 S. E. 343.

§ 6-3. **Sureties on prosecution bonds liable for costs.**—When an action is brought in any court in which security is given for the prosecution thereof, or when any case is brought up to a court by an appeal or otherwise, in which security for the prosecution of the suit has been given, and judgment is rendered against the plaintiff for the costs of the defendant, the appellate court shall also give judgment against the surety for said costs, and execution may issue jointly against the plaintiff and his surety. (Rev., s. 1251; Code, s. 543; R. C., c. 31, s. 126; R. S., c. 31, s. 133; 1831, c. 46; 1913, c. 189, s. 1; C. S. 1227.)

Cross References.—As to use of mortgages in lieu of security for costs, etc., see § 109-25. As to appeal bonds, see § 1-297.

Applies to Judgment for Defendant.—The section is so broadly worded as to apply to all cases where the costs are adjudged for the defendant against the plaintiff, and not simply to those where the plaintiff appeals. *Kenney v.*

Seaboard Air Line Railway Co., 166 N. C. 566, 569, 82 S. E. 849.

Applies in Supreme Court.—This section cannot be restricted in its application to appeals from the court of a justice of the peace, for the first sentence of the section would not apply to such a court, as no prosecution bond for costs is given there, but only in the superior court, or in the Supreme Court if an action is brought here against the state, or perhaps in some other cases not cognizable by a justice of the peace. *Kenney v. Seaboard Air Line Railway Co.*, 166 N. C. 566, 570, 82 S. E. 849; *Grimes v. Andrews*, 171 N. C. 367, 88 S. E. 513.

The words "appellate court," as used by the amendment of this section in 1913, in view of the context could mean only the Supreme Court. *Kenney v. Seaboard Air Line Railway Co.*, 166 N. C. 566, 571, 82 S. E. 849.

The words of this section "security for the prosecution of action," undeniably mean the prosecution bond, and, under the rule, should now have the same meaning. If the prosecution bond was not intended, the inaptness of the phraseology would hardly have escaped attention. *Kenney v. Seaboard Air Line Railway Co.*, 166 N. C. 566, 571, 82 S. E. 849.

Increasing Penalty of Bond.—Where the defendant has been successful on his appeal to the Supreme Court, and his judgment for costs against the sureties on the prosecution bond of the plaintiff results in making insecure the costs in the superior court, the remedy is by application to increase the penalty of the bond. *Kenney v. Seaboard Air Line Railway Co.*, 166 N. C. 566, 82 S. E. 849.

Partial New Trial.—This section does not apply where the defendant does not gain an entire reversal in the Supreme Court; where a partial new trial only is awarded the costs are in the discretion of the Supreme Court as provided in section 6-33. *Rayburn v. Casualty Company*, 142 N. C. 376, 55 S. E. 296.

Application.—Where an action is brought to recover fees of an office, and in the same action judgment is asked against the sureties on a bond given in a quo warranto proceeding, the superior court has jurisdiction and judgment may be rendered against the sureties. *McCall v. Zachary*, 131 N. C. 466, 42 S. E. 903.

Appeal.—Though a surety on a prosecution bond is not a party to the action, yet, when he is made a party to a proceeding to tax the costs in a case, he may appeal from the order allowing the motion to re-tax. *Smith v. Arthur et al.*, 116 N. C. 872, 874, 21 S. E. 696.

§ 6-4. Execution for unpaid fees; itemized bill of costs to be annexed.—The clerks of the supreme, superior and criminal courts, where suits are determined and the fees are not paid by the party from whom they are due, shall sue out executions, directed to the sheriff of any county in the state, who shall levy them as in other cases; and to the said execution shall be annexed a bill of costs, written in words so as plainly to show each item of costs and on what account it is taxed; and all executions for costs, issuing without such a bill annexed, shall be deemed irregular, and may be set aside as to the costs, at the return term, at the instance of him against whom it is issued. (Rev., s. 1252; Code, s. 3762; R. C., c. 102, s. 24; C. S. 1228.)

Every execution presupposes a judgment of some sort, and the right given by this section to issue the one implies the existence of the other. *Sheppard v. Bland*, 87 N. C. 163, 167.

§ 6-5. Jurors' tax fees.—On every indictment or criminal proceeding, tried or otherwise disposed of in the superior or criminal courts, the party convicted, or adjudged to pay the costs, shall pay a tax of four dollars. In every civil action in any court of record the party adjudged to pay the costs shall pay a tax of five dollars; but this tax shall not be charged unless a jury shall be impaneled. Said tax fees shall be charged by the clerk in the bill of costs, and collected by the sheriff, and by him paid into the county treasury. And the fund thus raised in any county shall be set apart for the payment of the jurors attending

the courts thereof. (Rev., s. 1253; Code, s. 732; R. C., c. 28; 1830, c. 1; 1879, c. 325; 1881, c. 249; 1905, c. 348; 1909, c. 1; 1919, c. 319; C. S. 1229.)

Local Modification.—Harnett: 1933, c. 75, s. 1(c); Wayne: 1927, c. 156; 1937, c. 120; 1941, c. 88.

Cross References.—As to fees of jurors, see § 9-5. As to unclaimed fees of jurors, see § 2-50.

Not a "Tax" within Meaning of Constitution.—The tax prescribed by Rev. Code, ch. 28, sec. 4, (similar to this section) was not a tax within the meaning of the Revenue Act of 1858-59, which repealed all taxes not therein imposed; nor was it a tax within the meaning of the Constitution, Art. V, sec. 3, which requires taxes to be equal and uniform. Such a tax was not in violation of the Constitution, Art. I, sec. 35. *State v. Nutt*, 79 N. C. 263.

Failure to List Taxes.—The plea of guilty to an indictment for failure to list taxes as required by the Revenue Act comes within the intent and meaning of this section requiring in criminal cases a tax of \$4 against the "party convicted or adjudged to pay the cost," and applies whether the jury has been impaneled or not; and the tax of \$5 in the civil actions should be imposed as a part of the costs, when the jury has been impaneled. This but evidences the legislative intent to draw this distinction between criminal and civil actions, the reason therefore, though apparent, is immaterial in construing the meaning of the statute. *State v. Smith*, 184 N. C. 728, 114 S. E. 625.

§ 6-6. In criminal cases, not demandable in advance.—In all cases of criminal complaints before justices of the supreme court, judges of the superior and criminal courts, justices of the peace and other magistrates having jurisdiction of such complaints, the officers entitled by law to receive fees for issuing or executing process are not entitled to demand them in advance. Such officers shall indorse the amounts of their respective fees on every process issued or executed by them, and return the same to the court to which it is returnable. (Rev., s. 1254; Code, s. 1173; 1868-9, c. 178, subch. 3, s. 40; C. S. 1230.)

Cross Reference.—As to costs payable in advance in civil actions, see § 2-29.

§ 6-7. Clerk to state in detail in entry of judgment.—The clerk shall insert in the entry of judgment the allowances for costs allowed by law, and the necessary disbursements, including the fees of officers and witnesses, and the reasonable compensation of referees and commissioners in taking depositions. The disbursements shall be stated in detail. When it is necessary to adjust costs in any interlocutory proceedings, or in any special proceedings, the same shall be adjusted by the clerk of the court to which the proceedings were returned, except in those matters in which the allowance is required to be made by the judge. (Rev., s. 1255; Code, s. 532; C. S. 1231.)

In General.—In *Young v. Connelly*, 112 N. C. 646, 650, 17 S. E. 424, the court cites this section to the following statement: "So it seems in this view of the testimony that it was the duty of the clerk to have filled the blanks and docketed the judgment. The referee's fee was a part of the costs. It was necessary for the clerk to tax the costs and insert the amount in the entry of judgment in addition to the sum adjudged by his honor."

§ 6-8. Clerk to itemize bills of criminal costs; approval of solicitor.—It is the duty of the clerks of the several courts of record, at each term of the court, to make up an itemized statement of the bill of costs in every criminal action tried or otherwise disposed of at said term, which shall be signed by the clerk and approved by the solicitor. (Rev., s. 1256; Code, s. 733; 1873-4, c. 116; 1879, c. 264; C. S. 1232.)

Local Modification.—Harnett: 1933, c. 75, s. 3.

§ 6-9. Justice required to itemize costs.—In all

trials before justices of the peace any party, plaintiff or defendant, may demand of the justice of the peace before whom the trial is held an itemized statement of the costs of the action. Upon such demand it shall be the duty of the justice to furnish the statement demanded. No person shall be compelled to pay any cost in any trial before a justice of the peace until an itemized statement of the costs has been made out and given to the party charged. It shall be the duty of the justice to insert in the entry of the judgment in every criminal action tried or otherwise disposed of by him a detailed statement of the different items of cost, and to whom due. (Rev., ss. 1257, 2789; Code, s. 734; 1887, c. 297; C. S. 1233.)

Cross Reference.—As to fees and costs in appeal from justices of the peace, see § 7-181.

§ 6-10. Justice of the peace refusing to furnish bill of costs.—If any justice of the peace before whom any trial is held shall refuse to furnish an itemized bill of costs, when demanded by the plaintiff or defendant, he shall be guilty of a misdemeanor, and upon conviction shall be punished at the discretion of the court. (Rev., s. 3588; Code, s. 734; 1887, c. 297; C. S. 1234.)

§ 6-11. Bills of costs open to the public.—Every bill of costs shall at all times be open to the inspection of any person interested therein. (Rev., s. 1258; Code, s. 735; 1873-4, c. 116; C. S. 1235.)

§ 6-12. Clerks to tax solicitors fees; paid to school fund.—The clerks of the superior courts of the several counties of the state shall, in computing bills of costs in criminal cases, tax against the party convicted the solicitors fees hereinafter set forth. The solicitors fees shall be collected by the clerks and paid into the school funds of the respective counties: Provided, that no such fees which are now required by law to be paid by the county shall be taxed in the bills of costs, nor shall any such fees be taxed in said bills of costs in cases where the defendants are assigned to work on the public roads of the state, or on any county properties.

The solicitors fees are as follows:

(a) For every conviction under an indictment charging a capital crime, whether by plea or verdict, forty dollars.

(b) For perjury, forgery, passing or attempting to pass or sell any forged or counterfeited paper, or evidence of debt; maliciously injuring or attempting to injure any railroad or railroad car, or any person traveling on such railroad car; stealing or obliterating records; maliciously burning or attempting to burn houses or bridges; seduction; slander of an innocent woman, and embezzlement; breaking into houses otherwise than burglariously; assault with intent to commit rape; larcenies from the person; false pretense, and secret assault; in each of the above cases, twenty dollars.

(c) For larceny, receiving stolen goods, frauds, maims, deceptions, escapes, and other felonies, fifteen dollars.

(d) For disturbing religious and other public meetings; for all violations of the prohibition law as to intoxicating liquors and narcotics; for fornication and adultery and resisting an officer, twelve dollars.

(e) For all other offenses, eight dollars.

No larger fee than ten dollars shall be taxed for

the solicitor in an indictment against the justices of the peace of any county, as justices, when there are more than three justices who are found guilty.

The solicitors of the several judicial districts and criminal courts shall prosecute all penalties and forfeited recognizances entered in their courts respectively, and a sum to be fixed by the court, not to exceed ten per centum of the amount collected upon such penalty or forfeited recognizance, shall be taxed in such prosecutions.

For the performance of the solicitors duties for the appointment of a receiver of an estate of a minor, there shall be taxed a sum to be fixed by the judge, not to exceed ten dollars; for passing on the returns of the receiver in such cases, where the estate of the infant does not exceed five hundred dollars, a sum not to exceed five dollars, and where the estate exceeds five hundred dollars, a sum to be fixed by the judge, not to exceed ten dollars; and in each case such sums taxed shall be paid out of the fund. (Rev., s. 2768; Code, s. 3737; 1873-4, c. 170; 1885, c. 130; 1895, c. 14; 1901, c. 4, s. 5; 1915, c. 86; Ex. Sess. 1920, c. 97; Ex. Sess. 1921, c. 75; 1923, c. 157, s. 3; C. S. 1235(a), 3891.)

Cross References.—As to salary of solicitors in lieu of fees, see §§ 7-44, 7-45. As to solicitors' fees where the bill of indictment contains more than one count, see § 15-152.

Art. 2. When State Liable for Costs.

§ 6-13. Civil actions by the state; joinder of private party.—In all civil actions prosecuted in the name of the state, by an officer duly authorized for that purpose, the state shall be liable for costs in the same cases and to the same extent as private parties. If a private person be joined with the state as plaintiff, he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the state till after execution is issued therefor against such private party and returned unsatisfied. (Rev., s. 1259; Code, s. 536; C. S. 1236.)

Constitutionality.—In *Blount v. Simmons*, 119 N. C. 50, 25 S. E. 789, it is said: "We find nothing in the Constitution depriving the Legislature of power to enact, Code, sec. 536, (this section) and we do not think it will impair the sovereign character of the state to meet its just liabilities, whether in the form of costs or otherwise."

Dependent upon Statute.—At common law the king neither paid nor received costs, as the former was his prerogative and the latter was beneath his dignity, and the general statutes giving costs did not include the sovereign. The same principle has been applied in this country and in this state, so that the state is only liable in the event of express statutory provisions, which are now quite general in the different states. *Blount v. Simmons*, 120 N. C. 19, 20, 26 S. E. 649.

Judgment against State.—Upon the failure of the litigation, the state is, under this section, liable for the costs of an action authorized by act of the General Assembly and prosecuted in its name by the solicitor, and judgment may be rendered in such action against the state for such costs. *Blount v. Simmons*, 119 N. C. 50, 25 S. E. 789.

States Recover Costs.—In an action in the United States Supreme Court between states, the successful state may ask for costs or not as it sees fit. *Missouri v. Illinois*, 202 U. S. 598, 26 S. Ct. 713, 50 L. Ed. 1160.

Application to Legislature for Payment.—In an article, entitled Jurisdiction of The North Carolina Supreme Court, 5 N. C. Law Rev. 1, 9, the following appears: "Costs of action as a claim. While the State may be sued only in the Supreme Court, it may sue in any court having jurisdiction over the cause of action, and the cost of such litigation may be taxed against the state as in case of private litigants. Such costs, however, do not constitute a claim against the State as contemplated in the jurisdiction of the Supreme Court, but are only incidental to the right to sue. The court in which the action is brought adjudicates the costs, and the parties interested should apply to the Legis-

lature for payment." *Miller v. State*, 134 N. C. 270, 46 S. E. 514; *Garner v. Worth*, 122 N. C. 250, 29 S. E. 364; *Blount v. Simmons*, supra.

Actions to Vacate Oyster-Bed Entry.—Where, in an action by the solicitor in the name of the State to vacate an oyster-bed entry, the plaintiff was nonsuited, it was error to tax the costs against the county, which was not a party to the action. *Blount v. Simmons*, 118 N. C. 9, 23 S. E. 923.

Under this section the state is liable for the costs of an action instituted by the state solicitor to vacate an oyster-bed entry. In such case, it seems that the persons making the required affidavit, alleging that the entry is a fraud upon the State, might be held liable as relators if it should appear that the action was for their benefit and at their instance. *Blount v. Simmons*, 120 N. C. 19, 26 S. E. 649.

Where the proceedings for disbarment of an attorney have not been sustained the costs are taxable against the State under the provisions of this section, and an order erroneously taxing them against the county in which the matter was tried will be vacated. Committee on Grievances of Bar Ass'n v. Strickland, 201 N. C. 619, 161 S. E. 76.

§ 6-14. Civil action by and against state officers.

—In all civil actions depending, or which may be instituted, by any of the officers of the state, or which have been or shall be instituted against them, when any such action is brought or defended pursuant to the advice of the attorney-general, and the same is decided against such officers, the cost thereof shall be paid by the state treasurer upon the warrant of the auditor for the amount thereof as taxed. (Rev., s. 1260; Code, s. 3373; 1874-5, c. 154; C. S. 1237.)

§ 6-15. Actions by state for private persons, etc.—In an action prosecuted in the name of the state for the recovery of money or property, or to establish a right or claim for the benefit of any county, city, town, village, corporation or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was prosecuted, and not against the state. (Rev., s. 1261; Code, s. 537; C. S. 1238.)

§ 6-16. Costs of county in certain bribery prosecutions to be a charge against state.—The expenses incurred by any county in investigating and prosecuting any charge of bribery or attempt to bribe any state officer or member of the general assembly within said county, and of receiving bribes by any state officer or member of the general assembly in said county, shall be a charge against the state, and the properly attested claim of the county commissioners shall be paid by the treasurer of the state. (Rev., s. 1262; Code, s. 742; 1868-9, c. 176, s. 6; 1874-5, c. 5; C. S. 1239.)

§ 6-17. Costs of state on appeals to federal courts.—In all cases, whether civil or criminal, to which the state of North Carolina is a party, and which are carried from the courts of this state, or from the district court of the United States, by appeal or writ of error, to the United States circuit court of appeals, or to the supreme court of the United States, and the state is adjudged to pay the costs, it is the duty of the attorney-general to certify the amount of such costs to the auditor, who shall thereupon issue a warrant for the same, directed to the treasurer, who shall pay the same out of any moneys in the treasury not otherwise appropriated. (Rev., s. 1263; Code, s. 538; 1871-2, c. 26; C. S. 1240.)

Art. 3. Civil Actions and Proceedings.

§ 6-18. When costs allowed as of course to plaintiff.—Costs shall be allowed of course to the plaintiff, upon a recovery, in the following cases:

1. In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial.

2. In an action to recover the possession of personal property.

3. In actions of which a court of a justice of the peace has no jurisdiction, unless otherwise provided by law.

4. In an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction, if the plaintiff recovers less than fifty dollars damages, he shall recover no more costs than damages.

5. When several actions are brought on one bond, recognizance, promissory note, bill of exchange or instrument in writing, or in any other case, for the same cause of action against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be allowed to the plaintiff in more than one of such actions, which shall be at his election, provided the party or parties proceeded against in such other action or actions were within the state and not secreted at the commencement of the previous action or actions. (Rev., s. 1264; Code, s. 535; 1874-5, c. 119; R. C. c. 31, s. 78; C. S. 1241.)

I. In General.

II. Actions for Recovery of Real Property, etc.

III. Recovery of Personalty.

IV. When Justice Has No Jurisdiction.

V. No More Recovery of Costs than Damages.

I. IN GENERAL.

Meaning of Recovery.—The recovery referred to in this section is a final determination upon the merits, and success in the Supreme Court is by no means equivalent to a recovery in the court below. *Williams v. Hughes*, 139 N. C. 17, 18, 51 S. E. 790.

Also a recovery within the meaning of the section cannot be predicated upon anything coming to the plaintiff which was not in the contemplation of the plaintiff when he filed his complaint, and especially of a thing to which he virtually disclaimed any right or title. *Patterson v. Ramsey*, 136 N. C. 561, 564, 48 S. E. 811.

In order to determine who should pay the costs, the general result must be considered and inquiry made as to who has, in the view of the law, succeeded in the action. *Patterson v. Ramsey*, 136 N. C. 561, 564, 48 S. E. 811.

Partial Recovery.—There is no provision that limits the allowance of costs in favor of the plaintiff in case of only a partial recovery. The language of the statute as to them is comprehensive and without exceptive provision. In *Wall v. Covington*, 76 N. C. 150, it was held that no part of the costs in such actions can be taxed against the party recovering. And in *Horton v. Horne*, 99 N. C. 219, 5 S. E. 927, it was decided in an action to recover personal property, that if the plaintiff establishes his title to only a portion of the property delivered to him under claim and delivery proceedings, he will be entitled to costs. *Wooten v. Walters*, 110 N. C. 251, 258, 14 S. E. 734, 736; *Ferrabow v. Green*, 110 N. C. 414, 14 S. E. 973; *Kinston Cotton Mills v. Rocky Mount Hosiery Co.*, 154 N. C. 462, 70 S. E. 910.

Where the plaintiff is entitled to nominal damages, such damages will carry with it the cost under this section. *Wilson v. Forbes*, 13 N. C. 30; *Britton v. Ruffin*, 123 N. C. 67, 70, 21 S. E. 271.

Section Qualified by Section 28-115.—Where the action is not of such a nature that it falls within any of the subdivisions of this section or of the following section, it comes within the terms and is included by section 6-20. *Parton v. Boyd*, 104 N. C. 422, 10 S. E. 490; *Yates v. Yates*, 170 N. C. 533, 87 S. E. 317. All these sections are, however, subject to the exception as to when costs are allowed against an administrator as stated in section 28-115. *Whitaker v. Whitaker*, 138 N. C. 205, 206, 207, 50 S. E. 630.

Action by Executor.—Where the action involves the question as to the recovery of a portion of the estate of a deceased person, and judgment is rendered in favor of the executor, the plaintiff, he is entitled to a judgment

for costs under this section. *White v. Mitchell*, 196 N. C. 89, 144 S. E. 526.

II. ACTIONS FOR RECOVERY OF REAL PROPERTY, ETC.

Common Law Rule.—This subdivision of the section in this respect is in affirmance of the principle established before its enactment. *Moore v. Angel*, 116 N. C. 843, 846, 21 S. E. 699.

Construed with Section 6-21.—This section, allowing plaintiffs costs as of course, upon recovery, in an action involving title to real estate, and § 6-21, providing apportionment of costs in a special proceeding for the division or sale of realty or personalty are related sections, pertain to the same subject matter, and must be construed in *pari materia*. *Bailey v. Hayman*, 222 N. C. 58, 22 S. E. (2d) 6.

Partial Recovery.—Applying the general rule as to partial recovery, which is set out under the preceding analysis line, it is held that where the plaintiff is adjudged entitled to a part of the land sued for, whether such land is a portion of one tract or is one of several tracts for which the action is brought, then the plaintiff is exonerated as to costs and no part thereof should be found against him. *Vanderbilt v. Johnson*, 141 N. C. 370, 54 S. E. 298; *Moore v. Angel*, 116 N. C. 843, 21 S. E. 699; *Ferrabow v. Green*, 110 N. C. 414, 14 S. E. 973; *Field v. Wheeler*, 120 N. C. 264, 26 S. E. 812. See also *Staley v. Staley*, 174 N. C. 640, 94 S. E. 407.

Where the plaintiff has been required to introduce evidence of his title to the whole of the locus in quo, and then the defendant consents that the court charge the jury to find for the plaintiff if they believe the evidence as to a certain part, and the issue is found for the defendant as to the remaining land, the costs of the action are properly awarded against the defendant. *Swain v. Clemons*, 175 N. C. 240, 95 S. E. 489.

When There is More than One Issue.—In an action of trespass to real property, where the plaintiff's title and the fact of trespass are both put in issue by the defendant's answer, and the jury find the issue as to the title in favor of the plaintiff, and the issue as to the trespass in favor of the defendant, the defendant is entitled to judgment for costs. To entitle the plaintiff to recover costs, both issues must be found in his favor. *Murray v. Spencer*, 92 N. C. 264.

Persons Severally Sued.—In the case of several persons, severally bound, and severally sued, until one has actually made satisfaction all are liable to make it, and costs may be allowed in all suits, though only one satisfaction can be recovered. See *Larin v. Morris*, 2 Dall. 115, 1 L. Ed. 312.

Boundary Dispute.—Where, in an action in ejectment and for damages for cutting of timber, defendant files answer denying plaintiff's title to the land in dispute, and verdict is entered in favor of plaintiffs, plaintiffs, as a matter of law, are not liable for any of the costs notwithstanding that upon the trial each party admitted the title of the other within the boundaries of their respective grants and the only controversy was as to the location of the boundary between their respective grants. *Cody v. England*, 221 N. C. 40, 19 S. E. (2d) 10.

Actions to Recover Both Realty and Personalty.—Under this section the plaintiff in an action to recover both real and personal property is entitled to recover costs, although he recovers the real property only. *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734.

Equitable Defense.—One who successfully maintains an equitable defense against the recovery of land on the bare legal title is entitled to judgment for his costs. *Vestal v. Sloan*, 83 N. C. 555.

Necessity for Disclaimer.—A defendant in an action concerning land should enter a disclaimer if he does not claim the land in controversy, or does not intend to litigate with the plaintiff, in order to escape the payment of costs. *Swain v. Clemons*, 175 N. C. 240, 95 S. E. 489.

This rule is forcibly illustrated by the case of *Moore v. Angel*, 116 N. C. 843, 21 S. E. 699, where, in an action in trespass, the defendant failed to disclaim title to all the land declared for by plaintiff, but recovered according to the boundaries set up in his answer, with a greater amount for damages on his counterclaim than was allowed the plaintiff, and the plaintiff was nevertheless held entitled to costs.

But if the defendant disclaims title to all the land declared for, except that for which he proves his right, no issue as to the plaintiff's title will arise, and the findings that the defendant's title, disputed by the plaintiff, is good and that the defendant has sustained greater damages than his adversary, upon both necessarily, perhaps on either, will

entitle the defendant to costs. *Moore v. Angel*, 116 N. C. 843, 846, 21 S. E. 699.

So in ejectment, where the defendant denies the right to possession and denies that the plaintiff holds the title in trust for him, and judgment is rendered that the defendant is entitled to the land upon payment of an amount found due the plaintiff, no part of the cost is taxable against the defendant. *Patterson v. Ramsey*, 136 N. C. 561, 48 S. E. 811.

It would seem that in order to escape potential liability for costs the defendant must enter his disclaimer of all the lands declared for, and that a disclaimer of half the locus in quo will not suffice to enable him to escape upon the unfavorable adjudication of the other half. See *In re Hurley*, 185 N. C. 422, 117 S. E. 345.

Liability of Intervener.—Where the defendant intervenes in an action to recover real property and files a joint answer with his co-defendant, and makes a joint defense, the plaintiff is entitled to the costs under this subdivision of the section. Having joined in the controversy, and made common cause in the defense, interveners must abide the result. *Spruill v. Arrington*, 109 N. C. 192, 196, 13 S. E. 779. See also *Willis v. Coleburn*, 169 N. C. 670, 86 S. E. 596.

Bill of Interpleader.—The U. S. Supreme Court in *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614, held that on a bill of interpleader, the plaintiffs are, in general, entitled to their costs out of the fund.

III. RECOVERY OF PERSONALTY.

Partial Recovery.—There is no exception to the partial recovery rule (see ante, this note, I. "In General") when the action is for the recovery of personalty, and when the plaintiff establishes title to any part of the property sued for, he is entitled to judgment for costs. *Wooten v. Walters*, 110 N. C. 251, 258, 14 S. E. 374; *Field v. Wheeler*, 120 N. C. 264, 26 S. E. 812. This is not the case where some of the defendants recover judgment, in which case, of course, they recover costs. *Phillips v. Little*, 147 N. C. 282, 283, 61 S. E. 49.

As an example of the application of this rule to claims for personal property it has been held that the plaintiff on being adjudged entitled to only a portion of a crop in a suit for claim and delivery was entitled to costs. *Field v. Wheeler*, 120 N. C. 264, 26 S. E. 812, and cases cited.

Claim and Delivery.—Judgment in an action of claim and delivery carries all costs under this section. *Rawlings v. Neal*, 126 N. C. 271, 35 S. E. 597.

Right to Possession Determines.—Where the controversy is made to depend upon the right of the mechanic to repossess an automobile that he has repaired, in order that he may enforce his lien thereon, and the jury has found in the plaintiff's favor upon determinative issues, but in the defendant's favor upon an issue of fraud, the question of taxing the cost does not depend upon the finding of the jury upon the issue of the defendant's fraud, and the plaintiff, having established his right to the possession, is entitled to recover the cost., under this section. *Maxton Auto Co. v. Rudd*, 176 N. C. 497, 97 S. E. 477.

IV. WHEN JUSTICE HAS NO JURISDICTION.

Construed with Sections 6-19 and 6-20.—The meaning of this subdivision of the section when considered in connection with section 6-20, is not clear, nor has it ever been fully and satisfactorily interpreted; but in many well considered decisions of the court it has been held to be the correct construction of these sections that, in actions which under the old system were peculiarly cognizable in courts of equity and unless coming in the class of actions specified in sections 6-18 and 6-19, in which the plaintiff and defendant who succeed in the controversies were to recover costs as of course, that the costs could be awarded in the discretion of the court under the provisions of section 6-20. *Yates v. Yates*, 170 N. C. 533, 535, 87 S. E. 317.

Application.—A justice has no cognizance of an action brought for the purpose of subjecting land to the payment of intestate's debts, *Williams v. Hughes*, 139 N. C. 17, 51 S. E. 790, consequently, such an action is controlled by this subdivision of the section; and a stakeholder who demurs to the complaint, has guardians ad litem appointed, etc., is liable for the costs. *Van Dyke v. Ins. Co.*, 174 N. C. 78, 93 S. E. 444.

V. NO MORE RECOVERY OF COSTS THAN DAMAGES.

In a civil action, if the provocation is great, the jury will usually see fit to return nominal or small damages, and if the amount is less than fifty dollars the plaintiff, under this section, recovers no more costs than damages. *Palmer v. Winston-Salem R., etc., Co.*, 131 N. C. 250, 251, 42 S. E. 604. The subsection was applied here the recovery for slander was less than fifty dollars in *Smith v. Myers*,

188 N. C. 551, 125 S. E. 178. And again when one dollar damages were sustained by the erection of a mill. See *Bridgers v. Purcell*, 23 N. C. 232. The former rule as to slander is stated in *Coates v. Stephenson*, 52 N. C. 124 where it was held that the costs of the plaintiff, under R. C., c. 31, section 78, could not be taxed against the defendant.

For a case where an instructed verdict for one penny damages and one penny costs, under this section, was held erroneous because actual and not nominal damage was shown, see *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811.

Applied, as to action of slander, in *Wolfe v. Montgomery Ward & Co.*, 211 N. C. 295, 189 S. E. 772.

§ 6-19. When costs allowed as of course to defendant.—Costs shall be allowed as of course to the defendant, in the actions mentioned in the preceding section, unless the plaintiff be entitled to costs therein. In all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor or any of them. (Rev., s. 1266; Code, ss. 526, 527; C. C. P., s. 277; C. S. 1242.)

Editor's Note.—As this section provides that costs shall be allowed to the defendant in the actions mentioned in the preceding section, unless the plaintiff is entitled to recover thereon, the constructions of the preceding section determining when the plaintiff is entitled to recover, are necessarily constructions of this section. Reference should be made to section 6-18 in all instances.

Applications.—Where the plaintiff fails in an action upon a covenant, the defendant recovers costs under this section. *Britton v. Ruffin*, 123 N. C. 67, 71, 31 S. E. 271.

Costs were properly awarded to the grantee in a deed in an unsuccessful action to set aside such deed. *Brisco & Co. v. Norris*, 112 N. C. 671, 16 S. E. 850.

Cited in *Gold v. Kiker*, 218 N. C. 204, 10 S. E. (2d) 650.

§ 6-20. Costs allowed or not, in discretion of court.—In other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law. (Rev., s. 1267; Code, s. 527; C. S. 1243.)

Editor's Note.—This section as it appeared in the Code of 1883 contained a substantial repetition of the provision now appearing in section 6-33 (i. e., as to costs on appeal). The cases pertaining to this subject will be found in the notes to section 6-33.

The purpose of this provision is to give the court authority to allow costs, as the justice of the case may require. *Gulley v. Macy*, 89 N. C. 343; *Parton v. Boyd*, 104 N. C. 422, 423, 10 S. E. 490.

In actions of an equitable nature the costs are in the discretion of the court. *Yates v. Yates*, 170 N. C. 533, 87 S. E. 317.

Exercise of Discretion Presumed.—Nothing to the contrary appearing, it will be taken that the court gave judgment in the exercise of its discretion as provided in this section. *Gulley v. Macy*, 89 N. C. 343; *Wooten v. Walters*, 110 N. C. 251, 259, 14 S. E. 734, 736.

Discretion Not Reviewable.—By the provisions of this section the taxing of the costs is placed in the discretion of the trial judge, which discretion is not reviewable. *Kluttz v. Allison*, 214 N. C. 379, 384, 199 S. E. 395.

In equity there was a broad discretion on the subject of costs, *Little v. Lockman*, 50 N. C. 433, 434, and the allowance rested with the court. *Hooper v. Davis*, 166 N. C. 236, 81 S. E. 1063; *Worthy v. Brower*, 93 N. C. 492. And even since the abolition of the courts of equity in this State, it is held that where the case partakes of an equitable nature, the question of costs is in the court's discretion. For example in *Hare v. Hare*, 183 N. C. 419, 111 S. E. 620, it was held where the jury found that each party was entitled to an undivided half in land, and the appeal was from taxing the defendant with costs, there being no element of an action in ejectment, neither party was permitted to recover cost from the other, especially as the question was of an equitable nature, and the taxing of costs was, under this section, in the sound discretion of the court.

But a consolidated action, tried before the referee, in which judgments are rendered, is not an equitable proceeding, in which costs may be allowed or not, in the discretion of the court under this section. *Highland Cotton*

Mills v. Ragan Knitting Co., 194 N. C. 80, 90, 138 S. E. 428.

New Trial.—See section 6-33 and notes thereto.

Qualified by Section 28-115.—This provision is subject to the exception contained in section 28-115, relative to costs against a representative. *Whitaker v. Whitaker*, 138 N. C. 205, 50 S. E. 630.

Application—Creditor's Bill.—It is within the discretion of the trial court to tax the costs accruing upon either of the parties litigant, in an action in the nature of a creditor's bill, brought by material men, claiming under the statutory lien, the unpaid balance due by the owner of a dwelling, etc., to his contractor for its erection; and the action of the judge in taxing the trust funds in the owner's hands with the cost is commended in this suit. *Bond v. Pickett Cotton Mills*, 166 N. C. 20, 81 S. E. 936.

Same—Specific Performance.—Where the purpose of an action was simply to compel the specific performance of an executory contract, and to adjust certain rights involved in an account of moneys collected and certain indebtedness incident to that contract, it was clearly within this section. *Parton v. Boyd*, 104 N. C. 422, 424, 10 S. E. 490.

Same—Setting Aside Proceedings of Probate Court.—Where the action is to set aside certain proceedings in the probate court, the court is vested with discretion in the matter of allowing costs, under this section: each party is ordered to pay his own and each to pay one-half of the allowance to the referee. *Gulley v. Macy*, 89 N. C. 343.

§ 6-21. Costs allowed either party or apportioned in discretion of court.—Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:

1. Application for year's support, for widow or children.

2. Caveats to wills.

3. Habeas corpus; and the court shall direct what officer shall tax the costs thereof.

4. In actions for divorce or alimony; and the court may both before and after judgment make such order respecting the payment of such costs as may be incurred by the wife, either by the husband or by her from her separate estate, as may be just.

5. Application for the establishment, alteration or discontinuance of a public road, cartway or ferry. The board of county commissioners may order the costs incurred before them paid in their discretion.

6. The compensation of referees and commissioners to take depositions.

7. All costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the chapter entitled Partition.

8. In all proceedings under the chapter entitled Drainage, except as therein otherwise provided.

9. In proceedings for reallocation of homestead for increase in value, as provided in the chapter, Civil Procedure.

The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow. (Rev., s. 1268; Code, ss. 2134, 2161, 1660, 1294, 2039, 2056, 533, 1422, 1323; 1889, c. 37; 1893, c. 149, s. 6; 1937, c. 143; C. S. 1244.)

Local Modification.—Nash: 1939, c. 46; 1941, c. 18.

Editor's Note.—The 1937 amendment added the paragraph at the end of this section and provided that it should not apply to pending causes.

For article discussing the effect of the amendment and the history of attorneys' fees as costs in this State, see 15 N. C. L. Rev. 333.

Caveats to Wills.—It is within the discretionary power of a court, under this section, before which an issue of *devisavit vel non* is tried, to direct the payment of the costs out of the estate. *Mayo v. Jones*, 78 N. C. 406. See In re

Hargrove, 206 N. C. 307, 313, 173 S. E. 577, for dicta on this point.

Where certain land contiguous to the lands of other devisees are devised, without direction in the will for the survey or partition or for perfecting the title, the cost of survey and registration of deeds should be born by the devisees of the lands, and it is not a proper charge against the estate to be paid by the executor. In *re* Winston, 172 N. C. 270, 90 S. E. 201.

Under this section, even though judgment is entered in favor of propounders, the trial court may tax the costs, including an allowance to counsel representing caveaters, against the estate upon finding that the filing of the caveat was apt and proper and done in good faith. In *re* Will of Slade, 214 N. C. 361, 199 S. E. 290.

The allowance of attorney fees to counsel for the propounders is in the sound discretion of the trial court. In *re* Coffield's Will, 216 N. C. 285, 4 S. E. (2d) 870.

In actions for divorce the husband, whether successful or unsuccessful, is liable for his own costs, and whether he shall pay the wife's costs is in all cases in the discretion of the court. *Broom v. Broom*, 130 N. C. 562, 565, 41 S. E. 673.

Allowance to Referee.—Originally, under the Code of 1883, sec. 533, referees' fees were taxed, like other costs, against the losing party, but by amendment (Laws 1889, ch. 37) the court was authorized to apportion them in its discretion. *Cobb v. Rhea*, 137 N. C. 295, 297, 49 S. E. 161.

Where, upon the trial in the superior court upon appeal from the referee, judgment is entered in the superior court in favor of plaintiffs, entitling plaintiffs to recover costs in the trial, such recovery does not include compensation of the referee. *Cody v. England*, 221 N. C. 40, 19 S. E. (2d) 10.

Ordinarily, in litigation over a fund in the nature of an *in rem* proceeding, such items of costs, as referee's allowances and stenographic reporter's bills, are paid out of the fund, although taxable in the discretion of the court, but in *Lightner v. Boone*, 222 N. C. 421, 23 S. E. (2d) 313, it was held that, when such costs have been ordered paid from the estate, they cannot afterwards be taxed against an executor personally.

Same—Analogy to Allowance to Receivers.—The allowance to the receiver is a part of the costs of the action, and usually taxable against the losing party. Whether the receiver's fees should be divided is a matter in the discretion of the presiding judge, as is now the case also with referees' fees. *Simmons v. Allison*, 119 N. C. 556, 564, 26 S. E. 171.

Same—Not Precluded by Former Judgment.—A former judgment, *Horner v. Oxford Water, etc., Co.*, 153 N. C. 535, 69 S. E. 607, 138 Am. St. Rep. 681, appealed from and affirmed by the Supreme Court, "that the defendants do recover against the plaintiff and the surety on his prosecution bond the costs of this action," does not preclude a subsequent trial judge from taxing the cost of reference "against either party or apportioning it among the parties in his discretion" under this section. *Horner v. Oxford Water & Electric Co.*, 156 N. C. 494, 72 S. E. 624.

Costs in Partition.—The taxing of costs among the parties to proceedings to partition land is left in the discretion of the court, and will not be reviewed on appeal. *Fortune v. Hunt*, 152 N. C. 715, 68 S. E. 213.

Where, in a petition for partition, defendant pleads sole seizin, and the trial of such issue results in a verdict for plaintiffs, and in judgment that the parties are tenants in common and appointing a commissioner to make sale, plaintiff is entitled to all costs from the filing of the answer through the final judgment below, that is, while the case was pending on the civil issue docket. This does not include costs of reference which may be taxed in the discretion of the court. Costs of the partition proceeding, exclusive of the issue of sole seizin, may be apportioned. *Bailey v. Hayman*, 222 N. C. 58, 22 S. E. (2d) 6.

In proceedings to partition lands held in common among the heirs at law of the deceased, including the question of dower and the claim of the widow to be allowed a certain fee-simple interest by contract, the court is without authority to allow attorneys' fees as a part of the costs, the same not being included in this section. Those cases wherein the employment of counsel was found necessary to protect the rights of infants represented by guardian in litigation, and other analogous cases, are not applicable to this case. *Regan v. Regan*, 186 N. C. 461, 119 S. E. 882.

Applied in *Field v. Wheeler*, 120 N. C. 264, 269, 26 S. E. 812. Stated in *Perry v. Pulley*, 206 N. C. 701, 704, 175 S. E. 89.

§ 6-22. Petitioner to pay costs in certain cases.—The petitioner shall pay the costs in the following proceedings:

1. In petitions for draining or damming low-lands.

2. In petitions for condemnation of water mill-sites when the petitioner is allowed to erect the mill; but when he is not allowed to erect the mill, the costs shall be paid by the person who is allowed to do so.

3. In petitions for condemnation of land for railroads, street railways, telegraph, telephone or electric power or light companies, or for water supplies for public institutions, or for the use of other quasi-public or municipal corporations; unless in the opinion of the superior court the defendant improperly refused the privilege, use or easement demanded, in which case the costs must be adjudged as to the court may appear equitable and just.

4. When the petition is refused. (Rev., s. 1269; Code, ss. 1299, 1855, 2013; 1893, c. 63; 1903, c. 562; C. S. 1245.)

§ 6-23. Defendant unreasonably defending after notice of no personal claim to pay costs.—In case of a defendant, against whom no personal claim is made, the plaintiff may deliver to such defendant with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects real or personal property, and that no personal claim is made against such defendant. If a defendant on whom such notice is served unreasonably defends the action, he shall pay costs to the plaintiff. (Rev., s. 1270; Code, s. 216; C. S. 1246.)

Condemnation Proceedings.—In proceedings brought by a railroad where it was found by the jury on appeal that the defendant's benefit exceeded his damages and then found they were equal, it was held that the plaintiff was taxable with costs up to the time of appeal. *Madison County R. Co. v. Gahagan*, 161 N. C. 190, 76 S. E. 696.

§ 6-24. Suits in forma pauperis; no costs unless recovery.—When any person sues as a pauper, no officer shall require of him any fee, and he shall recover no costs, except in case of recovery by him. (Rev., s. 1265; Code, s. 212; 1895, c. 149; 1868-9, c. 96, s. 3; C. S. 1247.)

Cross Reference.—As to when suits in forma pauperis may be permitted, see § 1-110.

Leave to Sue.—The leave to sue as a pauper does not extend in civil actions beyond the trial in the Superior Court. *Speller v. Speller*, 119 N. C. 356, 26 S. E. 160.

Costs of Witnesses.—One suing in forma pauperis is not entitled to recover costs of his witnesses. *Draper v. Buxton*, 90 N. C. 182. Nor does the section excuse the pauper from liability for his witnesses. *Bailey v. Brown*, 105 N. C. 127, 129, 10 S. E. 1054.

This provision, in terms, deprives all officers of costs, and the last clause of it is very sweeping, and manifestly embraces the costs of witnesses. Compensation to witnesses is part of the cost of an action, as much so as any other statutory charges in and about the same. *Hall v. Younts*, 87 N. C. 285; *Booshee v. Surles*, 85 N. C. 90; *Draper v. Buxton*, 90 N. C. 182, 185.

The Act of 1868-69, ch. 96, sec. 3, amending the section ameliorates the rigors of the pre-existing law in regard to witnesses, who are not compelled to attend for more than one day, if the party summoning shall, on presentation of the certificate of such attendance, fail to pay what may be then due them. *Booshee v. Surles*, 85 N. C. 90, 92.

§ 6-25. Party seeking recovery on usurious contracts; no costs.—No costs shall be recovered by any party, whether plaintiff or defendant, who may endeavor to recover upon any usurious contract. (Rev., s. 1271; 1895, c. 69; C. S. 1248.)

Cross Reference.—As to usury generally, see §§ 24-1, 24-2.

§ 6-26. Costs in special proceedings.—The costs in special proceedings shall be as allowed in civil actions, unless otherwise specially provided. (Rev., s. 1272; Code, s. 541; C. S. 1249.)

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

§ 6-27. Fees and disbursements in supplemental proceedings.—The court or judge may allow to the judgment creditor, or to any party examined in proceedings supplemental to execution, whether a party to the action or not, witnesses' fees and disbursements. (Rev., s. 1273; Code, s. 499; C. C. P., s. 273; C. S. 1250.)

Cross Reference.—As to examination of parties and witnesses in proceedings supplemental to execution, see § 1-356.

§ 6-28. Costs of laying off homestead and exemption.—The costs and expenses of appraising and laying off the homestead or personal property exemptions, when the same is made under execution, shall be charged and included in the officer's bill of fees upon such execution or other final process; and when made upon the petition of the owner, they shall be paid by such owner, and the latter costs shall be a lien on said homestead. (Rev., s. 1274; Code, s. 510; C. S. 1251.)

Cross References.—As to appraisal and laying off of homestead and personal property exemptions, see §§ 1-372, 1-378. As to costs in reallocation of homestead for increase in value, see § 6-21, subsec. 9.

Payment of Fees as Condition.—Where the judgment debtor claims his personal property from execution, the sheriff is justified in refusing to proceed further till such exemptions are properly set apart, and the payment of his fees for the purpose by the plaintiff in the action, except when the suit is brought in forma pauperis. *Whitmore-Ligon Co. v. Hyatt*, 175 N. C. 117, 95 S. E. 38.

Applied in *Beavans v. Goodrich*, 98 N. C. 217, 220, 3 S. E. 165; *Long v. Walker*, 105 N. C. 90, 10 S. E. 658.

§ 6-29. Costs of reassessment of homestead.—If the superior court at term shall confirm the appraisal or assessment, or shall increase the exemption allowed the debtor or claimant, the levy shall stand only upon the excess remaining, and the creditor shall pay all the costs of the proceeding in court. If the amount allowed the debtor or claimant is reduced, the costs of the proceeding in court shall be paid by the debtor or claimant, and the levy shall cover the excess then remaining. (Rev., s. 1275; Code, s. 521; C. S. 1252.)

Cross References.—As to reassessment of homestead, see § 1-381. As to costs in reallocation of homestead for increase in value, see § 6-21, subsec. 9.

Applied in *Beavans v. Goodrich*, 98 N. C. 217, 220, 3 S. E. 165.

§ 6-30. Costs against infant plaintiff; guardian responsible.—When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor. (Rev., s. 1276; Code, s. 534; C. S. 1253.)

§ 6-31. Costs where executor, administrator, trustee of express trust, or person authorized by statute a party.—In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected out of the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or

bad faith in such action or defense. And when any claim against a deceased person is referred, the prevailing party shall be entitled to recover the fees of referees and witnesses, and other necessary disbursements, to be taxed according to law. (Rev., s. 1277; Code, s. 535; C. S. 1254.)

Cross References.—As to personal liability of personal representative for denial of claim, see § 28-133. As to when costs against representative are allowed, see § 28-115. As to liability of guardian for costs for defaults, see § 33-30. As to reference of disputed claim generally, see §§ 28-111, 28-112.

When Fiduciary Personally Liable.—By virtue of this section costs should be taxed against the estate in the hands of a trustee, and not against him personally, except when the court adjudges that the trustee has been guilty of mismanagement, or bad faith, in such action or defense. *Smith v. King*, 107 N. C. 273, 278, 12 S. E. 57; *Sugg v. Bernard*, 122 N. C. 155, 29 S. E. 221; *Lance v. Russell*, 165 N. C. 626, 81 S. E. 922.

The same rule is applied to actions against administrators and executors. *State v. Roberts*, 106 N. C. 662, 19 S. E. 900; *Varner v. Johnston*, 112 N. C. 570, 577, 17 S. E. 483, with the additional limitation prescribed by section 28-115. *Whitaker v. Whitaker*, 138 N. C. 205, 50 S. E. 630. See section 28-115 and the notes thereto.

Includes Next Friend.—While "next friends" may not be embraced in the strict letter of this section, they come within its purview. *Smith v. Smith*, 108 N. C. 365, 369, 12 S. E. 1045, 13 S. E. 113. And it is error to tax "next friends" who are not parties without a finding of mismanagement or bad faith. *Hockaday v. Lawrence*, 156 N. C. 319, 322, 72 S. E. 387.

Allowance to Trustee.—A trustee, as against those for whose benefit the trust is created, will be allowed to apply so much of the funds to the payment of costs and expenses, including counsel fees, as may be necessary to protect it, but he will not be allowed such disbursements against one who establishes an adverse title to the property. *Chemical Company v. Johnson*, 101 N. C. 223, 7 S. E. 770, 775.

Cited in *In re Hargrove*, 206 N. C. 307, 313, 173 S. E. 577.

§ 6-32. Costs against assignee after action brought.—In actions in which the cause of action becomes by assignment after the commencement of the action, or in any other manner, the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party. (Rev., s. 1278; Code, s. 539; C. S. 1255.)

Absolute Assignments.—Cases have been decided in which it is held that the assignments contemplated by this section are only such as are absolute, and that such as are intended to be a collateral security only for a continuing obligation or claim are not within the purview of this act.

Thus, it has been held that an assignee could not be subjected to the payment of the costs incurred when the transfer was, as a collateral security, of a right to damages for an assault on the person of the assignor then in process of enforcement. *Wolcott v. Holcomb*, 31 N. Y. 125—of judgments. *Peck v. Yorks*, 75 N. Y. 421—of a demand under the mechanics' lien law; *In the matter of the lien of R. H. Dowling*, 52 N. Y. 658. *Davis v. Higgins*, 92 N. C. 203.

Art. 4. Costs on Appeal.

§ 6-33. Costs on appeal generally.—On an appeal from a justice of the peace to a superior court, or from a superior court or a judge thereof to the supreme court, if the appellant recovers judgment in the appellate court, he shall recover the costs of the appellate court and those he ought to have recovered below had the judgment of that court been correct, and also restitution of any costs of the court appealed from which he has paid under the erroneous judgment of such court. If in any court of appeal there is judgment for a new trial, or for a new jury, or if the judgment appealed from is not wholly reversed, but partly affirmed and partly disaffirmed, the costs shall be in the dis-

cretion of the appellate court. (Rev., s. 1279; Code, s. 540; C. S. 1256.)

In General.—The first part of this section manifestly refers not only to a reversal of the judgment below, but to a judgment in favor of the appellant on the merits and not merely to an order for a new trial. *Ellert v. Kelly*, 4 E. D. Smith (N. Y.), 12. The trial court cannot ordinarily tax the costs of an action in favor of either party unless there is a judgment, costs being an incident of the judgment. What is said by the court in *Dobson v. Southern R. Co.*, 133 N. C. 626, 45 S. E. 958, refers to the latter branch of this section. *Williams v. Hughes*, 139 N. C. 17, 19, 51 S. E. 790.

New Trial.—Where a new trial is granted, the awarding of costs is discretionary. *Universal Metal Co. v. Durham R. Co.*, 145 N. C. 293, 299, 59 S. E. 50.

When the new trial is on the ground of newly discovered evidence, the costs of the appellate court should always fall upon the party obtaining the new trial, unless in exceptional cases and for special reasons, since the other party is in no laches, as is shown by its having obtained the judgment below. This is also a wholesome rule of practice, as new trials on this ground are outside of the regular course and are only granted, in discretion, when justice requires a departure from the usual procedure. By analogy, when a continuance is asked for on the ground of newly discovered evidence, the statute expressly forbids it to be granted except upon payment of the costs of the term. *Herndon v. North Carolina R. Co.*, 121 N. C. 498, 500, 28 S. E. 144; *Ladd v. Ladd*, 121 N. C. 118, 28 S. E. 890.

When both parties are entitled to a new trial, each will pay his own costs in the Supreme Court. *Ladd v. Ladd*, 121 N. C. 118, 121, 28 S. E. 190.

The taxing of the costs on appeal, by partial new trial being granted, is in the discretion of the court. *Satterthwaite v. Goodyear*, 137 N. C. 302, 49 S. E. 205.

Appeal from Justice's Court.—On an appeal from the court of a justice of the peace to the superior court, the trial in the superior court is de novo, and its costs in both courts are required, by this section and section 1-300, to be taxed against the unsuccessful party, or, as in this case, upon a judgment in the plaintiff's favor for the difference between the amount of her demand over that allowed upon the defendant's counterclaim set up by way of answer. *Ritchie v. Ritchie*, 192 N. C. 538, 135 S. E. 458.

Where the subject-matter of the action is destroyed before the appeal is heard, the judgment below is presumed to be correct until reversed, and no part of the costs should be adjudged against the appellee. *Taylor v. Vann*, 127 N. C. 243, 37 S. E. 263.

Reversal Necessary to Tax Appellee.—Unless the court upon the merit reverses the judgment below, it cannot adjudge any part of the costs against the appellee. *Commissioners v. Gill*, 126 N. C. 86, 87, 35 S. E. 228.

Partial Affirmance and Partial Reversal.—Where the judgment appealed from is partly affirmed and partly reversed, in the exercise of the discretion permitted by this section, the costs in the Supreme Court may be divided so that each party pays his own costs. *Smith v. Building and Loan Association*, 119 N. C. 249, 26 S. E. 41; *Hawkins v. Cedar Works*, 122 N. C. 87, 30 S. E. 13.

Under this section, where the appellant was awarded a partial new trial only, as to one issue only out of several, the costs of the appeal are in the discretion of the court. *Rayburn v. Casualty Co.*, 142 N. C. 376, 55 S. E. 296.

In *McLean v. Breece*, 113 N. C. 390, 393, 18 S. E. 694, where the judgment was modified in the Supreme Court, the costs were taxed against the appellee. And where the plaintiffs recovered a part judgment on their demand, by establishing a mechanic's lien, they were entitled to costs of appeal. See *Hogsed v. Lumber Co.*, 170 N. C. 529, 87 S. E. 337.

Case Remanded.—Where an appellant fails to show that he was prejudiced by the order appealed from, he may be taxed with the costs of the appeal, though the case be remanded. *Harrington v. Rawls*, 136 N. C. 65, 48 S. E. 571.

Modification by Superior Court.—The superior court is without power to modify former orders of the supreme court taxing costs on former appeals, as costs thus incurred are no part of superior court costs, but are taxed by, and executions issue out of, the supreme court. *Bailey v. Hayman*, 222 N. C. 58, 22 S. E. (2d) 6.

Applied in *Kincaid v. Graham*, 92 N. C. 154; *Ebert v. Disher*, 216 N. C. 546, 5 S. E. (2d) 716.

§ 6-34. Costs of transcript on appeal taxed in supreme court.—When an appeal is taken from the superior court to the supreme court, the clerk

of the superior court, when he sends up the transcript, shall send therewith an itemized statement of the costs of making up the transcript on appeal, and the costs thereof shall be taxed as a part of the costs of the supreme court. (Rev., s. 1280; 1905, c. 456; C. S. 1257.)

Cross Reference.—As to duty of clerk to prepare transcript, see § 1-284.

Former Rule.—Prior to the enactment of this section, it was held that the successful party on appeal from the superior court was entitled to recover back the costs of the transcript and certificate, though subsequently final judgment is rendered in the lower court against him. *Dobson v. Southern R. Co.*, 133 N. C. 624, 45 S. E. 958.

Unnecessary Matter.—The Supreme Court has always held that the cost of printing unnecessary matter may be taxed against the party causing it to be sent up, regardless of the issue of the appeal. *Wilson v. Atlantic Coast Line R. Co.*, 142 N. C. 333, 55 S. E. 257; *Yow v. Hamilton*, 136 N. C. 357, 48 S. E. 782; *Finch v. Strickland*, 130 N. C. 44, 40 S. E. 841.

Especially is this so where the party has insisted on unnecessary matter being incorporated against the objection of the other party. See *Roanoke R., etc., Co. v. Privette*, 179 N. C. 1, 101 S. E. 489, and cases cited.

§ 6-35. Costs on appeal from justices of the peace.—1. After an appeal from the judgment of a justice of the peace is filed with a clerk of a superior court, the costs in all subsequent stages shall be as herein provided for actions originally brought to the superior court.

2. If, on appeal from a justice of the peace, judgment is entered for the plaintiff, and he shall not recover on his appeal a greater sum than was recovered before the justice, besides interest accrued since the rendition of the judgment, he shall not recover the costs of the appeal, but shall be liable at the discretion of the court to pay the same. (Rev., ss. 1281, 1282; Code, ss. 542, 566; R. C., c. 31, s. 106; 1794, c. 414, s. 17; C. S. 1258.)

Cross References.—As to advance costs on appeal, see § 2-30. See also, § 1-299.

Applied in *Kincaid v. Graham*, 92 N. C. 154.

Art. 5. Liability of Counties in Criminal Actions.

§ 6-36. County to pay costs in certain cases; if approved, audited and adjudged.—If there is no prosecutor in a criminal action, and the defendant is acquitted, or convicted and unable to pay the costs, or a nolle prosequi is entered, or judgment arrested, the county shall pay the clerks, sheriffs, constables, justices and witnesses one-half their lawful fees; except in capital cases and in prosecutions for forgery, perjury, or conspiracy, when they shall receive full fees. No county shall pay any such costs unless the same are approved, audited and adjudged against the county as provided in this chapter. (Rev., s. 1283; Code, ss. 733, 739; R. C., c. 28, s. 8; R. S., c. 28, s. 12; 1874-5, c. 247; C. S. 1259.)

Local Modification.—*Hertford*: 1933, c. 68; *Johnston*: 1939, c. 183; *Swain*: 1935, c. 210.

In General.—This section and secs. 6-59, 6-60 and 6-63, collated and construed together, place it in the discretion of the presiding judge, for reasons satisfactory to him, to refuse to direct the fees of witnesses for the State or for an acquitted defendant, in whole or in part, to be paid by the county, and from his decision no appeal can be taken. *State v. Hicks*, 124 N. C. 829, 32 S. E. 957; *State v. Ray*, 122 N. C. 1095, 29 S. E. 948.

Construed with Local Law.—Where a public-local law permits the costs of a municipal court to be recovered from a county upon conviction of a criminal offense in certain instances, this provision will be construed in pari materia with this section, and the intent and meaning of the local law will be to permit a recovery of one-half the costs only. *City v. Guilford County*, 191 N. C. 584, 132 S. E. 558.

Nolle Prosequi Entered.—Where a nolle prosequi is en-

tered on an indictment for homicide as to murder in the first degree, the witnesses for the State subsequently attending the trial are entitled to only half fees. *Coward v. Commissioners*, 137 N. C. 299, 49 S. E. 207.

The clerk of the court is not entitled to any fee for entering a judgment of nolle prosequi in a criminal action. *State v. Johnson*, 101 N. C. 711, 8 S. E. 360.

Where on appeal to the superior court from a judgment of a justice of the peace, in a matter in which he had final jurisdiction, a nol. pros. was entered by the solicitor, it was error to tax the county with the costs accrued in the superior court. *State v. Shuffler*, 119 N. C. 867, 26 S. E. 94.

Defendant Unable to Pay Costs.—To tax a county with the costs in a criminal action where the defendant is convicted, the trial judge must find that the defendant is unable to pay the costs. *Coward v. Commissioners*, 137 N. C. 299, 49 S. E. 207.

Subpoena of Witnesses.—For the attendance of a witness to be taxed as a part of the costs against the losing party to a civil action, or against the county in a criminal action, it is necessary that he should have been legally subpoenaed or lawfully recognized to attend. *State v. Means*, 175 N. C. 820, 95 S. E. 912.

Where Grand Jury Returns "Not a True Bill."—A county cannot be taxed, under this section, with any part of the fees of the clerk or other officers in criminal actions if the grand jury returns "not a true bill." *Guilford v. Board of Comm'rs*, 120 N. C. 23, 27 S. E. 94.

Appeal without Bond.—There being no statute authorizing it, the officers of the court are not entitled to collect from a county the costs accruing in the court on appeal in a criminal case when the defendant was allowed to appeal without bond and without an order allowing him to appeal in forma pauperis and is insolvent. *Clerk's Office v. Comm'rs*, 121 N. C. 29, 27 S. E. 1003.

Service on Public Roads.—Under this section the county is liable for the payment of full fees where the defendant is convicted and serves out a sentence on the public roads. *State v. Saunders*, 146 N. C. 597, 59 S. E. 695.

Applied in *State v. Horne*, 119 N. C. 853, 855, 26 S. E. 36.

§ 6-37. Local modification as to counties paying costs.—In the following counties the county shall pay one-half the fees specified when "not a true bill" is found: Alexander, Alleghany, Ashe, Avery, Bertie, Brunswick, Burke, Caldwell, Caswell, Catawba, Chatham, Clay, Craven, Davie, Duplin, Gaston, Granville, Greene, Guilford, Haywood, Henderson, Iredell, Jackson, Johnston, Jones, Lenoir, Lincoln, Macon, Madison, McDowell, Mecklenburg, Mitchell, Montgomery, Northampton, Onslow, Orange, Pamlico, Pender, Person, Pitt, Polk, Richmond, Robeson, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Wake, Watauga, Wilkes, Yadkin, Yancey. Provided, that Haywood County shall only be liable for one-half fee to clerks, constables and sheriffs serving process. (Rev., s. 1283; Code, ss. 733, 739; 1907, cc. 94, 162, 208, 606, 627, 695; 1909, cc. 50, 107; Pub. Loc. 1911, cc. 76, 167; Pub. Loc. 1915, c. 22; 1931, cc. 135, 187; 1933, c. 366; C. S. 1260.)

In Bladen County, where in a criminal proceeding before the grand jury a "true bill" is not found, the county shall pay one-half fees to clerks, sheriffs, officers, or constables who served any process in such proceeding. (1909, c. 183; C. S. 1260.)

In Brunswick and Catawba counties the county shall not be liable for any part of the costs of justices of the peace, when "not a true bill" is found. (Rev., s. 1283; 1905, c. 598; 1909, c. 107; C. S. 1260.)

In Montgomery County, in criminal cases, where the defendant is convicted in superior court, justices of the peace are entitled to full fees, if any are legally taxed in the bill of costs. (1909, c. 223; C. S. 1260.)

In New Hanover County, in a criminal action, if there is no prosecutor, and the defendant is convicted and serves out his sentence on the public roads of the county, the county shall pay one-half fees as provided in the first sentence of this section. (Rev., s. 1283; 1905, c. 511; C. S. 1260.)

In Northampton county where in criminal proceedings before the recorder's court, the grand jury, or superior court the defendant is found not guilty or a true bill is not found by the grand jury, or the defendant is found guilty and is sentenced by the court to serve on the roads or a term in jail, then the said county shall pay full fees to the sheriff, officer, or constable who served any process in such proceeding. (1937, c. 43.)

Editor's Note.—The Acts of 1931 added the counties of Avery and Guilford to this section.

Haywood County was added to the list of counties by Public Laws 1933, c. 366.

Public Acts 1937, c. 43, added the last paragraph.

§ 6-38. Liability of county when defendant acquitted in supreme court.—If, on appeal to the supreme court in criminal actions, the defendant is successful, the county from which the appeal was taken shall pay one-half the costs of the appeal and shall also pay all such sums as have been properly expended by the defendant for the transcript of the record and printing done under the rules of the court. (Rev., s. 1284; C. S. 1261.)

§ 6-39. County where offense committed liable for costs.—In all cases where the county is liable to pay costs, that county wherein the offense is alleged to have been committed shall be adjudged to pay them. (Rev., s. 1285; 1889, c. 354; C. S. 1262.)

§ 6-40. Liability of counties, where trial removed from one county to another.—The costs taxed in any case removed from another county for trial shall include the fees and expenses allowed for summoning the special venire, if one is ordered in the case, and the per diem and mileage of jurors who are impaneled to try the case, together with all other costs and expenses of the trial of the case, the amount of which, if not provided for by law, to be fixed by the presiding judge, so as to fully relieve the county in which the trial is had of all costs and expenses thereof. All fines, forfeitures, penalties and amercements imposed or levied in the case shall belong to the county from which the case was removed and be paid to the treasurer of said county. When a prisoner is sent from one county to another to be held for trial, or for any other cause or purpose, the county from which he is sent shall pay his prison expenses, unless the same is collected from him, on or before the first Monday in each month, and upon a failure to do so, it shall be the duty of the county to which he is sent to pay the same to the sheriff or jailer entitled to receive it at the same rate and under the same regulations as its own prison expenses are paid; and the county liable shall repay the same within thirty days after demand, and upon failing to do so the county to which the money is due shall be entitled to recover in the superior court, or, if the amount be within its jurisdiction, the court of justice of the peace of its own county, the amount due, with ten per cent additional, together with eight per cent interest on the sum due; and said courts of said county shall have full jurisdiction

to hear, try and determine all actions and proceedings that may be brought for the purpose of enforcing the collection of the same. When the county to which such prisoner has been sent has paid the prison expenses and has made demand therefor upon the county liable as above provided and such demand be not complied with within ten days, the sheriff or jailer shall at once return such prisoner to the county from which such prisoner was sent, and deliver him to the sheriff or jailer thereof. (Rev., s. 1285; 1889, c. 354; 1901, c. 718; C. S. 1263.)

Cross Reference.—As to requirement that prisoner pay charges and fees, see § 153-181.

§ 6-41. Statement of costs against county to be filed with commissioners.—In all criminal actions where the county is liable in whole or in part for costs, it is the duty of the clerks of the courts to make out a statement of such costs from the record or docket, within thirty days after the hearing, trial, determination, or other disposition thereof, and file the same with the board of commissioners of the county. (Rev., s. 1286; Code, s. 736; 1873-4, c. 116, s. 3; C. S. 1264.)

§ 6-42. Expenses in conveying prisoner to another county; provision for payment.—When a sheriff or other officer arrests a person under a *capias* or other legal process, which requires him to have the person arrested before a court or judge of another county, and such sheriff or other officer is obliged to incur expense in the safe delivery of such person by reason of his failing to give bond for his appearance, or if the sheriff or other officer of the county to which the prisoner is to be carried incurs any expense in going for and conveying said prisoner to his county, then in either case the sheriff or other officer shall file with the court or judge issuing the *capias* or other legal process and with the register of deeds an itemized and sworn account of such expenses, which shall be presented by the register to the board of commissioners at their next regular meeting, to be audited by them. Such sworn statement shall be received by the said board as *prima facie* correct. Upon such auditing the board of commissioners shall cause to be issued to such sheriff or other officer an order on the county treasurer for the amount so audited and allowed by them, and shall notify the court or judge of their action, to the end that the amount so allowed shall be taxed in the costs to the use of the county. (Rev., s. 1287; 1885, c. 262; 1901, c. 64; C. S. 1265.)

§ 6-43. Cost of investigating lynchings.—In all cases of investigation and trial of the crime of lynching, the entire cost incurred in the prosecution, unless paid by the person or persons convicted, shall be paid by the county wherein the crime shall have been committed. (Rev., s. 1288; 1893, c. 461, s. 6; C. S. 1266.)

Editor's Note.—This section was originally a part of ch. 461 of the Laws of 1893; other sections of this Act pertaining to lynchings will be found as sections 14-221, 14-222, 15-98, 15-99 and 15-128. It was held in *State v. Lewis*, 142 N. C. 626, 55 S. E. 600, that the Act of 1893 had lost none of its efficacy by splitting the same into sections and by placing these sections under the appropriate chapter headings of the Code.

§ 6-44. Costs due credited on taxes due by payee.—Whenever a bill of costs in a criminal ac-

tion is presented to any board of county commissioners in any county of the state for payment, as provided in this chapter and article, and the said bill is ordered to be paid by the said county commissioners, it shall be the duty of the clerk of said board, before issuing any orders for payment of the sum set out in said bill, to ascertain whether any person to whom any amount is due on said bill of costs, is indebted to the county for taxes, and if said person to whom said order is payable is so indebted, the order shall state in its face, "Payable only on taxes dueCounty," and upon presentation of such order to the sheriff or tax collector, said sheriff or tax collector shall give said taxpayer credit for the sum designated in said order, and the said sheriff or tax collector shall be entitled to receive credit for said sum so paid in his settlement for taxes.

It shall be unlawful for any board of county commissioners to pay to any person who is indebted to the county for taxes any money payable out of the revenues of the county on account of costs in a criminal case, which is payable by the county, except as provided in paragraph one above. (1933, c. 245.)

Local Modification.—Alamance: 1935, c. 319, ss. 1, 2; Craven: 1933, c. 426; Granville: 1933, c. 426; Wilson: 1933, c. 501.

Art. 6. Liability of Defendant in Criminal Actions.

§ 6-45. Costs against defendant convicted, confessing, or submitting.—Every person convicted of an offense, or confessing himself guilty, or submitting to the court, shall pay the costs of prosecution. (Rev., s. 1291; Code, s. 1211; R. C., c. 35, s. 46; C. S. 1267.)

Editor's Note.—This section is cited in 5 N. C. Law Rev. 359, in a note on "Interest in Cost."

In General.—The right of the officers to recover costs in the name of the state is a mere incidental one arising out of the conviction under the provisions of this section, and the judgment for them vests the claim in the officers to whom they are due. *State v. Crook*, 115 N. C. 760, 765, 20 S. E. 513. The legal effect of a conviction and judgment is to vest the right to the costs in those entitled to receive them. The judgment, though nominally in the name of the state, is, in effect, in favor of those performing services in the case for which the fees are given as a compensation. *State v. Mooney*, 74 N. C. 98, 99.

The "costs of prosecution" are those incurred in the conduct of the prosecution, and do not include the costs incurred by the defendant in resisting the prosecution. *State v. Wallin*, 89 N. C. 578.

Where a defendant is taxed with the costs of prosecution, a witness, though summoned by the defendant and examined in his defence, has no right to have his ticket for attendance allowed in the bill of costs. It is a personal debt of the defendant, the payment of which the witness may enforce by suing out execution in the cause. *State v. Wallin*, 89 N. C. 578.

No Part of Punishment.—The order for the payment of the costs of a criminal prosecution upon a suspension of judgment does not constitute any part of the punishment; the legal effect being only to vest the right to the costs in those entitled to them. *State v. Crook*, 115 N. C. 760, 20 S. E. 513.

§ 6-46. Defendant imprisoned not discharged until costs paid.—If the sentence be that the guilty person be imprisoned for a time certain, and that he pay the costs, there shall be added to it that he shall remain in prison, after the expiration of the fixed time for his imprisonment, until the costs shall be paid, or until he shall otherwise be discharged according to law. (Rev., s. 1292; Code, s. 905; 1868-9, c. 178; C. S. 1268.)

Cross References.—As to imprisonment for costs, see §§

153-191, 153-194 and 23-24, and *State v. Morgan*, 141 N. C. 726, 53 S. E. 142. As to when prosecutor may be imprisoned for failure to pay costs, see §§ 6-50 and 6-64.

Costs Not Part of Punishment.—The taxing the cost in a criminal action is not a part of the punishment for the offense committed. *State v. Smith*, 196 N. C. 438, 146 S. E. 73.

§ 6-47. Judgment confessed; bond given to secure fine and costs.—In cases where a court, mayor, or a justice of the peace permits a defendant convicted of any criminal offense to give bond or confess judgment, with sureties to secure the fine and costs which may be imposed, the acceptance of such security shall be upon the condition that it shall not operate as a discharge of the original judgment against the defendant nor as a discharge of his person from the custody of the law until the fine and costs are paid. (Rev., s. 1293; Code, s. 749; 1885, c. 364; 1879, c. 264; C. S. 1269.)

Cross Reference.—As to bonds generally, see § 153-177.

In General.—The power of the courts to suspend judgment in criminal cases should only be upheld when sanctioned by usage, and where the consent of the defendant was expressly given or would be implied from the fact that the order was made in the defendant's presence without his objection, and that its evident purpose was to save the defendant from a more grievous penalty permitted or required by law. *State v. Hilton*, 151 N. C. 687, 65 S. E. 1011.

Cited in *State v. Smith*, 196 N. C. 438, 439, 146 S. E. 73.

§ 6-48. Arrest for nonpayment of fine and costs.—In default of payment of such fine and costs, it is the duty of the court at any subsequent term thereof, on motion of the solicitor of the state, to order a *capias* to issue to the end that such defendant may be again arrested and held for the fine and costs until discharged according to law; and a justice of the peace or mayor may at any subsequent time arrest the defendant and hold him for the fine and costs until discharged according to law. (Rev., s. 1294; Code, s. 750; 1885, c. 364; 1879, c. 264; C. S. 1270.)

Cited in *State v. Smith*, 196 N. C. 438, 146 S. E. 73.

Art. 7. Liability of Prosecutor for Costs.

§ 6-49. Prosecutor liable for costs in certain cases; court determines prosecutor.—In all criminal actions, if the defendant is acquitted, *nolle prosequi* entered, judgment against him arrested, or if the defendant is discharged from arrest for want of probable cause, the costs, including the fees of all witnesses summoned for the accused, whom the judge, court or justice of the peace before whom the trial took place shall certify to have been proper for the defense, shall be paid by the prosecutor, whether marked on the bill or warrant or not, whenever the judge, court or justice is of opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest. And every judge, court or justice is hereby fully authorized to determine who the prosecutor is at any stage of a criminal proceeding, whether before or after the bill of indictment has been found, or the defendant acquitted: Provided, that no person shall be made a prosecutor after the finding of the bill, unless he shall have been notified to show cause why he should not be made the prosecutor of record. (Rev., s. 1295; Code, s. 737; 1889, c. 34; R. C., c. 35, s. 37; 1799, c. 4, s. 19; 1800, c. 558; 1868-9, c. 277; 1874-5, c. 151; 1879, c. 49; C. S. 1271.)

Cross Reference.—See also, §§ 6-50, 6-64 and 6-52.

General Consideration.—This section was intended to

enlarge the power of the courts over the question of costs in criminal actions. *State v. Norwood*, 84 N. C. 794. Its enactment was within the power of the Legislature. *State v. Cannady*, 78 N. C. 539.

Certifying Witnesses as Proper for Defense.—Where the court below taxed the costs of an unsuccessful prosecution against the prosecutor without finding that the defendant's witnesses were proper for the defense, as required by this section, judgment will be allowed to stand if the court below will make and certify the requisite finding that the said witnesses were proper for the defense. *State v. Jones*, 117 N. C. 768, 23 S. E. 247.

In *State v. Owens*, 87 N. C. 565, it was stated that the section includes such witnesses for the defense as are certified by the counsel to have been proper for the defense, and the Supreme Court approved that judgment. But this was not the point in the appeal, and was only incidentally presented. See also *State v. Massey*, 104 N. C. 877, 880, 10 S. E. 608. In *State v. Roberts*, 106 N. C. 662, 10 S. E. 900, which was also a judgment taxing the prosecutor with the costs, the judge did not find and certify that the prosecution was frivolous, malicious or was not for the public good. The Supreme Court held that this judgment was erroneous, and that the statute only allowed a party to be taxed as prosecutor with the costs upon the findings of these facts. *State v. Jones*, 117 N. C. 768, 773, 23 S. E. 247.

See remarks of Mr. Justice Ashe upon the Act of 1875, ch. 247, and the substitution of the words "opinion" for "certify" and "or" for "and," by the Act of 1879, in *State v. Norwood*, 84 N. C. 794.

Where Magistrate Has Final Jurisdiction.—As to causes of which a magistrate has final jurisdiction, when no appeal is taken from that court, it would seem, by virtue of section 6-52, that the prosecutor could only have been taxed with costs when the prosecution is adjudged frivolous or malicious, while this section extended to justices' as well as other courts, the power to tax the prosecutor with costs also in cases where there was no reasonable ground for the prosecution, or it was not required by public interest. Whatever difficulty there might have been in reconciling these apparently conflicting provisions of the Code is practically removed by ch. 34, Laws of 1889, which purports to amend this section, but which, also, being later in time, must modify sec. 6-52 where it conflicts with it. This Statute of 1889 applies to justices', as well as other courts, and provides that the prosecutor shall be taxed with the costs if the defendant is discharged from arrest for want of probable cause. The opinion in *Merrimon v. Commissioners*, 106 N. C. 369, 11 S. E. 267, must be modified by adding to the instances in which the prosecutor in a case before a magistrate can be taxed with the costs, that of the defendant being discharged for want of probable cause, though it is still only when the prosecution is adjudged frivolous or malicious that any court is empowered to imprison the prosecutor for non-payment of costs. *State v. Carlton*, 107 N. C. 956, 958, 12 S. E. 44.

"Not Required for Public Interests."—A finding by the trial judge that a prosecution of a criminal action "was not for the public interest" is equivalent to a finding that it "was not required by the public interest." *State v. Baker*, 114 N. C. 812, 19 S. E. 44.

Marking Prosecutor.—Under the Code of 1854 it was held that the person to be taxed must be marked on the bill as prosecutor (see *State v. Lupton*, 63 N. C. 483; *State v. Darr*, 63 N. C. 516) and that the court had no right to order him to be marked as such without his consent. See *State v. Crosset*, 81 N. C. 579, 582. But note the language of the section as it now reads, viz., "whether marked on the bill or warrant or not."

Notice.—It is necessary for the trial court, in order to adjudge the prosecution of a criminal action to be frivolous and malicious and tax the costs against the prosecutors who have employed attorneys to assist the solicitor, to give the prosecutors notice of such action and hear the matter according to the "law of the land." *State v. Collins*, 169 N. C. 323, 84 S. E. 1049.

The object of notice is only to give the party a day in court, and it matters not how he gets the notice, if he appears and defends under it. This may be done on motion of the defendant's counsel or by the court of its own motion. *State v. Hughes*, 83 N. C. 665; *State v. Hamilton*, 106 N. C. 660, 10 S. E. 854. The court should find the facts, and when this is done the findings are not reviewable in this court. *Id.* *State v. Roberts*, 106 N. C. 662, 10 S. E. 900, and *State v. Owens*, 87 N. C. 565; *State v. Jones*, 117 N. C. 768, 772, 23 S. E. 247.

A notice to mark one as prosecutor under this section need not be writing. Where it was announced in open court, upon the calling and continuance of a state case, that a motion would be made at the next term to mark a

witness as prosecutor (all the witnesses being present), and on the argument of the motion it was announced that all the parties were present, it was held to be sufficient evidence that such notice was given, and warranted the court in ordering the witness to be marked as prosecutor. *State v. Norwood*, 84 N. C. 794.

Insolvent Prosecutor—County Liable. — When a judge below orders an insolvent prosecutor to pay costs, and he fails or is unable to pay, the county in which the offense was committed becomes liable to pay the same. *Pegram v. Commissioners*, 75 N. C. 120.

Conclusiveness of Finding. — A judgment that a prosecution is frivolous and not required by the public interest, and that the prosecutor pay the costs, is conclusive and not appealable. *State v. Hamilton*, 106 N. C. 660, 10 S. E. 854.

The finding by the judge below that a criminal prosecution was frivolous and malicious is conclusive, and will support a judgment that the prosecutor pay costs, or in default thereof be imprisoned. *State v. Lance*, 109 N. C. 789, 14 S. E. 110.

But where the trial judge has dismissed a criminal action as being frivolous and malicious, and taxed the prosecutors with costs, and it appears from his findings of record that he has done so without any proper consideration of their affidavits in support of their position, and relevant to the issue, so as to deprive them of the benefits of the due process of law, his order will be set aside on appeal, leaving the matter open for proper adjudication. *State v. Collins*, 169 N. C. 323, 84 S. E. 1049.

In this latter case it is said: "In the disposition made of this appeal we do not intend to impair or qualify our former decisions on the subject, notably *State v. Hamilton*, 106 N. C. 660, 10 S. E. 854, and *State v. Roberts*, 106 N. C. 662, 10 S. E. 900, to the effect that, on a hearing of this character, the findings of fact by the trial judge are conclusive. In the disposition of these and like motions there must necessarily be some tribunal having the power to determine the ultimate facts on which the rights of the parties depend, and we think the cases which refer this power to the trial judge, who is present and has opportunity to personally observe and note the circumstances and attendant conditions, are grounded in good reason; but, on the facts as they appear from his honor's findings, and we think it not improper to say that he has spread them on the record with commendable candor, we are of opinion that these men, as heretofore stated, have had no proper hearing, within the meaning of the constitutional provision, and that the judgment against them must be set aside."

Applied in *State v. Baker*, 114 N. C. 812, 19 S. E. 145; *State v. Darr*, 63 N. C. 516.

§ 6-50. Imprisonment of prosecutor for nonpayment of costs, if prosecution frivolous. — Every such prosecutor may be adjudged not only to pay the costs, but he shall also be imprisoned for the nonpayment thereof, when the judge, court, or justice of the peace before whom the case was tried shall adjudge that the prosecution was frivolous or malicious. (Rev., s. 1297; Code, s. 738; R. C., c. 35, s. 37; 1800, c. 558; 1879, c. 49; 1881, c. 176; C. S. 1272.)

Constitutionality. — This section is held constitutional. *State v. Cannady*, 78 N. C. 539; *State v. Hamilton*, 106 N. C. 660, 661, 10 S. E. 854.

Costs of prosecution against a prosecutor (upon acquittal of the accused or nolle prosequi entered), or against the accused upon a verdict of guilty, or a fine imposed, does not constitute a debt within the meaning of Article one, section sixteen, of the Constitution, and hence the defendant may be imprisoned for nonpayment of the same. See notes of this case under section 6-45. *State v. Wallin*, 89 N. C. 578.

Where Bill Ignored. — No power is conferred by this section to tax a prosecutor with costs when the bill is ignored. *State v. Horton*, 89 N. C. 581; *State v. Cockerham*, 23 N. C. 381; *State v. Gates*, 107 N. C. 832, 833, 12 S. E. 319.

Art. 8. Fees of Witnesses.

§ 6-51. Not entitled to fees in advance.—Witnesses are not entitled to receive their fees in advance; but no witness in a civil action or special proceeding, unless summoned on behalf of the state or a municipal corporation, shall be compelled to attend more than one day, if the party by or for whom he was summoned shall, after

one day's attendance, on request and presentation of a certificate, fail or refuse to pay what then may be due for traveling to the place of examination and for the number of days of attendance. (Rev., s. 1298; Code, s. 1368; 1868-9, c. 279, subch. 11, s. 3; C. S. 1273.)

Cross Reference.—As to attendance of witnesses, see § 8-63.

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

Ex. Sess. 1920, c. 61, ss. 2, 3; 1921, c. 62, s. 2; 1933, c. 40; 1941, c. 171; C. S. 3893.)

Local Modification.—Alamance: 1935, c. 264; Beaufort: 1931, c. 54; Cleveland, Henderson, McDowell, Polk, Rutherford: 1933, c. 495; Craven: 1935, c. 209; Duplin: 1935, c. 247; Forsyth: 1935, c. 333; Franklin: C. S. 3893; 1935, c. 93; Guilford: 1935, c. 93, 185; Iredell: 1937, c. 240; New Hanover: 1935, c. 237; Pitt, Richmond, Rowan, Wayne: 1935, c. 93.

Cross References.—As to liability of prosecutor for costs in certain cases, see § 6-49. As to appearance of witnesses before the Utilities Commission, see §§ 62-13, 62-16. As to attendance of witnesses in courts of justices of the peace, see §§ 7-144, 7-145.

Editor's Note.—The 1941 amendment added the last proviso to this section.

In General.—The manner of summoning witnesses, and their compensation is entirely regulated by statute. *Stern & Co. v. Herren*, 101 N. C. 516, 8 S. E. 221.

Proof of Attendance.—Witnesses should swear to their attendance at each term, and the ticket should state the number of days' attendance at each term. *Thompson v. Hodges*, 10 N. C. 318.

Same—State's Witnesses upon Acquittal.—Costs and charges of State's witnesses upon acquittal of a defendant were ordered to be paid by the county; and in an action against the Commissioners to recover the amount of tickets issued to such witnesses: It was held, (1) that ch. 105, § 33, Bat. Rev. makes the tickets presumptive evidence of the facts set forth therein—attendance, miles traveled, etc.; (2) this evidence, together with the order of the court, imposes a duty upon defendants to provide for their payment. *Deaver v. Commissioners*, 80 N. C. 116. Section 6-53 now provides that "the certificate of the clerk shall be sufficient evidence of the debt."—Editor's Note.

A witness in a criminal action has no claim upon the county until the liability of the county for the costs is passed upon by the court. *Young v. Commissioners*, 76 N. C. 316.

Liability of County for Defendant's Witnesses.—The liability of the county for defendant's witnesses is restricted to the same cases in which the county is responsible for half fees to officers, except that the county is not liable to defendant's witnesses where he is convicted and unable to pay. An appeal in the matter of costs lies in cases of this kind. *State v. Horne*, 119 N. C. 853, 26 S. E. 36; *Guilford v. Commissioners*, 120 N. C. 23, 28, 27 S. E. 94. See § 6-59 and notes thereto.

Witnesses for the losing party receive no pay unless said party be solvent. *State v. Wheeler*, 141 N. C. 773, 777, 53 S. E. 358.

But this does not abridge the right of all the witnesses to recover compensation against the party summoning them. *State v. Massey*, 104 N. C. 877, 881, 10 S. E. 608.

A witness can always prove his attendance against the party who subpoenas him. *Sitton v. Lumber Co.*, 135 N. C. 540, 47 S. E. 609.

When Grand Jury Witnesses Entitled to Compensation.—Witnesses are entitled to compensation where a bill is prepared and sent to the grand jury with the names of those summoned indorsed thereon as sworn and sent. *Lewis v. Commissioners*, 74 N. C. 194.

Witnesses to Testify Generally before Grand Jury.—There is no provision of law for the payment of witnesses summoned to appear and testify generally before the grand jury "in certain matters then and there to be inquired of." *Lewis v. Commissioners*, 74 N. C. 194.

When Court Rules Witness Incompetent.—Where a witness was ruled by the court to be incompetent, and such ruling was not appealed from, or reversed, it was held that his fees could not be taxed against the adverse party, whether the ruling out of the witness was erroneous or not. *Keith v. Goodwin*, 51 N. C. 398.

May Not Withdraw Witness Ticket and Sue Thereon.—A witness is not at liberty after final judgment to withdraw his "witness ticket" and sue upon it. His fees for attendance should be taxed and collected with the other costs against the party adjudged to pay the same, if he be solvent; and if not, then the prevailing party who summoned and required his testimony is responsible therefor. *Belden v. Snead*, 84 N. C. 243.

Court's Power to Fix Fees for Expert Witnesses.—The court has now the statutory authority to fix the fees of expert witnesses, and its action is res judicata as to the amount, leaving open the question of the legality of the taxing of the fee on a motion to retax. *Chadwick v. Life Ins. Co.*, 158 N. C. 380, 74 S. E. 115.

The amount to be paid an expert witness testifying at a hearing before a commissioner of the industrial commission in proceedings before him under the Workmen's

Compensation Act is a question to be determined in the discretion of the court and the witness may not require that it be fixed in advance before testifying as to a material matter involved in the inquiry. *In re Hayes*, 200 N. C. 133, 156 S. E. 791.

The court has discretionary authority under this section, to allow expert witnesses compensation and mileage, and plaintiff's remedy upon being so taxed is to move to retax the costs rather than to except under § 6-54. *Connor v. Hayworth*, 206 N. C. 721, 175 S. E. 140.

§ 6-53. Witness to prove attendance; action for fees.—Every person summoned, who shall attend as a witness in any suit, shall, before the clerk of the court, or before the referee or officer taking the testimony, ascertain by his own oath or affirmation the sum due for traveling to and from court, attendance and ferriage, which shall be certified by the clerk; and on failure of the party, at whose instance such witness was summoned (witnesses for the state and municipal corporations excepted), to pay the same previous to the departure of the witness from court, such witness may at any time sue for and recover the same from the party summoning him; and the certificate of the clerk shall be sufficient evidence of the debt. Where recovery may be had before a justice of the peace on a witness ticket, the justice shall deface it by writing the word judgment, and deliver the same to the person of whom it is recovered. (Rev., s. 1299; Code, s. 1369; R. C., c. 31, s. 73; 1777, c. 115, s. 46; 1796, c. 458; 1868-9, c. 279, subch. 11, ss. 2, 4; C. S. 1274.)

Cross Reference.—As to attendance of witnesses generally, see §§ 8-59, 8-60.

In General.—Payment of witnesses by the sovereign is neither given by common law nor is it an inherent right. It is granted at the discretion of the court in the cases, and only within the limits authorized by statute. *State v. Massey*, 104 N. C. 877, 879, 10 S. E. 608.

Need Not Show Assignment of Witness Tickets.—The party to an action summoning witnesses to testify in his behalf is liable for their witness fees which may be recovered in an action against him, and when it appears of record entry of the judgment by the clerk of the Superior Court that these fees have been taxed against the party recovering the judgment, and paid by him, he is entitled to recover them against the losing party to the action without showing that the witnesses had transferred or assigned their tickets to him. *McClure v. Fulbright*, 126 N. C. 450, 146 S. E. 74.

Witnesses Not Sworn or Tendered.—Where a trial is had and the witnesses are not sworn or tendered, their costs cannot be taxed against the party cost. *Loftis v. Raxter*, 66 N. C. 340. But where the defendant's witnesses are present and are not sworn or tendered because the plaintiff takes a nonsuit, the costs of such witnesses are properly taxable against the plaintiff. *Henderson v. Williams*, 120 N. C. 339, 27 S. E. 30.

There is no provision in our law authorizing the taxation as costs, of the fees for attendance and mileage of witnesses who have not been summoned, nor of witnesses who have been summoned but who are nonresidents of the State. *Stern v. Herren*, 101 N. C. 516, 8 S. E. 221.

Witnesses Subpoenaed but Not Examined.—When a cause has been tried, only those witnesses of the successful party who have been sworn and either examined or tendered to the opposite party can be taxed against the other. *Hobbs v. Atlantic, etc.*, R. Co., 151 N. C. 134, 136, 65 S. E. 755; *Chadwick v. Life Ins. Co.*, 158 N. C. 380, 381, 74 S. E. 115.

It has always been the recognized practice that, inasmuch as only two witnesses of the successful party to prove any single fact can be taxed against the losing party, the purport of the evidence of the witnesses so sought to be taxed shall be demonstrated by examination on the trial, or at least that the losing party may have an opportunity to ascertain the materiality of the evidence of such witnesses and prevent being taxed with an excessive number upon any single point by such witnesses being sworn and tendered to the opposite party for examination. *Porter v. Durham*, 79 N. C. 596. It is true that in *Loftis v. Raxter*, 66 N. C. 340, it is said that the witnesses must be "sworn or tendered," but this is an inadvertent expression for

"sworn and examined or tendered" i. e., witnesses subpoenaed by the successful party cannot be taxed against the losing party unless sworn and examined by the successful party, or sworn and tendered to the losing party to be examined, that their materiality may be shown. Otherwise, a successful party may oppress the losing party by subpoenaing and swearing any number of witnesses and having their attendance taxed, while examining only the few necessary to gain the action. Merely swearing the witnesses would be no assurance of this materiality. They must be examined or tendered to the opposite party to be examined, should he so choose, and if examined by the opposite party they are to be examined as the witnesses of the party summoning such witnesses, and under the rules of cross-examination pertaining to the examination of an adversary's witnesses. *Sitton v. Lumber Company*, 135 N. C. 540, 541, 47 S. E. 609.

Effect of Nonsuit.—The costs of the defendant's witnesses who are present when the case is brought for trial, but are not sworn, because the plaintiff takes a nonsuit, are properly taxed against the latter. *Henderson v. Williams*, 120 N. C. 339, 27 S. E. 30, citing *Loftis v. Raxter*, 66 N. C. 340, cited in *Sitton v. Lumber Company*, 135 N. C. 540, 541, 47 S. E. 609.

A pauper is not excused from liability for his witnesses. *Bailey v. Brown*, 105 N. C. 127, 129, 10 S. E. 1054.

Witnesses Summoned by Both Parties.—A witness summoned by each party to a suit is entitled to compensation from each. *Peace v. Person*, 5 N. C. 188.

§ 6-54. Witness tickets to be filed; only two witnesses for single fact.—At the court where the cause is finally determined the party recovering judgment shall file in the clerk's office the witness tickets; the amount whereof shall be taxed in the bill of costs, to be levied and recovered for the benefit of said party. The party cast shall not be obliged to pay for more than two witnesses to prove a single fact. (Rev., s. 1300; Code, s. 1370; R. C., c. 31, s. 74; 1783, c. 189, s. 3; 1796, c. 458, s. 2; C. S. 1275.)

Local Modification.—Anson, Buncombe, Columbus, Forsyth, Gaston, Richmond, Robeson, Rutherford, Surry: C. S. 1276.

Editor's Note.—"Service as a witness," as stated by Justice Clark, (then Chief Justice) in *State v. Wheeler*, 141 N. C. 773, 777, 53 S. E. 358, "is the exaction of a public duty, like service upon a jury, grand jury, coroners inquest, special venire, military service, and the like, which men are required to render either wholly without compensation or (usually) with inadequate pay, as the sovereign may require. Originally none of these received any pay whatever (*State v. Massey*, 104 N. C. 877, 878, 10 S. E. 608), the duration of military service only having a time limit. And to this day witnesses, above two to each material fact, receive no pay."

See also annotations under § 6-53.

Where the issue submitted is a complex one, involving the investigation of a multiplicity of single facts material to be ascertained, to establish each such fact two witnesses are allowable under this section. *Ex parte Beckwith*, 124 N. C. 111, 32 S. E. 393.

Four Witnesses Summoned—Two Called by Each Party.—Where there was only one issue in the case, and plaintiff summoned four witnesses, but called only two of them, and the defendant summoned the witness who did not attend, the defendant was nevertheless liable for the costs of the two witnesses not sworn, as the court could not say that they had not been summoned to contradict testimony expected from the defendant's witness. *Hayle v. Cowan*, 2 N. C. 21.

Against Parties Summoning Witnesses.—While not more than two witnesses, summoned by the successful party to prove a single fact, can be taxed against the losing party under this section, this does not abridge the right of all the witnesses to recover compensation against the party summoning them. *State v. Massey*, 104 N. C. 877, 881, 10 S. E. 608.

This section does not apply to expert witnesses, the court being allowed under § 6-52 to exercise its discretion with reference to compensation for same. *Connor v. Hayworth*, 206 N. C. 721, 724, 175 S. E. 140.

Applied in *Cureton v. Garrison*, 111 N. C. 271, 16 S. E. 338.

§ 6-55. Fees of witnesses before jury of view, commissioner, etc.—Witnesses summoned to appear at any survey, or before any jury of view, or

before any commissioner, arbitrator, referee, or other person authorized to require their attendance, shall be entitled to the same fees as for similar attendance at the court of the county, and may prove, by their own oath, their attendance, mileage, and ferriage before such person, who is hereby authorized to administer the oath; and when they shall attend on any commission issuing from without the state, they may recover the fees for attendance against the party summoning them, or his agent or attorney directing them to be summoned; and when they shall attend under a commission or authority from any court in this state, the fees for attendance shall be proved as aforesaid, and be certified to the proper court and taxed among the costs of the cause, as if the witness had attended the court; but nevertheless, such fees may be immediately recovered against the party summoning. (Rev., s. 1301; Code, s. 1365; R. C., c. 31, s. 67; 1805, c. 685; 1848, c. 66; 1850, c. 188, s. 3; C. S. 1277.)

§ 6-56. Fees of witnesses before grand jury.—No witness shall receive pay for attendance in a criminal case before a grand jury, unless such witness has been summoned by direction in writing of the foreman of the grand jury, or of the solicitor prosecuting, addressed to the clerk of the court, commanding him to summon such witness, stating the name of the parties against whom his testimony may be needed, or unless he has been bound or recognized by some justice of the peace to appear before the grand jury. (Rev., s. 1302; Code, s. 743; 1879, c. 264; C. S. 1278.)

Local Modification.—Martin, Moore, Wayne: C. S. 1279.

Cross Reference.—As to witnesses before grand jury, see §§ 15-138, 15-139.

Permission to Summon.—Grand jurors have no right to summon witnesses to appear before them except by the permission of their foreman or the solicitor as prescribed by this section. *State v. Wilcox*, 104 N. C. 847, 10 S. E. 453.

Endorsement of Names.—Witnesses are entitled to compensation where a bill is prepared and sent to the grand jury with the names of those summoned endorsed thereon as sworn and sent. *Lewis v. Board of Comm'rs*, 74 N. C. 194.

§ 6-57. Pay of state's witnesses.—All witnesses summoned or recognized in behalf of the state shall be allowed the same pay for their daily attendance, ferriage and mileage as is allowed to witnesses attending in civil suits; and such fees for attendance shall be paid by the defendant only upon conviction, confession or submission; and if the defendant is acquitted on any charge of an inferior nature, or a nolle prosequi be entered thereto, the court shall order the prosecution to pay the cost, if such prosecution appears to have been frivolous or malicious; but if the court is of opinion that such prosecution was neither frivolous nor malicious, and a greater number of witnesses have been summoned than were, in the opinion of the court, necessary to support the charge, the court may, nevertheless, order the prosecutor to pay the attendance of such unnecessary witnesses, if it appear that they were summoned at his special request. (Rev., s. 1296; Code, s. 1204; R. C., c. 35, s. 37; 1800, c. 558, s. 1; 1879, c. 49; 1879, c. 92, s. 3; 1881, c. 176; C. S. 1280.)

An appeal lies from the judgment of a justice of the peace in a criminal action taxing the prosecutor with cost. *State*

v. Morgan, 120 N. C. 563, 21 S. E. 634, cited in Harris v. Singletary, 193 N. C. 583, 588, 137 S. E. 724.

§ 6-58. County to pay state's witnesses in certain cases.—Witnesses summoned or recognized on behalf of the state to attend on any criminal prosecution in the superior or criminal courts where the defendant is insolvent, or by law is not bound to pay the same, and the court does not order them to be paid by the prosecutor, shall be paid by the county in which the prosecution was commenced. And in all cases wherein witnesses may be summoned or recognized to attend any such court to give evidence on behalf of the state, and the defendant is discharged, and in cases where the defendant breaks jail and is not afterwards retaken, the court shall order the witnesses to be paid. (Rev., s. 1289; Code, s. 740; R. C., c. 28, s. 9; 1804, c. 665; 1819, c. 1008; 1824, c. 1253; C. S. 1281.)

Local Modification.—Durham, Wilkes: C. S. 1282; Wake: C. S. 1282; 1929, c. 102; 1931, c. 201.

Editor's Note.—See annotations under § 6-36. For history of pay of State's witnesses, see *State v. Massey*, 104 N. C. 877, 10 S. E. 608.

Service out of State.—The service of a subpoena on a witness beyond the borders of the state in a criminal action is not valid; and where the trial judge has allowed a necessary nonresident witness to prove his ticket against the county with mileage to the state line, there is no authority for him to allow the witness to prove for services rendered by him outside of the state when service has been attempted there. *State v. Means*, 175 N. C. 820, 95 S. E. 912.

§ 6-59. County to pay defendant's witnesses in certain cases.—When the defendant is acquitted, a nolle prosequi entered, or judgment against him arrested, and it is made to appear to the court, by certificate of counsel or otherwise, that said defendant had witnesses, duly subpoenaed, bound or recognized, in attendance, and that they were necessary for his defense, it is the duty of the court, unless the prosecutor is adjudged to pay the costs, to make and file an order in the cause directing that said witnesses be paid by the county in such manner and to such extent as is authorized by law for the payment of state's witnesses in like cases. (Rev., s. 1290; Code, s. 747; 1879, c. 264; 1881, c. 312; C. S. 1283.)

Cross Reference.—See also §§ 6-36 and 6-64.

In General.—This section shows the legislative intent to restrict payment by the county of the defendant's witnesses to the cases specified, and their number and amount of compensation. *State v. Massey*, 104 N. C. 877, 880, 10 S. E. 608.

In this case the court below held that there is no statute authorizing the court to tax defendant's witnesses against the county when the "bill is quashed." If this is a *casus omissus* the remedy can only be found in a legislative enactment. It would seem, however, intentional for the Statute of 1799 (Code, sec. 737, now G. S. § 6-49), authorizing the court to tax prosecutors with costs, does not extend to cases in which the bill is quashed. In *Office v. Gray*, 4 N. C. 307, the court gives the reason that the bill can only be quashed if the offense be not indictable, or is not set forth with legal precision, and the court could not, therefore, find that the prosecution was frivolous or malicious. It seems, from the similarity of language used in sec. 6-49 and this section, that the intention was to allow the defendant's witnesses to be taxed against the county only in the cases in which they could be taxed against a prosecutor. As to the state's witnesses, the language is broader, and provides for their payment in all cases in which "the defendant is discharged" (this section), subject, of course, to the restrictions above cited.

The liability of the county for the defendant's witnesses is restricted to the same cases in which the county is responsible for half fees to officers, except that the county is not liable to the defendant's witnesses where he is convicted and unable to pay. An appeal in the matter of

costs lies in cases of this kind. *State v. Horne*, 119 N. C. 853, 26 S. E. 36; *Guilford v. Comm'rs*, 120 N. C. 23, 28, 27 S. E. 94.

§ 6-60. Fees of state witnesses; two only in misdemeanors; one fee for day's attendance.—No person shall receive pay as a witness for the state on the trial of any criminal action unless such person was summoned by the clerk under the direction of the solicitor prosecuting in the court in which the action originated, or in which it shall be tried if removed; and no solicitor shall direct that more than two witnesses shall be summoned for the state in any prosecution for a misdemeanor, nor shall any county or defendant in any such prosecution be liable for or taxed with the fees of more than two witnesses, unless the court, upon satisfactory reasons appearing, otherwise directs. And no witness summoned in a criminal action or proceeding shall be paid by the county for attendance in more than one case for any one day; nor shall the county be required to pay any such witness if his attendance shall be taxed in more than one case on the same day. (Rev., s. 1303; Code, s. 744; 1871-2, c. 186; 1879, c. 264; C. S. 1284.)

§ 6-61. On appeal from justice only two witnesses bound over.—When the defendant appeals from the judgment of the justice of the peace, in any criminal action, it is the duty of such justice of the peace to select and bind over on behalf of the state not more than two witnesses, and neither the county nor the defendant shall be liable for the fees of more than two witnesses on such appeal, unless additional witnesses are summoned by order of the appellate court as provided in the preceding section. (Rev., s. 1304; Code, s. 745; 1879, c. 264; C. S. 1285.)

Where on appeal to the superior court from a judgment of a justice of the peace, in a matter in which he had final jurisdiction, a nol. pros. was entered by the solicitor, it was error to tax the county with the costs accrued in the superior court. *State v. Shuffler*, 119 N. C. 867, 26 S. E. 94.

§ 6-62. Solicitor to announce discharge of state's witnesses.—It is the duty of all solicitors prosecuting in the several courts, as each criminal prosecution is disposed of by trial, removal, continuance or otherwise, to call, in open court, and announce the discharge of witnesses for the state, either finally or otherwise as the disposition of the case may require, and thereupon the clerk of the superior court shall enter such announcement of discharge, with the names of the witnesses discharged, in his minutes. (Rev., s. 1305; Code, s. 746; 1879, c. 264; 1881, c. 312; 1935, c. 26; C. S. 1286.)

Cross Reference.—As to discharge of witnesses generally, see § 8-63.

Editor's Note.—The amendment of 1935 omitted the provision as to the form of the certificate. It also requires that the discharge shall be in open court. The requirement for entry on the minutes is new.

§ 6-63. Witnesses not paid without certificate; court's discretion.—No county, prosecutor or defendant shall be liable to pay any witness, nor shall his fees be embraced in the bill of costs to be made up as hereinbefore provided, unless his name is certified to the clerk by the solicitor, or included in the order of the court. And the judge or justice may, in his discretion, for satisfactory cause appearing, direct that the witnesses, or any

of them, shall receive no pay, or only a portion of the compensation authorized by law. The court, at any time within one year after judgment, may order that any witness may be paid who for any good reason satisfactory to the court failed to have his fees included in the original bill of costs. (Rev., s. 1306; Code, ss. 733, 748; 1879, c. 264; 1881, c. 312; C. S. 1287.)

The discretion conferred upon the court, in this section, in respect to regulating, or refusing to allow any compensation to the witnesses therein named, is not reviewable. *State v. Massey*, 104 N. C. 877, 10 S. E. 608.

It is within the discretion of the trial Court (under § 733 of the Code of 1883) to refuse to make an order for the payment by the county of the fees of witnesses for a defendant acquitted of a criminal charge, where no prosecutor is marked, and the exercise of such discretion is not reviewable. *State v. Ray*, 122 N. C. 1095, 29 S. E. 948.

Appeal.—In an appeal from defendant's motion to retax the costs in a criminal action it should appear on the record that the provisions of this and § 6-60 were complied with and when it does not so appear the case will be remanded. *State v. Kirby*, 201 N. C. 789, 161 S. E. 483.

Art. 9. Criminal Costs before Justices, Mayors, County or Recorders' Courts.

§ 6-64. Liability for criminal costs before justice, mayor, county or recorder's court.—The party convicted in a criminal action or proceeding, within the jurisdiction of a justice of the peace, before any justice, mayor, county or recorder's court, shall always be adjudged to pay the costs, and if the party charged be acquitted, the complainant shall be adjudged to pay the costs, and may be imprisoned for the nonpayment thereof, if the justice, mayor, county or recorder's court shall adjudge that the prosecution was frivolous or malicious. But in no action or proceeding in which a justice of the peace has final jurisdiction,

commenced or tried in a court of a justice of the peace, mayor, county or recorder's court shall the county be liable to pay any costs: any defendants or prosecuting witness shall have the right of appeal to the superior court. (Rev., 1307; Code, s. 895; 1868-9, c. 178; 1879, c. 92, s. 3; 1881, c. 176; 1931, c. 252; C. S. 1288.)

Local Modification.—*Jackson*: 1933, c. 225; *Martin*: 1935, c. 20; *Swain*: 1935, c. 84.

Cross References.—As to liability of prosecutor for costs, see § 6-49. As to liability of county for costs, see § 6-36. As to appeals, see §§ 15-177, 15-180.

Editor's Note.—The Act of 1931 repealed the former section and enacted this section in lieu thereof. The former section applied only to proceedings before a justice.

For general discussion of costs in criminal actions before a justice of the peace, see *Merrimon v. Henderson County Com'rs*, 106 N. C. 369, 11 S. E. 267; *State v. Carlton*, 107 N. C. 956, 12 S. E. 44.

Where the justice of the peace has testified on the trial to recover damages for a false arrest that he considered the criminal action "frivolous and malicious," and had taxed the defendant (prosecutor) with cost, the erroneous admission of this evidence is cured by the defendant's admission that he had paid the cost thus taxed him. *Harris v. Singlet y*, 193 N. C. 583, 137 S. E. 724.

Taxation of Prosecutor in Justices Court.—See annotations under § 6-49.

Cited in 5 N. C. Law Rev. 359, in a note on "Interest in Costs."

§ 6-65. Imprisonment of defendant for non-payment of fine and costs.—If the justice sentences the party found by him to be guilty to pay a fine and costs, and the same are not immediately paid, the justice shall commit the guilty person to the county jail until the same are paid, or until he is otherwise discharged according to law. (Rev., s. 1308; Code, s. 904; 1868-9, c. 178, subchap. 4, s. 15; C. S. 1289.)

Cross Reference.—See also § 6-46 and note thereto.

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- 7-365. Waiver of jury trial; jurisdiction concurrent with justice of peace.
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SUBCHAPTER I. SUPREME COURT.

Art. 1. Organization and Terms.

§ 7-1. Number of justices.—The supreme court of North Carolina shall consist of a chief justice and six associate justices, to be chosen in the manner now prescribed by law. (Rev., s. 1532; Const., Art. 4, s. 6; 1937, c. 16, s. 1; C. S. 1403.)

Editor's Note.—The 1937 amendment increased the associate justices from four to six in pursuance of authority of the constitutional amendment proposed by Public Laws 1935, c. 444, s. 1, and adopted at the general election of November, 1936.

Historical.—"When first established, the court was composed of three justices, appointed by the general assembly to hold office during good behavior; and the justices themselves appointed one of their number as chief justice. By the Constitution of 1868 the number was increased to five, a chief justice and four associate justices, to be elected by popular vote, and to hold office for eight years and until their successors are qualified. By an amendment in 1875 the number was reduced to three, and in 1887 it was again increased to five, as the court is now constituted." 5 N. C. L. Rev. 5.

§ 7-2. Election and term of office.—The justices of the supreme court shall be elected by the qualified voters of the state, as is provided for the election of members of the general assembly. They shall hold their offices for eight years. (Const., Art. 4, s. 21; C. S. 1404.)

§ 7-3. Salaries of supreme court justices.—Each justice of the supreme court shall be paid an annual salary of seven thousand five hundred dol-

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- 7-422. Continuance of trial upon demand for jury; drawing and summoning of jury; compensation of jurors.
- 7-423. Jury trials in criminal actions.
- 7-424. Talesmen may serve as jurors.
- 7-425. Sessions of court.
- 7-426. Civil jurisdiction of court.
- 7-427. Procedure for hearing of appeals from courts of justices of the peace.
- 7-428. Transfer of cases from superior court.
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- 7-431. Orders to stay execution; judgments.
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- 7-438. Criminal cases bound over by justices of the peace.
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- 7-444. Costs and fees as county funds.
- 7-445. Abolition of court by resolution of commissioners.
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- 7-447. Construction of article.

lars, and in lieu of and in commutation for expenses incident to attendance upon the court an amount equal to that allowed to each judge of the superior court, payable in equal monthly installments, as a part of his compensation. (Rev., s. 2764; Code, s. 3733; 1891, c. 193; 1903, c. 805; 1905, c. 208; 1907, cc. 841, 988; 1909, c. 486; 1911, c. 82; 1915, c. 44; 1919, c. 51; 1921, c. 25, s. 2; 1925, c. 214; 1927, c. 69, s. 1; 1939, c. 252; C. S. 3883.)

Cross Reference.—For the amount allowed superior court judges for expenses, see § 7-42.

Editor's Note.—The amendments changed the amount of salary and allowance for expenses.

Justices' Salaries Not Subject to Taxation.—See notes to Const. Art. IV, § 18.

§ 7-4. Oath of office.—The justices, before they act as such, shall, before the governor or some judicial officer, take and subscribe the oaths appointed for the qualification of public officers, and also an oath of office, which shall be certified by the officer taking the same and delivered to the secretary of state, to be safely kept. (Rev., s. 1533; Code, s. 955; R. C., c. 33, s. 3; 1818, c. 963; C. S. 1405.)

Cross References.—As to forms of oath, see §§ 11-6, 11-7, 11-11. As to penalty for failure, see § 128-5. As to constitutional requirement and form, see Const., Art. VI, § 7.

§ 7-5. Name of court; where records to be kept.—The court bears the name and style of The Supreme Court of North Carolina, and is a court of record; and the papers and records belonging

to the clerk's office thereof shall be constantly kept within the city of Raleigh. (Rev., s. 1536; Code, s. 954; R. C., c. 33, s. 2; R. S., c. 33, s. 2; 1884, c. 660; 1805, c. 674; 1818, c. 962; 1828, c. 13; C. S. 1406.)

A Court of Record.—"The Supreme Court is a court of record, and the clerk who is appointed by the court for a term of eight years, is required to keep the records of the court in his office in Raleigh." See 5 N. C. L. Rev. 5.

Derived from Constitution.—The Supreme Court is established by, and derives its jurisdiction from, the constitution, and its judicial powers and jurisdiction so prescribed, as well as its methods of procedure, are not subject to legislative control. *Rencher v. Anderson*, 93 N. C. 105.

§ 7-6. Quorum.—Four justices shall constitute a quorum for the transaction of the business of the court. (Rev., s. 1534; Code, s. 956; 1889, c. 230; 1937, c. 16, s. 2; C. S. 1407.)

Editor's Note.—Prior to the 1937 amendment three justices constituted a quorum.

The court means the three (now seven) judges sitting together, consulting and advising one with the other, upon the question before them for judicial decision. *State v. Lane*, 26 N. C. 434, 435. Upon the death of one, the remaining judges have power and authority to hold court. *Id.*

§ 7-7. Terms of court.—There shall be held at the seat of government of the state in each year two terms of the supreme court, commencing on the first Monday in February and the last Monday in August.

The court shall sit at each term until all the business on the docket shall be determined or continued on good cause shown. In case no one of the justices shall attend the term during the first week thereof, at the end of that time the court shall stand adjourned till the next term, and the causes on the docket be continued. (Rev., ss. 1535, 1536; Code, ss. 953, 954; 1901, c. 660; 1887, c. 49; 1881, c. 178; R. C., c. 33, s. 2; R. S., c. 33, s. 2; 1804, c. 660; 1805, c. 674; 1818, c. 932; 1828, c. 13; 1842, c. 15; 1846, cc. 28, 29; C. S. 1408.)

Editor's Note. — Under the law as it existed prior to 1868, the court held three terms a year, two in Raleigh and one in Morganton. See 5 N. C. Law Rev. 6.

When the Court Has Adjourned. — When the Supreme Court has finished the business of any one term and adjourned, its jurisdiction of a case decided at that term ceases, and it cannot again acquire jurisdiction of it except by petition to rehear or by a new appeal. *State v. Marsh*, 134 N. C. 184, 197, 47 S. E. 6.

In *Ruffin v. Harrison*, 91 N. C. 398, it was said, "The court has no power to amend or modify the final decree, entered at the last term, upon an application like this. After final judgment the court cannot disturb it unless upon an application to rehear or for fraud, accident or mistake alleged in an independent action, or perhaps, in some cases a party might be relieved against a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect' within a year after the entry of the same..... This of course does not imply that the court has not power to correct the entry of its orders, judgments and decrees so as to make them conform to the truth or what the court did in granting them, or to set aside an irregular judgment in a proper case." *State v. Marsh*, 134 N. C. 184, 197, 47 S. E. 6.

Art. 2. Jurisdiction.

§ 7-8. Original jurisdiction. — The supreme court has original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action. (Rev., s. 1537; Const., Art. IV, s. 9; C. S. 1409.)

Editor's Note.—This section, conferring jurisdiction on

the Supreme Court to render an opinion in cases wherein there are claims against the State, has a rather unique purpose. The principle underlying its enactment is the well established one that a sovereign state cannot be sued without its consent. Hitherto it was questioned whether the court could lend its aid to the Legislature in disposing of important questions of law in cases to which the State was a party. *Reynolds v. State*, 64 N. C. 461. The realization of the necessity of having recourse to the advice of men who were experts in this particular field, and the extreme difficulty with which the Legislature, unaided, was confronted, coupled with the fact that persons who asserted that they held legal claims against the sovereign State might here find a tribunal before which they might have, in proper cases, the legality of their claims adjudicated, led to the passage of this section. However, the jurisdiction, hereby conferred, is not without its clean-cut limitations which will appear in the cases following. See also the annotations under N. C. Const., Art. IV, § 9.

Purpose.—The original jurisdiction was conferred upon the Supreme Court for the benefit only of such plaintiffs, and to be used only in such cases, as could not obtain a footing in the courts, by reason of the State's being a party against whom the claims were to be asserted. *Bain v. State*, 86 N. C. 49, 50.

Nature of Claim. — The claim against the State must be such as, against any other defendant, could be reduced to a judgment and enforced by an execution. *Bain v. State*, 86 N. C. 49, 50.

Same—Question of Law. — The Supreme Court has not original jurisdiction to hear claims against the State in cases in which no question of law is involved. *Miller v. State*, 134 N. C. 270, 271, 46 S. E. 514; *Cowles v. State*, 115 N. C. 173, 179, 20 S. E. 384.

This section is applicable only as to the matters of law involved upon facts agreed to, or made to appear, and the Supreme Court does not pass upon conflicting evidence to determine the facts at issue. *Calkins Dredging Co. v. State*, 191 N. C. 243, 131 S. E. 665; *Reynolds v. State*, 64 N. C. 461. The adjudication is of the legal validity of the claims. *Baltzer v. State*, 104 N. C. 265, 10 S. E. 153.

Court Cannot Enforce Judgments — No power to enforce its judgment is given the court; its decisions are merely recommendatory to the Legislature, which may provide for the enforcement of the claims if it see proper to do so. *Baltzer v. State*, 104 N. C. 265, 10 S. E. 153.

The Supreme Court renders no judgment in a proceeding in which original jurisdiction is invoked under Const. art. 4, § 9, nor has it power to enforce its decision made in such proceeding by process in nature of execution. Its decision is merely recommendatory. *Rotan v. State*, 195 N. C. 291, 141 S. E. 733.

Recovery of Taxes.—When nonresident executors have failed to proceed in the Superior Court, under § 105-406, to recover an amount they have paid as an inheritance tax to the State of North Carolina, the method by which the Legislature has authorized the State to be sued is exclusive, and the recommendatory original jurisdiction of the Supreme Court may not be invoked. *Rotan v. State*, 195 N. C. 291, 141 S. E. 733.

Transmission to General Assembly. — Upon the decision of the Supreme Court in favor of the plaintiff upon a claim preferred against the State, the proper course is for the clerk to transmit the proceedings in the cause, together with the judgment of the court, to the Governor to be communicated by him to the General Assembly. *Clements v. State*, 77 N. C. 142; *Horne v. State*, 82 N. C. 382.

State May Plead Statute of Limitations. — In proceedings under this section the State has the right to plead the bar of the statute of limitations to prevent a recommendatory decision. *Cowles v. State*, 115 N. C. 173, 179, 20 S. E. 384. The court said: "It is not for us here to say whether or not there is a moral obligation resting upon the Commonwealth to pay the petitioner a certain sum of money, but whether, under the law that controls such a controversy, when waged between two citizens, the State is indebted to their petitioning citizen." *Id.*

Set-Off and Counterclaim. — A person indebted to the State, and sued on such indebtedness cannot offer as a set-off or counterclaim its indebtedness of the State to him arising out of coupons of the State which are overdue, and which the State legally owes. *Battle v. Thompson*, 65 N. C. 406, 407. It is otherwise when the claim is in the nature of a payment or credit. *Id.* See also, *Lindsay v. King*, 23 N. C. 401.

§ 7-9. Procedure to enforce claims against the state.—Any person having any claim against the state may file his complaint in the office of the

clerk of the supreme court, setting forth the nature and grounds of his claim. He shall cause a copy of his complaint to be served on the governor, and therein request him to appear on behalf of the state and answer his claim. The copy shall be served at least twenty days before application for relief shall be made to the court. In case of an appearance for the state by the governor, or any other authorized officer, the pleadings and trial shall be conducted in such manner as the court shall direct. If an issue of fact shall be joined on the pleadings, the court shall transfer it to the superior court of some convenient county for trial by a jury, as other issues of fact are directed to be tried, and the judge of the court before whom the trial is had shall certify to the supreme court, at its next term, the verdict and the case, if any, made up and settled as prescribed in cases of appeal to the supreme court. If the state shall not appear in the action by any authorized officer, the court may make up issues and send them for trial, as aforesaid. The supreme court shall in all cases report the facts found, and their recommendation thereon, with the reasons thereof, to the general assembly at its next term. (Rev., s. 1538; Code, s. 948; C. S. 1410.)

Editor's Note.—This section was first enacted by the General Assembly in 1868. *Lacy v. State*, 195 N. C. 284, 289, 141 S. E. 886.

In General.—In these proceedings the rights of the petitioner and the liability of the State are determined by the same laws that would govern those rights and that liability if the action were against an individual debtor. *Cowles v. State*, 115 N. C. 173, 179, 20 S. E. 384.

The Supreme Court, as a rule, will consider only such claims as present serious questions of law and will not take the burden of passing upon those claims which involve mainly issues or questions of fact, although in proper cases the Court may order that issues of fact be tried in the Superior Court, as provided in this section. *Cohon v. State*, 201 N. C. 312, 314, 160 S. E. 183.

The recommendatory or original jurisdiction of the Court is confined to claims in which it is supposed that an opinion on an important question of law would be of aid to the General Assembly in determining the merits of a claim against the State. This is true notwithstanding the broad provision of this section that any person having any claim against the State may commence the proceeding by filing his complaint. Id.

The Supreme Court is given original jurisdiction to hear claims against the State, but its decisions are merely recommendatory, and no process in the nature of execution shall issue thereon. Id.

The procedure thus authorized is prescribed by this section, but this procedure must not be construed as exceeding the power conferred upon the Supreme Court by the organic law. Id.

Construction of Section.—Insofar as this section provides for and prescribes the procedure by which a claimant may invoke the original jurisdiction of the Supreme Court, conferred by the Constitution, with respect to his claim against the State, it is valid, and enforceable in all respects; when, however, a proceeding has been duly instituted and filed in the Supreme Court, in accordance with the provisions of the statute, the procedure by which the Court will thereafter exercise its power to hear and decide upon the claim is not controlled by the statute. When it appears that an issue or question of law is presented which can be intelligently decided, without determining facts in issue, the Court will proceed to hear and decide such issue or question of law. When it appears that there is no issue or question of law involved no decision will be made and the proceeding will be dismissed. When, however, in order to decide an issue or question of law involved, the Court deems it best to have issues of fact first determined, the Court may or may not follow the provisions of the statute with respect to a trial by jury of such issues. The statute is at most, in this respect, directory. *Lacey v. State*, 195 N. C. 284, 290, 141 S. E. 886.

Ascertainment of Facts.—The facts are ascertained by reference to the clerk of the Supreme Court or by trans-

ferring the issue to a superior court for trial by jury, and when sufficiently informed of the facts the Supreme Court will declare the law. *Bledsoe v. State*, 64 N. C. 392; *Clements v. State*, 76 N. C. 199, 201.

The court cannot enforce its judgment, see notes of *Baltzer v. State*, 104 N. C. 265, 10 S. E. 153, under section 7-8.

Duty of Clerk after Decision.—See note of *Clements v. State*, 77 N. C. 142, under section 7-8.

Cited in *Rotan v. State*, 195 N. C. 291, 292, 141 S. E. 733.

§ 7-10. Appellate jurisdiction.—The supreme court has jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said court over “issues of fact” and “questions of fact” is the same exercised by it before the adoption of the constitution of one thousand eight hundred and sixty-eight, and the court has the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts. (Rev., s. 1539; Const., Art. IV, s. 8; C. S. 1411.)

I. In General.

II. Issues and Questions of Fact.

A. In General.

B. Jurisdictional Requisites.

C. The Principles Applied.

III. Jury Trial.

Cross Reference.

As to appeals from superior court judges, see also § 1-277.

I. IN GENERAL.

Editor's Note.—See notes under Const. Art. 4, § 8. The provisions of this section are, in substance, quite similar to those contained in section 1-277. Practically the only distinguishing feature is that this section provides for the jurisdiction of the Supreme Court over “issues of fact” and “questions of fact,” making it the same as was exercised by the court prior to the adoption of the Constitution of one thousand eight hundred and sixty eight. It is thought more advisable and expedient to place the major annotations under section 1-277, to which reference is hereby made, and to confine the notes to this section to those cases bearing upon the last provision herein contained.

In General.—In our practice, both before and since the establishment of the Constitution of 1868, the Supreme Court has all the power which a court of errors had at common law. *Rush v. Steamboat Co.*, 68 N. C. 72.

Ruling on Question in Lower Court Essential.—The appellate jurisdiction of the Supreme Court is limited to the correction of errors in the rulings below, and when there has been no ruling thereon below, the court cannot pass upon a question presented by the record. *Tyson v. Tyson*, 110 N. C. 360, 366, 6 S. E. 707.

Same—Exceptions to Referee's Report.—It is required of the trial judge to review and pass upon exceptions to a report of a referee as to the facts found and the conclusions of law thereon, and a pro forma judgment entered by him for any reason cannot be reviewed by the Supreme Court on appeal under this section for it is only decisions of the lower courts which may thus be considered. *Overman v. Lanier*, 156 N. C. 537, 72 S. E. 575.

An Appeal Essential.—The Supreme Court being strictly an appellate court, except as to claims against the State, its jurisdiction is acquired only by reason of the appeal. *James v. Western, etc.*, R. R., 123 N. C. 299, 301, 31 S. E. 707.

Record Controlling.—On appeal, the record controls as to facts stated therein. *Southerland v. Brown*, 176 N. C. 187, 96 S. E. 946; *Thompson v. Williams*, 175 N. C. 696, 95 S. E. 100.

In case of conflict as to occurrences, at the trial, the record will prevail. *Howard v. Wright*, 173 N. C. 339, 345, 91 S. E. 1032; *Bell v. Harrison*, 179 N. C. 190, 102 S. E. 200; *McDonald v. McLendon*, 173 N. C. 172, 91 S. E. 1017.

Second Appeal.—The Supreme Court will not *ex mero motu* review a former decision upon a second appeal in the same case. *Best v. British, etc., Mortgage Co.*, 131 N. C. 70, 71, 42 S. E. 456. But the court, on the second appeal, is not precluded under the doctrine of the law of the case from passing on a question not determined on the first appeal. *Vann v. Edwards*, 135 N. C. 661, 663, 47 S. E. 784.

Same—Party Harmed.—The Supreme Court will not review a ruling of its own, which does not affect injuriously

the complaining party, even where the ruling is erroneous. *Balk v. Harris*, 132 N. C. 10, 16, 43 S. E. 477, and cases cited.

II. ISSUES AND QUESTIONS OF FACT.

A. In General.

Defined.—Issues of fact on those matters alleged on one side and denied on the other, and every question presented under these issues necessary to decide the matter in controversy should be presented to the jury. *Kirk v. Atlanta*, etc., Ry. Co., 97 N. C. 82, 2 S. E. 536.

Power of Court.—"The power of the appellate court to review the facts is limited to matters exclusively of equitable cognizance under the former system, and in such cases only when the evidence is written and documentary, so that the higher court is in the same position as the court below." 5 N. C. Law Rev. 16. See also *State v. Lilliston*, 141 N. C. 857, 867, 54 S. E. 427.

B. Jurisdictional Requisites.

When Jurisdiction Assumed.—The jurisdiction of the Supreme Court over issues of fact, under this section, will be assumed upon two conditions: 1. If the matter be of such an equitable nature as a court of equity under the former system took exclusive cognizance of. 2. If the proofs are written and documentary, and in all respects the same as they were when the judge of the court below passed upon them. *Worthy v. Shields*, 90 N. C. 192.

Since this decision the courts have consistently followed the two foregoing propositions, and have made the two principles conditions precedent to the valid exercise of a hearing on appeal. It necessarily follows from these rules that, (1) if the question presented on appeal is not strictly of an equitable nature, or (2) if the proofs are not written and documentary and in the same form as they were presented to the lower court, then it is not a case over which the Supreme Court can exercise jurisdiction. Herein lies the principle on which the court on appeal has refused to take cognizance of "issues of fact," which were in the court below, tried by a jury, for a *fortiori* the second proposition noted above will not have been fulfilled. The basis for the exclusion of such "issues of fact" would seem to be that the jury, with all the witnesses before them, are in a better position to weigh all the material evidence and can better reach the logical solution to the issue in controversy. See *Howard v. Board*, 189 N. C. 675, 127 S. E. 704; *Cameron v. Highway Comm'r*, 188 N. C. 84, 123 S. E. 465.—Ed. Note.

C. The Principles Applied.

Judgment Must be Equitable in Nature.—The jurisdiction of the Supreme Court over "issues of fact," is restricted to interlocutory and final judgments which are exclusively equitable in their nature, and which a court of equity as a distinct and separate tribunal could alone render, under the former system. *Young v. Rollins*, 90 N. C. 125.

This jurisdiction does not extend to a case which under the former practice would have been an action at law, and in which only errors of law could have been corrected on appeal. *State v. Scott*, 84 N. C. 184.

Same—Motion for Injunction.—On a motion for an injunction, being an application for equitable relief, it is the right and duty of the Supreme Court, under this section, on an appeal from an order granting or refusing the injunction, to determine the questions of fact as well as of law upon which the propriety of the order depends. *Jones v. Boyd*, 80 N. C. 258.

Same—Former Acquittal.—No appeal can be taken by the State to any court from the action of an inferior court in sustaining a plea of former acquittal, although such plea is a mixed question of law and fact, and the court erred in not leaving it to the jury. *State v. Lane*, 78 N. C. 547.

Same—Action of Covenant.—Whether an action of covenant which was strictly an action at law under the former system, but to which an equitable defense can now be made under the new system, falls within the operation of this section was left undecided by the court in *Gragg v. Wagner*, 77 N. C. 246-7.

When there is any evidence proper to be submitted to the jury, the Supreme Court has no power to interfere with the verdict. *Brown v. Power Co.*, 140 N. C. 333, 52 S. E. 954.

All the Evidence Must Be Sent Up.—The Supreme Court has no jurisdiction, on appeal, to review the evidence and findings of fact of the lower court in an equitable action, unless the same evidence, and the whole of it just as taken below, is sent to such court. *Gatewood v. Burns*, 99 N. C. 357, 6 S. E. 635.

III. JURY TRIAL.

Generally.—In *Leggett v. Leggett*, 88 N. C. 108, some doubt is cast upon the question whether, under the provisions of this section in reference to the jurisdiction of the

court over "issues of fact" and "questions of fact," a party has the right to have a cause, heretofore cognizable only in a court of equity, tried by the court without the intervention of a jury.

Same—Estoppel.—But where, in such case, a party has of his own accord accepted a trial by jury, he cannot afterwards have the same facts passed upon by the court. *Leggett v. Leggett*, 88 N. C. 108.

§ 7-11. Power to render judgment and issue execution.—In every case the court may render such sentence, judgment and decree as on inspection of the whole record it shall appear to them ought in law to be rendered thereon; and it may at its discretion make the writs of execution which it may issue returnable either to the said court or to the superior court: Provided, that when an execution shall be made returnable as last mentioned, a certificate of the final judgment of the supreme court shall always be transmitted to the superior court aforesaid, and there be recorded: Provided further, that the said superior court may enforce obedience to the execution, and in the event of its not being executed may issue new or further execution or process thereon in the same manner as though the first execution had issued from the said superior court: Provided, also, that in criminal cases the decision of the supreme court shall be certified to the superior court from which the case was transmitted, which superior court shall proceed to judgment and sentence agreeable to the decision of the supreme court and the laws of the state. (Rev., s. 1542; Code, s. 957; R. C., c. 33, s. 6; 1799, c. 520; 1818, c. 963; 1830, c. 2; 1868-9, c. 962; C. S. 1412.)

I. In General.

II. Exceptions.

III. Effect of Decision.

A. In General.

B. Power of Superior Court.

I. IN GENERAL.

Editor's Note.—The provisions of this section are so similar to those contained in section 1-297 that the practitioner must necessarily take notice of that section and the notes placed thereunder.

See comment in 13 N. C. Law Rev., 343, wherein it is suggested that this section be invoked to prevent useless non-suits.

Affirmance as to One Defendant Dismissal as to Other.—Under the technical rules of the common law a different rule prevailed, from that prescribed by this section and section 1-297, but the court of equity always followed this procedure, which was adopted by this State when the distinction between law and equity was abolished. One court having taken place of both law and equity, a joint judgment may be affirmed as to one defendant, and dismissed as to another. This has been the uniform course and practice since the blending of the two forms of procedure, and is expressly authorized by the sections cited above. The same practice has been followed in the courts of the other states which have adopted the modern system of practice. *Kimbrough v. Atlantic*, etc., R. Co., 182 N. C. 234, 109 S. E. 11.

Where a railroad company and the Director General of Railroads have both been joined as parties defendant in an action to recover for a negligent injury, and issues have been submitted as to each, and adverse verdict rendered as to each, there can be no prejudice to the Director General in dismissing the action as to the railroad company and affirming it as to the Director General, and the same may be done under the provisions of § 1-297 and this section. *Kimbrough v. Hines*, 182 N. C. 234, 109 S. E. 11.

Errors in Pleadings, etc.—This section requiring the Supreme Court to give such judgment as shall appear to be proper from an "inspection of the whole record" has reference only to essential parts of the record as pleadings, verdict and judgment, in which, if there be error, the court will correct it, though it be not assigned. *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513. See also *Wyne v. Atlantic*, etc., R. Co., 182 N. C. 253, 109 S. E. 19.

The Supreme Court ought not to render judgment upon

an aspect of the case not presented by the pleadings. *Oakley v. Noppen*, 95 N. C. 60, 61, 62; *Bush v. Hall*, 95 N. C. 82; *Morrison v. Watson*, 95 N. C. 479, 481.

Except in proper instances a party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation. *Hill v. Director General*, etc., 178 N. C. 607, 612, 101 S. E. 376. Especially is this true where the change of front is sought to be made between the trial and appellate courts. *Ingram v. Yadkin River Power Co.*, 181 N. C. 359, 107 S. E. 209.

Theory of Lower Court Adopted.—A case is heard and determined in the Supreme Court according to the theory on which it was tried below. *Coble v. Barringer*, 171 N. C. 445, 98 S. E. 518; *Warren v. Susman*, 168 N. C. 457, 84 S. E. 760.

Sufficiency of Record Must Be Apparent.—The Supreme Court renders judgment upon an inspection of the whole record, and must therefore, be satisfied of the sufficiency of each record. *State v. Daniel*, 121 N. C. 574, 28 S. E. 255.

Judgment in Lower Court Essential.—When the transcript does not show that any court was held, or that any judge was present or gave judgment, it is so defective that the Supreme Court has no jurisdiction to act upon it. *Boardfoot v. McKeithan*, 92 N. C. 561. It must also appear that the court was lawfully organized and held, and all the proceedings had in the action arranged in an orderly manner. *Id.*

Proceedings to Modify Judgment.—A judgment of the superior court may be modified on appeal where the plaintiff's right to remove adverse claims as a cloud upon his title to lands has been established, so as to enjoin, upon the defendant's appeal, actions pending in the superior court involving the same equity and the same subject-matter, where the parties thereto have been made parties to the case at bar, the proceedings being in the nature of a bill of peace. *Ormand Mining Co. v. Gambrell*, etc., *Mills Co.*, 181 N. C. 361, 107 S. E. 216.

Parties Not Appealing or Complaining.—Although the plaintiff does not appeal the appellate court may afford him relief upon defendant's appeal, because, by the terms of this section, it should render such judgment as "on an inspection of the whole record it shall appear to them ought in law to be rendered." *Ormand Min. Co. v. Gambrell*, etc., *Mills Co.*, 181 N. C. 361, 107 S. E. 216.

Errors Which Have to Be Assigned.—Under the provisions of this section the appellate court is required to take notice of all errors appearing upon the face of the record proper, such as defects in the summons, pleadings and the judgment, even though such errors are not assigned. *Wilson v. Beaufort Lumber Co.*, 131 N. C. 163, 164, 42 S. E. 565; *Thornton v. Brady*, 100 N. C. 38, 40, 5 S. E. 910. When other matters are relied upon, they must be pointed out by an exception on the trial or in the case on appeal. *State v. Ashford*, 120 N. C. 588, 589, 26 S. E. 915; *State v. Cowan*, 29 N. C. 239. See *In re Will of Roediger*, 209 N. C. 470, 184 S. E. 74.

II. EXCEPTIONS.

In General.—On appeal to the Supreme Court, only error as to the law or legal inferences are reviewable upon the record in the case. *Merchants Nat. Bank v. Howard*, 188 N. C. 543, 125 S. E. 126.

Where the record discloses no error of law or legal inference made upon the trial, the Supreme Court on appeal cannot consider whether a miscarriage of justice has resulted in the case appealed. *Rawls v. Lupton*, 193 N. C. 428, 137 S. E. 175.

The Supreme Court can not consider a question not considered by the trial court, and not affecting the verdict appealed from. *Herring v. Warwick*, 155 N. C. 345, 71 S. E. 462; *Kennedy v. Johnson*, 69 N. C. 249; *Williamson Co. v. Canaday*, 25 N. C. 349.

Error Apparent on Record.—The rule which forbids the hearing of an objection not taken, and which ought to have been taken, at the trial, does not embrace the case where the judge misdirects the jury upon a material question of law, injuriously to the appellant. *Burton v. Wilmington*, etc., *R. Co.*, 84 N. C. 193.

Failure to State Cause of Action.—An objection that the complaint does not state a cause of action may be taken advantage of at any time, even in the Supreme Court on appeal. *McDonald v. MacArthur Bros. Co.*, 154 N. C. 122, 69 S. E. 832; *Tucker v. Baker*, 86 N. C. 1; *Baker v. Garris*, 108 N. C. 218, 13 S. E. 2; *Jackson v. Jackson*, 105 N. C. 433, 11 S. E. 173.

Venue.—In an action against the board of commissioners of one county, brought to the superior court of an adjoining county, objection to the venue must be taken in the trial court, otherwise the objection will be considered as waived. *Edwards v. Board*, 70 N. C. 571. See, also, *McMinn v. Hamilton*, 77 N. C. 300.

Answer to Excluded Questions.—Assignments of error to exclusion of questions asked can not be considered, where the record does not indicate what the answers would have been. *Smith v. Commissioners*, 176 N. C. 466, 97 S. E. 378; *Brinkley v. Norfolk Southern R. Co.*, 168 N. C. 428, 84 S. E. 700; *Bryant Timber Co. v. Tilghman Lumber Co.*, 168 N. C. 154, 84 S. E. 765.

No Presumption of Error.—An assignment of error, to be considered, must be based upon an exception previously taken and appearing in the record, for the court will not presume error. *Bailey v. Justice*, 174 N. C. 733, 94 S. E. 518.

Where No Exceptions Appear.—No exceptions will be considered on appeal except such as appear in the record and were made in the court below. *Phipps v. Pierce*, 94 N. C. 514, 516; *Taylor v. Plummer*, 105 N. C. 56, 11 S. E. 266.

Where, by consent of the parties, the Judge frames the issue at the close of the testimony and no exception is made on the trial to such issues or to the evidence or charge, objection can not be raised on appeal that the issues submitted were not such as arose on the pleadings. Exception to the issues should be made on the trial so that the judge may, if he thinks proper, revise and correct them. *Wills v. Fisher*, 112 N. C. 529, 17 S. E. 73.

III. EFFECT OF DECISION.

A. In General.

Decision Fixes the Law.—The decision of the Supreme Court becomes the law of the case upon the second trial. *Davis v. Hilton Lumber Co.*, 190 N. C. 873, 130 S. E. 156. It is the duty of the superior court to proceed with the case in accordance with this decision and the principles established by the Supreme Court. *James v. Western*, etc., *R. R.*, 123 N. C. 299, 31 S. E. 707; *Ray v. Veneer Co.*, 188 N. C. 414, 124 S. E. 756.

The Decision Certified.—The requirement of this section that the Supreme Court transmit its "decision" means the results reached by the court, and there is no provision requiring the clerk to certify to a court below the opinion of the court. *State v. Ketchy*, 71 N. C. 148.

Certified Opinion—Appeal from Interlocutory Orders.—See section 7-12.

Final Judgment.—Final judgment may be rendered in the Supreme Court, *Alspaugh v. Winstead*, 79 N. C. 526. But where the case is sent back to the lower court it is within the discretion of the trial judge to permit the filing of a verified answer where there was a failure to do so in the first instance. *Griffin v. Asheville Light Co.*, 111 N. C. 434, 438, 16 S. E. 423.

B. Power of Superior Court.

Power Limited.—The superior court has no power to modify or change a judgment or decree of the Supreme Court certified to the court below. Its powers are confined to incidental matters of detail necessary to carry the decree into effect, not inconsistent therewith. The rule that the superior courts have authority to vacate or modify decrees made in a cause, at any time before final judgment, does not apply here. *Murrill v. Murrill*, 90 N. C. 120.

When a final judgment is rendered in the Supreme Court upon an appeal from a final judgment in the superior court, the latter court has power to issue no other process in the case than an execution for its own costs. *Grissett v. Smith*, 61 N. C. 297.

Judgment for Costs.—Judgment for costs in the Supreme Court is rendered in that court, the superior court has no jurisdiction in that matter. *Johnson v. Danville*, etc., *R. R.*, 109 N. C. 504, 13 S. E. 881. *Midgett v. Vann*, 158 N. C. 128, 73 S. E. 801. See section 6-33 and the notes thereto.

Motion for New Trial.—Where the Supreme Court has affirmed the judgment on an appeal in a criminal case and the judgment has been certified to the clerk of the Superior Court, under this section and § 7-16, the case is in the latter court for the purpose of the execution of the sentence, and a motion for a new trial may be there entertained for disqualification of jurors and for newly discovered evidence. *State v. Casey*, 201 N. C. 620, 161 S. E. 81; *State v. Cox*, 202 N. C. 378, 162 S. E. 907.

§ 7-12. No judgment on interlocutory order; opinion certified.—When an appeal is taken to the supreme court from any interlocutory judgment, the supreme court shall not enter any judgment reversing, affirming or modifying the judgment, order or decree so appealed from, but shall cause their opinion to be certified to the court below, with instructions to proceed upon such order, judgment or decree, or to reverse or modify

the same according to said opinion, and the court below shall enter upon its records the opinion at length, and proceed in the cause according to the instructions. (Rev., s. 1544; Code, s. 962; C. S. 1413.)

Editor's Note.—It is to be noted that in this section it is required that the opinion shall be certified "with instructions" etc., whereas in the preceding section, the provision, applicable to criminal cases, only required that the decision be certified.

Interlocutory Order Defined.—See sec. 1-208 and notes thereto.

Procedure Explained.—The appeal, like a writ of error, does not disturb the interlocutory order, but suspends action on it, intended to carry it into effect, until its legality is tested in the court above, and this being decided and certified to the superior court, then, if sustained, that court is directed to proceed upon the judgment as already existing; or if declared erroneous, to reverse or modify it, in conformity to the law declared. *Green v. Griffin*, 95 N. C. 50.

Effect of Appeal.—Appeals from interlocutory or subsidiary orders, judgments and decrees made in a cause, carry up for review only the ruling of the court upon that specific point. The order of judgment appealed from is not vacated, but further proceedings under it are suspended until its validity is determined. Meanwhile the action remains in the court below. *Green v. Griffin*, 95 N. C. 50.

If the appeal is from an interlocutory order the cause does not come up to the Supreme Court, but only the order, which is decided and the decision certified to the superior court, to the end that the cause may be proceeded with. *Perry v. Tupper*, 71 N. C. 380.

Substantial Right Affected.—Before an appeal should be taken from an interlocutory judgment or order, it should affect some substantial right of the appellant. *Rogerson v. Lumber Co.*, 136 N. C. 266, 48 S. E. 647.

Same—Discretion of Court.—However, even though there may be some doubt as to whether an appeal will lie from the interlocutory order, the court may, in its discretion, hear and decide the matter presented. *Barnes v. Fort*, 169 N. C. 431, 86 S. E. 340; *Best v. Best*, 161 N. C. 513, 77 S. E. 762.

Motion to Dismiss.—An appeal from the refusal of a motion to dismiss an action is premature and will not lie; the proper procedure is for the movant to except, reserve exceptions and appeal from the adverse decision. *Bradshaw v. Citizens Nat. Bank*, 172 N. C. 632, 90 S. E. 789.

Criminal Action.—In a criminal action there is no appeal save from a final judgment. *State v. Nash*, 97 N. C. 514, 2 S. E. 645. And when the record does not show a final judgment the appeal will be dismissed. *State v. Hazell*, 95 N. C. 623.

Motions.—All proper motions in the action should be made in the superior court, except such motion as may be made affecting the appeal and the action of the Supreme Court therein. *Stephens v. Koonce*, 106 N. C. 222, 10 S. E. 996.

As to the binding force of the Appellate Court's decision when certified, see note of *Murrill v. Murrill*, 90 N. C. 120, under section 7-11.

When Error Committed by Supreme Court.—If the Supreme Court issues an irregular order, neither the judge of the Supreme Court nor the litigating parties can frustrate it; the remedy is by a petition to the Supreme Court to rehear. *Perry v. Tupper*, 71 N. C. 380.

§ 7-13. Power of amendment and to require further testimony.—The supreme court has power to amend any process, pleading or proceeding either in form or substance for the purpose of furthering justice, on such terms as shall be deemed just at any time before final judgment; and to amend by making proper parties to any case where the court may deem it necessary and proper for the purposes of justice and on such terms as the court may prescribe. And whenever it appears necessary for the purpose of justice, the court may allow and direct the taking of further testimony in any case which may be pending in the court, under such rules as may be prescribed, or may remand the case to the intent that amendments may be made, further testimony taken or other proceedings had in the

court below. (Rev., s. 1545; Code, s. 965; R. C., c. 33, s. 17; 1777, c. 115, s. 75; 1785, c. 233; 1792, c. 360; 1831, c. 46; C. S. 1414.)

- I. In General.
- II. Pleading.
- III. Parties.
- IV. Case Remanded.

Cross Reference.

See also § 1-163.

I. IN GENERAL.

Extent of Power.—The Supreme Court can amend as fully as the superior court can do, and in the same instances. *Perry v. Perry*, 175 N. C. 141, 95 S. E. 98.

But the power given the court under this section is not an unlimited one, even though the provisions of the section have been given a rather liberal construction. In the exercise of the power herein provided for, the courts have allowed the amendments in the light of the primary object for which the section was enacted, namely, to further justice between the parties and not to allow an undeserving party to gain any undue advantage due to some technical omission on the part of his adversary, which should have been pleaded or included at an earlier stage of the litigation.

Hence, where the amendment is of such nature that, to allow it would make the record not conform to or correspond with the facts developed on the trial below, and would be in contradiction of the evidence adduced, and the theory upon which the trial must have proceeded, then the amendment will not be allowed. See *Huyett, etc., Mfg. Co. v. Gray*, 126 N. C. 108, 35 S. E. 236.

Same—Facts Cannot Be Found.—Under the provisions of this section the Supreme Court cannot find the facts. All it can do is to remand the case to the end that the lower court can discover them. *Bank v. Blossom*, 89 N. C. 341.

After Final Judgment.—The Supreme Court has no power to direct or allow amendments to the record after a final judgment therein has been rendered. *Walton v. McKesson*, 101 N. C. 428, 7 S. E. 566.

Different Case Presented.—The power to amend will not be exercised where the amendment would, perhaps, present a case substantially different from the one tried below and raise a question of law not involved in the present appeal. *Bonner v. Stotesbury*, 139 N. C. 3, 51 S. E. 781.

Cited in *Lipe v. Citizens' Bank, etc., Co.*, 206 N. C. 24, 173 S. E. 316; *Byers v. Byers*, 222 N. C. 298, 22 S. E. (2d) 902.

II. PLEADING.

When Nonresident Petitions for Removal.—Where a nonresident defendant claims an interest in lands, in proceedings by a municipality against a resident owner to take it for a public use, and the nonresident has been made a party and files his petition and bond for removal to the federal court for diversity of citizenship, the plaintiff may amend his pleadings on motion granted by the State court, under this section, and set up facts sufficient to show that the claim of the nonresident arose by contract that gave him no interest in the lands within the meaning of the Federal Removal Act. *Morganton v. Hutton, etc., Co.*, 187 N. C. 736, 122 S. E. 842.

Pleading by Guardian.—Where an infant entered a certain pleading by her next friend when it should have been made by her guardian, the objection thereto was such a technical one that it was disregarded, although the court specifically says that had the objection any force whatever, the mistake could readily be cured by allowing an amendment to be made. *Hollomon v. Hollomon*, 125 N. C. 29, 34 S. E. 99.

Explanation by Parol Proof.—Where a description in a deed is not so uncertain and vague as to render it void, the Supreme Court, where justice requires it, may allow the uncertain part to be aided by parol proof. *Allen v. Sallinger*, 108 N. C. 159, 160, 12 S. E. 896.

Inadvertence of Judge.—While a judge cannot resettle a case on appeal, yet, where the ends of justice require it, it is his duty to correct such errors as have resulted from inadvertence, mistake, misapprehension, or the like. *People v. Teague*, 106 N. C. 571, 11 S. E. 330.

Action on Administration Bond.—An objection in the Supreme Court that the action on an administration bond was not brought in the name of the state may be obviated by a motion to amend under this section. *Wilson v. Pearson*, 102 N. C. 290, 9 S. E. 707. But such an amendment will not be allowed when it would destroy a just and legal ground of the appeal which existed when the objection thereto was taken. *Grant v. Rogers*, 94 N. C. 756, 760.

Failure to File Replication.—Where the plaintiff, in a

suit, failed to file a replication to the answer, and the parties proceeded to take proofs in the cause, this was held, a waiver by the defendant of a replication, and the court allowed an amendment under this section. *Fleming v. Murphy*, 59 N. C. 59.

Amendment of Answer.—The supreme court has the power to grant a motion by defendant to be allowed to amend his answer, but the motion is denied where the matter sought to be alleged by amendment is immaterial to the defense. *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265.

III. PARTIES.

The Rule Stated.—A bill can be amended as to parties in the Supreme Court. *Kent v. Bottoms*, 56 N. C. 69, 70, 72.

Same—Guardian ad Litem.—The power to make parties includes the power to appoint a guardian ad litem. *Perry v. Perry*, 175 N. C. 141, 95 S. E. 98. It is useless to remand the case for such appointment where the interests of the children had been duly protected by this petitioner. *Id.*

Personal Representative.—Where a claim under the Workmen's Compensation Act has been litigated in the name of the deceased it is not permissible under this section for the personal representative of the deceased, hereafter to be appointed, to come in and make himself a party to the proceeding in the Supreme Court. *Hunt v. State*, 201 N. C. 37, 39, 158 S. E. 703.

Opposite Party Harmed.—While an amendment substituting parties can be allowed in the Supreme Court, it will not be allowed when it will put the opposite party to a disadvantage. *Hodge v. Marietta, etc.*, R. R., 108 N. C. 24, 12 S. E. 1041.

IV. CASE REMANDED.

In General.—The Supreme Court has the power, in a proper case, to remand causes to the end that proper amendments may be made, or further proceedings taken in the court below. *Holley v. Holley*, 96 N. C. 229, 1 S. E. 553.

Essentials of Transcript Lacking.—Where the transcript of the record fails to set forth facts necessary for the determination of the case on appeal, it will be remanded to the end that the same may be supplied or found by the court below, as the nature of the cause may require. *Bank v. Blossom*, 89 N. C. 341.

Requisites of Transcript.—See section 1-284 and notes thereto.

Insanity of Plaintiff.—Where after an appeal and before a hearing, the plaintiff became insane and was committed to an asylum, it was held that the case must be remanded. *Jones v. Cotten*, 108 N. C. 457, 13 S. E. 161.

Jury Trial.—Upon allegation of inadvertence in issuing a supersedeas bond in the appeal bond, an issue therein may be remanded to the superior court to be tried by jury. *Burnett v. Nicholson*, 86 N. C. 728, 730.

§ 7-14. Proof of exhibits.—Exhibits or other documents relative to cases pending in the supreme court may be proved by the parol testimony of witnesses to be examined in the court in the same manner and under the same rules as such exhibits or documents may be proved in the superior court, and suitors in the court may have subpoenas to enforce the attendance of witnesses, who shall be liable to the same penalties and actions for nonattendance, and be entitled to the same pay for traveling, ferriage and attendance as witnesses in the superior court: Provided, that witnesses attending the supreme court shall be taxed in the bill of costs and paid by the party on whose behalf they may be summoned. (Rev., s. 1547; Code, s. 963; R. C., c. 33, s. 21; 1820, c. 1070; 1825, c. 1282; 1842, c. 1; C. S. 1415.)

Regular Practice Explained.—Though witnesses in some instances may be summoned, it has not been the practice. Owing both to the great addition it would make to the already large and steadily increasing volume of business in this court to examine affidavits on questions of fact, the court has adhered to its settled ruling, that it will not pass upon the facts, except as to injunctions and in similar cases, but will take the findings of fact by the judge who tried the cause below as conclusive. In *re Deaton*, 105 N. C. 59, 63, 11 S. E. 244.

§ 7-15. Opinions and judgments to be in writing.—The justices shall deliver their opinions and judgments in writing, and the clerk shall make

no entry upon the records of the court that any cause pending therein is decided, nor give to any person a certificate of such decision, nor issue execution in such suit, until after the opinion of the court shall have been delivered publicly in open court, and a written copy of the same opinion shall have been delivered to the clerk; which shall afterwards be filed among the records of the court and published in the reports of the decisions made by the court: Provided, that the justices shall not be required to write their opinions in full except in cases in which they deem it necessary. (Rev., s. 1548; Code, s. 964; 1893, c. 370, s. 5; R. C., c. 33, s. 16; 1810, c. 785; C. S. 1416.)

Editor's Note.—Under the law as it stood prior to 1868, the opinions of the judges were required to be in writing, "with reasons at full length upon which they are founded," the purpose and intent of the statute being to prevent per curiam opinion.

Subsequently the statute was amended and the requirement of "reasons at full length, etc.," was omitted. Still later (in 1893) it was left within the discretion of the judges by the addition of the proviso to decide when the opinions were to be written. This is the situation under the law as it stands today. It has been held in at least one case that even in the absence of the statutory provision placing their discretionary power in the court, that such power exists by force of the constitutional provision giving the court the right to make its own rules of practice. *State v. Council*, 129 N. C. 511, 39 S. E. 814. See also 5 N. C. Law Rev. 20.

Discretion of Court.—The filing of a written opinion in a case is discretionary with the Supreme Court. *Parker v. Atlantic, etc.*, R. R., 133 N. C. 335, 45 S. E. 638.

The writing of the reason at length is discretionary with the court. *Bradsher v. Cheek*, 112 N. C. 838, 17 S. E. 533.

A judgment may be affirmed without extended opinion. *Rogen v. Luff*, 202 N. C. 819, 161 S. E. 924.

Applied, opinion deemed necessary. In *Wootton v. McGinnis*, 201 N. C. 841, 161 S. E. 926; *Thrash v. Roberts*, 201 N. C. 843, 161 S. E. 925.

§ 7-16. Certificates to superior courts; execution for costs; penalty.—The clerk on the first Monday in each month shall transmit by some safe hand, or by mail, to the clerks of the superior courts certificates of the decisions of the supreme court in cases sent from such courts, which shall have been on file ten days; and thereupon the clerks respectively shall issue execution for the costs incurred in the courts from which the cases were sent; and the clerk of the supreme court shall issue execution for the costs incurred in that court, including all publications in newspapers made in the progress of the cause in that court, and by order of the same, and all postage on letters which concern the transfer of original papers. And if the clerk shall fail for the space of twenty days to perform the duty herein enjoined of transmitting the certificates of decisions, he shall forfeit and pay to the party or parties in whose favor the supreme court shall have decided, one hundred dollars. (Rev., s. 1549; Code, s. 968; 1887, c. 41; R. C., c. 33, s. 21; 1820, c. 1070; 1825, c. 1282; 1842, c. 1, s. 3; C. S. 1417.)

Cross Reference.—See notes to § 7-11.

Editor's Note.—This and section 7-18 are in *pari materia* and must be construed together. See *Emery v. Raleigh, etc.*, R. R., 102 N. C. 234, 10 S. E. 141.

Generally.—By virtue of this section opinions are certified down on the first Monday in each month, provided they shall have been on file ten days. As opinions are usually filed on Tuesdays, they remain not less than thirteen days and not more than forty-two days in *feri*, and, in that time, if there is error (and in criminal cases it should be scrutinized in that time), it can be observed and the matter called to the attention of the court, which, in such cases, on sufficient cause shown, has more than once called up the

opinion for reconsideration. If this is not done, the remedy is by application to the Governor. *State v. Council*, 129 N. C. 511, 39 S. E. 814.

Effect of Certifying Case.—When the Supreme Court has certified its decision to the court below for judgment there, this court has no further jurisdiction of the case. *James v. Western, etc.*, R. R., 123 N. C. 299, 307, 31 S. E. 707.

Case certified in Advance of Statutory Time.—The court in its judgment may direct an opinion certified down in advance of the statutory time. *State v. Herndon*, 107 N. C. 934, 939, 12 S. E. 268.

Costs.—Judgment for costs in the Supreme Court is rendered in that court; the superior court has no jurisdiction in the matter. *Johnson v. Danville, etc.*, R. R., 109 N. C. 504, 13 S. E. 881. See section 6-33 and the note thereto.

Applied in Commissioner of Banks v. Harvey, 202 N. C. 380, 162 S. E. 894.

Cited in Morris v. Cleve, 197 N. C. 253, 256, 148 S. E. 253.

§ 7-17. Appeals dismissed.—Suits and appeals pending in the supreme court may be dismissed on failure to prosecute the same, after a rule obtained for that purpose and served on the plaintiff or appellant, his agent or attorney, at least thirty days before the term next ensuing that of entering the rule; when, if the party shall fail to prosecute his suit or appeal, the court shall, at the election of the adverse party, dismiss the suit or appeal at the costs of the plaintiff or appellant, or proceed to hear and determine it. (Rev., s. 1543; Code, s. 967; R. C., c. 33, s. 20; 1848, c. 28; Supm. Ct. Rules, 15, et seq.; C. S. 1418.)

Failure to Docket Transcript.—An appeal will be dismissed upon a failure of the appellant to docket the transcript as required. *Cox v. Kinston, etc.*, R. R., 177 N. C. 227, 98 S. E. 704.

Same—When Deemed Docketed.—An appeal is deemed docketed when the transcript is received by the clerk of the court. *Bradford v. Reed*, 124 N. C. 345, 32 S. E. 726.

Failure to Print Record.—The appeal will be dismissed where there is a failure to print record and brief as required. *Bradshaw v. Stansberry*, 164 N. C. 356, 79 S. E. 302.

Filing of Bond Gives Notice.—An appeal will not be dismissed upon the ground that no notice of appeal was given, where the record shows that an appeal bond was filed and approved by the court. The filing of the bond and its approval in open court is notice to the appellee. *Capehart v. Biggs & Co.*, 90 N. C. 373.

Compliance with Statute Essential.—Compliance with the statutory regulation as to appeals is a condition precedent, without which (unless waived) the right to appeal does not become potential. Hence, it is no defense to say that the negligence is negligence of counsel and not negligence of the party. *Cozart v. Assurance Co.*, 142 N. C. 522, 55 S. E. 411.

The rules of court are not merely directory, and a failure of the appellant to prosecute his appeal in accordance therewith is sufficient ground for dismissal. *Wiseman v. Comm.*, 104 N. C. 330, 10 S. E. 481; *Davis v. Wall*, 142 N. C. 450, 55 S. E. 350.

Where the appellant has failed to prosecute his appeal as required by the rule of the court, the right of the appellee to dismiss the appeal must be exercised before the appellant has complied with the particular rule in question, and if appellee's motion is made thereafter his right to dismiss at that term is barred by his own laches. *McLean v. McDonald*, 175 N. C. 418, 95 S. E. 769.

Where an appeal is not prosecuted according to law, the appellee has the right to have a transcript of the record sent up, or a certificate of the clerk that an appeal was taken, and the case docketed and the appeal dismissed. *Cross v. Williams*, 91 N. C. 496. The court said: "The appellant has no right to take an appeal and bring it up, or abandon it at his will and pleasure; he must bring it up in the established course of procedure." *Id.*

Laches.—Where a case was remanded from the Supreme Court to the end that the appellant might have a lost record supplied by proper proceedings in the court below, which has not been done, and the record is as defective as when the order of remand was made, though three or four terms of the superior court in that county have transpired and no excuse is rendered for the laches, the case will be dismissed on motion of appellee. *Cox v. Jones*, 113 N. C. 276, 18 S. E. 199.

Motion to dismiss appeal must be made in writing. *Bradford v. Reed*, 124 N. C. 345, 32 S. E. 726.

Notice.—No notice is required to be given of a motion to

dismiss an appeal when no appeal bond has been filed. *Jones v. Asheville*, 114 N. C. 621, 19 S. E. 631.

Time for Reinstatement.—Motion to reinstate, upon notice, may be heard not later than the next term. *Wiseman v. Comm.*, 104 N. C. 330, 10 S. E. 481.

Same—Failure to Print.—A motion to reinstate an appeal dismissed for failure to print must be made at the same term, and will only then be allowed for good cause shown. *Pipkin v. Green*, 112 N. C. 355, 17 S. E. 534.

Same—Failure to Docket.—A motion to reinstate an appeal dismissed for failure to docket the record at the first term of the court after the trial below is fatally defective where it does not show that the delay was without laches on the part of the appellant. *Pipkin v. Green*, 112 N. C. 355, 17 S. E. 534.

Same—Insufficiency of Bond.—A motion to dismiss an appeal for insufficiency of bond will not be entertained, unless after written notice, as required by this section. *McGee v. Fox*, 107 N. C. 766, 12 S. E. 369; *Jones v. Asheville*, 114 N. C. 621, 19 S. E. 631.

Time.—Motion to dismiss because appellant has failed to perfect his appeal must be made at or before hearing. *Hutchinson v. Rumpfelt*, 82 N. C. 426, 427.

§ 7-18. Petition to rehear; execution restrained.—A petition to rehear may be filed during the vacation succeeding the term of the court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term, and upon the filing of such petition the chief justice, or any one of the associate justices, may, upon such terms as he sees fit, make an order restraining the issuing of an execution, or the collection and payment of the same, until the next term of said court, or until the petition to rehear shall have been determined. (Rev., s. 1546; Code, s. 966; R. C., c. 33, s. 18; Supreme Court Rules 52, 53, 54; C. S. 1419.)

Cross Reference.—See § 7-16 and notes thereto.

In General.—Petitions to rehear are confined to alleged errors of law or newly discovered evidence. *Barcroft v. Roberts*, 92 N. C. 250.

Not Absolute Right.—This section cannot be allowed to give the losing party an absolute right to a rehearing, and to have his petition considered by the whole court contrary to its rule governing the practice in such cases. *Herndon v. Fire Ins. Co.*, 111 N. C. 384, 16 S. E. 465.

Mistake or Error of Fact.—The Supreme Court will not rehear upon the ground of mistake or error of fact. *Weathersbee v. Farrar*, 98 N. C. 265, 3 S. E. 482.

Mistake and Excusable Neglect.—A party against whom a judgment has been entered by mistake, excusable neglect or surprise may make application for petition to rehear. *Farrar v. Staton*, 101 N. C. 78, 7 S. E. 753.

Compliance with Section Essential.—Petitions to rehear must be filed according to the requirements of this section. *Strickland v. Draughan*, 91 N. C. 103.

Former Decision must Be Erroneous.—When questions of law have been considered and decided the court will not re-examine the question and reverse its former decision, unless it clearly appears that it is erroneous. *School Directors v. City*, 137 N. C. 503, 50 S. E. 279.

Criminal Actions.—Petitions to rehear are not allowable in criminal actions. *State v. Council*, 129 N. C. 511, 39 S. E. 814.

Matters in Transcript Considered.—On petition to rehear a case formerly decided, the Supreme Court will not consider matters not contained in the transcript of the record. *Presnell v. Garrison*, 122 N. C. 595, 29 S. E. 839.

A petition to rehear must be upon the record as it was at the former hearing. *Presnell v. Garrison*, 122 N. C. 595, 29 S. E. 839.

Presumption.—Rehearings of decision of cases in the Supreme Court are granted only in exceptional cases and, when granted, every presumption is in favor of the judgment already rendered. *Weisel v. Cobb*, 122 N. C. 67, 30 S. E. 312.

Court Will Correct Errors.—When a rehearing has been ordered and a manifest error is made to appear, the court will correct it. *Hodgin v. Peoples Bank*, 125 N. C. 503, 34 S. E. 709, 712.

Burden of Proof.—The burden of showing error is on the petitioner. *Webb v. Hicks*, 125 N. C. 201, 34 S. E. 395.

Notice.—A purchaser of land which is the subject of litigation is conclusively fixed with notice of the fact that petition for rehearing could be filed at any time until after

the expiration of the first twenty days of the next term of the Supreme Court. *Bird v. Gilliam*, 125 N. C. 76, 79, 34 S. E. 196.

Computation of Time.—In computing the time under the provision of this section allowing a petition to rehear to be filed "within twenty days after the commencement of the succeeding term," the first day thereof must be excluded. *Barcroft v. Roberts*, 92 N. C. 250. The last day must also be excluded when it falls on Sunday. *Id.* Cited and approved in *Cook v. Moore*, 95 N. C. 4.

After Case Certified.—After a decision of the Supreme Court has been certified down, the court is without jurisdiction to entertain a motion to recall the mandate and judgment rendered and reconsider it, the only method for such being upon petition to rehear filed according to the rules. *Davis v. Southern R. R.*, 176 N. C. 186, 96 S. E. 945.

Second Rehearing.—A second rehearing is permissible only when the court has reversed or materially changed the original opinion that was sought to be reheard. *Nelson v. Hunter*, 145 N. C. 334, 59 S. E. 116.

§ 7-19. **Records to be made.**—The court may order the clerk to record such parts of the record of cases as it may deem necessary. (Rev., s. 1550; Code, s. 959; C. S. 1420.)

§ 7-20. **Power to make rules of court.**—The justices of the supreme court shall prescribe and establish from time to time rules of practice for that court and also for the superior courts. The clerk shall certify to the judges of the superior court the rules of practice for such court, to be entered on the records thereof in each county. (Rev., s. 1541; Code, s. 961; R. C., c. 33, s. 13; 1818, c. 963; C. S. 1421.)

Generally.—"In North Carolina, the power to prescribe rules for trial courts (superior courts and inferior courts) is vested in the Legislature by the Constitution, but the Legislature has committed it to the Supreme Court. This enables the Supreme Court to make rules for trial courts subject, in North Carolina, to legislative modification." 5 N. C. Law Rev. 275.

The General Assembly is without power to prescribe rules of practice or procedure for the Supreme Court. *Lacy v. State*, 195 N. C. 284, 141 S. E. 886. See note under N. C. Const., Art. IV, § 12.

Rules for Subordinate Courts.—The Supreme Court has, by this section, the power to prescribe rules of practice for the subordinate courts. *Barnes v. Easton*, 98 N. C. 116, 119, 3 S. E. 744.

Rules Mandatory.—The rules of practice made under the power given by this section are not merely directory, but are mandatory and must be observed. *Walker v. Scott*, 102 N. C. 487, 489, 9 S. E. 488.

In this State the rules of court are the sole code of practice for the Supreme Court and are to be strictly observed. *Calvert v. Carstarphen*, 133 N. C. 25, 27, 45 S. E. 353.

Cited in *In re Will of Roediger*, 209 N. C. 470, 184 S. E. 74.

§ 7-21. **Supreme court to prescribe rules; rules to conform to law.**—The supreme court is hereby vested with the power to prescribe from time to time the modes of making and filing proceedings, actions, and pleadings, and of entering orders and judgments and recording the same, and to prescribe and regulate the practice on appeals to the supreme court, and in the trial of actions in the superior court, and before referees: Provided, no rule or regulation so adopted shall be in conflict with any of the provisions of this code. Such rules as may be adopted by the supreme court shall be printed and distributed by the secretary of state as are the reports of the supreme court. (Ex. Sess. 1921, c. 92, s. 1, subsec. 20; C. S. 1421(a).)

Art. 3. Officers of Court.

§ 7-22. **The court may appoint acting attorney-general.**—If the attorney-general should fail at any term of the supreme court to attend to the business which by law is assigned him, the

court may appoint some counsel learned in the law to discharge his duties during the term. (Rev., s. 1551; Code, s. 969; R. C., c. 33, s. 22; 1846, c. 29; C. S. 1422.)

See article entitled, *The State's Legal Business*, 16 N. C. Law Rev. 119.

§ 7-23. **Reporter.**—The supreme court may employ a reporter of its decisions. (Rev., s. 1552; Code, s. 3363; 1893, c. 379, s. 4; 1897, c. 429; C. S. 1423.)

§ 7-24. **Supreme court reporter; salary; offices.**—The governor and council of state shall fix the salary of the supreme court reporter at not to exceed three thousand dollars a year, and shall furnish the reporter with suitable offices at a cost not to exceed five hundred dollars a year, which shall be paid direct to the lessor upon the warrant of the state auditor drawn upon the state treasurer. The reporter may employ a stenographer and clerk, at a salary to be fixed by the governor and council of state, payable monthly to the stenographer and clerk by voucher drawn by the state auditor on the state treasurer. (Rev., s. 2771; Code, ss. 3363, 3728; 1893, c. 379; 1897, c. 429; 1911, c. 107; 1913, c. 59; 1917, c. 272; 1919, c. 276; 1921, c. 143; Ex. Sess. 1921, c. 29; C. S. 3861, 3889.)

§ 7-25. **Clerk.**—The clerk of the supreme court shall be appointed by the court, and shall hold his office for eight years. (Rev., s. 1553; Const., Art. IV, s. 15; C. S. 1424.)

§ 7-26. **Clerk of supreme court; salary; fees.**—The clerk of the supreme court shall receive an annual salary of three hundred dollars, to be paid semiannually, on a certificate of the justices; and, in addition thereto, the following fees, namely: For recording the papers and proceedings in the causes decided in the supreme court, which are required by law to be recorded, such compensation as may be estimated by the justices of the court at each term, not to exceed thirty cents for each page recorded, to be paid by the treasurer on the certificate of the justices; for entering an appeal, one dollar; a continuance, thirty cents; a scire facias, eighty cents; a certiorari, eighty cents; a determination, two dollars; a certificate, sixty cents; a fieri facias, or other execution, fifty cents; a seal, twenty-five cents; a transcript, or copy of a record, twenty cents for each copy-sheet; a rule given for service, twenty-five cents; a rule not for service, fifteen cents; a subpoena, writ, or other process, one dollar; a commission, fifty cents; drawing a decree or judgment, by the copy-sheet, forty cents; a search, ten cents; affixing the seal to any writing requiring it, twenty-five cents; and an affidavit, twenty-five cents. (Rev., s. 2769; Code, s. 3738; R. C., c. 102, ss. 25, 26; 1870-1, c. 139, s. 7; C. S. 3886.)

Cross Reference.—As to payment of fees, see § 138-2.

When Judge Allows Appeal without Bond.—The clerk of the Supreme Court is not bound to render his services gratuitously to a party whom the judge of the court below has allowed to appeal without giving the bond required by law. *Martin v. Chasteen*, 75 N. C. 96, in which Superior Court Office v. Lockman, 12 N. C. 146, and *Biggerstaff v. Cox*, 46 N. C. 534, are cited and approved.

§ 7-27. **Clerk's bond and oath of office.**—Before undertaking his duties, the clerk of the supreme court shall enter into bond with sufficient surety payable to the state of North Carolina, in the sum of fifteen thousand dollars, condi-

tioned for the faithful discharge of his duties and for the safe keeping of all records committed to his custody, which bond shall be lodged with the secretary of state; and he shall also before said justices, or one of them, take the oaths which are prescribed for clerks of the superior court, and shall keep his office in the city of Raleigh. (Rev., s. 290; Code, s. 958; R. C., c. 33, s. 9; 1812, c. 829, s. 2; 1818, c. 963, s. 5; 1846, c. 28, s. 3; 1799, c. 520, s. 2; C. S. 1425.)

Cross References.—As to action on official bonds, see § 109-34 and notes thereto. As to forms of oaths, see §§ 11-6, 11-7, 11-11. As to constitutional requirement and form, see Const., Art. VI, s. 7.

§ 7-28. Clerk to report money on hand.—The clerk of the supreme court shall, at the beginning of each fall term, produce to the court a statement on oath of all moneys remaining in his hands which have been paid into his office three years or more previous thereto, whether received directly from parties or from his predecessor in office, and is not detained in his hands by special order of the court, specifying therein the name of the person to whom the same is payable, and his address, if known; a copy of which report shall be transmitted to the state treasurer and to the auditor. (Rev., s. 1554; Code, s. 1864; R. C., c. 73; 1823, c. 1186; 1831, c. 3; C. S. 1426.)

§ 7-29. Marshal; librarian.—The Supreme Court may appoint a marshal of the Supreme Court, removable at will, who shall have the criminal and civil powers of a sheriff and shall attend upon the court during its sessions. The Supreme Court may consolidate the duties of the marshal with those of the librarian; when so consolidated the compensation of the marshal-librarian shall be fixed by the Supreme Court, with the approval of the governor. (Rev., s. 1555; Code, s. 950; 1873-4, c. 34; 1881, c. 306; 1939, c. 4; C. S. 1427.)

Art. 4. Supreme Court Library.

§ 7-30. Location.—The Supreme Court Library shall occupy the fifth floor of the Department of Justice Building. (Rev., s. 5083; 1885, c. 121, s. 7; 1913, c. 99, s. 1; C. S. 6588.)

§ 7-31. Trustees; powers; duties.—The Justices of the Supreme Court shall be, ex officio, the trustees of the Supreme Court Library and all moneys appropriated for its benefit shall be paid out under their direction and supervision. They shall have general charge and control of the library with authority to acquire, lend, exchange, and dispose of books and equipment in the interest of the library, but may, in their discretion, employ a librarian to discharge this function under such regulations and orders as they may prescribe. The trustees may employ an assistant librarian and such other assistants as may be deemed necessary for the efficient functioning of the library. (Rev., s. 5084; Code, s. 3606; 1883, c. 100; 1889, c. 482; 1937, c. 173; C. S. 1428, 6589.)

Cross Reference.—As to supreme court rule relating to duties of librarian, see Rule 41, subsection 1.

Editor's Note.—The 1937 amendment authorized the appointment of an assistant librarian.

§ 7-32. Library hours; night use.—The library shall be kept open during such hours and under such conditions as the trustees may prescribe;

attorneys of North Carolina, and such other persons as the trustees may deem proper, shall be admitted to the library at night upon application and compliance with reasonable rules adopted by the trustees. (Rev., s. 5085; 1889, c. 482; C. S. 6590.)

Cross Reference.—As to supreme court rule relating to use of books in the library, see Rule 41, subsection 2.

§ 7-33. Appropriation.—In addition to the funds regularly appropriated for the library, the clerk of the supreme court shall, upon order of the librarian under the general supervision and control of the trustees, expend for the maintenance and equipment of the library the funds, in excess of the actual expenses of each examination, paid in by the board of Law Examiners from the fees of applicants. (Rev., s. 5086; Code, s. 3613; Rev., 1872-3; 1925, c. 275, s. 6; C. S. 6591.)

Editor's Note.—By the act of 1925 a provision for the expenditure of \$200 for the binding of books was omitted.

Art. 5. Supreme Court Reports.

§ 7-34. Supreme court reports; contract for printing.—The Supreme Court is authorized to contract from time to time for the printing of its reports; to select a printer for the same and to prescribe such terms of contract as will insure, under the supervision of the Court, the prompt issue of the reports, as soon as practicable after a sufficient number of opinions are filed. Such contract shall be made after consultation with the division of purchase and contract after a comparison of prices for similar work in other states to such an extent as may be practicable. (Rev., s. 5093; 1905, c. 400; 1929, c. 39, s. 1; 1931, c. 261, s. 3; 1931, c. 312, ss. 14, 15; C. S. 7296.)

Cross Reference.—See § 143-49.

In General.—Upon the Supreme Court devolves the duty only of selecting the printer and directing the style and general execution of the work, the price of which is restricted to that allowed and fixed by the committee. In re Printing of the Supreme Court Reports, 153 N. C. 649, 70 S. E. 620.

§ 7-35. Supreme court reports; number printed.—Of the supreme court reports there shall be printed and bound in full sheep or buckram as many copies, not less than seven hundred and fifty, as in the opinion of the attorney-general and secretary of state may be sufficient to supply the demand. All such copies shall be delivered to the secretary of state. Advance sheets of the supreme court reports are hereby authorized to be printed, and to be sold, under the rules of the supreme court. (Rev., s. 5097; Code, s. 3632; 1893, c. 146, s. 2; 1897, c. 135; 1901, c. 401, s. 2; 1919, c. 314, s. 4; 1923, c. 25; C. S. 7297.)

Editor's Note.—The 1923 amendment added the last sentence.

Art. 6. Salaries of Supreme Court Employees.

§ 7-36. Governor and council to fix certain salaries.—The governor and council of state shall constitute a board to adjust and fix the compensation to be paid to the employees of the Supreme Court. (1921, c. 143, ss. 1, 4; Ex. Sess. 1921, c. 29; Ex. Sess. 1924, c. 124; C. S. 3861.)

Editor's Note.—Under the 1924 amendment this section was applicable to employees of the State Library.

§ 7-37. Limit of salary; certificate and payment.—The compensation fixed under § 7-36 shall not exceed three thousand dollars per annum, except

as may be elsewhere provided by law, for any individual employee, and shall be certified by the governor to the state auditor, and paid as provided by law for the payment of other salaries. (1921, c. 143, s. 2; C. S. 3861(a).)

§ 7-38. Proceedings and reports.—The proceedings of the board shall be kept by the state auditor, and reported to each regular session of the general assembly. (1921, c. 143, s. 3; C. S. 3861(b).)

§ 7-39. Employment of additional assistants; compensation.—The governor and council of state are authorized and empowered to employ any additional clerical or stenographic help, for the Supreme Court, upon written request from the Chief Justice, and when they are satisfied that such additional help is needed temporarily, to do the departmental work efficiently, and to fix the salary of such additional help at not to exceed eighteen hundred dollars for any one person. (Ex. Sess. 1920, c. 95, s. 2; C. S. 3861(d).)

SUBCHAPTER II. SUPERIOR COURTS.

Art. 7. Organization.

§ 7-40. Number of judges and solicitors.—The state shall be divided into twenty-one superior court judicial districts, for each of which a judge shall be chosen in the manner now prescribed by law. The state shall also be divided into twenty-one solicitorial districts as set out in § 7-68, for each of which a solicitor shall be chosen in the manner now prescribed by law. (1913, cc. 9, 63; Const., Art. 4, s. 10; 1943, c. 134, s. 3; C. S. 1429.)

Editor's Note.—The 1943 amendment substituted "twenty-one" for "twenty" in line two, and added the second sentence.

For act creating twenty-first judicial district and providing for judge and solicitor thereof, see Public Laws 1937, c. 413, s. 5, 6.

Judge Appointed Prior to Creation of District.—Appointment of a judge of the superior court prior to the date when the act creating the judicial district takes effect is invalid. *State v. Shuford*, 128 N. C. 588, 38 S. E. 808.

§ 7-41. Election and term of office of judges.—The judges of the superior courts shall be elected in like manner as is provided for justices of the supreme court, and shall hold their offices for eight years. (Const., Art. 4, s. 21; C. S. 1430.)

Cross Reference.—For manner of electing supreme court justices, see § 7-2.

§ 7-42. Salaries of superior court judges.—The salary of each of the judges of the superior court shall be six thousand five hundred dollars per annum, and each judge shall be allowed the sum of one thousand five hundred and fifty dollars in lieu of his traveling expenses, to be paid monthly. They shall also receive one hundred dollars per week and their actual expenses incurred in attending and holding special terms of court by assignment of the governor, which expenses shall be paid by the county in which such special term is held. (Rev., s. 2765; Code, ss. 918, 3734; 1891, c. 193; 1901, c. 167; 1905, c. 208; 1907, c. 988; 1909, c. 85; 1911, c. 82; 1919, c. 51; 1921, c. 25, s. 3; 1925, c. 227; 1927, c. 69, s. 2; C. S. 3884.)

Cross Reference.—As to compensation of judge in district having fewer than 20 regular weeks of term, see § 7-79.

Editor's Note.—The 1927 amendment increased the salary from \$5,000 to \$6,500.

Additional Compensation Part of Salary.—The additional

compensation of one hundred dollars given to a superior court judge by this section for services in holding a special term, is a part of his salary. *Buxton v. Commissioners*, 82 N. C. 91.

As to taxing salaries of judges, see Const., Art. IV, § 18.

§ 7-43. Election and term of office of solicitors.—A solicitor shall be elected for each solicitorial district by the qualified voters thereof, as is prescribed for members of the general assembly, who shall hold office for the term of four years, and prosecute on behalf of the state in all criminal actions in the superior courts, and advise the officers of justice in his district. (Const., Art. 4, s. 23; 1943, c. 134, s. 4; C. S. 1431.)

Local Modification.—Forsyth: 1927, c. 129.

Cross References.—As to when term begins, see § 163-114.

As to duty of solicitors to bring action for failure of trustee of charitable trust to file account, see § 36-20. As to duty of solicitor to appear in contempt actions, see § 5-3. As to duty to prosecute in certain violations of law by county officers, see § 153-139. As to duty to investigate in case of lynching, see § 15-98. As to duty to inform grand juries in adjoining counties in case of lynching, see § 15-128. As to duty to aid in prosecuting for violation of laws governing monopolies and trusts, see § 75-13.

Editor's Note.—The 1943 amendment, which substituted "solicitorial" for "judicial" in line two, further provided: "Wherever reference to the solicitor of a 'judicial district' appears in any statute the same shall be deemed to refer to the solicitor of a 'solicitorial district.'"

§ 7-44. Solicitors; general compensation.—The several solicitors of the solicitorial districts of the state of North Carolina shall each receive, as full compensation for services as solicitor, the sum of forty-five hundred dollars (\$4,500.00), to be paid in equal monthly installments out of the state treasury upon warrants duly drawn thereon, which said salaries shall be in lieu of fees or other compensation, except the expenses allowed in § 7-45. (Rev., s. 2767; Code, s. 3736; 1879, c. 240, s. 12; 1923, c. 157, s. 1; 1933, c. 78, s. 1; 1935, c. 278; 1943, c. 134, s. 4; C. S. 3890.)

Editor's Note.—The amendment of 1935 increased the salary from \$3,900 to \$4,500.

The 1943 amendment substituted "solicitorial" for "judicial" in line two.

In *Moore v. Roberts*, 87 N. C. 11, it was held that the solicitor of the criminal court of a county has no claim upon the State for such compensation as is allowed the district solicitors under this section, where the act establishing said court puts the burden of sustaining the same upon the county.

§ 7-45. Appropriation for expenses of solicitor.—Each solicitor shall receive, in addition to the salary named in § 7-44, the sum of five hundred (\$500.00) dollars per annum, which will cover all of his expenses while engaged in duties connected with his office. Said sum shall be paid in equal monthly installments out of the state treasury upon warrant duly drawn thereon. (1923, c. 157, s. 2; 1933, c. 78, s. 2; 1937, c. 348; C. S. 3890(a).)

Editor's Note.—This section, first inserted by the act of 1923 and providing \$750 for expenses, was repealed in 1933. The present section was codified from the 1937 act.

§ 7-46. Residence and rotation of judges.—Every judge of the superior court shall reside in the district for which he is elected. The judges shall preside in the courts of the different districts successively, but no judge shall hold the courts in the same district oftener than once in four years, but in case of the protracted illness of the judge assigned to preside in any district, or of any other unavoidable accident to him, by reason of which he shall be unable to preside, the governor may require any judge to hold one or more specified

terms in said district in lieu of the judge assigned to hold the courts of the said district. (Const., Art. 4, s. 11; C. S. 1432.)

Cross References.—As to method of rotation, see § 7-74. See also N. C. Const., Art. IV, s. 11 and notes.

De Facto Judges.—A judge of a superior court who presides in another district by appointment of the Governor, is a de facto judge, and his acts in that capacity are valid. *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 100; *State v. Turner*, 119 N. C. 841, 25 S. E. 810.

§ 7-47. Oath of office.—Every judge before he shall act as such shall, in open court, or before the governor, or before one of the judges of the supreme or superior courts, or before some justice of the peace, take the oath appointed for public officers, and also an oath of office. The officer or court before whom the judge shall qualify shall cause the judge to subscribe the oaths by him taken, and having certified the same, shall return the oaths to the secretary of state, who shall carefully preserve them; and if any judge shall act in his office before he shall have taken the oaths directed, he shall forfeit and pay two thousand dollars, one-half to the use of the state and the other half to the person who shall sue for the same. (Rev., s. 1497; Code, s. 924; R. C., c. 31, ss. 18, 19; 1777, c. 115; 1806, c. 694, s. 13; 1848, c. 45; C. S. 1433.)

Cross References.—As to forms of oaths, see §§ 11-6, 11-7, 11-11. As to penalty for failure, see § 128-5. As to constitutional requirement and form, see Const., Art. VI, s. 7.

§ 7-48. Vacancies filled.—All vacancies occurring by death, resignation or otherwise in the offices of justice of the supreme or judge of the superior court of the state shall be filled for the unexpired term at the next general election for members of the general assembly held after such vacancy is created. The persons elected at such election shall be commissioned by the governor immediately after the ascertainment of the result in the manner provided by law, and shall qualify and enter upon the discharge of the duties of the office within ten days after receiving such commission. (Rev., s. 1498; 1899, c. 613; Const., Art. 4, s. 25; C. S. 1434.)

Cross Reference.—As to filling vacancies prior to next election, see N. C. Const., Art. IV, s. 25.

§ 7-49. When judge may discharge solicitor.—When any state solicitor, authorized by election or appointment to act as prosecuting attorney for or in behalf of the state of North Carolina, in any of the courts of said state, shall appear at such court, in term time, drunk or intoxicated, or when it shall be brought to the knowledge of the judge presiding at such court that the solicitor whose duty it is to represent the state at such court is in the town in which such court is being held, drunk or intoxicated, at any time, it shall become the duty of such judge and he is hereby directed to immediately discharge such solicitor from the duties of such court, for the term then being held, and appoint some competent attorney to act as state solicitor for the term. The appointee shall be allowed all the fees and compensation belonging to the solicitor for such term. (Rev., s. 1499; 1901, c. 717; C. S. 1435.)

§ 7-50. Emergency judges; duties; compensation.—The persons embraced within the provisions of section 7-51 are hereby constituted emergency judges of the superior court under article four

(4), section eleven (11), of the constitution of this state, and are authorized to hold the superior courts of any county or district when the judge assigned thereto, by reason of sickness, disability, or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same, and to hold special terms when commissioned so to do by the governor, and as compensation for holding such special terms shall receive their actual expenses and in addition thereto fifty dollars per week, to be paid by the county in which such special term is held.

In case of emergency arising as provided in said section, the governor shall designate the person to act as emergency judge who shall receive his actual expenses only incurred while so acting, to be paid by the treasurer upon warrant of the auditor, upon certificate of the judge: Provided, that the county asking the governor for an emergency judge shall have the privilege of requesting the assignment of a particular judge. Such emergency judges shall be subject to all the regulations respecting superior court judges except as otherwise provided in §§ 7-50, 7-52, and 7-53. (1921, c. 125, ss. 2, 3; Ex. Sess. 1921, c. 20, s. 3; 1941, c. 52, s. 1; C. S. 1435(a).)

Cross References.—As to duty of governor to assign judges when regular judges not available, see § 7-71. As to governor ordering special terms, see § 7-78.

Editor's Note.—The 1941 amendment struck out the words "special or" formerly appearing after the word "constituted" in line three of the first paragraph.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 473.

This section was discussed in 3 N. C. Law Rev. 131.

§ 7-51. Salaries of resigned or retired justices of supreme court and judges of superior courts.—Every justice of the supreme court and regular or special judge of the superior court who has heretofore resigned or retired from office at the end of his term, or who shall hereafter resign or retire at expiration of his term, who has attained the age of sixty-five (65) years at the date of his resignation or retirement, and who has served for fifteen (15) years on the supreme court or on the superior court, or on the supreme and superior courts combined, or twelve consecutive years on the supreme court, or who, without regard to the age of such judge or justice having served one full term or six years on either the supreme or superior court, and while still in active service thereon, shall have become totally disabled through accident or disease to carry on the duties of said office; or who, without regard to the age of such judge or justice, by reason of such accident, without fault on his part, shall suffer such physical impairment as not to be able to efficiently perform the duties of his office and who retires at the end of his term, shall receive for life two-thirds (2/3) of the annual salary from time to time received by the justices of the supreme court or judges of superior court, respectively, payable monthly; provided, that any such justice or judge, who has or shall have served as such for twenty-five years or longer (whether continuously or not), and whose sixty-fifth birthday shall occur within six months next succeeding his resignation or retirement, shall be entitled to all of the benefits of this section from and after the date of his resignation or retirement, and shall also be subject to the other provisions of this section.

The provisions herein as to the amount of life-time pay shall relate back to and become effective as of the fourth day of March, one thousand nine hundred and twenty-one, and the state treasurer is authorized and directed to pay on the warrant of the state auditor the salary of any justice or judge as affected by such provisions, less any amount heretofore paid. (1921, c. 125, s. 1; Ex. Sess. 1921, c. 20, ss. 1, 2; 1927, cc. 133, 201; 1935, cc. 233, 400; 1937, c. 199; 1939, c. 258; 1943, c. 543; C. S. 3884(a).)

Editor's Note.—The amendment of 1935 reduced the retirement age from seventy (70) years to sixty-five (65) years and added the phrase reading: "or twelve consecutive years on the supreme court."

The 1937 amendment, inserting the provision as to disability through accident or disease provides: "The provisions of this amendatory act shall apply without regard to the age of the judge or justice affected."

The 1939 amendment inserted the words "regular or special" near the beginning of the section and the words "or six years" after the words "served one full term."

The 1943 amendment substituted "sixty-fifth" for "seventieth" in the fourteenth line from the end of the section. See 12 N. C. Law Rev. 367, for note on "Power of Congress to Diminish the Retired Salaries of Federal Judges."

§ 7-52. Jurisdiction and powers of emergency judges.—To the end that emergency judges provided for in § 7-50 shall have the fullest power and authority sanctioned by Article Four (IV), Section Eleven (11), of the Constitution of North Carolina, such judges are hereby vested, in the courts which they are duly appointed to hold, with the same power and authority in all matters whatsoever that regular judges holding the same courts would have. An emergency judge duly assigned to hold the court of a particular county shall have, during said term of court, in open court and in chambers, the power and authority of a regular judge in all matters whatsoever arising in that judicial district that could properly be heard or determined by a regular judge holding the same term of court. (Ex. Sess. 1921, c. 94, s. 1; 1925, c. 8; 1941, c. 52, s. 2; C. S. 1435(b).)

Cross Reference.—As to duty of governor to assign judges when regular judges not available, see § 7-71.

Editor's Note.—The 1941 amendment rewrote this section.

§ 7-53. Orders returnable to another judge; notice.—If any special or emergency judge has made any matters returnable before him, and subsequent thereto he should be called upon by the governor to hold court elsewhere, said judge shall make an order directing said matter to be heard before some other judge, setting forth in said order the time and place same is to be heard, and send a copy of said order to the attorney or attorneys representing the parties plaintiff and defendant in such matter. (Ex. Sess. 1921, c. 94, s. 2; C. S. 1435(c).)

§ 7-54. Governor to make appointment of four special judges.—The governor of North Carolina may appoint four persons who shall possess the requirements and qualifications of special judges as prescribed by article four, section eleven of the constitution, and who shall take the same oath of office and otherwise be subject to the same requirements and disabilities as are or may be prescribed by law for judges of the superior court, save the requirements of residence in a particular district, to be special judges of the superior courts of the state of North Carolina. Two of the said judges shall be appointed from the western judicial

division and two from the eastern judicial division, as now established. The governor shall issue a commission to each of said judges so appointed for a term to begin July first, one thousand nine hundred and forty-three, and to end June thirtieth, one thousand nine hundred and forty-five, and the said commission shall constitute his authority to perform the duties of the office of a special judge of the superior courts during the time named herein. (1927, c. 206, s. 1; 1929, c. 137, s. 1; 1931, c. 29, s. 1; 1933, c. 217, s. 1; 1935, c. 97, s. 1; 1937, c. 72, s. 1; 1939, c. 31, s. 1; 1941, c. 51, s. 1; 1943, c. 58, s. 1.)

For a discussion of this statute, see Jerome on Civil Procedure, p. 37.

Editor's Note.—Prior to the amendment of 1933, this section was mandatory. It required that the governor shall appoint, etc.

The subsequent amendments re-enacted sections 7-54 to 7-61 without change except as to dates, and as specified in the note to § 7-56. For comment on the 1941 amendment, see 19 N. C. Law Rev. 473.

Judicial Notice of Appointment as Special Judge.—The Supreme Court will take judicial notice on appeal of the appointment of a certain person as a special judge under the provisions of this chapter. *Greene v. Stadiem*, 197 N. C. 472, 149 S. E. 685.

When necessary for the determination of a case on appeal, the Supreme Court will take judicial notice of the counties comprising a judicial district, and that a judge holding a term in one of the counties was a special judge appointed by the Governor under the authority of this section. *Reid v. Reid*, 199 N. C. 740, 155 S. E. 719.

Cited in *Bohannon v. Virginia Trust Co.*, 198 N. C. 702, 153 S. E. 263.

§ 7-55. Time for appointment.—Each special judge shall be appointed by the governor on or before July first, one thousand nine hundred and forty-three, and shall be subject to removal from office for the same causes and in the same manner as regular judges of the superior court; and vacancies occurring in the offices created by §§ 7-54 to 7-61 shall be filled by the governor in like manner for the unexpired term thereof. (1927, c. 206, s. 2; 1929, c. 137, s. 2; 1931, c. 29, s. 2; 1933, c. 217, s. 2; 1935, c. 97, s. 2; 1937, c. 72, s. 2; 1939, c. 31, s. 2; 1941, c. 51, s. 2; 1943, c. 58, s. 2.)

§ 7-56. Further appointments.—The governor is further authorized and empowered, if in his judgment the necessity exists therefor, to appoint at such time as he may determine, not exceeding four additional judges, two of whom shall be residents of the eastern judicial division and two of whom shall be residents of the western judicial division, whose term of office shall begin from his or their appointment and qualification and end June thirtieth, one thousand nine hundred and forty-five. All the provisions of §§ 7-54 to 7-61 applicable to the four special judges shall be applicable to the four special judges authorized to be appointed under this section. (1927, c. 206, s. 3; 1929, c. 137, s. 3; 1931, c. 29, s. 3; 1933, c. 217, s. 3; 1935, c. 97, s. 3; 1937, c. 72, s. 3; 1939, c. 31, s. 3; 1941, c. 51, s. 3; 1943, c. 58, s. 3.)

Editor's Note.—The 1941 amendment authorized the appointment of four additional judges, the appointment of two having been previously authorized.

For comment on this amendment, see 19 N. C. Law Rev. 473.

§ 7-57. Extent of authority.—The authority conferred in §§ 7-54 to 7-61 upon the governor, pursuant to article four, section eleven, of the constitution of North Carolina, to appoint such special judges shall extend to regular as well as

special terms of the superior court, with either civil or criminal jurisdiction, or both, as may be designated by the statutes or by the governor pursuant to law. (1927, c. 206, s. 4; 1929, c. 137, s. 4; 1931, c. 29, s. 4; 1933, c. 217, s. 4; 1935, c. 97, s. 4; 1937, c. 72, s. 4; 1939, c. 31, s. 4; 1941, c. 51, s. 4; 1943, c. 58, s. 4.)

§ 7-58. Jurisdiction as of regular judges.—To the end that such special judges shall have the fullest power and authority sanctioned by article four, section eleven, of the constitution of North Carolina, such judges are hereby vested, in the courts which they are duly appointed to hold, with the same power and authority in all matters whatsoever that regular judges holding the same courts would have. A special judge duly assigned to hold the court of a particular county shall have during said term of court, in open court and in chambers, the same power and authority of a regular judge in all matters whatsoever arising in that judicial district that could properly be heard or determined by a regular judge holding the same term of court. (1927, c. 206, s. 5; 1929, c. 137, s. 5; 1931, c. 29, s. 5; 1933, c. 217, s. 5; 1935, c. 97, s. 5; 1937, c. 72, s. 5; 1939, c. 31, s. 5; 1941, c. 51, s. 5; 1943, c. 58, s. 5.)

No Jurisdiction When Not Holding Term of Court.—A special or emergency judge has no authority to determine a controversy without action at chambers when not holding a term of court. *Greene v. Stadium*, 197 N. C. 472, 149 S. E. 685. See also *Bohannon v. Virginia Trust Co.*, 198 N. C. 702, 153 S. E. 263, and cases cited under § 7-63.

Special Judge Holding Single Term—Motion for Alimony.—Where a special judge has been authorized under commission of the Governor to hold a term of court in only one county of a district, he may not issue an order for alimony, attorney's fees and costs in a proceeding in an action for divorce a vinculo, continued to be heard before a judge regularly holding the terms of court in that district and this being determinative of the appeal the question is not presented as to whether it was required that the appellant should make it appear by the Governor's commission, or otherwise, that the regular judge assigned was unable to attend and hold courts, etc. N. C. Const. Art. IV, §§ 10 and 11. *Reid v. Reid*, 199 N. C. 740, 155 S. E. 719.

Cited in *Edmondson v. Edmondson*, 222 N. C. 181, 190, 22 S. E. (2d) 576 (dis. op.).

§ 7-59. Salary, expenses; terms; practice of law.—The special judges so appointed shall receive the same salary and traveling expenses as now are, or may hereafter be, paid or allowed to judges of the superior court for holding their regularly assigned courts, and they shall hold all such regular and special terms of court as they may be directed and assigned by the governor to hold, without additional compensation: Provided, that no person appointed under §§ 7-54 to 7-61 shall engage in the private practice of law. (1927, c. 206, s. 6; 1929, c. 137, s. 6; 1931, c. 29, s. 6; 1933, c. 217, s. 6; 1935, c. 97, s. 6; 1937, c. 72, s. 6; 1939, c. 31, s. 6; 1941, c. 51, s. 6; 1943, c. 58, s. 6.)

§ 7-60. Powers after commission expires.—Nothing in §§ 7-54 to 7-61 shall be construed to prohibit such special judges from settling cases on appeal and making all proper orders in regard thereto after the time for which they were commissioned has expired. (1927, c. 206, s. 7; 1929, c. 137, s. 7; 1931, c. 29, s. 7; 1933, c. 217, s. 7; 1935, c. 97, s. 7; 1937, c. 72, s. 7; 1939, c. 31, s. 7; 1941, c. 51, s. 7; 1943, c. 58, s. 7.)

§ 7-61. Effect on sections 7-50 and 7-51.—Nothing in §§ 7-54 to 7-60 shall in any matter affect §§ 7-50 and 7-51. (1927, c. 206, s. 8; 1929, c. 137, s. 8;

1931, c. 29, s. 8; 1933, c. 217, s. 8; 1935, c. 97, s. 8; 1937, c. 72, s. 8; 1939, c. 31, s. 8; 1941, c. 51, s. 8; 1943, c. 58, s. 8.)

§ 7-62. Disposition of motions where judge disqualified.—Whenever the judge before whom any motion is made, either at term time or at chambers, shall disqualify himself from determining it, he may in his discretion refer the same for disposition to the resident judge of any adjoining district, who shall have full power and authority to hear and determine the cause in the same manner as if he were the presiding judge of the district in which the cause arose. (1939, c. 48.)

Art. 8. Jurisdiction.

§ 7-63. Original jurisdiction.—The superior court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof. (Rev., s. 1500; Code, s. 922; 1889, c. 504, s. 2; Const., Art. IV, ss. 12, 27; 1879, c. 92, s. 11; 1881, c. 210; C. S. 1436.)

I. In General.

II. Actions Ex Contractu.

A. Jurisdiction Generally.

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1. The Amount.

a. In General.

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III. Actions Ex Delicto.

IV. Criminal Actions.

A. Generally.

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V. Equitable Jurisdiction.

Cross Reference.

As to jurisdiction of justices of the peace, see § 7-121.

I. IN GENERAL.

Constitutionality of Section.—The General Assembly has constitutional authority to distribute among the other courts prescribed in the Constitution that portion of judicial power and jurisdiction which does not pertain to the Supreme Court. Const., Art. IV, sec. 12; *Williams v. Williams*, 188 N. C. 728, 125 S. E. 482.

The constitutional jurisdiction of the superior court, generally, may be stated as intermediate between the Supreme Court and the courts of justices of the peace. *Mott v. Board*, 126 N. C. 866, 36 S. E. 330.

Construction with Other Sections.—This section defining the jurisdiction of the superior court, means only the jurisdiction which is necessary to be set out in good faith to confer original jurisdiction on that court of the action, and must be construed in connection with section 1-123, authorizing a joinder of additional causes of action, which may be of "any" amount, and sec. 1-135, par. 2, and sec. 1-137, authorizing counterclaims also, without any limitation as to the amount. Either of these three sections is as valid as the other, and all three must be construed together. There is no conflict between them. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

Distribution of Jurisdiction Question of Procedure.—The interpretation of the Constitution and statutes as to the distribution of jurisdiction among the superior and inferior courts, and courts of the justices of the peace, involves no rule of property, but only of procedure. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

General Jurisdiction of Superior Court.—The jurisdiction of the superior court is general and not limited, except in the sense that it has been narrowed from time to time by carving out a portion of this general jurisdiction and giving

it, either exclusively or concurrently, to other courts. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

The superior court, under the provisions of this section, has exclusive original jurisdiction in all cases when it is not given to some other court. *State v. Waldrop*, 63 N. C. 507, 508.

The superior court is a court of general common-law jurisdiction, with power to try all actions founded on contract, where the principal sum demanded is above \$200, and such other actions which have been or may be allotted to it by the General Assembly, within the limits of the constitution. *Walton v. Walton*, 80 N. C. 26.

The superior court is one of general jurisdiction, being the highest court of original jurisdiction in the State, and it may take cognizance of all suits, which are not taken from it by statute. *State v. Garland*, 29 N. C. 48, 49.

A nonresident plaintiff may maintain an action against the initial and nonresident carrier, the cause being transitory. *McGovern v. Atlantic Coast Line R. Co.*, 180 N. C. 219, 104 S. E. 534.

Power to Give Complete Relief.—Where superior court acquires jurisdiction of any part of the matter involved in a suit it will proceed to determine the whole. *Baker v. Carter*, 127 N. C. 92, 37 S. E. 81.

Action Wrongfully Instituted.—Where an action is wrongfully brought before the clerk of the superior court and is taken to the superior court by appeal, the superior court having original jurisdiction, it will be retained for hearing. *Springs v. Scott*, 132 N. C. 548, 44 S. E. 116; *Smith v. Gudger*, 133 N. C. 627, 45 S. E. 955; *In re Anderson*, 132 N. C. 243, 43 S. E. 649.

Whether Action in Tort or on Contract.—To determine whether an action is brought in tort or on contract the complaint alone will be considered, and where the complaint alleges the wrongful demand of one hundred dollars by the defendant of the plaintiff's wife, as money due to the defendant under a mistake in the payment of a check, and alleges that the money was paid the defendant by plaintiff's wife upon insistent demand, the complaint alleges an action in tort within the original jurisdiction of the superior court under const. art. 4, § 27, and this and section 7-122, and not an action on contract within the jurisdiction of a justice of the peace under § 7-121. *Roebuck v. Short*, 196 N. C. 61, 144 S. E. 515.

Demurrer for Lack of Jurisdiction.—Where it appears from the complaint in an action brought in the superior court that a good cause of action is alleged in the amount cognizable only in the court of the justice of the peace, and recovery cannot be had for the difference in amount necessary to sustain the jurisdiction of the superior court, a demurrer should be sustained. *Williams v. Williams*, 188 N. C. 728, 125 S. E. 482.

Construction of Complaint.—Allegations of a complaint are construed liberally in the pleader's favor with a view to substantial justice between the parties, and where the question of jurisdiction between the superior court and that of a justice of the peace arises, depending upon the amount involved, and whether the action is *ex contractu* or *ex delicto*, the courts are disposed to construe the complaint in favor of the jurisdiction chosen. *Mitchem v. Pasour*, 173 N. C. 487, 92 S. E. 322.

Quoted in *Albertson v. Albertson*, 207 N. C. 547, 549, 178 S. E. 352.

Applied in *Bryan v. Street*, 209 N. C. 284, 183 S. E. 366.

Cited in *Edmundson v. Edmundson*, 222 N. C. 181, 22 S. E. (2d) 576.

II. ACTIONS EX CONTRACTU.

A. Jurisdiction Generally.

Editor's Note.—Reference must be had to section 7-121 wherein exclusive original jurisdiction of all civil actions founded on contract, subject to two exceptions therein mentioned, is given to the justices of the peace.

When Jurisdiction Assumed.—By this section exclusive original jurisdiction is conferred on courts of a justice of the peace in actions *ex contractu* where the amount demanded does not exceed the sum of two hundred dollars, and in the superior court where the demand exceeds that sum, the jurisdiction of the latter court depending upon whether from the pleadings it may be seen that it was made in good faith, and whether the allegations of the complaint sufficiently allege a good cause of action to sustain the jurisdiction sought. *Williams v. Williams*, 188 N. C. 728, 125 S. E. 482.

Test.—The aggregate sum demanded in good faith is the test of jurisdiction. *Boyd v. Roanoke, etc., R. R.*, 132 N. C. 184, 186, 43 S. E. 631; *Martin v. Goode*, 111 N. C. 288, 289, 16 S. E. 232.

Amendment after Verdict.—Where a complaint does not

state the sum demanded, and a verdict is rendered for less than \$200, the trial court may allow the complaint to be amended after verdict so as to make the claim more than \$200, and the superior court has jurisdiction if the claim was made in good faith. *Boyd v. Roanoke R., etc., Co.*, 132 N. C. 184, 43 S. E. 631.

B. Essentials.

1. The Amount.

a. In General.

Separate Items.—Where the items of an account are incurred under different contracts, an action may be brought on each item before a justice of the peace, the separate item being less than \$200. *Copland v. Tel. Co.*, 136 N. C. 11, 48 S. E. 501.

Under Single Contract.—Where a single contract is made for furnishing certain specified articles, at prices fixed for each, the plaintiff cannot be allowed to "split up" the account and recover upon each item. *Jarret v. Self*, 90 N. C. 478.

Action to Recover Loan.—The superior court has not original jurisdiction of an action by a stockholder in an insurance company doing business as a building and loan association, against the company, to recover an overpayment of interest on a loan, where the amount sought to be recovered is less than \$200. *Gillam v. Life Ins. Co.*, 121 N. C. 369, 28 S. E. 470.

Waiver of Tort.—The superior court possesses no jurisdiction in actions in which a tort is waived and suit is brought on an implied contract for a claim less than \$200. *Winslow v. Weith*, 66 N. C. 432.

Less Than Statutory Amount.—In an action, founded on an implied contract, by the sheriff against his deputy for a misfeasance in office, the superior court has no jurisdiction where the amount demanded is less than \$200. *Latham v. Rollins*, 72 N. C. 454.

Where Recovery of Jurisdictional Amount Impossible.—The superior court has no original jurisdiction of a legal cause of action, founded on contract, when in no event can the plaintiff recover as much as \$200. *Howard v. Mutual, etc., Life Ins. Ass'n*, 125 N. C. 49, 34 S. E. 199; *Sloan v. Carolina Cent. R. Co.*, 126 N. C. 487, 36 S. E. 21.

b. Previous Remission.

The fact that plaintiff has remitted damages in excess of \$200 in his action sued on in the justice's court does not necessarily oust the jurisdiction of the superior court in an action brought on the same contract there. *Brock v. Scott*, 159 N. C. 513, 75 S. E. 724.

But the superior court has no jurisdiction of an action to recover upon a running account of \$312, where it is shown that from time to time the defendant had reduced the amount by sundry payments to a sum under \$200 at the time the action is brought. *Wiserman v. Witherow*, 90 N. C. 140.

2. Good Faith.

Generally.—It is the amount demanded in good faith (definable as an honest purpose plus relation to the facts alleged in the complaint as a whole which reasonably tend to support it), that fixes the jurisdiction of the court. *Thompson v. Southern Express Co.*, 144 N. C. 389, 57 S. E. 18; *Wooten v. Biggs Drug Co.*, 169 N. C. 64, 85 S. E. 140.

While the sum demanded ordinarily determines the jurisdiction, yet the plaintiff must make his demand in good faith and not for the purpose of giving the court jurisdiction. *Wiserman v. Witherow*, 90 N. C. 140.

Bona Fide Contention.—In an action involving the construction of a contract, where it is apparent that there was a bona fide contention for more than \$200, the superior court has jurisdiction. *Hornor School v. Westcott*, 124 N. C. 518, 32 S. E. 885.

III. ACTIONS EX DELICTO.

Constitution and Statute.—Under our Constitution and statute jurisdiction is conferred upon a justice of the peace concurrent with that of the superior court of all actions of tort wherein the plaintiff, in good faith, states or limits his demand at fifty dollars, or less. *Houser v. Bonsal & Co.*, 149 N. C. 51, 62 S. E. 776, and cases cited.

Failure to Prove Allegation in Entirety.—Where a cause of action within the jurisdiction of the superior court is alleged in good faith, jurisdiction is not lost by failure to prove the allegation in its entirety, and in an action in tort the superior court has jurisdiction though the sum demanded is less than \$200. *Fields v. Brown*, 160 N. C. 295, 76 S. E. 8.

Conversion.—The superior court has jurisdiction of an action for damages for the conversion of property where

the amount claimed is one hundred and twenty-five dollars. *Ashe v. Reizenstein*, 105 N. C. 213, 10 S. E. 889.

Deceit and False Warranty.—An action for deceit and false warranty, in the sale of a horse, is cognizable in the superior court, though the damages claimed amount only to fifty dollars. *Ashe v. Gray*, 88 N. C. 190.

In *Long v. Fields*, 104 N. C. 221, 10 S. E. 253, it was said: "It has been settled by a line of decisions in this court, and manifestly upon mature consideration, that where there is a warranty of soundness in the sale of a horse, the vendee may declare in tort for a false warranty and add a count in deceit, or, under the new procedure, a second cause of action in the nature of deceit, and though the sum demanded be less than \$200 the action will not be deemed one founded on contract, and the superior court will have jurisdiction." *Bullinger v. Marshall*, 70 N. C. 520; *Ashe v. Gray*, 88 N. C. 190; S. C., 90 N. C. 137; *Harvey v. Hambright*, 98 N. C. 446, 4 S. E. 187.

Same—Proof of Guilty Knowledge.—The complaint being for a tort, sustains the jurisdiction, though the charge of a guilty knowledge of the falsity of the representations which influenced the plaintiff in making the contract of exchange may not have been proved, and for the want of which no issue was asked to be made up. *Fields v. Brown*, 160 N. C. 295, 300, 76 S. E. 8.

Waiver of Tort.—Plaintiff may waive the tort and sue in contract. *Bullinger v. Marshall*, 70 N. C. 520; *McDonald v. Cannon*, etc., Co., 82 N. C. 245, but where this course is pursued, it is incumbent upon the plaintiff to allege in good faith a claim amounting to more than \$200. *Winslow v. Weith*, 66 N. C. 432.

Where, in an action for damages in the sum of \$125, for the conversion of certain cotton, the complaint alleged that the plaintiff sold to the defendants two bales of cotton at a certain price per pound on the terms that the price was to be paid down and no title to pass until the price was paid, and the defendants, on getting possession of the cotton, refused to pay the price, it was held, that the superior court had jurisdiction. *McDonald v. Cannon*, etc., Co., 82 N. C. 245. In such case the plaintiffs might have affirmed the contract and sued for the price agreed to be paid (less than \$200), and then a justice of the peace would have had jurisdiction of the action. *Id.*

IV. CRIMINAL ACTIONS.

A. Generally.

The superior court has original jurisdiction of assaults and batteries: 1st, when a deadly weapon is used; 2nd, when serious damage is done; 3rd, when the offense was committed six months (now twelve months) before the indictment was found, and no justice of the peace has taken cognizance of the offense. *State v. Cunningham*, 94 N. C. 824. See also, *State v. Phillips*, 104 N. C. 786, 10 S. E. 463.

Jurisdiction Attaches for All Crimes Included.—Having acquired cognizance of an imputed crime, which was assaulted with intent to commit rape, the court may proceed to dispose of the subordinate misdemeanor, of which it could not have taken jurisdiction as a distinct substantive offense until after the lapse of the specified time without judicial action commenced before a justice, it being not the purpose of the legislation to arrest further proceedings when the assumed jurisdiction was rightful, and neither offense is outside of that jurisdiction ultimately. *State v. Reaves*, 85 N. C. 553.

Charge Different from Case Made Out.—Where the indictment charges an assault with a deadly weapon, but the proof shows a simple assault, committed within less than six (now twelve) months since the finding of the bill, the jurisdiction of the superior court is not ousted, as the cases in which this would happen are limited to those in which the charge in itself is of a simple assault. *State v. Fesperman*, 108 N. C. 770, 771, 13 S. E. 14.

Manner of Excepting to Jurisdiction.—Exception to the jurisdiction of the superior court, for that six months (now twelve) had not elapsed, should be made, not by a motion to quash or in arrest of judgment, but by a prayer for instructions to the jury to acquit. *State v. Earnest*, 98 N. C. 740, 4 S. E. 495.

Misdemeanors.—The superior court has exclusive jurisdiction of misdemeanors where the punishment is not limited to a fine not exceeding fifty dollars or imprisonment not exceeding thirty days. *Washington v. Hammond*, 76 N. C. 33.

B. Essentials of Indictment.

Twelve Month Period.—An indictment for an affray need not aver that the offense was committed more than six months (now twelve) before the finding of the bill and that no justice has taken jurisdiction. *State v. Moore*, 82 N. C. 660.

Failure of Justice of Peace to Assume Jurisdiction.—When the superior court takes cognizance of such cases as the justices of the peace fail to assume jurisdiction of, it is not necessary to aver in the indictment the fact of the justice's omission in order to confer jurisdiction on the superior court. *State v. Porter*, 101 N. C. 713, 714, 7 S. E. 902. Nor is it material that the offense is alleged to have been committed on a day more than six months (now twelve) before the finding of the indictment, in the indictment itself, as the date is not traversable and is not fixed on the verdict. *Id.*

Use of Deadly Weapon.—This section does not render it necessary that a bill found by the grand jury of the superior court for an assault and battery should aver that a deadly weapon was used, that any serious damage was done, that six months had elapsed before the finding of the bill, or that the offense was committed within one mile of the court during the session thereof. The defendant, under the plea of not guilty, may negative the existence of the jurisdictional facts. *State v. Taylor*, 83 N. C. 602.

Matter of Defense.—Upon the trial of an indictment for simple assault, the superior court *prima facie* has jurisdiction, but it is open to the defendant to show that the offense was committed within six months (now twelve) of the finding of the bill. *State v. Earnest*, 98 N. C. 740, 4 S. E. 495.

V. EQUITABLE JURISDICTION.

Generally.—The superior court possesses the same equitable jurisdiction, when not limited by statute, formerly exercised by courts of equity. *Seattle v. Seattle*, 141 N. C. 553, 54 S. E. 445.

Over Property of Infants.—The superior courts in their equity jurisdiction have inherent authority over the property of infants, since they stand in loco parentis and have the same jurisdiction in this respect as that of the English High Courts of Chancery. *Coxe v. Charles Stores Co.*, 215 N. C. 380, 1 S. E. (2d) 848, 121 A. L. R. 959.

Interpleader.—Where the controversy involves an action in the nature of a bill of interpleader to determine the right of two adverse claimants to a fund, jurisdiction of the superior court attached upon the ground that it is an exercise of the powers of the court enforceable by a bill in equity under the old system. *Timber Co. v. Wells*, 171 N. C. 262, 88 S. E. 327.

Foreclosure of Mortgages.—Because of the equity growing out of the relation of mortgagor and mortgagee when the latter seeks to have the mortgaged premises foreclosed for the nonpayment of the debt, the superior court has jurisdiction when the amount secured is for a less sum than two hundred dollars. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

Subrogation.—The superior court has jurisdiction of an action by a creditor seeking to be subrogated to the rights of other creditors of the same debtor whose claims he had paid. *Fidelity Co. v. Jordan*, 134 N. C. 236, 46 S. E. 496.

To Establish Claim against Married Woman.—A proceeding to establish a claim against a feme covert and to have a lien declared for materials furnished, etc., must be brought before a justice, if the amount claimed is under \$200. It is when the proceeding is not under the statute, but is equitable in nature, as a bill for foreclosure of a mortgage, that the superior court has jurisdiction. *Smaw v. Cohen*, 95 N. C. 85.

Debtor a Lunatic.—The superior court has jurisdiction to hear and determine an action instituted by a creditor of a lunatic for the recovery of a debt contracted prior to the lunacy. *Blake v. Respass*, 77 N. C. 193.

§ 7-64. Concurrent jurisdiction.—In all cases in which by statute original jurisdiction of criminal actions has been, or may hereafter be, taken from the superior court and vested exclusively in courts of inferior jurisdiction, such exclusive jurisdiction is hereby divested, and jurisdiction of such actions shall be concurrent and exercised by the court first taking cognizance thereof. The provisions of this section shall remain in full force and effect, unless expressly repealed by some subsequent Act of the General Assembly, and shall not be repealed by implication or by general repealing clauses in any Act of the General Assembly conferring exclusive jurisdiction on inferior courts in misdemeanor cases which may be hereafter enacted. Appeal shall be, as heretofore, to the superior court from all judgments of such inferior courts: Provided,

that this section shall not apply to the counties of Alleghany, Cabarrus, Caswell, Cherokee, Clay, Craven, Cumberland, Currituck, Dare, Davidson, Edgecombe, Gaston, Gates, Graham, Granville, Guilford, Halifax, Harnett, Henderson, Hertford, Hyde, Iredell, Jones, Lenoir, New Hanover, Pamlico, Perquimans, Rockingham, Rutherford, Scotland, Surry, Union and Warren. (1919, c. 299; c. 98; 1941, c. 265; C. S. 1437.)

Editor's Note.—The 1941 amendment rewrote this section. For comment on the 1941 amendment, see 19 N. C. Law Rev. 472.

Only One Prosecution.—Where two courts have concurrent jurisdiction of an offense, the judgment of that one which first passes judgment is a good defense against a prosecution in the other court for the same offense. *State v. Bowers*, 94 N. C. 910.

Prisoner Bound Over to Superior Court.—Where a recorder's court and the superior courts have concurrent jurisdiction of a criminal offense and the judge of the former court acts within his powers of committing magistrate, and binds the prisoner over to the superior court, objection that the recorder's court had thereby taken jurisdiction of the offense is untenable, and neither will a motion to quash the indictment, nor a plea in abatement be sustained. *State v. Shemwell*, 180 N. C. 718, 104 S. E. 885.

Applied in *State v. Everhardt*, 203 N. C. 610, 166 S. E. 738.

§ 7-65. Jurisdiction in vacation or at term.—In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election. The resident judge of the judicial district and the judge regularly presiding over the courts of the district, shall have concurrent jurisdiction in all matters and proceedings where the superior court has jurisdiction out of term. (Rev., s. 1501; Code, c. 10, s. 230; 1871-2, c. 3; 1939, c. 69; C. S. 1438.)

Editor's Note.—The 1939 amendment added the second sentence of this section.

Motions.—After leaving the bench for a term of the superior court to expire by limitation, the judge cannot hear motions or other matters outside of the courtroom except by consent, unless they are such as are cognizable at chambers. *May v. Nat. Fire Ins. Co.*, 172 N. C. 795, 90 S. E. 890.

Interlocutory Order.—It seems that the superior court has power to make an amendment to an interlocutory order in an ancillary proceeding out of term. *Coater Bros. v. Wilkes*, 94 N. C. 174, 175.

Consent of Parties.—A judge has no power to render judgment after the expiration of the term of court without the consent of parties. *Hardin v. Ray*, 89 N. C. 364.

Same—Civil Actions.—By consent, the superior court can grant judgment in civil cases in vacation. *Coater Bros. v. Wilkes*, 94 N. C. 174, 175.

The Resident Judge.—The resident judge of a district has no other power within such district in vacation than any other judge of the superior court. *State v. Ray*, 97 N. C. 510, 1 S. E. 876.

The judge, holding the courts of a judicial district, has authority to act in all matters within the jurisdiction of the superior court, with the consent of the parties, by signing judgments out of term and in or out of the county and out of the district. *Edmundson v. Edmundson*, 222 N. C. 181, 22 S. E. (2d) 576.

§ 7-66. Appellate jurisdiction.—The superior court has appellate jurisdiction of all issues of law or of fact, determined by a clerk of the superior court or a justice of the peace, and of all appeals from inferior courts for error assigned, in matters of law, as provided by law. (Rev., s. 1502; Const., Art. IV, ss. 12, 27; Code, s. 923; C. S. 1439.)

Cross References.—As to appeal from clerk to judge, see §§ 1-272 to 1-276. As to appeals from justices of the peace, see §§ 7-195 and notes. As to appeals from other inferior courts, see §§ 7-195, 7-230, 7-253, 7-292, 7-295, 7-313, 7-343, 7-378, 7-393, 7-442. As to appeal from utilities commission,

see § 62-20 and notes. As to appeal from industrial commission, see § 97-61. As to appeals from unemployment compensation commission, see § 96-15.

General Appellate Power.—The Constitution and statutes vest in the superior court general appellate and supervisory powers over the judicial action of all the inferior courts of the State. *Taylor v. Johnson*, 171 N. C. 84, 87 S. E. 987.

The superior court is the court of final jurisdiction and has power to completely determine a controversy properly before it, and its judgment is final as to all matters of fact established in accordance with procedure and is subject to appeal and review only on matters of law. *State v. Carolina Scenic Coach Co.*, 218 N. C. 233, 10 S. E. (2d) 824.

Appeals from Justice of Peace.—In cases where bills are found in the superior court, its jurisdiction is original. But in cases of appeal from justices of the peace its jurisdiction is derivative, and it has no more or greater jurisdiction than the justice of the peace had; and if the justice had none, the superior court has none. Page v. Page, 167 N. C. 350, 353, 83 S. E. 627.

§ 7-67. Transfer of cases pending in abolished inferior court.—In case of the abolition of any court inferior to the superior court (except courts of the justices of the peace), all cases and matters then in such court, not finally disposed of, and all records of such court, shall forthwith be transferred and delivered to the superior court of the county in which such inferior court has functioned, for trial or other disposition of such cases and matters as may be necessary and proper.

The superior court to which such cases and matters are transferred shall have the power and jurisdiction to hear, deal with and dispose of the same to the same extent as would said inferior court had its existence continued. (1941, c. 117.)

Where the municipal court in which the case is originally tried is abolished pending the decision of the supreme court granting a new trial, the cause will be remanded to the superior court of the county. *Barnes v. Teer*, 219 N. C. 823, 15 S. E. (2d) 379.

Art. 9. Judicial and Solicitorial Districts and Terms of Court.

§ 7-68. Number of districts.—The state shall be divided into twenty-one superior court judicial districts, numbered first to twenty-first, composed of the counties hereinafter designated.

As required by the constitution, article IV, section twenty-three, as amended, the state shall be divided into twenty-one solicitorial districts, numbered first to twenty-first, which districts shall be the same as the judicial districts hereinafter designated. The solicitors elected for the twenty-one judicial districts, respectively, in the general election held on November third, one thousand nine hundred and forty-two, shall be the solicitors, respectively, of the twenty-one solicitorial districts hereby created. (1913, c. 63; 1913, c. 196; 1937, c. 413, s. 1; 1943, c. 134, s. 2; C. S. 1441.)

Editor's Note.—Prior to the 1937 amendment there were twenty districts.

The 1943 amendment added the second paragraph of this section. It also inserted "solicitorial" in the article heading.

§ 7-69. Eastern and western judicial divisions.—The state shall be divided into two judicial divisions, the Eastern and Western Judicial Divisions. The counties which are now or may hereafter be included in the judicial districts from one to ten, both inclusive, shall constitute the Eastern Division, and the counties which are now or may hereafter be included in the judicial districts from eleven to twenty-one, both inclusive, shall constitute the Western Division. The judicial districts shall

retain their numbers from one up to twenty-one, and all such other districts as may from time to time be added by the creation of new districts shall be numbered consecutively. (1915, c. 15; 1937, c. 413, s. 2; C. S. 1442.)

Editor's Note.—The 1937 amendment substituted "twenty-one" for "twenty" formerly appearing in this section.

§ 7-70. Terms of court.—A superior court shall be held by a judge thereof at the courthouse in each county. The twenty-one judicial districts of the state shall be composed of the counties designated in this section, and the superior courts in the several counties shall be opened and held in each year at the times herein set forth. Each court shall continue in session one week, and be for the trial of criminal and civil cases, except as otherwise provided, unless the business thereof shall be sooner disposed of. Each county shall have the number of regular weeks of superior court as set out in this section: Provided, however, that the schedule of courts of any county or judicial district may be revised or reformed and the number of terms of court may be increased or decreased from time to time as may appear advisable to the court calendar commission; which said commission shall be composed of the chief justice of the supreme court and four judges of the superior court, to be appointed by the governor for a period of four years each. The members of said commission shall serve without compensation other than their necessary expenses incurred in attending meetings of said commission. (1913, c. 63, 196; 1937, c. 408; C. S. 1443.)

Eastern Division

First District

The first district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Currituck—Third Monday in July, for civil cases only; first Monday in March; first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 51; Ex. Sess. 1920, c. 23, s. 2; 1939, c. 59; C. S. 1443.)

Camden—First Monday after the first Monday in March and the last Monday in August. (1913, c. 196; 1921, c. 105; 1937, c. 283, s. 1; 1943, c. 376; C. S. 1443.)

Pasquotank—Eighth Monday before the first Monday in March for the trial of civil cases only; third Monday before the first Monday in March to continue for two weeks, the first week for the trial of civil cases only and the second week for the trial of criminal cases only; second Monday after the first Monday in March for the trial of civil cases only; ninth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; thirteenth Monday after the first Monday in March for the trial of criminal cases only; fourteenth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; second Monday after the first Monday in September for the trial of civil cases only; fifth Monday after the first Monday in September to continue for two weeks for the trial of civil cases only; ninth Monday after the first Monday in September to continue for two weeks, the first week for the trial of civil cases only and the second week for the trial of criminal cases only. (1913, c. 196; Ex. Sess.,

1913, c. 51; 1921, c. 105; 1923, c. 232; Pub. Loc. 1925, c. 631; 1929, c. 167; 1933, cc. 3, 129; C. S. 1443.)

Perquimans—Seventh Monday before the first Monday in March, for civil cases only, for which term a special judge to be assigned by the governor; sixth Monday after the first Monday in March; eighth Monday after the first Monday in September. (1913, c. 196; Ex. Sess., 1913, c. 51; 1931, c. 6; 1933, c. 286; C. S. 1443.)

Chowan—Fourth Monday after the first Monday in March; eighth Monday after the first Monday in March to continue for one week, for the trial of civil cases only; first Monday after the first Monday in September; twelfth Monday after the first Monday in September. (1913, c. 196; 1931, c. 87; 1933, c. 456; 1937, c. 102; 1941, c. 367, s. 1; C. S. 1443.)

Gates—Third Monday after the first Monday in March; eleventh Monday after the first Monday in September. (1913, c. 196; 1935, c. 70; C. S. 1443.)

Dare—Twelfth Monday after the first Monday in March; seventh Monday after the first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 51; C. S. 1443.)

Tyrrell—Seventh Monday after the first Monday in March; fourth Monday after the first Monday in September, and for this term a special Judge may be assigned; fourth Monday before the first Monday in March, for civil cases only. Upon recommendation of the local bar, the board of commissioners for the county of Tyrrell, at their option, may abolish and suspend the opening and holding, in any year, of the term above provided for the week commencing on the fourth Monday before the first Monday in March, by notifying the governor and the judge scheduled to hold said term, at least thirty days prior to the date for opening same, that such term of court is not desired. (1913, c. 196; Ex. Sess. 1913, c. 51; 1919, c. 128, s. 1; Ex. Sess. 1920, c. 23, s. 1; 1921, c. 83; Ex. Sess. 1921, c. 19; 1923, c. 124; Pub. Loc. 1925, c. 389; 1927, c. 123; 1931, c. 92; 1933, c. 126; C. S. 1443.)

Hyde—Eleventh Monday after the first Monday in March; sixth Monday after the first Monday in September.

In addition to the terms of court now provided by law to be held in Hyde county, the following term of court shall be opened and held in each year, except as hereinafter provided, in the manner and at the time herein set forth, to-wit: To convene on the third Monday in August of each year and to continue for one week for the trial of civil cases only. If the judge regularly assigned to the district in which said court is situate be unable to hold any term of court provided in the first sentence of this paragraph, for any cause set out in article four, section eleven of the constitution, the governor may appoint a judge to hold such term from among the regular, special or emergency judges. If, in the opinion of the board of commissioners of Hyde county, it is not advisable or necessary to hold said additional term of court, and such fact is so stated in a resolution duly adopted by a majority of said board on or before the second Monday in July next preceding the day for the convening of said term, then said term shall not be held on the third Monday in August of that year

as provided in this paragraph. Upon the adoption of such a resolution, the clerk of said board shall immediately notify the judge, who has been assigned to hold the additional term, that the same will not be held, and no jury for the said term shall be drawn; but if no such resolution shall be adopted on or before the second Monday in July as provided above, then it shall be the duty of the board of commissioners to cause the jury to be drawn in the manner now prescribed by law for the drawing of a jury for the trial of civil cases in regular terms of the superior court. (1913, c. 196; 1935, c. 191; 1941, c. 367, s. 1; C. S. 1443.)

Beaufort—Seventh Monday before the first Monday in March for two weeks, the first week for criminal cases only, and the second week for criminal and civil cases; second Monday before the first Monday in March for two weeks for civil cases only; second Monday after the first Monday in March for criminal cases only; fifth Monday after the first Monday in March for civil cases only; ninth Monday after the first Monday in March for two weeks for civil cases only; sixteenth Monday after the first Monday in March for the trial of criminal and civil cases; second Monday after the first Monday in September for the trial of criminal cases with a grand jury in attendance; third Monday after the first Monday in September for civil cases only; fifth Monday after the first Monday in September for civil cases only; ninth Monday after the first Monday in September for criminal cases and consent trials and decrees in civil cases; thirteenth Monday after the first Monday in September for civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 51; 1919, c. 128, ss. 3, 4; 1927, c. 111; 1931, cc. 4, 8, 87; 1933, c. 3; c. 456, s. 2; 1935, c. 176; 1937, cc. 40, 283, s. 2; C. S. 1443.)

Second District

The second district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Washington—Eighth Monday before the first Monday in March, to continue for two weeks; sixth Monday after the first Monday in March, for civil cases only; eighth Monday before the first Monday in September; seventh Monday after the first Monday in September, for civil cases only. (1913, cc. 63, 196; Ex. Sess. 1913, c. 51; 1919, c. 128, s. 2; c. 133; 1923, c. 227; 1929, c. 54; C. S. 1443.)

Martin—Second Monday after the first Monday in March, to continue for two weeks; fifteenth Monday after the first Monday in March; second Monday after the first Monday in September, to continue for two weeks; fourteenth Monday after the first Monday in September; sixth Monday after the first Monday in March and eleventh Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases only. For the last two terms of court the Governor is hereby directed to appoint a judge to hold the same from among the regular or emergency judges. (1913, c. 196; 1919, c. 133; 1924, c. 12; 1929, c. 124; C. S. 1443.)

Edgecombe—Sixth Monday before the first Monday in March; first Monday in March; fourth Monday after the first Monday in March, to continue for two weeks, for civil cases only; thirteenth Monday after the first Monday in March, to con-

tinue for two weeks; first Monday after the first Monday in September; sixth Monday after the first Monday in September; tenth Monday after the first Monday in September, to continue for two weeks, for civil cases only.

The grand jury drawn by the commissioners of Edgecombe county for the term of court beginning on the sixth Monday before the first Monday in March of each year shall also serve as the grand jury for the term beginning on the first Monday in March and on the thirteenth Monday after the first Monday in March, and shall be charged with the same duties and clothed with the same power at each of said terms and shall receive for each term such mileage and compensation as is now provided by law. (1913, c. 196; Ex. Sess. 1913, c. 17; 1915, c. 107; 1917, c. 12; 1919, c. 133; Ex. Sess., 1921, c. 108, s. 1; 1923, c. 246; 1927, c. 128; 1941, cc. 2, 32; C. S. 1443.)

Nash—Fifth Monday before the first Monday in March; second Monday before the first Monday in March, to continue for two weeks, for the trial of civil cases only; first Monday after the first Monday in March; seventh Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; twelfth Monday after the first Monday in March; first Monday before the first Monday in September; second Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only, and for the term of court the governor is hereby directed to appoint a judge, other than the judge holding courts of the second judicial district, to hold the same from among the regular, special or emergency superior court judges; fifth Monday after the first Monday in September, for the trial of civil cases only; twelfth Monday after the first Monday in September, to continue for two weeks, the first week to be for the trial of criminal cases and the second week for the trial of civil cases only. The court shall have jurisdiction to try and determine civil actions and civil matters at any term of superior court held in Nash county, whether said term is designated above as a civil term or not: Provided, that any term of said court may be canceled by the board of commissioners of Nash County when in the opinion of the clerk of the superior court of Nash County and the resident judge of the second judicial district sufficient cause exists for the cancellation of said term. (1913, c. 196; 1915, c. 63; 1919, c. 133; Ex. Sess. 1921, c. 108; 1923, c. 237; 1924, c. 46; 1933, c. 145; 1935, c. 201; 1943, c. 687; C. S. 1443.)

Wilson—Fourth Monday before the first Monday in March, to continue for two weeks, the first week for criminal cases only, and the second week for civil cases only; tenth Monday after the first Monday in March, to continue for two weeks, the first week for criminal cases only, and the second week for civil cases only; sixteenth Monday after the first Monday in March, for civil cases only; first Monday in September; fourth Monday after the first Monday in September, for civil cases only; eighth Monday after the first Monday in September, to continue for two weeks, for civil cases only; thirteenth Monday after the first Monday in September and for this term of court a special or emergency judge shall be assigned by the governor to hold the same. (1913,

c. 196; 1915, c. 45; 1917, c. 12; 1919, c. 133; 1921, c. 10; 1937, c. 104; C. S. 1443.)

Third District

The third district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Hertford—First Monday before the first Monday in March; sixth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases and only such criminals as are confined in the common jail or otherwise imprisoned; fifth Monday before the first Monday in September; sixth Monday after the first Monday in September, to continue for two weeks. (1913, c. 196; 1915, c. 282; 1919, c. 142; 1923, c. 113; 1924, c. 9; 1927, c. 118; 1929, c. 217; 1931, cc. 140, 200; 1935, cc. 102, 276; 1939, c. 40; C. S. 1443.)

Bertie—Third Monday before the first Monday in March, to continue for one week for the trial of both criminal and civil cases; ninth Monday after the first Monday in March, to continue for two weeks, for trial of both criminal and civil cases; first Monday before the first Monday in September, to continue for two weeks, for the trial of both criminal and civil cases; tenth Monday after the first Monday in September, to continue for two weeks, for the trial of both criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 16; 1915, c. 78; 1917, c. 226; Ex. Sess. 1921, c. 45; 1923, c. 185; 1931, cc. 192, 247; 1941, c. 367, s. 1; C. S. 1443.)

Northampton—Fourth Monday after the first Monday in March; Eighth Monday after the first Monday in September, each to continue for two weeks; first Monday in August to continue for one week. (1913, c. 196; 1929, cc. 123, 244; 1933, c. 409; 1935, c. 148; 1937, c. 64; C. S. 1443.)

Halifax—Fifth Monday before the first Monday in March, to continue for two weeks; second Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; eighth Monday after the first Monday in March, for the trial of both criminal and civil cases, to continue for one week, and for this term of court the governor is hereby directed to appoint a judge to hold same from among the regular, special or emergency judges; thirteenth Monday after the first Monday in March, to continue for two weeks, the first week of which shall be for the trial of criminal or civil cases, or both, and the second week for trial of civil cases exclusively; third Monday before the first Monday in September, to continue for two weeks, for the trial of civil and criminal cases; fourth Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only, and for this term of court the governor is hereby directed to appoint a judge to hold same from among the regular, special or emergency judges; seventh Monday after the first Monday in September, to continue for one week, for the trial of criminal cases only, and for this term of court the governor is hereby directed to appoint a judge to hold the same from among the regular, special or emergency judges; twelfth Monday after the first Monday in September, for the trial of civil and criminal cases, to continue for two weeks. (1913, c. 196; Ex. Sess. 1913, c. 2; 1915, c. 78; 1924, c. 87; 1925, cc. 36, 47; 1929, c. 160; 1941, c. 367, s. 1; C. S. 1443.)

Warren—Seventh Monday before the first Mon-

day in March for criminal cases only; sixth Monday before the first Monday in March for civil cases only; eleventh Monday after the first Monday in March for criminal cases only; twelfth Monday after the first Monday in March for civil cases only; second Monday after the first Monday in September for criminal cases only; third Monday after the first Monday in September for civil cases only; each to continue one week. At any term for the trial of criminal cases, civil cases may be tried by consent. (1913, c. 196; 1917, c. 256; 1941, c. 367, s. 1; C. S. 1443.)

Vance—Eighth Monday before the first Monday in March for criminal cases only; first Monday in March for criminal cases only; second Monday in March for civil cases only; fifteenth Monday after the first Monday in March for criminal cases only; sixteenth Monday after the first Monday in March for civil cases only; fourth Monday after the first Monday in September for criminal cases only; fifth Monday after the first Monday in September for civil cases only, each to continue one week. At any term for the trial of criminal cases, civil cases may be tried by consent. (1913, c. 196; 1917, c. 256; 1925, cc. 66, 165; 1927, c. 169, s. 1; C. S. 1443.)

Fourth District

The fourth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Wayne—Sixth Monday before first Monday in March, fifth Monday after the first Monday in March, twelfth Monday after the first Monday in March, second Monday before the first Monday in September, each to continue for one week; twelfth Monday after the first Monday in September, to continue for two weeks; fifth Monday before the first Monday in March, sixth Monday after the first Monday in March, thirteenth Monday after the first Monday in March, first Monday before the first Monday in September, each to continue for two weeks, for civil cases only; first Monday in March and fifth Monday after the first Monday in September, each to continue for two weeks, for civil cases only.

If no regular judge is available for the two weeks' term of court beginning on the first Monday in March, or for the second week of the terms beginning on the fifth Monday before the first Monday in March, or on the sixth Monday after the first Monday in March, or on the thirteenth Monday after the first Monday in March, or on the first Monday before the first Monday in September, the governor may assign a special judge to hold said court. (1913, c. 196; 1927, c. 77; 1929, c. 132, s. 1; 1937, c. 192; C. S. 1443.)

Johnston—First Monday after the first Monday in March; third Monday before the first Monday in September, for criminal cases only; also the first Monday in March; the third Monday before the first Monday in March; sixth Monday after the first Monday in March; and sixth Monday after the first Monday in September, each for one week for criminal and civil cases; and the eighth Monday before the first Monday in March, two weeks for civil cases; and ninth Monday after the first Monday in September, two weeks for civil cases. The governor shall assign some regular or special judge to hold said courts; fourteenth Monday after the first Monday in Septem-

ber, to continue for two weeks; second Monday before the first Monday in March; seventh Monday after the first Monday in March; and third Monday after the first Monday in September, each to continue for two weeks; and the last three terms for civil cases only; sixteenth Monday after the first Monday in March, for the trial of criminal cases only. (1913, c. 196; 1927, c. 190; 1929, c. 208; 1933, c. 81; C. S. 1443.)

Harnett—Eighth Monday before the first Monday in March, one week, for the trial of criminal cases only; fourth Monday before the first Monday in March to continue for two weeks, for the trial of civil cases only; second Monday after the first Monday in March, for the trial of criminal cases only; fourth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; ninth Monday after the first Monday in March for the trial of civil cases only; eleventh Monday after the first Monday in March, one week, for the trial of criminal cases only; fourteenth Monday after the first Monday in March, two weeks, for the trial of civil cases only; first Monday in September for criminal cases only; second Monday after the first Monday in September for the trial of civil cases only; fourth Monday after the first Monday in September to continue for two weeks, civil cases only; tenth Monday after the first Monday in September to continue for two weeks, for the trial of criminal cases only.

If no regular judge is available for any cause set out in article four, section eleven, of the constitution, for the one week term of court beginning on the second Monday after the first Monday in March, or on the first Monday in September, or for the two weeks term of court beginning on the fourth Monday after the first Monday in March, or on the fourth Monday after the first Monday in September, the governor may assign a special judge to hold said court. (1913, c. 196; 1927, cc. 161, 212; 1931, c. 147; 1937, c. 105; 1941, c. 367, s. 1; C. S. 1443.)

Chatham—Seventh Monday before the first Monday in March, to continue one week for the trial of criminal and civil cases; the first Monday in March to continue one week for the trial of civil cases only; the second Monday after the first Monday in March to continue one week for the trial of civil cases only; tenth Monday after the first Monday in March to continue for one week for the trial of civil and criminal cases; fifth Monday before the first Monday in September to continue for two weeks for the trial of civil cases only; seventh Monday after the first Monday in September to continue for one week for the trial of criminal and civil cases. (1913, c. 196; 1917, c. 228; 1919, c. 35; Pub. Loc. 1925, c. 602; 1929, c. 169; C. S. 1443.)

Lee—Fifth Monday before the first Monday in March, to continue for two weeks for the trial of civil cases only; provided, that for this term the governor shall assign a judge to hold the same from among the regular, special or emergency judges; third Monday after the first Monday in March to continue for two weeks; seventh Monday before the first Monday in September; first Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases; provided, that for the last week of said term the governor shall assign a judge to hold

the same from among the regular, special or emergency judges; eighth Monday after the first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 24; 1917, c. 228; 1929, c. 162; 1931, c. 86; 1939, c. 194; C. S. 1443.)

Fifth District

The fifth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Pitt—Seventh Monday before the first Monday in March, for civil cases only; sixth Monday before the first Monday in March; second Monday before the first Monday in March, for civil cases only; second Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; sixth Monday after the first Monday in March and seventh Monday after the first Monday in March to constitute one term for the trial of criminal and civil cases; ninth Monday after the first Monday in March to continue for one week for the trial of civil cases; eleventh Monday after the first Monday in March, for civil cases only; twelfth Monday after the first Monday in March, for civil cases only; second Monday before the first Monday in September, for civil cases only; first Monday before the first Monday in September; first Monday after the first Monday in September, for civil cases only; third Monday after the first Monday in September, for civil cases only; seventh Monday after the first Monday in September, for civil cases only; eighth Monday after the first Monday in September; eleventh Monday after the first Monday in September, to continue for one week for the trial of civil cases. For the terms beginning the ninth Monday after the first Monday in March and the eleventh Monday after the first Monday in September the governor may appoint a judge to hold the same from among the regular or emergency judges. (1913, c. 196; Ex. Sess. 1913, c. 25; 1915, cc. 111, 139; 1917, c. 217; 1919, c. 56; Ex. Sess. 1920, c. 29; 1921, c. 159; 1929, c. 153; 1931, c. 94; 1935, c. 73; 1939, c. 43; C. S. 1443.)

Craven—Eighth Monday before the first Monday in March; thirteenth Monday after the first Monday in March, and the first Monday in September for criminal cases only; fifth Monday after the first Monday in March, for civil cases and jail cases on the criminal docket; fifth Monday before the first Monday in March to continue for three weeks for the trial of civil cases only; fourth Monday after the first Monday in September; eleventh Monday after the first Monday in September, each to continue for two weeks, for civil cases only; tenth Monday after the first Monday in March, for civil cases only. (1913, c. 196; 1915, c. 111; 1917, c. 217; 1929, c. 166; C. S. 1443.)

Pamlico—Eighth Monday after the first Monday in March, and ninth Monday after the first Monday in September, each to continue for two weeks. (1913, c. 196; 1921, c. 159; C. S. 1443.)

Jones—Fourth Monday after the first Monday in March; third Monday before the first Monday in September to continue for one week for civil cases only; fifth Monday after the first Monday in November; and second Monday after the first Monday in September.

If the judge regularly assigned to the district in

which said county is situate be unable because of another regular term of court in said district, or for other cause, to hold any term of court provided in the preceding paragraph, the governor may appoint a judge to hold such term from among the regular or emergency judges. (1913, c. 196; Ex. Sess. 1913, c. 19; P. L. 1915, c. 363; 1921, c. 159; 1937, c. 29; 1939, c. 283; C. S. 1443.)

Carteret—Fourteenth Monday after the first Monday in March, to continue for two weeks; first Monday after the first Monday in March, and sixth Monday after the first Monday in September; thirteenth Monday after the first Monday in September, for civil cases only. (1913, c. 196; 1921, c. 159; 1929, c. 166, s. 2; C. S. 1443.)

Greene—First Monday before the first Monday in March, to continue for two weeks; sixteenth Monday after the first Monday in March; fourteenth Monday after the first Monday in September, to continue for two weeks; thirteenth Monday after the first Monday in September to continue for one week for the trial of both criminal and civil cases. And for this last mentioned term of court the governor shall assign a judge from among the regular, special or emergency judges. (1913, cc. 63, 171, 196; Ex. Sess. 1913, cc. 19, 47; 1915, c. 139; 1935, c. 109; C. S. 1443.)

Sixth District

The sixth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Cross Reference.—As to provision relating to all criminal terms in sixth district, see paragraph at end of sixth district division.

Lenoir—Sixth Monday before the first Monday in March, to continue for one week, for the trial of criminal cases; second Monday before first Monday in March to continue for two weeks, for the trial of civil cases only; fifth Monday after first Monday in March for the trial of criminal cases or civil cases, or both, to continue for one week; tenth Monday after first Monday in March, to continue for two weeks for the trial of civil cases only; fourteenth Monday after first Monday in March, to continue for two weeks for the trial of civil cases only; sixteenth Monday after first Monday in March for the trial of criminal cases only; second Monday before first Monday in September, to continue for one week for the trial of criminal or civil cases, or both; third Monday after first Monday in September, to continue for one week for trial of civil cases only; sixth Monday after first Monday in September, for the trial of civil or criminal cases, or both, to continue for one week; ninth Monday after first Monday in September, to continue for two weeks for the trial of civil cases only; fourteenth Monday after first Monday in September, to continue for one week for the trial of criminal or civil cases, or both, and for this term of court, the governor is hereby directed to appoint a judge to hold the same from among the regular or special judges. (1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 240; 1917, c. 13; Pub. Loc. 1925, c. 5; 1931, c. 271; 1933, c. 234, s. 1; C. S. 1443.)

Cross Reference.—As to trial in Lenoir County of uncontested divorce cases at criminal terms, see paragraph at end of sixth district division.

Duplin—Eighth Monday before the first Monday in March, to continue for two weeks, for the trial

of civil cases only; fifth Monday before the first Monday in March, to continue for one week, for the trial of criminal cases; first Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; sixth Monday after first Monday in March to continue for two weeks, the first week of which shall be for the trial of criminal cases, or civil cases, or both, and the second week for the trial of civil cases exclusively; sixth Monday before first Monday in September to continue for one week, for the trial of criminal cases only; first Monday before the first Monday in September, to continue for two weeks, for the trial of civil cases only; fourth Monday after first Monday in September, to continue for one week for the trial of criminal cases; thirteenth Monday after the first Monday in September, to continue for two weeks for the trial of civil cases only.

At all criminal terms of the superior court in the county of Duplin, uncontested divorce cases may be tried and the court may hear and determine all motions in civil matters, not requiring a jury trial and make any order, judgment or decree respecting the confirmation of judicial sales. (1913, c. 196; Ex. Sess. 1913, c. 53; 1915, c. 240; Ex. Sess. 1920, c. 81; Ex. Sess. 1921, cc. 78, 79; 1931, c. 271; 1933, c. 234, s. 1; 1935, cc. 157, 289; 1941, c. 321; C. S. 1443.)

Onslow—First Monday in March to continue for one week, for the trial of criminal cases, or civil cases, or both; twelfth Monday after the first Monday in March to continue for two weeks, for the trial of criminal and civil cases; seventh Monday before the first Monday in September, to continue for one week, for the trial of civil cases and jail cases, in accordance with the next succeeding paragraph; fifth Monday after the first Monday in September, to continue for one week for the trial of criminal and civil cases; eleventh Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases. (1913, c. 196; Ex. Sess. 1913, c. 75; 1915, c. 240; Ex. Sess. 1921, c. 78, s. 1; 1927, c. 179, s. 1; 1933, c. 234, s. 1; 1941, c. 321; 1943, c. 389; C. S. 1443.)

The July term of the superior court for Onslow County, is hereby authorized, in the discretion of the board of county commissioners signified by resolution duly adopted in apt time, to try any or all state cases which involve defendants or witnesses confined in jail to await trial. In the event such trials are ordered, by such resolution, the board of county commissioners shall cause to be drawn and summoned in the usual manner sufficient jurors to provide for the empaneling of a grand jury and to also provide for a trial jury or juries. (1931, c. 341.)

Sampson—Fourth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal or civil cases, or both; third Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; eighth Monday after the first Monday in March, to continue for two weeks, the first week of which shall be for the trial of criminal or civil cases, or both, and the second week for the trial of civil cases exclusively; fourteenth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only, and for this term of court a special or emergency judge shall be as-

signed by the governor if the regular judge is unable for any cause set out in article four, section eleven of the constitution to hold said term. Fourth Monday before the first Monday in September, to continue for two weeks, for the trial of criminal or civil cases, or both; first Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only; seventh Monday after the first Monday in September, to continue for two weeks, the first week of which shall be for the trial of criminal or civil cases, or both, and the second week for the trial of civil cases exclusively. (1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 240; Ex. Sess. 1921, c. 79, s. 2; 1927, c. 179, s. 1(b); 1933, c. 234, s. 1; 1935, c. 283; 1941, c. 351, 367, s. 1; C. S. 1443.)

At criminal terms of superior court in the sixth judicial district, civil actions which do not require a jury may be heard by consent; and at criminal terms in the county of Lenoir uncontested divorce cases may be tried by the court and a jury in all respects as at civil terms, and any order, judgment or decree may be entered in a civil action not requiring a jury trial. (1915, c. 240, s. 3; 1917, c. 13; Pub. Loc. 1925, c. 5; 1933, c. 234, s. 2; 1941, c. 367, s. 1; C. S. 1443.)

Seventh District

The seventh district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Wake—Criminal courts: Eighth Monday before the first Monday in March; first Monday in March to continue for two weeks; fourth Monday after the first Monday in March; ninth Monday after the first Monday in March; thirteenth Monday after the first Monday in March to continue for two weeks; eighth Monday before the first Monday in September; first Monday in September to continue for two weeks; fourth Monday after the first Monday in September; ninth Monday after the first Monday in September; thirteenth Monday after the first Monday in September to continue for two weeks. These terms shall be for criminal cases only, and there is scheduled a two weeks term of criminal court each for March, June, September, and December, no court for the month of August, criminal or civil, and one week of criminal court for each of the other months.

Civil courts: Seventh Monday before the first Monday in March to continue for three weeks; second Monday before the first Monday in March to continue for two weeks; second Monday after the first Monday in March to continue for two weeks; sixth Monday after the first Monday in March to continue for three weeks; tenth Monday after the first Monday in March to continue for three weeks; fifteenth Monday after the first Monday in March to continue for two weeks; second Monday after the first Monday in September to continue for two weeks; sixth Monday after the first Monday in September to continue for three weeks; tenth Monday after the first Monday in September to continue for three weeks; fifteenth Monday after the first Monday in September to continue for one week. These terms shall be for civil cases only and there shall be no term for civil cases in July or in August. (1913, c. 196; 1917, c. 116; 1919, c. 113; Ex. Sess. 1924, c. 77; 1937, cc.

163, 387; 1939, c. 378; 1941, c. 367, s. 1; 1943, c. 587; C. S. 1443.)

Franklin—Eighth Monday before the first Monday in March, to continue for two weeks for the trial of civil cases only; fourth Monday before the first Monday in March, to continue for one week for the trial of criminal cases only; first Monday in March, to continue for two weeks for the trial of civil cases only; fifth Monday after the first Monday in March to continue for one week for the trial of criminal cases only; first Monday after the first Monday in September, to continue for one week for the trial of civil cases only; fifth Monday after the first Monday in September, to continue for one week for the trial of criminal cases only; ninth Monday after the first Monday in September to continue for two weeks for the trial of civil cases only.

The courts provided in the above paragraph shall be held by the judge regularly riding the seventh judicial district.

At all criminal terms provided for in the second preceding paragraph, all motions and divorce cases may be heard, and, by consent, jury trials in all civil cases may be heard at said criminal terms. (1913, c. 196; 1917, c. 116; 1937, c. 387, ss. 1, 3; 1939, c. 184; 1941, c. 189; 1943, c. 699; C. S. 1443.)

Eighth District

The eighth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Cross Reference.—For provisions applicable to entire eighth district, see paragraph at end of eighth district division.

New Hanover—Seventh Monday before the first Monday in March; second Monday after the first Monday in March; tenth Monday after the first Monday in March; fourteenth Monday after the first Monday in March; sixth Monday before the first Monday in September; first Monday before the first Monday in September; ninth Monday after the first Monday in September, each to continue for one week, and each to be for the trial of criminal cases only.

Fourth Monday before the first Monday in March; sixth Monday after the first Monday in March; twelfth Monday after the first Monday in March; sixth Monday after the first Monday in September; thirteenth Monday after the first Monday in September, each to continue for two weeks and each to be for the trial of civil cases only. The first Monday after the first Monday in March, and the second Monday before the first Monday in September, each for one week and each to be for the trial of civil cases only. The tenth Monday after the first Monday in September for one week for the trial of both criminal and civil cases. (1913, c. 196; 1915, c. 60; 1919, c. 167; 1921, c. 14; 1941, c. 367, s. 1; C. S. 1443.)

Pender—Eighth Monday before the first Monday in March; eighth Monday after the first Monday in March; third Monday after the first Monday in September, each to continue for one week, and each to be for the trial of both criminal and civil cases. The third Monday after the first Monday in March; seventh Monday before the first Monday in September; eighth Monday after the first Monday in September, each to continue for one week, and each to be for the trial of civil cases

only. (1913, c. 196; 1921, c. 14; 1933, c. 153; 1941, c. 367, s. 1; C. S. 1443.)

Columbus—Fifth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal cases only; second Monday before the first Monday in March, to continue for two weeks, for the trial of civil cases only; ninth Monday after the first Monday in March, to continue for one week, for the trial of criminal cases only; fifteenth Monday after the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; first Monday in September to continue for one week, for the trial of criminal cases only; fourth Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only; eleventh Monday after the first Monday in September, to continue for one week, for the trial of criminal cases only; twelfth Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only. The courts provided in this paragraph shall be held by the judge regularly assigned to hold the courts of the eighth judicial district. (1913, c. 196; Ex. Sess. 1913, c. 61; 1917, c. 124; 1921, cc. 14, 149; Ex. Sess. 1921, c. 40; 1931, c. 246; 1937, c. 52; 1941, c. 367, s. 1; 1943, c. 541; C. S. 1443.)

Brunswick—The sixth Monday before the first Monday in March; eleventh Monday after the first Monday in March; first Monday after the first Monday in September, each to continue for one week, and each to be for the trial of both criminal and civil cases. The fifth Monday after the first Monday in March; the second Monday after the first Monday in September, each to continue for one week and each to be for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 56; 1917, c. 18; 1921, c. 14; 1941, c. 367, s. 1; C. S. 1443.)

All motions and orders, applications for injunctions, receiverships, etc., in the eighth district, may be heard at criminal terms upon five days notice. Divorce cases may be tried at any term of court, civil or criminal. (1921, c. 14; C. S. 1443.)

Ninth District

The ninth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Bladen—Eighth Monday before the first Monday in March for the trial of civil cases, and the trial of criminal cases, where bills have been found, and cases on appeal from the recorder's court and courts of the justices of the peace; the second Monday after the first Monday in March for the trial of criminal cases only; the eighth Monday after the first Monday in March for the trial of civil cases only; the fourth Monday before the first Monday in September for the trial of civil cases only; the second Monday after the first Monday in September for the trial of criminal cases only. Said courts to continue for one week unless the business is sooner disposed of, and grand juries to be summoned only for the March and September terms of court: Provided, that if the necessity should arise, and the county commissioners of Bladen county should so determine and order, a grand jury may be summoned by said commissioners for the January terms of court; and such grand jury so summoned shall have, perform and exercise all of the powers and

duties of regular grand juries herein provided for the March and September terms of court. At any term for the trial of criminal cases, civil cases may be tried by consent. (1913, c. 196; 1915, c. 110; 1925, c. 64; 1927, c. 166, s. 1; 1929, c. 27, s. 1; 1931, c. 96; 1933, c. 77; Pub. Loc. 1935, c. 101, s. 3; 1937, c. 159; C. S. 1443.)

If it shall appear to the board of county commissioners of Bladen County at any time before the jury is summoned for a term of superior court of Bladen County that there is not sufficient business to justify a term of such court or that there are no cases of sufficient importance to warrant the expense of a term of such court, the said board of commissioners are authorized to order that the jury for such term be not summoned, and all cases which would come on for trial at such term shall be continued. In case of the continuance of a term of superior court of Bladen County as herein provided the board of commissioners of Bladen County shall notify, or cause to be notified, the solicitor of the district, the judge holding the courts of the district and the court stenographer of their action. (1933, c. 119.)

Cumberland—Seventh Monday before the first Monday in March; first Monday in March; the first Monday after the first Monday in March; the eighth Monday after the first Monday in March; thirteenth Monday after the first Monday in March; first Monday before the first Monday in September; fifth Monday after the first Monday in September; and the eleventh Monday after the first Monday in September, the last for two weeks; each for criminal cases only. If the regular judge is unable for any reason set forth in article four, section eleven of the constitution to hold the terms above provided for beginning on the first Monday in March, the eighth Monday after the first Monday in March, and the fifth Monday after the first Monday in September, the governor shall assign a special, emergency or other regular judge to hold said terms. Third Monday before the first Monday in March; third Monday after the first Monday in March; ninth Monday after the first Monday in March; third Monday after the first Monday in September; seventh Monday after the first Monday in September, each to continue for two weeks, for civil cases only. At all criminal terms of court civil cases may be heard by consent of the parties, and motions may be heard upon ten days' notice to the adverse party prior to said term. (1913, c. 196; Ex. Sess., 1913, c. 23; 1931, c. 96; 1937, c. 159; 1941, c. 367, s. 1; C. S. 1443.)

Hoke—Sixth Monday before the first Monday in March; seventh Monday after the first Monday in March; second Monday before the first Monday in September, to continue for one week; tenth Monday after the first Monday in September; and fifth Monday before the first Monday in September, to continue for one week for the trial of civil cases and no longer. The commissioners of Hoke County, whenever in their discretion the best interests of the county demand it, shall have and are hereby granted the power and authority, by order, to abrogate, in any year, the holding of any one of the above set forth terms of court, and when said term is so abrogated, thirty days' notice of the same shall be given by said commissioners by the publication of same in a newspaper published in said county

and at the court house door: Provided, that in the event the regular term at which the grand jury is selected shall be the term abrogated then the grand jury shall continue to serve until the following term of court at which time a new grand jury shall be selected. (1913, c. 196; 1917, c. 233; Ex. Sess. 1921, c. 81; 1927, c. 153; 1931, c. 96; 1933, c. 333; 1939, c. 108; C. S. 1443.)

Robeson—Fifth Monday before the first Monday in March two weeks for the trial of criminal cases; first Monday before the first Monday in March two weeks for the trial of civil cases; fifth Monday after the first Monday in March two weeks for the trial of criminal cases; eleventh Monday after the first Monday in March two weeks for the trial of civil cases; fourteenth Monday after the first Monday in March one week for the trial of civil cases; fifteenth Monday after the first Monday in March one week for the trial of criminal cases; eighth Monday before the first Monday in September two weeks for the trial of civil cases; third Monday before the first Monday in September one week for the trial of criminal cases; first Monday in September two weeks for the trial of criminal cases; fifth Monday after the first Monday in September two weeks for the trial of civil cases; ninth Monday after the first Monday in September one week for the trial of criminal cases; thirteenth Monday after the first Monday in September two weeks for the trial of civil cases; fifteenth Monday after the first Monday in September one week for the trial of criminal cases.

There shall also be held in Robeson county superior courts, to which judges shall be assigned, the following terms: Second Monday after the first Monday in March one week for the trial of criminal cases; ninth Monday after the first Monday in March two weeks for the trial of criminal cases; third Monday after the first Monday in September one week for the trial of criminal cases; seventh Monday after the first Monday in September one week for the trial of criminal cases.

At all criminal terms all motions and divorce cases may be heard and jury trials in all civil cases may be heard by consent. The commissioners of Robeson county, by and with the consent and approval of the solicitor of the ninth judicial district, in writing, may call off any term of superior court in said county scheduled above for the trial of criminal cases to which the judge must be assigned. The grand jury shall convene at all criminal terms of said courts unless the solicitor of the ninth judicial district shall, prior to the said court, notify the sheriff of Robeson county not to assemble the grand jury for said term, and such notice, in writing, shall be filed with the clerk of the board of commissioners of said county, and shall be spread upon the minutes of the board of commissioners thereof. (1913, c. 196; 1915, c. 208; 1919, c. 105; 1923, c. 209; Pub. Loc. 1925, cc. 12, 22, 519; 1927, c. 84; 1931, c. 96; 1935, c. 132; 1937, c. 167; 1939, c. 171, s. 2; C. S. 1443.)

In addition there shall also be held in Robeson county, superior courts to which judges shall be assigned, the following terms:

Seventh Monday before the first Monday in March two weeks for the trial of civil cases; seventh Monday after the first Monday in March one week for the trial of civil cases; first Monday before the first Monday in September one week for the trial of civil cases; tenth Monday after

the first Monday in September one week for the trial of civil cases. (1939, c. 171, s. 1.)

Tenth District

The tenth district shall be composed of the following counties, and the superior courts thereof shall be held in each year at the following times, to-wit:

Alamance—First Monday before the first Monday in March, tenth Monday after the first Monday in March, third Monday before the first Monday in September and twelfth Monday after the first Monday in September, each for one week, for the trial of criminal cases only; fifth Monday before the first Monday in March, fourth Monday after the first Monday in March, each for one week, twelfth Monday after the first Monday in March, two weeks, fifth Monday before the first Monday in September, one week, first Monday in September and tenth Monday after the first Monday in September each for two weeks, all for the trial of civil cases only.

In case of conflict of any of the regularly established terms of the courts of the tenth judicial district with the terms above set out, the said terms of court herein established shall be considered special terms, and the governor may assign a special or emergency judge to hold said terms of the superior court of Alamance County when the judge holding the regular terms of court in the district is unable to hold said terms. (1913, c. 196; 1915, c. 53; 1921, c. 134; Ex. Sess. 1921, c. 36; 1929, c. 172; 1931, c. 228; C. S. 1443.)

Durham—Eighth Monday before the first Monday in March; second Monday before the first Monday in March; third Monday after the first Monday in March, for a term of two weeks; eleventh Monday after the first Monday in March; sixteenth Monday after the first Monday in March; seventh Monday before the first Monday in September; first Monday in September, for a term of two weeks; fifth Monday after the first Monday in September; thirteenth Monday after the first Monday in September, each for the trial of criminal cases only; seventh Monday before the first Monday in March, for a term of three weeks; first Monday before the first Monday in March, for a term of four weeks; fifth Monday after the first Monday in March, for a term of three weeks; eighth Monday after the first Monday in March, for a term of two weeks; twelfth Monday after the first Monday in March, for a term of three weeks; fifth Monday before the first Monday in September, for a term of two weeks; second Monday after the first Monday in September, for a term of three weeks; sixth Monday after the first Monday in September, for a term of two weeks; eighth Monday after the first Monday in September, for a term of two weeks, each for the trial of civil cases only.

In case of conflict of any of the regularly established terms of the courts of the tenth judicial district with the terms above set out, the said terms of court here established shall be considered special terms, and the governor may assign a special or emergency judge to hold said terms of the superior court of Durham county when the judge holding the regular terms of court in the district is unable to hold said terms for any cause set out in article four, section eleven, of the constitution.

(1913, c. 196; 1915, c. 68; Ex. Sess. 1921, c. 36; Ex. Sess. 1924, c. 39; 1929, c. 243; 1931, cc. 224, 419; 1941, cc. 274, 367, s. 1; C. S. 1443.)

Granville—Fourth Monday before the first Monday in March, fifth Monday after the first Monday in March, tenth Monday after the first Monday in September, each term for two weeks; sixth Monday before the first Monday in September, one week; seventh Monday after the first Monday in September, one week, for civil cases only. (1913, c. 196; 1915, c. 7; Ex. Sess. 1921, c. 36; 1923, c. 131; C. S. 1443.)

Orange—Tenth Monday after the first Monday in March, fifteenth Monday after the first Monday in March, fourth Monday after the first Monday in September, for civil cases only; second Monday after the first Monday in March, first Monday before the first Monday in September, fourteenth Monday after the first Monday in September.

The fourteenth Monday after the first Monday in March, to continue for one week, for the trial of criminal and civil cases and is hereby constituted a mixed term of court;

The second Monday before the first Monday in September to continue for one week for the trial of criminal and civil cases and is hereby constituted a mixed term of court;

The first Monday before the first Monday in September to continue for one week for the trial of civil cases only.

For each separate week of court there shall be separate jurors summoned. If the judge regularly assigned to the district in which said county is situated is unable, because of another regular term of court in the said district, or for other causes, to hold any term of court provided for in the three preceding paragraphs, then the governor shall assign another judge to hold said term. (1913, c. 196; 1915, cc. 33, 54; 1917, c. 52; Ex. Sess. 1921, c. 36; 1927, c. 205; 1929, c. 172, s. 2; C. S. 1443.)

Person—Fifth Monday before the first Monday in March; fourth Monday before the first Monday in March; seventh Monday after the first Monday in March; fourth Monday before the first Monday in September; sixth Monday after the first Monday in September. All of said terms shall be for the trial of criminal and civil cases, except the term beginning on the fourth Monday before the first Monday in March, which shall be for the trial of civil cases only. (1913, c. 196; 1915, c. 54; Ex. Sess. 1921, c. 36; 1929, c. 23; 1941, c. 367, s. 1; C. S. 1443.)

Western Division

Eleventh District

The eleventh district will be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Alleghany—Eighth Monday after the first Monday in March, and the fourth Monday after the first Monday in September, both terms to be held by the regular judge, and both terms to be for the trial of civil and criminal cases. (1913, c. 196; 1935, c. 246; 1937, c. 413, s. 4; 1941, c. 367, s. 1; C. S. 1443.)

Ashe—Sixth Monday after the first Monday in March, and seventh Monday after the first Monday in September (both by regular judge), for the trial of criminal cases only; twelfth Monday

after the first Monday in March, to continue for two weeks, for the trial of civil cases only; sixth Monday before the first Monday in September, to continue for two weeks, for the trial of civil cases only (regular judge): Provided, that motions and uncontested civil cases may be heard at either of the terms designated for the trial of criminal cases only. (1913, c. 196; Ex. Sess. 1913, c. 34; Ex. Sess. 1921, c. 32; 1935, c. 246; 1937, c. 413, s. 4; C. S. 1443.)

Forsyth—Eighth Monday before the first Monday in March; fourth Monday before the first Monday in March; first Monday in March; fourth Monday after the first Monday in March; ninth Monday after the first Monday in March; fourteenth Monday after first Monday in March; eighth Monday before first Monday in September; first Monday in September; fifth Monday after first Monday in September; ninth Monday after the first Monday in September; thirteenth Monday after first Monday in September, each of said terms to continue for two weeks, for the trial of criminal and civil cases; the seventh Monday before the first Monday in March, to continue for three weeks; the third Monday before the first Monday in March, to continue for three weeks; the first Monday after the first Monday in March, to continue for three weeks; the sixth Monday after the first Monday in March to continue for three weeks; the twelfth Monday after the first Monday in March to continue for two weeks; the fifteenth Monday after the first Monday in March to continue for two weeks; the second Monday after the first Monday in September, to continue for three weeks; the seventh Monday after the first Monday in September to continue for two weeks; the eleventh Monday after the first Monday in September, to continue for two weeks, each of said terms for the trial of civil cases only.

The governor shall assign a special, emergency or any regular judge to hold the following courts hereinbefore provided for when the regular judge assigned to the district is unable to hold same for any cause set out in article four, section eleven, of the constitution.

The second week of the term to try civil and criminal cases of the term beginning the eighth Monday before the first Monday in March; the second week of the civil and criminal term, beginning the fourth Monday before the first Monday in March; the second week of the civil and criminal term beginning the first Monday in March; the entire civil term beginning the sixth Monday after the first Monday in March; the second week of the civil and criminal term beginning the fourteenth Monday after the first Monday in March; the third week of the term beginning the second Monday after the first Monday in September; the first week of the civil term beginning the seventh Monday after the first Monday in September. All other terms and weeks of terms shall be presided over by the regular judge assigned to hold courts in the eleventh judicial district. (1913, c. 196; 1917, c. 169; Pub. Loc. 1917, c. 375; 1919, c. 87; 1923, c. 151; Pub. Loc. 1925, c. 19; 1927, c. 197; 1929, c. 131; 1933, cc. 231, 306; 1935, c. 246; 1937, c. 158; 1937, c. 413, ss. 4, 5; 1941, c. 367, s. 1; C. S. 1443.)

Twelfth District

The twelfth district is composed of Guilford

County and Davidson County. The superior court of Guilford County is composed of two divisions, the Greensboro division and the High Point division; and the superior court thereof shall be opened and held at the following times and places, to-wit:

In the Greensboro division at the county courthouse in Greensboro, for the trial of criminal cases only:

Ninth Monday before the first Monday in March, one week; sixth Monday before the first Monday in March, one week; fourth Monday before the first Monday in March, one week; first Monday in March, one week; third Monday after the first Monday in March, one week; seventh Monday after the first Monday in March, one week; eleventh Monday after the first Monday in March, one week; fifteenth Monday after the first Monday in March, one week; eighth Monday before the first Monday in September, one week; fifth Monday before the first Monday in September, one week; first Monday after the first Monday in September, one week; third Monday after the first Monday in September, one week; sixth Monday after the first Monday in September, one week; eighth Monday after the first Monday in September, three weeks; thirteenth Monday after the first Monday in September, one week; and fifteenth Monday after the first Monday in September, one week.

In the High Point Division at the county building in High Point, for the trial of criminal cases only:

Eighth Monday before the first Monday in March, one week; first Monday after the first Monday in March, one week; eighth Monday after the first Monday in March, one week; twelfth Monday after the first Monday in March, one week; seventh Monday before the first Monday in September, one week; second Monday after the first Monday in September, one week; seventh Monday after the first Monday in September, one week; and fourteenth Monday after the first Monday in September, one week.

In the Greensboro division at the county courthouse in Greensboro for the trial of civil cases only:

Eighth Monday before the first Monday in March, three weeks; second Monday before the first Monday in March, two weeks; second Monday after the first Monday in March, one week; fifth Monday after the first Monday in March, three weeks; thirteenth Monday after the first Monday in March, two weeks; third Monday before the first Monday in September, one week; first Monday before the first Monday in September, two weeks; third Monday after the first Monday in September, three weeks; eleventh Monday after the first Monday in September, two weeks; and thirteenth Monday after the first Monday in September, two weeks.

In the High Point division at the county building in High Point, for the trial of civil cases, only:

Fourth Monday before the first Monday in March, two weeks; third Monday after the first Monday in March, two weeks; tenth Monday after the first Monday in March, two weeks; fourth Monday before the first Monday in Sep-

tember, one week; second Monday after the first Monday in September, one week; and the eighth Monday after the first Monday in September, two weeks.

Any of the terms of court assigned or provided as above set out to be held in either the Greensboro division or the High Point division of the superior court of Guilford County may be transferred to, and held in, the other division of the said superior court of Guilford County by order of the governor: Provided, however, that the president of the Greensboro Bar Association and the president of the High Point Bar Association recommend and agree in writing thereto.

In Davidson County at the courthouse in Lexington for the trial of criminal cases only:

Fifth Monday before the first Monday in March, one week; ninth Monday after the first Monday in March, one week; sixteenth Monday after the first Monday in March, one week; and second Monday before the first Monday in September, one week.

In Davidson County at the courthouse in Lexington for the trial of civil cases only:

Second Monday before the first Monday in March, two weeks; fifth Monday after the first Monday in March, two weeks; twelfth Monday after the first Monday in March, two weeks; first Monday after the first Monday in September, two weeks; and fourth Monday after the first Monday in September, two weeks.

In Davidson County at the courthouse in Lexington for the trial of both criminal and civil cases:

Eleventh Monday after the first Monday in September, two weeks.

If the judge regularly assigned to the district is unable to hold any term as above set out then the governor shall assign another judge to hold such term. (1913, c. 196; Ex. Sess. 1913, c. 14; 1921, cc. 22, 42; 1923, c. 169; 1927, c. 211; 1931, c. 114; 1933, cc. 14, 404; 1935, c. 184; 1939, c. 42; 1941, c. 367, s. 1; 1943, c. 682; C. S. 1443.)

Thirteenth District

The thirteenth district shall be composed of the following counties, and the superior courts shall be held at the following times, to-wit:

Union—Second Monday before the first Monday in March to continue for two weeks for the trial of civil and criminal cases; ninth Monday after the first Monday in March for the trial of civil and criminal cases; second Monday before the first Monday in September to continue for two weeks and for the trial of civil and criminal cases; sixth Monday after the first Monday in September to continue for two weeks and for the trial of civil and criminal cases.

If it shall appear to the Board of County Commissioners of Union County thirty days prior to the convening of either of said terms hereinabove provided for that the condition of the criminal docket does not justify the assembling of the grand jury for such term, then the board of county commissioners may in their discretion direct the clerk of superior court of said county to notify such grand jurors and the solicitor of said district of such fact and that they need not appear at said term.

If it shall appear to the board of commissioners

of Union County thirty days prior to the convening of either of said terms hereinabove provided for that the civil or criminal docket, or both, do not justify the holding of such term, or the second week thereof, in the event such term be a two-weeks term, then the board of county commissioners in their discretion, and upon the recommendation of the Union County Bar Association, may notify the clerk of the superior court that said term or the second week thereof, has been dispensed with, and the clerk of said court shall not make a calendar of cases to be tried at such term, or second week thereof, as the case may be, and the judge assigned to hold the courts for said district shall be notified forthwith by said clerk that such term will not be held. (1913, c. 196; Ex. Sess. 1913, c. 22; 1915, c. 72; 1917, cc. 28, 117; 1921, c. 55; 1933, c. 112; 1939, c. 25; 1943, c. 654; C. S. 1443.)

Anson—Seventh Monday before the first Monday in March, for criminal cases only; first Monday in March for civil cases only; sixth Monday after the first Monday in March to continue for two weeks; fourteenth Monday after the first Monday in March, for civil cases only; first Monday after the first Monday in September, for civil cases only; third Monday after the first Monday in September, for criminal cases only; tenth Monday after the first Monday in September, for civil cases only. (1913, c. 196; Ex. Sess. 1921, c. 16; 1923, c. 112; 1927, c. 181; 1929, c. 157; C. S. 1443.)

Scotland—First Monday after the first Monday in March for one week, for the trial of criminal and civil cases; eighth Monday after the first Monday in March for one week, for the trial of civil cases only; fourth Monday before the first Monday in September for one week, for the trial of criminal and civil cases; eighth Monday after the first Monday in September for one week, for the trial of civil cases only; twelfth Monday after the first Monday in September for two weeks, for the trial of criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 22; 1917, c. 105; 1923, c. 178; 1933, c. 116; 1937, c. 371; C. S. 1443.)

Moore—Sixth Monday before the first Monday in March, for the trial of criminal cases only, to continue for one week; third Monday before the first Monday in March, for the trial of civil cases only, to continue for one week; eleventh Monday after the first Monday in March, to continue for two weeks, the first week for the trial of criminal cases only and the second week for the trial of civil cases only; third Monday before the first Monday in September, to continue for one week, for the trial of criminal cases only; second Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only.

Each of the terms designated for the trial of criminal cases shall also have jurisdiction to hear motions in civil actions on notice; and civil cases requiring a jury may, by consent of parties thereto, be tried at such terms. Uncontested divorce cases may be tried at any criminal term of superior court by permission of the presiding judge. (1913, c. 196; Ex. Sess. 1913, c. 30; 1915, c. 64; 1929, c. 229; 1943, c. 629; C. S. 1443.)

Richmond — Eighth Monday before the first Monday in March to continue for one week; fifth Monday after the first Monday in March to con-

tinue for one week; sixth Monday before the first Monday in September to continue for one week; fourth Monday after the first Monday in September to continue for one week, all for the trial of criminal cases; fourth Monday before the first Monday in March to continue for one week; second Monday after the first Monday in March to continue for one week; twelfth Monday after the first Monday in March to continue for one week; fifteenth Monday after the first Monday in March to continue for one week; seventh Monday before the first Monday in September to continue for one week; first Monday in September to continue for one week; ninth Monday after the first Monday in September to continue for one week, all for the trial of civil cases.

Each of the terms designated for the trial of criminal cases shall also be the return term for such civil process as may be returnable at term, and for the hearing of motions in civil actions; and civil cases requiring a jury, may, by consent of the parties thereto, be tried at such criminal terms.

The governor shall assign an emergency, or any other judge, to hold any of the terms of the superior court for Richmond County when the judge regularly holding the courts in said district for any cause is unable to hold any of said terms. (1913, c. 196; 1915, c. 72; 1917, s. 117; 1919, c. 93; 1921, c. 77; Ex. Sess. 1921, c. 16; 1923, cc. 112, 184; 1925, c. 241; 1931, c. 82; 1935, c. 3; C. S. 1443.)

Stanly—Fourth Monday before the first Monday in March to continue for two weeks, for civil cases only; fourth Monday after the first Monday in March; tenth Monday after the first Monday in March, for civil cases only; eighth Monday before the first Monday in September; first Monday in September to continue for two weeks, for civil cases only; fifth Monday after the first Monday in September, for civil cases only; eleventh Monday after the first Monday in September.

Each of the terms set for the trial of criminal cases shall also be the return term for such civil process as may be returnable at term; and for the hearing of motions in civil actions; and for the trial of civil cases requiring a jury where issues are drawn by consent of the parties thereto; and for the trial of actions for divorce and other actions in which no answer has been filed when the time for filing the answer has expired.

The governor shall assign an emergency, or any other judge, to hold any of the terms of the superior court for Stanly County when the judge regularly holding the courts in said district for any cause is unable to hold any of said terms. (1913, c. 196; 1933, c. 240; C. S. 1443.)

Fourteenth District

The fourteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Gaston—Seventh Monday before the first Monday in March; first Monday after the first Monday in March; seventh Monday after the first Monday in March; thirteenth Monday after the first Monday in March; sixth Monday before the first Monday in September; first Monday after the first Monday in September; seventh Monday after the first Monday in September; twelfth Monday after the first Monday in September, each to continue for

one week, for the trial of criminal cases exclusively; sixth Monday before the first Monday in March; second Monday after the first Monday in March; eleventh Monday after the first Monday in March; fifth Monday before the first Monday in September; second Monday after the first Monday in September; thirteenth Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases exclusively; eighth Monday after the first Monday in September to continue for one week for the trial of civil cases only: Provided, that when the judge regularly assigned to hold the courts of the district is unable to do so for any cause set out in article four, section eleven, of the constitution, a special or emergency judge shall be assigned by the governor to hold said courts in Gaston county, and such special or emergency judge shall have all the powers conferred upon any resident or presiding judge.

At all criminal terms of said court, civil trials which do not require a jury may be heard by consent of the parties; and at all criminal terms of said court, upon five days' notice to the adverse party, any order, application for injunction, receivership, motions, etc., may be heard in same manner as at civil terms. (1913, c. 196; Ex. Sess. 1913, c. 12; 1915, c. 153; 1919, c. 187; Ex. Sess. 1920, c. 39; 1925, c. 237; 1931, c. 242; 1941, c. 367, s. 1; C. S. 1443.)

Mecklenburg—Eighth Monday before the first Monday in March; first Monday before the first Monday in March; tenth Monday after the first Monday in March; fourteenth Monday after the first Monday in March; eighth Monday before the first Monday in September, which last named term only is to continue two weeks; first Monday before the first Monday in September; fourth Monday after the first Monday in September; tenth Monday after the first Monday in September, which eight terms are for the trial of criminal cases exclusively; fourth Monday before the first Monday in March, to continue three weeks; the first Monday in March; fourth Monday after the first Monday in March; eighth Monday after the first Monday in March; eleventh Monday after the first Monday in March; the first Monday in September; fifth Monday after the first Monday in September; eighth Monday after the first Monday in September; eleventh Monday after the first Monday in September, which last named eight terms are to continue for two weeks; fifteenth Monday after the first Monday in March, and all of the last named ten terms are for the trial of civil cases exclusively: Provided, that the board of county commissioners of Mecklenburg county may in their discretion, by an order at their regular meeting held on the first Monday in March in any year, provide for the holding of a term of court for the seventh Monday after the first Monday in March, and for the trial of civil and criminal cases, either or both, at said term.

No process nor other writ of any kind pertaining to civil actions shall be made returnable to any of the criminal terms, and no business pertaining to civil actions shall be transacted at the criminal terms for Mecklenburg county.

In addition to the courts above set out for Mecklenburg county, the following terms of superior court for the trial of civil cases in Mecklenburg

county shall be held, as follows: eighth Monday before the first Monday in March; sixth Monday before the first Monday in March; fourth Monday before the first Monday in March; second Monday before the first Monday in March; first Monday in March; second Monday after the first Monday in March; fourth Monday after the first Monday in March; sixth Monday after the first Monday in March; eighth Monday after the first Monday in March; tenth Monday after the first Monday in March; twelfth Monday after the first Monday in March; fourteenth Monday after the first Monday in March; the first Monday in September; the second Monday after the first Monday in September; the fourth Monday after the first Monday in September; the sixth Monday after the first Monday in September; the eighth Monday after the first Monday in September; the tenth Monday after the first Monday in September; the twelfth Monday after the first Monday in September; and the fourteenth Monday after the first Monday in September. Said terms of court may be held contemporaneously with other courts in said county or district, shall be for two weeks each, shall be for the trial of civil cases only, and shall be held by regular, special, or emergency judges who shall be assigned by the governor, and the special or emergency judges who preside over said additional terms of court shall have all the powers conferred upon any resident or regular judge.

In addition to the courts above set out for Mecklenburg county, the following terms of superior court for the trial of criminal cases in Mecklenburg county shall be held, as follows: sixth Monday after the first Monday in March; fifth Monday before the first Monday in September; fourth Monday before the first Monday in September, each to continue for one week. The sixth Monday before the first Monday in March; the second Monday after the first Monday in March; the sixteenth Monday after the first Monday in March; the third Monday before the first Monday in September; the second Monday after the first Monday in September; and the thirteenth Monday after the first Monday in September. Said terms of court may be held contemporaneously with other courts in said county or district, shall be for two weeks each, shall be for the trial of criminal cases only, and shall be held by regular, special, or emergency judges who shall be assigned by the governor, and the special or emergency judges who preside over said additional terms of court shall have all the powers conferred upon any resident or regular judge. (1913, c. 196; Ex. Sess. 1913, cc. 11, 18; 1915, c. 153; 1919, c. 187; Ex. Sess. 1920, c. 39; 1935, c. 48; 1937, c. 27; 1939, c. 9; 1941, c. 367, s. 1; C. S. 1443.)

Fifteenth District

The fifteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Iredell—Fifth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; first Monday after the first Monday in March, to continue for one week, for civil cases only; eleventh Monday after the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; fifth Monday before the first Monday in September

ber, to continue for two weeks, for criminal and civil cases; ninth Monday after the first Monday in September, to continue for two weeks for criminal and civil cases. (1913, c. 196; 1921, c. 121, s. 2; 1923, c. 129; C. S. 1443.)

Randolph—Second Monday after the first Monday in March, to continue for two weeks, for civil cases only; fourth Monday after the first Monday in March, for criminal cases; seventh Monday before the first Monday in September, to continue for two weeks for civil cases only; the first Monday in September for criminal cases; thirteenth Monday after the first Monday in September, to continue for two weeks for criminal and civil cases. In addition to the regular terms of superior court now provided for by law for Randolph County there shall be held in Randolph County three additional terms of superior court as follows, to-wit: On the fifth Monday before the first Monday in March, to continue for two weeks, for the trial of civil cases only. On the sixteenth Monday after the first Monday in March for a term of one week, for the trial of criminal cases only. On the seventh Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only. This paragraph shall not be construed to repeal or abolish any terms now provided for the fifteenth judicial district, but in case of conflict of any of the regularly established terms of court of the fifteenth judicial district with the terms created in this paragraph, the said terms of court hereby and herein established shall be considered special terms, and the governor may assign the judge to hold said terms of superior court for Randolph County, when the judge holding the regular terms of court in the district is unable to hold said terms. (1913, c. 196; Ex. Sess. 1913, c. 31; 1921, c. 121, s. 3; Ex. Sess. 1921, c. 22; 1923, c. 229; Ex. Sess. 1924, c. 23; 1925, c. 156; Pub. Loc. 1939, c. 78; C. S. 1443.)

Rowan—Third Monday before the first Monday in March, to continue for two weeks; first Monday in March, to continue for one week, for civil cases only; ninth Monday after the first Monday in March, to continue for two weeks; first Monday after the first Monday in September, to continue for two weeks; fifth Monday after the first Monday in September, for civil cases only; eleventh Monday after the first Monday in September, to continue for two weeks. (1913, c. 196; Ex. Sess. 1913, c. 5; 1921, c. 31; C. S. 1443.)

In addition to the regular terms of court now prescribed by law for Rowan County, there shall be held in Rowan County two additional terms of the superior court as follows, to-wit: On the sixth Monday after the first Monday in September to continue for one week for the trial of civil cases only; on the first Monday after the first Monday in March to continue for one week for the trial of civil cases only. This paragraph shall not be construed to repeal or abolish any terms of court now provided for the fifteenth judicial district, but in case of conflict of any of the regularly established terms of the courts of the fifteenth judicial district with the terms above set out, the said terms of court herein established shall be considered special terms and the governor may assign a special or emergency judge to hold said terms of superior court of Rowan County when

the judge holding the regular terms of court in the district is unable to hold said terms. (1933 c. 274.)

Cabarrus—Eighth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; first Monday before the first Monday in March, to continue for two weeks, for civil cases only; seventh Monday after the first Monday in March, to continue for two weeks, for criminal and civil cases; fourteenth Monday after the first Monday in March, to continue for two weeks, for civil cases only; second Monday before the first Monday in September, to continue for one week, for criminal cases only; first Monday before the first Monday in September, to continue for one week, for civil cases only; sixth Monday after the first Monday in September, to continue for two weeks, for criminal and civil cases; tenth Monday after the first Monday in September, to continue for one week, for civil cases only; thirteenth Monday after the first Monday in September, to continue for one week, for civil cases only.

The governor shall assign an emergency or any other judge to hold any of the terms of the superior court of Cabarrus county when the judge holding courts in said district is unable to hold said terms. (1913, c. 196; 1921, c. 121, s. 2; 1933, c. 76; 1935, c. 177; 1939, c. 377; C. S. 1443.)

Montgomery—Sixth Monday before the first Monday in March for criminal cases: Provided, motions on the civil docket may be heard at said term, and uncontested divorce cases and, with the consent of the parties thereto, any other civil case requiring a jury may also be tried at said term. Fifth Monday after the first Monday in March, to continue for two weeks, for civil cases only. Eighth Monday before the first Monday in September; third Monday after the first Monday in September, and eighth Monday after the first Monday in September for civil cases; fourth Monday after the first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 183; 1917, c. 122; 1921, c. 121, s. 3; 1927, c. 193, s. 1; 1941, c. 98; C. S. 1443.)

Alexander—Fourth Monday before the first Monday in March, to continue for two weeks, for the trial of civil and criminal cases; first Monday before the first Monday in September, to continue for two weeks, for the trial of criminal and civil cases. For these terms of court the governor may assign a judge to hold the same from among the regular, special or emergency judges. (1913, c. 196; 1921, c. 166; 1933, c. 250, s. 4; 1935, cc. 101, 252, s. 2; 1937, c. 214; C. S. 1443.)

Sixteenth District

The sixteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Cleveland—Third Monday after the first Monday in March for two weeks; eleventh Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; sixth Monday before the first Monday in September for two weeks; first Monday after the first Monday in September to continue for one week for the trial of civil cases only; second Monday after the first Monday in September, one week, for the trial of civil cases only; eighth Monday after the first Monday in September for two weeks; eighth

Monday before the first Monday in March, for one week.

For the terms commencing on the eleventh Monday after the first Monday in March, and on the first Monday after the first Monday in September, the governor may assign a judge to hold such terms from among the regular, special or emergency judges. (1913, c. 196; 1915, c. 173; 1917, c. 245; 1927, c. 154; 1931, cc. 240, 456; 1935, cc. 194, 195; C. S. 1443.)

Lincoln—Sixth Monday before the first Monday in March to continue for two weeks, the second week for civil cases only; seventh Monday before the first Monday in September; sixth Monday after the first Monday in September; the last term to continue for two weeks, the second week for civil cases only. (1913, c. 196; 1915, c. 210; 1925, c. 26; C. S. 1443.)

Burke—Second Monday before the first Monday in March, to continue for one week, for the trial of civil and criminal cases; first Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; thirteenth Monday after the first Monday in March, to continue for three weeks, for the trial of civil and criminal cases; fourth Monday before the first Monday in September, to continue for two weeks, for the trial of civil and criminal cases; third Monday after the first Monday in September, to continue for three weeks, for the trial of civil cases only; fourteenth Monday after the first Monday in September, to continue for two weeks, for the trial of civil and criminal cases: Provided, however, that the board of commissioners of Burke County, in any year, upon the written petition of a majority of the practicing attorneys resident in said county, may, by resolution duly adopted, dispense with and abrogate the holding of that term of said court which by the provisions of this section commences on the thirteenth Monday after the first Monday in March. (1913, c. 196; 1915, c. 67; Ex. Sess. 1920, c. 5; Ex. Sess. 1921, c. 90, s. 3; Pub. Loc. 1925, c. 306; 1931, c. 343; C. S. 1443.)

Caldwell—First Monday before the first Monday in March; second Monday before the first Monday in September, each to continue two weeks; eleventh Monday after the first Monday in March, to continue two weeks, for civil cases only; twelfth Monday after the first Monday in September, to continue two weeks, for the trial of civil and criminal cases; the eighth Monday before the first Monday in March, to continue two weeks, for the trial of civil cases only; ninth Monday after the first Monday in March, to continue one week, for the trial of civil and criminal cases; fourth Monday after the first Monday in September, to continue two weeks, for the trial of civil cases only. For the last three terms provided for above, the governor may assign a regular, special or emergency judge when the judge regularly assigned to the district is unable to hold said terms for any cause set out in article four, section eleven, of the constitution. (1913, c. 196; 1915, c. 35; Ex. Sess. 1921, c. 90, s. 2; 1941, c. 367, s. 1; C. S. 1443.)

Catawba—Seventh Monday before the first Monday in March, to continue for two weeks and for the trial of civil cases only, fourth Monday before the first Monday in March, to continue for two weeks; ninth Monday after the first Mon-

day in March, to continue for two weeks, for the trial of civil cases only; ninth Monday before the first Monday in September, to continue for two weeks; first Monday in September, to continue for two weeks, for the trial of civil cases only; tenth Monday after the first Monday in September, to continue for one week, for the trial of criminal cases only; thirteenth Monday after the first Monday in September, to continue for one week and for the trial of civil cases only. Fifth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; eleventh Monday after the first Monday in September, to continue for one week, for the trial of civil cases only: Provided, that the board of county commissioners may by resolution, adopted not less than 30 days prior to the convening of either of the last two courts, determine that the holding of such court is not necessary and cancel the same, in which case notice of such action shall immediately be given to the governor to the end that the judge assigned to said court may be relieved from such assignment. (1913, c. 196; Ex. Sess. 1913, c. 7; Ex. Sess. 1921, c. 47; c. 90, s. 1; 1923, c. 18; 1925, c. 13, ss. 1, 2; 1933, c. 311; C. S. 1443.)

Watauga—Seventh Monday after the first Monday in March, to continue for two weeks; second Monday after the first Monday in September, to continue for one week; fourteenth Monday after the first Monday in March to continue for a term of two weeks, for the trial of civil cases only. (1913, c. 196; 1921, c. 166; 1931, c. 424; 1933, c. 250, s. 2; 1935, c. 274; C. S. 1443.)

Seventeenth District

The seventeenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Yadkin—Fourth Monday before the first Monday in March for three weeks for the trial of criminal and civil cases; second Monday before the first Monday in September for one week for the trial of criminal cases; eleventh Monday after the first Monday in September for two weeks for the trial of civil cases. (1913, c. 196; Ex. Sess. 1920, c. 42; 1921, c. 166; 1925, c. 65; 1941, c. 367, s. 1; C. S. 1443.)

Wilkes—Seventh Monday before the first Monday in March for three weeks for the trial of civil cases only; first Monday in March for three weeks for the trial of both civil and criminal cases; eighth Monday after the first Monday in March for two weeks for the trial of civil cases only; thirteenth Monday after the first Monday in March for two weeks for the trial of civil cases only; fourth Monday before the first Monday in September for two weeks for the trial of both civil and criminal cases; fourth Monday after the first Monday in September for two weeks for the trial of civil cases only; fourteenth Monday after the first Monday in September for two weeks for the trial of civil and criminal cases.

If, in the opinion of the board of commissioners of Wilkes county, it is not advisable or necessary to hold the term of court beginning on the fourteenth Monday after the first Monday in September, and such fact is so stated in a resolution duly adopted by a majority of said board on or before the second Monday in November next preceding the day for the convening of said term, then the

said term shall not be held on the fourteenth Monday after the first Monday in September of that year. Upon the adoption of such a resolution, the clerk of the board shall immediately notify the judge, who has been assigned to hold said term, that same will not be held, and no jury for the said term shall be drawn. (1913, c. 196; 1919, c. 165; 1921, c. 166; 1935, c. 105, s. 1, c. 192; 1937, c. 48; 1941, c. 367, s. 1; C. S. 1443.)

Davie—Second Monday after the first Monday in March; twelfth Monday after the first Monday in March, for civil cases only; first Monday before the first Monday in September; and thirteenth Monday after the first Monday in September, last term for civil cases only. (1913, c. 196; 1921, cc. 31, 121, 166; 1935, c. 105, s. 2; C. S. 1443.)

Mitchell—Fourth Monday after the first Monday in March, two weeks; sixth Monday before the first Monday in September, two weeks for civil cases only; second Monday after the first Monday in September for two weeks. (1913, c. 196; 1921, c. 166; Ex. Sess. 1921, c. 33; 1927, c. 168; 1929, c. 10; 1933, c. 250, s. 3; 1935, c. 1; 1941, c. 212, s. 1; C. S. 1443.)

Avery—Fifth Monday after the first Monday in March, for two weeks, for the trial of both criminal and civil cases; ninth Monday before the first Monday in September, two weeks, for the trial of both civil and criminal cases; sixth Monday after the first Monday in September, for two weeks, for the trial of both criminal and civil cases. (1913, c. 196; 1915, c. 169; 1921, c. 166; Ex. Sess. 1921, c. 33; 1923, c. 90; 1931, c. 84; 1933, cc. 152, 250, s. 1; 1941, c. 212, s. 1, c. 367, s. 1; 1943, c. 162; C. S. 1443.)

Eighteenth District

The eighteenth district shall be composed of the following counties and the superior courts thereof shall be held at the following times, to-wit:

Henderson—Eighth Monday before the first Monday in March to continue for two weeks for the trial of civil cases only; the first Monday in March to continue for two weeks for the trial of both criminal and civil cases; the eighth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only, and the twelfth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; the fifth Monday after the first Monday in September to continue for two weeks for the trial of both criminal and/or civil cases or both; eleventh Monday after the first Monday in September to continue for two weeks for the trial of civil cases only. (1913, c. 196; 1917, c. 115; 1919, c. 162; Ex. Sess. 1921, c. 24; 1923, c. 204; 1927, c. 207, s. 1; 1933, c. 117; 1935, c. 127; C. S. 1443.)

McDowell—Seventh Monday before the first Monday in March, to continue for one week for the trial of criminal cases only; the third Monday before the first Monday in March, to continue for two weeks for the trial of civil cases only; the fourteenth Monday after the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; the eighth Monday before the first Monday in September, to continue for two weeks for the trial of civil cases only; the first Monday in September, to

continue for two weeks for the trial of both criminal and civil cases.

At any criminal term of court in McDowell County civil actions which do not require a jury, motions, and uncontested divorce actions with jury trial, may be heard, tried and determined and proper judgment and orders entered therein.

In the event the county commissioners shall find that any term for the trial of civil cases is not needed they may by resolution sent to the governor cancel the term in question.

The governor shall assign an emergency, or any other judge, to hold any of the terms of the superior court for McDowell County when the judge regularly holding the courts in said district is, because of a conflict in the terms of court or for any other cause, unable to hold any of said terms. (1913, c. 196; Ex. Sess. 1921, c. 24; 1923, c. 219; 1927, c. 207, s. 1; 1935, c. 127; 1937, c. 309; 1943, c. 549; C. S. 1443.)

Polk—The fifth Monday before the first Monday in March to continue for two weeks for the trial of both criminal and civil cases; second Monday before the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases. (1913, c. 196; Ex. Sess. 1921, c. 24; 1927, c. 207, s. 1; 1933, c. 232, s. 2; 1935, c. 127; C. S. 1443.)

Rutherford—First Monday before the first Monday in March, to continue for one week for the trial of civil cases only; sixth Monday after the first Monday in March, to continue for two weeks for the trial of civil cases only; tenth Monday after the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; sixteenth Monday after the first Monday in March, to continue for two weeks for the trial of civil cases only; third Monday after the first Monday in September, to continue for two weeks for the trial of civil cases only; ninth Monday after the first Monday in September, to continue for two weeks for the trial of both civil and criminal cases. (1913, c. 196; 1915, c. 116; Ex. Sess. 1921, c. 24; 1927, c. 207, s. 1; 1933, c. 232, s. 1; 1935, c. 127; 1937, c. 309; C. S. 1443.)

Transylvania—Fourth Monday after the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; sixth Monday before the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases; thirteenth Monday after the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases. (1913, c. 196; 1915, c. 66; Ex. Sess. 1920, c. 19; Ex. Sess. 1921, c. 24; 1925, c. 63; 1927, c. 207, s. 1; 1929, c. 173, s. 2; 1935, c. 127; C. S. 1443.)

Yancey—Sixth Monday before the first Monday in March, to continue for one week for the trial of civil cases only; second Monday after the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; fourth Monday before the first Monday in September, to continue for two weeks for the trial of criminal and civil cases; seventh Monday after the first Monday in September, to continue for two weeks for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 38; 1915, c. 71; Ex. Sess. 1920, c. 4; Ex. Sess. 1921, c. 24; 1923, c. 222; 1927, c. 207, s. 1; 1929, c. 173; 1933, c. 478; 1935, c. 127; C. S. 1443.)

In all criminal terms of court in the eighteenth judicial district, civil actions and proceedings, which do not require a jury, may be heard by consent and any order, judgment or decree therein may be entered. (1935, c. 127.)

Nineteenth District

The nineteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Buncombe—Eighth Monday before the first Monday in March, to continue for two weeks for the trial of civil cases only; sixth Monday before the first Monday in March, to continue for one week, for the trial of criminal cases only; eighth Monday before the first Monday in September, to continue for two weeks for the trial of civil cases only; sixth Monday before the first Monday in September, to continue for one week for the trial of criminal cases only.

Fourth Monday before the first Monday in March, to continue for two weeks, for the trial of civil cases only; second Monday before the first Monday in March, to continue for one week for the trial of criminal cases only; first Monday in March, to continue for two weeks for the trial of civil cases only; second Monday after the first Monday in March, to continue for one week for the trial of criminal cases only; fourth Monday after the first Monday in March, to continue for two weeks for the trial of civil cases only; sixth Monday after the first Monday in March, to continue for one week for the trial of criminal cases only; ninth Monday after the first Monday in March, to continue for two weeks for the trial of civil cases only; eleventh Monday after the first Monday in March, to continue for one week for the trial of criminal cases only; thirteenth Monday after the first Monday in March, to continue for two weeks for the trial of civil cases only; fifteenth Monday after the first Monday in March, to continue for one week for the trial of criminal cases only; fourth Monday before the first Monday in September, to continue for two weeks for the trial of civil cases only; second Monday before the first Monday in September, to continue for one week for the trial of criminal cases only; first Monday in September, to continue for two weeks for the trial of civil cases only; second Monday after the first Monday in September, to continue for one week for the trial of criminal cases only; fourth Monday after the first Monday in September, to continue for two weeks for the trial of civil cases only; sixth Monday after the first Monday in September, to continue for one week for the trial of criminal cases only; ninth Monday after the first Monday in September, to continue for two weeks for the trial of civil cases only; eleventh Monday after the first Monday in September, to continue for one week for the trial of criminal cases only; thirteenth Monday after the first Monday in September, to continue for two weeks for the trial of civil cases only; fifteenth Monday after the first Monday in September, to continue for one week for the trial of criminal cases only.

The terms of court provided in the preceding paragraph shall be held by the judge regularly riding the nineteenth judicial district, and during said terms uncontested divorce actions and civil orders

may be tried and heard by the judge assigned to hold said courts.

Seventh Monday before the first Monday in March, to continue for two weeks; fifth Monday before the first Monday in March, to continue for one week; second Monday before the first Monday in March, to continue for two weeks; second Monday after the first Monday in March, to continue for two weeks; sixth Monday after the first Monday in March, to continue for two weeks; eighth Monday after the first Monday in March, to continue for one week; eleventh Monday after the first Monday in March, to continue for two weeks; fifteenth Monday after the first Monday in March, to continue for two weeks; seventh Monday before the first Monday in September, to continue for two weeks; fifth Monday before the first Monday in September, to continue for one week; second Monday before the first Monday in September, to continue for two weeks; second Monday after the first Monday in September, to continue for two weeks; sixth Monday after the first Monday in September, to continue for two weeks; eighth Monday after the first Monday in September, to continue for one week; eleventh Monday after the first Monday in September, to continue for two weeks; fifteenth Monday after the first Monday in September, to continue for two weeks.

The courts provided in the preceding paragraph shall be held by special or emergency judges to be assigned by the governor, if the regular judge assigned is unable to hold said terms for any cause set out in article four, section eleven, of the constitution. The board of county commissioners shall notify the jury commission at, or before, the time of drawing the jurors for these terms of court whether the same shall be for the trial of civil or criminal cases, or what portions thereof shall be for each, and the jury commission shall draw jurors accordingly. (1913, c. 196; 1915, c. 117; 1917, c. 79; 1923, c. 31; Pub. Loc. 1925, c. 400; 1929, c. 213; 1941, c. 367, s. 1; C. S. 1443.)

Madison—First Monday before the first Monday in March, to continue for one week; third Monday after the first Monday in March, to continue for one week; seventh Monday after the first Monday in March, to continue for one week; twelfth Monday after the first Monday in March, to continue for one week; sixteenth Monday after the first Monday in March, to continue for one week; first Monday before the first Monday in September, to continue for one week; third Monday after the first Monday in September, to continue for one week; seventh Monday after the first Monday in September, to continue for one week; twelfth Monday after the first Monday in September, to continue for one week; sixteenth Monday after the first Monday in September, to continue for one week.

The board of county commissioners shall, at the time of drawing the jurors for the terms of court provided in the preceding paragraph, designate whether the terms shall be for the trial of civil or criminal cases, and draw the jurors accordingly. (1913, c. 196; 1915, c. 117; 1917, c. 79; 1929, c. 205; 1931, c. 25; 1941, c. 367, s. 1; C. S. 1443.)

Twentieth District

The twentieth district shall be composed of the

following counties, and the superior courts thereof shall be held at the following times, to-wit:

Cherokee—Sixth Monday before the first Monday in March for civil cases only; fourth Monday after the first Monday in March; fifteenth Monday after the first Monday in March, for the trial of civil cases only: Provided, that upon request of the bar of Cherokee county the board of county commissioners need not draw a jury for this term; fourth Monday before the first Monday in September; ninth Monday after the first Monday in September, each to continue two weeks. (1913, c. 196; Ex. Sess. 1913, c. 21; 1917, c. 114; 1923, c. 51; 1925, c. 30; C. S. 1443.)

Graham—Eighth Monday before the first Monday in March, to continue for two weeks, for civil cases only; second Monday after the first Monday in March; thirteenth Monday after the first Monday in March, to be held for civil cases only; first Monday in September, each to continue for two weeks. (1913, c. 196; Ex. Sess. 1913, c. 28; 1917, c. 54; 1927, c. 245, s. 1; C. S. 1443.)

Swain—Seventh Monday before the first Monday in March, for the trial of civil cases only, to continue for two weeks; a special judge to be assigned for this court; first Monday in March; sixth Monday before the first Monday in September; seventh Monday after the first Monday in September, each to continue for two weeks: Provided, that the board of commissioners of Swain County may, when the public interest requires it, decline to draw a grand jury for the July term. (1913, c. 196; 1933, c. 125; C. S. 1443.)

Haywood—Eighth Monday before the first Monday in March, to continue for two weeks, for civil cases only; fourth Monday before the first Monday in March, to continue for two weeks; ninth Monday after the first Monday in March, to continue for two weeks, for civil cases only; eighth Monday before the first Monday in September, to continue for two weeks; second Monday after the first Monday in September, for civil cases only and the eleventh Monday after the first Monday in September, each to continue for two weeks. (1913, c. 196; 1917, cc. 7, 114; 1923, c. 35, s. 2; Ex. Sess. 1924, c. 27; 1937, c. 106; C. S. 1443.)

Jackson—Second Monday before the first Monday in March; eleventh Monday after the first Monday in March, for the trial of civil cases only, each to continue for two weeks; fourteenth Monday after the first Monday in March, for the trial of criminal cases only and for this term of court the governor shall assign a judge to hold same from among the regular, special or emergency judges; fifth Monday after the first Monday in September to continue for two weeks.

The county commissioners, may, in their judgment abrogate the term herein provided to be held on the fourteenth Monday after the first Monday in March, the jurors for this term to be drawn at the same time as those for the May term, service to be withheld pending the decision of the county commissioners. (1913, c. 196; 1933, c. 107; 1939, c. 212; C. S. 1443.)

Macon—Sixth Monday after the first Monday in March; second Monday before the first Monday in September, and thirteenth Monday after the first Monday in September, each to continue for two weeks. The board of commissioners of

Macon county may, for good cause, decline to draw a jury for more than one week for any term of court provided for in this paragraph. (1913, c. 196; 1923, c. 35, s. 1; 1927, c. 245; 1937, c. 106; C. S. 1443.)

Clay—Eighth Monday after the first Monday in March, and fourth Monday after the first Monday in September. (1913, c. 196; 1927, c. 245, s. 1; 1937, c. 162; 1939, c. 44; C. S. 1443.)

Twenty-First District

There is hereby created district number twenty-one composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Caswell—Second Monday after the first Monday in March, to continue for two weeks, the first week to be for the trial of criminal cases only, and the second week for the trial of civil cases; ninth Monday before the first Monday in September, to continue for one week for the trial of both criminal and civil cases; tenth Monday after the first Monday in September, to continue for two weeks, the first week to be for the trial of criminal cases only, and the second week for the trial of civil cases. (1913, c. 196; 1919, c. 289; 1927, c. 202; 1933, c. 45, s. 1; 1935, c. 246; 1937, cc. 107, 413, s. 5; 1941, c. 367, s. 1; C. S. 1443.)

Rockingham — First Monday after the first Monday in March to continue for one week; sixth Monday before the first Monday in March to continue for two weeks; eleventh Monday after the first Monday in March to continue for two weeks; fourth Monday before the first Monday in September to continue for two weeks; eighth Monday after the first Monday in September to continue for two weeks; fourteenth Monday after the first Monday in September to continue for one week, each of the above terms to be for the trial of criminal cases only.

First Monday in March to continue one week; sixth Monday after the first Monday in March to continue for one week; ninth Monday after the first Monday in March to continue for two weeks; fourteenth Monday after the first Monday in March to continue for two weeks; first Monday in September to continue for two weeks; seventh Monday after the first Monday in September to continue for one week; twelfth Monday after the first Monday in September to continue for two weeks, each of the above terms to be for the trial of civil cases only. Provided, that at any criminal term, either regular or special, of the superior court to be held for Rockingham County, all motions in any civil actions pending before said court, and all uncontested divorce cases pending before said court, may be heard and tried by the court, and provided further, that all other civil actions and civil matters may, with the consent of the parties and the approval of the court, be heard and tried at any criminal term, either regular or special, of the superior court of Rockingham County. However, no contested civil cases shall be tried until after the criminal docket for the term has been disposed of. (1913, c. 196; Ex. Sess. 1913, c. 49; 1917, c. 107; 1933, cc. 45, 264; 1935, c. 246; 1937, cc. 156, 413, s. 5; 1939, c. 156; 1941, c. 58; C. S. 1443.)

Stokes—Fourth Monday after the first Monday in March to continue for one week for the trial of criminal cases only; fifth Monday after the first

Monday in March to continue for one week for the trial of civil cases only; sixteenth Monday after the first Monday in March to continue for one week for the trial of criminal cases only; second Monday before the first Monday in September to continue for one week for trial of both criminal and civil cases; fifth Monday after the first Monday in September to continue for one week for the trial of criminal cases only; sixth Monday after the first Monday in September to continue for one week, for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 1; 1921, c. 142; 1923, c. 169; 1929, c. 158; 1937, c. 413, s. 5; C. S. 1443.)

There is hereby established a term of court to continue for one week in Stokes county, beginning the first Monday in January of each year for the trial of criminal causes only. There shall be jurors, including a grand jury, provided for said January term of court. (1939, c. 342.)

Surry—Eighth Monday before the first Monday in March to continue for one week; third Monday before the first Monday in March to continue for one week; seventh Monday after the first Monday in March to continue for one week; second Monday after the first Monday in September to continue for one week; fifteenth Monday after the first Monday in September to continue for one week, for the trial of criminal cases only.

Seventh Monday before the first Monday in March to continue for one week; second Monday before the first Monday in March to continue for two weeks; eighth Monday after the first Monday in March to continue one week; thirteenth Monday after the first Monday in March to continue for one week; eighth Monday before the first Monday in September to continue for two weeks; third Monday after the first Monday in September to continue for two weeks, for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 34; Ex. Sess. 1921, c. 9; Pub. Loc. 1925, c. 417; 1931, c. 251; 1933, cc. 180, 413; 1935, c. 246; 1937, c. 210, 413, s. 5; C. S. 1443.)

Editor's Note.—Public Laws 1931, c. 240, as amended by c. 456, added a new term for Cleveland County. This new term conflicts with a term of Watauga County, which was transferred to the Sixteenth Judicial District by Public Laws 1931, c. 424.

One 1937 amendment added the proviso to the first paragraph of this section. Another created the twenty-first judicial district composed of the counties of Caswell, Rockingham, Surry (formerly in the eleventh judicial district) and Stokes (formerly in the twelfth judicial district, now composed of the counties of Guilford and Davidson).

The 1939 amendments have been cited at the end of the paragraphs affected thereby.

The 1941 amendments have been cited at the end of the paragraphs affected thereby.

For comment on Public Laws 1941, c. 367, see 19 N. C. Law Rev. 475.

The 1943 amendments made changes in the paragraphs relating to the following counties: Avery, Camden, Cleveland, Columbus, Davidson, Franklin, Guilford, McDowell, Moore, Nash, Onslow, Union, Wake.

Session Laws 1943, c. 121, provided for holding terms of the superior court in each city in the state, which is not a county seat, having as many as thirty-five thousand inhabitants according to the last federal census.

When Term Ends.—The term of court ends when the business is disposed of and the judge leaves the bench, and does not necessarily extend to the end of the period prescribed. *May v. National etc. Co.*, 172 N. C. 795, 90 S. E. 890.

When the Term Embraces Sunday.—When a term of court is set by statute to begin on a certain Monday, and to last for "one week," (or two or three weeks, as the case may be), it embraces the Sunday of each week (unless sooner adjourned), and the term expires by limitation at

midnight of that day. *Taylor v. Ervin*, 119 N. C. 274, 25 S. E. 875. A verdict entered on Sunday of a week set for the duration of a court, in the absence of an earlier adjournment, is legally entered. *Id.*

Session at Scene of Crime.—Where at the requests of defendants, a view of the scene of a crime is granted and a short session of the court held there, no prejudicial error is committed under this section. *State v. Stewart*, 189 N. C. 340, 127 S. E. 260.

Applied in *State v. Dalton*, 206 N. C. 507, 510, 174 S. E. 422, with reference to Henderson County.

Cited in *West v. Woolworth Co.*, 214 N. C. 214, 198 S. E. 659.

§ 7-71. Governor to assign judges to hold terms of court when regular judges are not available.—If the regular judge holding the courts for any district is not available for any cause set out in Article four, Section eleven, of the Constitution to hold any of the terms of court provided for in Chapter 367 of the Public Laws of 1941, amending § 7-70, the Governor shall assign a judge to hold such term or terms from among the regular, special or emergency judges. (1941, c. 367, s. 2.)

§ 7-71.1. Governor authorized to cancel terms of court; judges available for assignment elsewhere.—The governor is authorized and empowered, upon a finding by him that any term of superior court for any of the counties of the state are not necessary due to the lack of sufficient official business to be transacted, to cancel any term of superior court scheduled to be held in any of the counties of the state: Provided, that any term of superior court canceled hereunder shall be canceled at least ten days prior to the time for the convening of said court.

Upon the cancellation of any term of superior court the judge scheduled to hold said term of court shall be available for assignment by the governor to hold superior court in any other county in the state. (1943, c. 348, ss. 1, 2.)

§ 7-71.2. Cancellation not to affect subsequent terms.—The cancellation of any term of court by the Governor, as provided in § 7-71.1 shall dispense with the holding of the term of court during the year for which it is canceled, but it shall not affect the terms of court provided by law for the county during succeeding years. (1943, c. 348, s. 3.)

§ 7-72. Civil cases at criminal terms.—At criminal terms of court, motions in civil actions may be heard upon due notice, and trials in civil actions may be heard by consent of parties. Also motions for confirmation or rejection of referees' reports may be heard upon ten days notice and judgment entered on said reports. (Rev., s. 1507; 1901, c. 28; 1913, c. 196, s. 2; Ex. Sess. 1913, c. 23; 1915, cc. 68, 240; 1917, c. 13; 1931, c. 394; C. S. 1444.)

Local Modification.—*Anson, Bladen, Cumberland, Durham, Gaston, Robeson: C. S. 1444.*

Failure to Give Notice.—It is required by the provisions of this section that due notice be given of motions in civil action to be heard at a criminal term of court, and where the movant has failed to give the statutory notice of his motion, and the superior court has ordered a dismissal of the action, the judgment will be reversed on appeal. *Dawkins v. Phillips*, 185 N. C. 608, 116 S. E. 723.

The superior court has authority to hear motions in civil actions at criminal terms only after due notice to the adverse party, and therefore when it does not affirmatively appear that due notice was given of plaintiff's motion to be allowed to amend, the granting of the motion at a term of court for criminal cases only will be held for error as being presumptively outside the authority of the court. *Beck*

v. Lexington Coca-Cola Bottling Co., 216 N. C. 579, 5 S. E. (2d) 855.

§ 7-73. No criminal business at civil terms.—No grand juries shall be drawn for the terms of court designated by law as being for the trial of civil cases exclusively, and the solicitors shall not be required to attend upon any exclusively civil terms, unless there are cases on the civil docket in which they officially appear, and no criminal process shall be returnable to any term designated for the trial of civil actions alone. (Rev., s. 1508; 1901, c. 28, ss. 3, 7; 1913, c. 196; C. S. 1445.)

§ 7-74. Rotation of judges.—The judges of the superior court shall hold the courts of the several judicial districts successively, according to the following order and system: The judges resident in the Eastern Judicial Division shall hold the courts for the spring term, one thousand nine hundred and forty-four, as follows: The judge of the first district shall hold the courts of the second district; the judge of the second, the courts of the third; the judge of the third, the courts of the fourth; the judge of the fourth, the courts of the fifth; the judge of the fifth, the courts of the sixth; the judge of the sixth, the courts of the seventh; the judge of the seventh, the courts of the eighth; the judge of the eighth, the courts of the ninth; the judge of the ninth, the courts of the tenth; the judge of the tenth, the courts of the first; and the judges of the Eastern Judicial Division shall thereafter successively hold the courts of this division, subject to such exchanges of courts as are now provided by law.

The judges resident in the Western Judicial Division shall hold the courts for the spring term, one thousand nine hundred and forty-four, as follows: The judge of the eleventh district shall hold the courts of the twenty-first district; the judge of the twelfth, the courts of the eleventh; the judge of the thirteenth, the courts of the twelfth; the judge of the fourteenth, the courts of the fourteenth; the judge of the fifteenth, the courts of the fifteenth; the judge of the sixteenth, the courts of the sixteenth; the judge of the seventeenth, the courts of the seventeenth; the judge of the eighteenth, the courts of the eighteenth; the judge of the nineteenth, the courts of the nineteenth; the judge of the twentieth, the courts of the twentieth; the judge of the twenty-first, the courts of the thirteenth; and the judges resident in the Western Judicial Division shall thereafter successively hold the courts of this division, subject to such exchanges of courts as are now provided by law.

The judge riding any spring circuit shall hold all the courts which fall between January and June, both inclusive, and the judge riding any fall circuit shall hold all the courts which fall between July and December, both inclusive. (Rev., s. 1509; Code, s. 911; 1913, c. 196, ss. 4, 5, 6, 9; 1915, c. 15, ss. 3, 4; 1901, c. 28, ss. 4, 9; R. C., c. 31, s. 20; 1876-7, c. 27; 1879, c. 11; 1885, c. 180; 1937, c. 413, s. 1; Const. Art. 4, s. 11; C. S. 1446.)

Cross Reference.—As to residence and rotation of judges, see § 7-46.

Constitutional Provisions.—Sec. 22 of Art. IV of the Constitution, requiring the courts to be always open, must be construed in connection with sec. 11 of the same article, and does not apply to the terms of court and matters con-

nected therewith. *Delafield v. Mercer Construction Co.*, 115 N. C. 21, 20 S. E. 167.

A Judge Is Essential.—There can be no session of a court without a judge; hence, when the judge leaves the bench for the term, although no notice is given of the final adjournment, or it is ordered to expire by limitation, the term ends and the judge cannot hear any matters out of the courthouse, except by consent, unless it is "chambers" business. *Delafield v. Mercer Construction Co.*, 115 N. C. 21, 20 S. E. 167.

Injunction—Failure of Judge to Hear Order.—If the judge before whom the order is made returnable fails to hear it, any judge resident in or assigned to or holding by exchange the courts of some adjoining district may hear it upon giving ten days notice to the parties interested. *Hamilton v. Icard*, 112 N. C. 589, 591, 17 S. E. 519.

A judge assigned to a district is the judge thereof for six months, beginning either January or July first, and where a restraining order was made returnable before such judge at a place outside of the district, and after the courts were over, but before the end of the term of assignment to the district, such judge had jurisdiction to hear the application and grant the injunction until the hearing. *Hamilton v. Icard*, 112 N. C. 589, 17 S. E. 519.

Term Beginning in June.—When a term of court begins the last part of June, the judge of the superior court assigned to that district for the spring circuit has authority throughout the term of court, even though the term runs over into July, and the second week thereof starts during the month of July, since any term which begins in June "falls" between January and June within the meaning of the statute. *West v. Woolworth Co.*, 214 N. C. 214, 198 S. E. 659.

§ 7-75. Exchange of courts.—By consent of the governor the judges may exchange the courts of a particular county or counties; and the judges resident in the western division and the judges resident in the eastern division may exchange courts or circuits with the consent of the governor; but no judge shall hold all the courts in one district oftener than once every four years. When a judge shall die or resign, his successor shall hold the courts of the district allotted to his predecessor. (Rev., s. 1511; Code, s. 913; R. C., c. 31, s. 20; 1879, c. 11; 1915, c. 15, s. 4; Const., Art. 4, s. 11; C. S. 1447.)

Under Prior Law.—Before the Act of 1879, assigning the judges to the different districts, an exchange of circuits with the consent of the Governor under the Act of 1877 was not in violation of section 11, Art. IV, of the amended Constitution. *State v. McGimsey*, 80 N. C. 377.

A partial exchange of circuits between two of the judges of the superior court, with the approval of the Governor, is legal. *State v. Graham*, 75 N. C. 256.

Power of Legislature.—Neither does this prohibitory clause restrict the Legislature from creating an extra term of the superior court of a county and designating the resident judge to hold the same. *State v. Monroe*, 80 N. C. 373, 374.

Governor's Power.—When the Constitution (and this section) has clothed the Governor with the power to require a judge to hold a court in a district other than that to which he is assigned by the general law, upon certain conditions as to the fulfillment, of which the Governor must of necessity be the judge, and the Governor issues a commission, the Supreme Court will assume that, in fact, the emergency had arisen which would sanction the issuing of the commission, and the same will be recognized as valid if the Governor could, for any reason, have lawfully issued it. *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247.

Governor's Authority a Command.—The Governor can require a judge of the superior court to hold a term of the court in a county not within his own district. And when the Governor so authorizes and empowers a judge to hold such court, expressing in the commission that it is done with his consent, and under that authority, the judge holds the court, as between the judge and the suitors in the court, the consent and authority granted by the Governor is equivalent to a command. *State v. Watson*, 75 N. C. 136.

De Facto Judge.—Where the Governor issues a commission to one of the judges of the superior courts, authorizing him to hold certain terms of the superior courts, and the judge undertakes to discharge the duties required of him, he is, so far as the public and third persons are concerned

a de facto judge so long as he assumes to act in that capacity, and this is so although the commission was issued without authority of law. *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247.

Upon Death of Judge.—Upon the death of one of the judges of the superior courts, the Governor has the authority under this section to require one of the other judges to hold one or more specified terms of the courts in the district assigned to the deceased judge. *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247.

Prohibitory Clause Considered.—The inhibition contained in this section applies neither to the holding by any judge of the superior court of one or more regular terms of said court by exchange with some other judge, and with the sanction of the Governor, nor to the holding of special terms under section 7-78. *State v. Turner*, 119 N. C. 841, 25 S. E. 810.

Same—Applies to Series of Courts.—The provision that “no judge (of the superior courts) shall hold the courts in the same district oftener than once in four years,” is held to apply only to the series of courts forming a district over which a judge, in his riding, is to preside, and has no reference to the courts separately considered. *State v. Speaks*, 95 N. C. 689.

§ 7-76. Court adjourned by sheriff when judge not present.—If the judge of a superior court shall not be present to hold any term of a court at the time fixed therefor, he may order the sheriff to adjourn the court to any day certain during the term, and on failure to hear from the judge it shall be the duty of the sheriff to adjourn the court from day to day until the fourth day of the term inclusive, unless he shall be sooner informed that the judge from any cause can not hold the term. If by sunset on the fourth day the judge shall not appear to hold the term, or if the sheriff shall be sooner advised that the judge cannot hold the term, it shall then be the duty of the sheriff to adjourn the court until the next term. (Rev., s. 1510; Code, s. 926; 1901, c. 269; 1887, c. 13; C. S. 1448.)

Presumption of Adjournment.—Where the record recited that a regular term of a superior court was opened and held Wednesday, instead of on Monday, of the week fixed by the statutes, it will be presumed that the sheriff had duly opened the court and adjourned it from day to day as provided in this section. *State v. Weaver*, 104 N. C. 758, 10 S. E. 486.

Duty of Defendant to Attend Special Term.—A defendant bound over to answer a criminal charge at a regular term of the superior court, which term is not held in consequence of the absence of the judge, is required to attend an intervening special term subsequently appointed and held. *State v. Horton*, 123 N. C. 695, 31 S. E. 218.

Implied Power of Judge to Order Adjournment.—The provision in this section that the sheriff should adjourn the court from day to day until the fourth day of the term, and then for the term, in the absence of the judge who was to have held it, under the law, is subject to the provision that this shall be done “unless the sheriff shall be sooner informed that the judge, from any cause cannot hold the term,” which implies the power of the judge to order an adjournment to a later day in the term. *State v. Wood*, 175 N. C. 809, 95 S. E. 1050.

Failure of Sheriff to Adjourn Court.—The provision in this section that where the judge fails to appear at any term until the fourth day thereof, inclusive, the sheriff shall adjourn the court until the next term, does not avoid the acts of any term where, upon the non-appearance of the judge, the sheriff did not in fact adjourn the court, and the judge afterwards actually appeared and held court. *Norwood v. Thorp*, 64 N. C. 682.

Where the sheriff has not continued a term of the superior court for the absence of the judge to hold the same, the judge may appear at any day within the term, and the proceedings thereafter will be valid. *State v. Wood*, 175 N. C. 809, 95 S. E. 1050.

All Matters Carried Over.—This section by operation of law carries all matters over to the next term, in the same plight and condition. *State v. Horton*, 123 N. C. 695, 31 S. E. 218.

Newly Elected Judge.—Where a newly elected judge, as successor to one who was to have held the term of a court commencing on the 30th of December, continuing for several

weeks, and designated by the statute as a Spring Term, has ordered the sheriff to adjourn the court from day to day, not exceeding four days, to enable him to take the oath of office and preside, and accordingly he qualifies and holds the court, those of his acts are valid, as an officer de jure. And if not, they are valid as those of an officer de facto, and an exception to the validity of a trial of an action on that ground is untenable. *State v. Harden*, 177 N. C. 580, 98 S. E. 782.

Adjournment from Day to Day.—Stated in *State v. McGimsey*, 80 N. C. 377.

Art. 10. Special Terms of Court.

§ 7-77. Governor may designate judge.—The governor has the power to appoint any judge to hold special terms of the superior court in any county. (Rev., s. 1511; Code, s. 913; 1879, c. 11; Const., Art. 4, s. 11; C. S. 1449.)

Cross Reference.—See §§ 7-71, 7-75, 7-78.

§ 7-78. Governor may order special terms.—Whenever it shall appear to the governor by the certificate of any judge, a majority of the board of county commissioners, or otherwise, that there is such an accumulation of criminal or civil actions in the superior court of any county as to require the holding of a special term for its dispatch, he shall issue an order to the judge of the judicial district in which such county is, or to any other judge of the superior court, requiring him to hold a special term of the superior court for such county, to begin on a certain Monday, not to interfere with any of the regular terms of the courts of his district, and hold for such time as he may designate, unless the business be earlier disposed of. If the dispatch of business requires it, the Governor may order a special term of court to be held by a regular, special, or emergency judge of the superior court in any county or district during the holding of a regular term in such county or district. (Rev., s. 1512; Code, s. 914; R. C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44; Ex. Sess. 1924, c. 100; C. S. 1450.)

Editor's Note.—The last sentence in this section was added by the 1924 amendment.

Section Constitutional.—This section is constitutional. *State v. Ketchey*, 70 N. C. 621.

Particular Class of Cases.—In appointing special terms the Governor is not bound by the certificate of the judge, so far as to confine such terms to the trial of a particular class of cases. *State v. Ketchey*, 70 N. C. 621.

Regular Order Presumed.—When it appears from the record that a cause was tried at a special term of a superior court, it is presumed prima facie that an order for holding it was duly made, and that it was duly held. *Sparkman v. Daughtry*, 35 N. C. 168.

The power of the governor to order special terms is not restricted to instances where there is accumulation of business, nor when such fact is recited or a reason in the commission is the power of the judge restricted to the trial of indictments found before that term. *State v. Register*, 133 N. C. 746, 46 S. E. 21. See also note of *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, under section 7-75.

No reason need be assigned by the Governor for calling special terms. *State v. Watson*, 75 N. C. 136, 139. He is the sole judge of the evidence necessitating such action. *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247.

Must Appoint Judge.—When the governor has ordered such term as provided in this section to be held in any county of this State, it is the duty of the Governor to appoint one of the judges of the Superior Court to hold such term, and to issue to the judge appointed by him a commission authorizing him to hold such court. *State v. Baxter*, 208 N. C. 90, 94, 179 S. E. 450.

Plea Denying Existence of Court.—A plea of the defendant that the court was unlawfully called because the Governor was absent from the State when he attempted to order the holding of the court is properly overruled. *State v. Hall*, 142 N. C. 710, 55 S. E. 806.

Arraignment at Former Term.—It is not necessary that

a prisoner should be arraigned and plead at a preceding regular term to the special term at which he is tried. *State v. Ketchey*, 70 N. C. 621.

Applied in *State v. Boykin*, 211 N. C. 407, 191 S. E. 18.

§ 7-79. Compensation of judge.—Any regular judge appointed to hold a special term of court shall attend and hold such court, and shall be paid as compensation therefor at the rate of one hundred dollars per week and his actual expenses incurred in attending such special term by the county in which the special term is held. But any such judge who is in a district having fewer than twenty regular weeks of court for the six months shall hold without extra compensation, if directed by the governor, enough extra weeks of court to make out twenty weeks for the six months. (Rev., s. 1512; Code, s. 914; 1913, c. 63; 1901, c. 167; R. C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44; 1909, c. 85, s. 1; C. S. 1451.)

Reduction of Salary.—The Constitution provides that the salaries of the judges shall not be diminished during their continuance in office. The additional compensation of one hundred dollars given to a superior court judge, by this section, for services in holding a special term, is a part of his salary, hence, any statutory provision providing for a reduction thereof is void as being unconstitutional. *Buxton v. Comm.*, 82 N. C. 92.

§ 7-80. Notice of special terms.—Whenever the governor shall call a special term of the superior court for any county, he shall notify the chairman of the board of commissioners of the county of such call, and such chairman shall take immediate steps to cause competent persons to be drawn and summoned as jurors for said term; and also to advertise the term at the courthouse and at one public place in every township of his county, or by publication of at least two weeks in some newspaper published in his county in lieu of such township advertisement. (Rev., s. 1513; Code, s. 915; 1868-9, c. 273; C. S. 1452.)

Neither the certificate forwarded to the executive office nor the notice sent down to the county commissioners constitutes an essential part of the record of the term. *State v. Lewis*, 107 N. C. 967, 975, 12 S. E. 457, 13 S. E. 247.

The notice is directory and not mandatory under this section. *State v. Boykin*, 211 N. C. 407, 413, 191 S. E. 18.

And Is for the Benefit of the Public.—The notice which is required to be published under this section is designed not for the purpose of warning the jury of the coming term. These persons receive separate notices or summons. Rather, it serves the purpose of notifying the public. It follows, then, that the failure to comply with this section goes to the set-up or organization of the court itself rather than of the jury. *State v. Boykin*, 211 N. C. 407, 413, 191 S. E. 18.

Cited in *State v. Baxter*, 208 N. C. 90, 92, 179 S. E. 450.

§ 7-81. Certificate of attendance.—The clerk shall give the judge a certificate of attendance for the number of days occupied by the court, and the judge shall thereupon be entitled to receive from the commissioners of the county in which the court is held the compensation provided by law. (Rev., s. 1514; Code, s. 918; 1901, c. 167; 1868-9, c. 273; 1909, c. 85, s. 1; 1913, c. 63; C. S. 1453.)

§ 7-82. Grand juries at special terms.—There shall be no grand jury at any special term, unless the same shall be ordered by the governor. (Rev., s. 1515; Code, s. 921; 1868-9, c. 273; C. S. 1454.)

In the absence of any order of the Governor that a grand jury be drawn at a special term, as provided by this section the indictment returned at said time is void. *State v. Baxter*, 208 N. C. 90, 94, 179 S. E. 450.

§ 7-83. Jurisdiction.—The special terms of the

superior court held in pursuance of this chapter shall have all the jurisdiction and powers that regular terms of the superior court have. (Rev., s. 1516; Code, s. 916; 1868-9, c. 273; C. S. 1455.)

Governor Not Bound to Confine Term to Particular Class of Cases.—In appointing a special term the governor is not bound by the certificate of the judge, so far as to confine such term to the trial of a particular class of cases. *State v. Ketchey*, 70 N. C. 621.

Jurisdiction Not Dependent upon Arraignment at Former Term.—It is not necessary that a prisoner should be arraigned and plead at a preceding regular term to the special term at which he is tried. *State v. Ketchey*, 70 N. C. 621.

Removal of Cause.—A superior court at a special term has the same power to remove a cause to another county that it has at a regular term. *Sparkman v. Daughtry*, 35 N. C. 168.

Judgment by Default.—Whether at a regular or special term of the court, notice to the adverse party of a motion in term for judgment by default for want of an answer is not necessary. *Reynolds v. Greensboro, etc., Co.*, 153 N. C. 342, 69 S. E. 248.

Court Held outside Judge's District.—A judge specially commissioned to hold court in a certain county outside his district has the same jurisdiction of matters transferred to that court, by consent, from another county, as the judge of the district comprising both counties. *Henry v. Hilliard*, 120 N. C. 479, 27 S. E. 130.

§ 7-84. Attendance and process at special terms.—All persons and witnesses summoned at the regular or special term, and officers or others who may be bound to attend the next regular term of the court, shall attend the special term, under the same rules, forfeitures and penalties as if the term were a regular term. (Rev., s. 1517; Code, s. 919; R. C., c. 31, s. 23; 1844, c. 10; 1848, c. 29; C. S. 1456.)

Duty of Defendant to Appear.—A defendant bound over to answer a criminal charge at a regular term of the superior court, which term is not held in consequence of the absence of the judge, is required to attend an intervening special term subsequently appointed and held. *State v. Horton*, 123 N. C. 695, 31 S. E. 218.

Applied in *State v. Boykin*, 211 N. C. 407, 191 S. E. 18.

§ 7-85. Subpœnas returnable.—Subpœnas may issue returnable on any day of any special term. (Rev., s. 1518; Code, s. 920; 1868-9, c. 273; C. S. 1457.)

Art. 11. Special Regulations.

§ 7-86. Reading the minutes.—Every morning during the term the judge presiding shall order the reading of the minutes of the court for the day preceding, and the minutes of the last day shall be read immediately preceding the final adjournment of the term. (Rev., s. 1519, Code, s. 925; 1861, c. 3; C. S. 1458.)

§ 7-87. Officer attending juries sworn.—When any officer (except such as are appointed to attend the grand jury) shall be appointed or summoned to attend any superior court the clerk, at the time of the first going out of a jury on the trial of any civil or criminal action, shall administer an oath to such officer, faithfully to attend the several juries that may be put under his care during that term, that shall be charged in the trial of any civil or criminal action; and after such officer shall be once so sworn, he shall be considered to all intents and purposes as acting upon the same oath while attending every jury that he may be called to attend during that term. (Rev., s. 1527; Code, s. 927; R. C., c. 31, s. 36; 1801, c. 592; C. S. 1459.)

Cross Reference.—As to form of oath, see § 11-11.

§ 7-88. Quakers may wear hats in court.—The people called Quakers may wear their hats in courts of judicature, as elsewhere, according to the custom of their sect. (Rev., s. 1528; Code, s. 943; R. C., c. 31, s. 131; 1784, c. 209; C. S. 1460.)

§ 7-89. Court reporters.—Upon the request of a judge holding a superior court in any county in the state, the board of county commissioners in such county shall employ a competent stenographer to take down the proceedings of the court, at a compensation not to exceed five dollars per day and actual expenses, to be paid by the county in which the court is held: Provided, that the compensation of said stenographers in counties composing the sixteenth judicial district shall not exceed ten dollars per day.

The judge is authorized to tax a reasonable fee against the losing party in every action, civil and criminal, to be turned into the county treasury towards reimbursing the county, but no fee shall be taxed against a losing party suing in forma pauperis.

Every stenographer so employed shall make three copies of the proceedings in every case appealed to the supreme court, without extra charge, and shall furnish one copy to the attorneys on each side and file one copy with the clerk of the superior court of the county in which any such case is tried, and shall obey all orders of the judge relative to the time in which any such work shall be done: Provided, that the restrictions herein against an extra charge for making copies of the proceedings in cases appealed to the supreme court shall not apply to counties composing the sixteenth judicial district.

Every stenographer so employed shall, before entering upon the discharge of his duties, be duly sworn to well, truly, and correctly take down and transcribe the proceedings of the court, except the argument of counsel, and the charge of the court thus taken down and transcribed shall be held to be a compliance with the law requiring the judge to put his instructions to the jury in writing.

This section shall not apply to any county which has a court stenographer authorized by law: Provided, that the board of county commissioners of Mecklenburg county may, by resolution approving this section, bring said county within the provisions of the same: Provided further, that this section shall not apply to the following counties: Alleghany, Brunswick, Caldwell, Camden, Carteret, Caswell, Chatham, Currituck, Dare, Davidson, Davie, Forsyth, Greene, Harnett, Haywood, Hoke, New Hanover, Orange, Pender, Person, Transylvania, Union, Watauga. (Ex. Sess. 1913, c. 69; Ex. Sess. 1921, c. 57; 1927, c. 268; Pub. Loc. 1927, c. 49; 1933, c. 75, s. 2; C. S. 1461.)

Local Modification.—Alamance: Ex. Sess. 1921, c. 2; 1935, c. 474; Burke, Lincoln, Catawba: 1929, cc. 53, 260; Halifax: 1929, c. 45, s. 5; Johnston: 1943, c. 689; McDowell: 1933, c. 85; Northampton: 1931, c. 11, s. 5; Robeson: 1935, c. 9; Surry: 1927, c. 268, s. 2; Wayne: 1927, c. 156.

§ 7-90. Official court reporter for second judicial district.—The resident judge of the second judicial district is hereby authorized and empowered to appoint an official court reporter for one or more or all of the counties in said district who shall serve at the will of the resident judge, and whose

appointment may be terminated by thirty days' written notice thereof.

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

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

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

The resident judge shall likewise fix the compensation to be received by such reporter and such reporter pro tem: Provided, however, such compensation shall not exceed ten dollars per day and actual expenses upon a weekly basis.

The testimony taken and transcribed by said court reporter or said court reporter pro tem, as the case may be, and duly certified, either by said reporter or the presiding judge at the trial of the cause, may be offered in evidence in any of the courts of this state as the deposition of the witness whose testimony is so taken and transcribed, in the same manner, and under the same rule governing the introduction of depositions in civil actions. (1933, c. 335.)

§ 7-91. Official court reporter for fifth judicial district.—The resident judge of the fifth judicial district is hereby authorized and empowered to appoint an official court reporter for all of the counties in said district, who shall serve at the will of the resident judge, and whose appointment may be terminated at thirty days written notice thereof.

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

Before entering upon the discharge of the duties of said office, said reporter shall take and sub-

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

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

The resident judge shall likewise fix the compensation to be received by said reporter and said reporter pro tem, provided, however, such compensation shall not exceed ten dollars per day and actual expenses upon a weekly basis.

Said court reporter or reporter pro tem must, upon request of counsel when the presiding judge shall find as a fact that same is necessary and so order, deliver to the clerk of the superior court in which said cause is pending a transcript of the evidence in that cause within fifteen days from the adjournment of the term of court in which such evidence was taken.

The testimony taken and transcribed by said court reporter or said reporter pro tem as the case may be, and duly certified, either by said reporter or the presiding judge at the trial of the cause, may be offered in evidence in any civil action in any of the courts in this state as the deposition of the witness whose testimony is so taken and transcribed in the same manner and under the same rules governing the introduction of depositions in civil actions: Provided, however, that such transcript of testimony shall be admissible in evidence only in the cause in which same was taken. (1935, c. 128.)

Local Modification.—Carteret: 1941, c. 137; Greene: 1943, c. 284.

§ 7-92. Official court reporter for sixth judicial district. — The resident judge of the sixth judicial district is hereby authorized and empowered to appoint an official court reporter for one or more, or all of the counties in said district, whose term of office shall be for a period of five years from and after qualification: Provided, however, that said judge shall have the right to remove said reporter for cause at any time.

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

Before entering upon the discharge of the duties of said office, said reporter shall take and subscribe the oath provided by law for public officers, and shall in addition thereto take and subscribe an oath in words substantially as follows: "I,, do furthermore solemnly swear that I will, to the best of my ability, discharge the duties of the office of court reporter in and for the sixth judicial district, and will faithfully transcribe the testimony offered in said courts as the presiding judge may direct, or as I may be required to do under the law, so help me God." Said oath shall be filed in the office of the clerk of the superior court of the county in which said reporter resides, and recorded and indexed by him on the minute docket of said court.

In case of sickness, or for other cause, if said reporter fails to attend upon any of the courts of said district, the presiding judge may appoint a reporter pro tem, for said court, and said appointment shall appear upon the minutes of said term, and said reporter shall take and subscribe the oath referred to above, which oath shall be filed with the clerk.

The resident judge shall likewise fix the compensation to be received, by said reporter, and said reporter pro tem, provided, however, such compensation shall not exceed ten dollars per day and actual expenses upon a weekly basis.

Said court reporter or reporter pro tem must, upon request of counsel when the presiding judge shall find as a fact that same is necessary and so order, deliver to the clerk of the superior court in which said cause is pending a transcript of the evidence in that cause within fifteen days from the adjournment of the term of court in which such evidence was taken.

The testimony taken and transcribed by said court reporter, and duly certified, either by said reporter or the presiding judge at the trial of the cause, may be offered in evidence in any of the courts of this State as the deposition of the witness whose testimony is so taken and transcribed, in the same manner, and under the same rules governing the introduction of depositions in civil actions. (1931, c. 154, s. 5; 1935, c. 420.)

SUBCHAPTER III. COMMISSION FOR IMPROVEMENT OF LAWS.

Art. 12. Commission for Improvement of Laws.

§ 7-93: Repealed by Session Laws 1943, c. 746.

Editor's Note.—The duties of the commission created by the repealed section were similar to those theretofore conferred on the Judicial Conference by c. 244 of the Public Laws 1925, which was repealed by Public Laws 1931, c. 451. The Act of 1925 was amended by Public Laws 1927, c. 39.

The repealed sections of this article were codified from Public Laws 1931, c. 98.

§ 7-94: Repealed by Session Laws 1943, c. 746.

Editor's Note.—The repealed section related to the members of the former commission. These consisted of the attorney-general, the chairman of each of the committees on judiciary of the senate and the house of representatives of the general assembly, two members appointed from the justices of the supreme court and the judges of the superior courts, two members who were active practitioners in the trial and appellate courts, three members who were appointed from the faculties of law in the various universities in the state, and two members, not attorneys at law, who were men of proven ability in other occupations.

§§ 7-95 to 7-100: Repealed by Session Laws 1943, c. 746.

SUBCHAPTER IV. DOMESTIC RELATIONS COURTS.

Art. 13. In Counties with a City of at Least Twenty-five Thousand Inhabitants.

§ 7-101. Established by county or city or both.—The Board of County Commissioners in the various counties having a county seat with twenty-five thousand or more inhabitants of the State, or the governing authorities in cities of twenty-five thousand or more inhabitants shall have authority to establish a "Domestic Relations Court," which court may be a joint county and city court, as provided in section 7-102 or a court for the county or city as may be determined by the governing authorities. (1929, c. 343, s. 1.)

Local Modification.—Durham, Edgecombe, Gaston, Guilford, Nash, New Hanover, Pitt, Wayne: 1929, c. 343, s. 10; Buncombe: 1929, c. 343, s. 10; 1941, c. 208, s. 2; Forsyth: 1929, c. 343, s. 10; 1931, c. 221, s. 2; Wake: 1929, c. 343, s. 10; Pub. Loc. 1941, c. 339.

Cross Reference.—As to establishment and jurisdiction of juvenile court, see § 110-21 et seq.

§ 7-102. Vote on establishment of court; any other city in county with required population may have such court.—In case the Board of County Commissioners and governing authorities of a particular city decide to establish a joint city and county Domestic Relations Court, they, voting as separate bodies, shall determine whether or not such Domestic Relations Court shall be established. If both bodies, shall vote for its establishment, each of them shall record the resolutions in their minutes and upon such consent by both boards, the court shall be established. In counties in which the said joint court is thus established by the Board of County Commissioners and the governing authorities of the county and city such establishment of the court shall not prevent any other city within the territorial limits of the county and having more than twenty-five thousand inhabitants, establishing its own court under section 7-101. (1929, c. 343, s. 2.)

§ 7-103. Jurisdiction.—Said Domestic Relations Court shall have, and is hereby vested with all the power, authority, and jurisdiction heretofore vested by law in the juvenile courts of North Carolina, and said power, authority, and jurisdiction being as fully vested in the Domestic Relations Court as if herein particularly set forth in detail; and in addition thereto the said Domestic Relations Court shall have exclusive original jurisdiction over the following classes of cases:

(a) All cases where any adult is charged with abandonment, non-support, or desertion of any minor child, or where either spouse is charged with abandonment, non-support, or desertion of the other.

(b) All cases involving voluntary desertion of any juvenile by its mother.

(c) All cases involving the custody of juveniles, except where the case is tried in Superior Court as a part of any divorce proceeding.

(d) All cases where assault, or assault and battery, on a juvenile is charged against an adult, or where husband or wife is charged with assault, or assault and battery, upon the other.

(e) All cases in which an adult is charged with causing or being responsible for delinquency, dependency, or neglect of a juvenile.

(f) All bastardy cases within said county.

(g) All cases wherein any person is charged with receiving stolen goods from any juvenile, knowing them to be stolen.

(h) All cases involving violation of the North Carolina School Attendance Law as set forth in Public Laws of North Carolina, one thousand nine hundred and nineteen, chapter one hundred, and Public Laws of North Carolina, one thousand nine hundred and twenty-three, chapter one hundred and thirty-six; and in §§ 115-302 to 115-312, inclusive; and such other laws relative to school attendance as may hereafter be enacted.

(i) In either case where either parent institutes a divorce action when there is a minor child or children, it shall be the duty of the Clerk of the Superior Court to refer the case for investigation as to the child, or children, to the Domestic Relations Court, and the Judge of the Domestic Relations Court shall make his recommendations to the Judge of the Superior Court as to the disposition of the child, or children, for the consideration of the Judge of the Superior Court in disposing of the custody of the said child or children. (1929, c. 343, s. 3; 1941, c. 308; 1943, c. 470, s. 1.)

Cross References.—As to establishment and jurisdiction of juvenile court, see § 110-21 et seq. For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64.

Editor's Note.—The 1941 amendment struck out former subsection (g), relating to the adoption of juveniles, and relettered the subsequent subsections in alphabetical order.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 453.

The 1943 amendment substituted "minor child" for "juvenile" in line three of subsection (a).

Issuance of Process and Hearing Complaints.—There is no statutory provision referring specifically to issuance of process, but the statute indicates that the same persons who would issue process in other courts having jurisdiction of the offenses of which the domestic relations court is given jurisdiction, would be authorized to issue process for the domestic relations court, and hence hear complaints. 15 N. C. Law Rev. 113.

§ 7-104. Election of judge and term of office; vacancy appointments; judge to select clerk; juvenile Court officers may be declared officers of new Court.—It shall be the duty of the Board of Commissioners of any county and the governing board of any city, in which a joint Court of Domestic Relations is established, as provided in this article, or of the governing authorities of any city or county in which an independent Domestic Relations Court shall be established, as provided in this article, acting jointly, in the first instance, or independently, in the second instance, to elect a Judge of the Domestic Relations Court and to fix his salary and provide for the payment of same, his term of office to run from the time of his election to the second Monday in July in each odd numbered year and until his successor shall have been elected and qualified. The regular term of office shall be for a term of two years and until his successor is elected and qualified. If any vacancy should occur in said office during the two years' term, for any cause, it shall be filled for the unexpired term in the same manner and by the same bodies as provided for the election of said Judge.

It shall be the duty of the Judge of the Domestic Relations Court to appoint a Clerk for

said court, the salary of said Clerk to be fixed, provided for, and paid by the Board of County Commissioners of any of such counties and the governing board of any of such cities, acting jointly, or independently when a joint county and city court is not established.

And the officers of the Juvenile Court of any of such cities and of any of such counties, as now constituted by law may be declared to be officers of the Domestic Relations Court.

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

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

Local Modification.—Forsyth: 1931, c. 221, s. 2; Mecklenburg: 1937, c. 268.

Editor's Note.—The 1943 amendment added the last paragraph of this section.

§ 7-105. Co-operation of all peace officers.—It shall be the duty of all officers of the counties and of the cities to assist the Domestic Relations Court in any and all ways in the line of their official duty as fully and to the same extent and in the same manner as they heretofore have been authorized and required to do in the case of all other courts. (1929, c. 343, s. 5.)

§ 7-106. Procedure, practice and punishments.—The procedure, practice, and punishments imposed in the Domestic Relations Court as established in this article shall be the same as now provided by law in courts now having original jurisdiction of the various offenses or causes enumerated in this article, and the Judge of the said Domestic Relations Court is hereby granted the power to prescribe such rules and fix such modes of procedure, as, in his discretion, will best effect the purposes for which said court is created.

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

Editor's Note.—The 1943 amendment added the second paragraph of this section.

§ 7-107. Right of appeal to Superior Court; trial de novo.—Wherever in this article criminal jurisdiction is conferred upon the Domestic Rela-

tions Court there shall be the same right of appeal from this court as from Recorders' Courts or other inferior criminal courts to the Superior Court, and the same rules and regulations of such appeals from inferior courts shall apply to appeals from this court, and in the Superior Court the trial shall be de novo. This provision shall apply also to the trials in bastardy cases, and cases involving the custody of juveniles. (1929, c. 343, s. 7; 1943, c. 470, s. 4.)

Editor's Note.—The 1943 amendment made this section applicable to cases involving the custody of juveniles.

§ 7-108. Offenses before Court to be petty misdemeanors; demand for jury trial; appearance bonds.—All the offenses for the trial of which the Domestic Relations Court is given jurisdiction are hereby declared to be petty misdemeanors punishable as now prescribed by law. On the trial before such Domestic Relations Court, if a jury trial is demanded, the cause shall be therewith transferred for trial to some criminal term of the Superior Court of the counties in which the Domestic Relations Court is situated. The defendant or defendants shall be held under an adequate bond to secure his or their attendance at the criminal term of the Superior Court to which the record is transferred. If in the exercise of the jurisdiction hereinbefore conferred upon the Domestic Relations Court, it should appear that a felony has been committed, said court shall have jurisdiction and authority upon proper investigation to bind over the alleged felon in all cases in which probable cause is found, to the Superior Court of the county, under proper bond and recognizances. (1929, c. 343, s. 8.)

§ 7-109. Pending cases in Juvenile Court transferred to new Court.—All causes pending in the Juvenile Court of the county or city at the time of the organization of any Domestic Relations Court within said county or city, shall be transferred to the Domestic Relations Court for final adjudication. (1929, c. 343, s. 9.)

§ 7-110. Cases transferred from Superior Court.—Upon the establishment of a domestic relations court as authorized in this article, the clerk of the superior court shall immediately transfer from the superior court to such domestic relations court all actions pending in the superior court of which the domestic relations court has jurisdiction as in this article conferred, whether such actions are untried or tried and retained for judgment, sentence or further orders, and the domestic relations court shall immediately have jurisdiction of such actions and shall thereafter try, enter further orders or dispose of such actions in the same manner and to the same extent as if said actions had been initiated in said domestic relations court. (1941, c. 208, s. 1.)

§ 7-111. Discontinuance of Court.—After the establishment of any domestic relations court by any county commissioners or by the governing authorities of a particular city, or the establishment of a joint county-city court of domestic relations, such board, governing authorities, or both, may, by resolution or resolutions, discontinue any such court. (1941, c. 208, s. 2½.)

SUBCHAPTER V. JUSTICES OF THE PEACE.

Art. 14. Election and Qualification.

§ 7-112. Constitution, article seven, abrogated; exceptions. — All the provisions of article seven of the constitution inconsistent with this chapter, except those contained in sections seven and twelve are hereby abrogated, and the provisions of this article substituted in their place; subject, however, to the power of the general assembly to alter, amend or abrogate the provisions of this article, and to substitute others in their stead, as provided in section thirteen of article seven of the constitution. (Rev., s. 1408; Code, s. 818; 1876-7, c. 141, s. 7; C. S. 1462.)

§ 7-113. Election and number of justices.—At every general election held for members of the general assembly there shall be elected in each township three justices of the peace, and for each township in which any city or incorporated town is situated, one justice of the peace for every one thousand inhabitants in such city or town, who shall hold office for a term of two years from and after the first Monday in December next after their election. (Rev., s. 1409; Code, s. 819; 1876-7, c. 141; 1895, c. 157; 1905, cc. 35, 44, 148; 1907, c. 225; 1909, cc. 177, 716; C. S. 1463.)

Local Modification.—Bertie, Caswell, Chowan, Franklin: C. S. 1464; Gaston: 1931, c. 256; Granville: C. S. 1464; New Hanover (City of Wilmington): C. S. 1464; Vance: C. S. 1466; Wake: 1937, c. 113; Warren: C. S. 1465.

Number Elected.—Under the legislation of 1895, since continued, each township is entitled to elect three justices of the peace on one ballot, and no more, unless the township shall contain a city or incorporated town with as much as 1,000 inhabitants, in that case one additional justice for every 1,000 inhabitants. *Mitchell v. Alley*, 126 N. C. 84, 35 S. E. 231. A ticket containing more names than the elector has a right to vote for, is to be void, and not counted. *Id.*

§ 7-114. Oath of office; vacancies filled.—Every person elected or appointed a justice of the peace, before his term of office begins or within thirty days thereafter, shall take and subscribe the prescribed oaths of office before the clerk of the superior court, who shall file the same. All elections of justices of the peace by the general assembly or by the people shall be void unless the persons so elected shall qualify as herein directed. All original vacancies in the offices of justice of the peace occurring before qualification as provided in this section shall be filled for the term by the governor. All other vacancies shall be filled by the clerk of the superior court. (Rev., s. 1411; Code, s. 821; 1901, c. 37; C. S. 1467.)

Cross Reference.—As to forms of oaths, see §§ 11-6, 11-7, 11-11; Const., Art. VI, s. 7.

Section Constitutional.—This section is not unconstitutional. *Gilmer v. Holton*, 98 N. C. 26, 3 S. E. 812.

Duty of Clerk.—It is the duty of the clerk to administer the oath to the justices elected or appointed. *Gilmer v. Holton*, 98 N. C. 26, 3 S. E. 812.

Appointed by Clerk.—The authority of the clerks of the superior courts to appoint justices of the peace is confined to vacancies caused by death, resignation or other causes during the term. *Gilmer v. Holton*, 98 N. C. 26, 3 S. E. 812.

Misbehavior in Office.—If one elected to an office takes possession of the same and engages in the exercise of its duties and misbehaves by taking unlawful and extortionate fees, he will be liable for such misbehavior, and may be indicted therefor, notwithstanding the fact he had failed to take the oath of office. *State v. Cansler*, 75 N. C. 442.

§ 7-115. Governor may appoint justices.—The governor may, from time to time, at his discre-

tion, appoint one or more fit persons in every county to act as justices of the peace, who shall hold their office for four years from and after the date of their appointment; and, on exhibiting their commission to the clerk of the superior court of the county in which they are to act, shall be duly qualified by taking before said clerk an oath of office and the oaths prescribed for other officers. The governor shall issue to each justice of the peace so appointed a commission, a certificate of which shall be deposited with the clerk of the court and filed among the records, and he shall note on his minutes the qualifications of the justice of the peace.

Any commission so issued by the Governor or his predecessor shall be revokable by him in his discretion upon complaint being made against such justice of the peace and when he shall be satisfied that the interest of the public will be best served by the revocation of said commission.

Whenever the Governor shall have revoked the commission of any justice of the peace appointed by him, or his predecessor in office, it shall be his duty to file with the clerk of the court in the county of such justice of the peace a copy of said order and mail a copy of same to said justice of the peace.

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

§ 7-116. Forfeiture of office.—When any justice of the peace removes out of his township and does not return therein for the space of six months, he thereby forfeits and loses his office; and any such justice presuming to act thereafter, contrary to this section, unless reelected or reappointed, shall be guilty of a misdemeanor. (Rev., ss. 1412, 3589; Code, s. 822; C. S. 1469.)

§ 7-117. Resignation.—Justices of the peace wishing to resign must deliver their letters of resignation to the clerk of the superior court, who shall file the same. (Rev., s. 1413; Code, s. 823; C. S. 1470.)

§ 7-118. Removal and disqualification for crime.—Upon the conviction of any justice of the peace of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he shall be disqualified from holding or enjoying any office of honor, trust or profit under this state. (Rev., s. 1414; Code, s. 826; C. S. 1471.)

Criminal Liability. — The functions of a justice of the peace are ministerial, in preserving the peace, hearing charges against offenders and issuing warrants thereon, examining the parties and bailing or committing them for trial, and in the exercise of such functions, if he act corruptly, oppressively or from any other bad motive, he is liable to indictment. *State v. Sneed*, 84 N. C. 817.

§ 7-119. Justice may hold other office.—Any justice of the peace may accept a civil office or appointment of trust or profit, under the authority of the United States, the duties of which confine him to the county where he is resident. (Rev., s. 1415; Code, s. 825; Const., Art. 14, s. 7; C. S. 1472.)

Cross Reference.—See § 128-1; Const., Art. XIV, s. 7, and annotations thereto.

Justice of Peace May Also Be Recorder of City Court.—Under Const. Art. 14, sec. 7, excepting a justice of the peace from the inhibition against one holding two offices of trust or profit, one may be both a justice of the peace and the recorder of a city recorder's court. *State v. Lord*, 145 N. C. 479, 59 S. E. 656.

§ 7-120. Validation of official acts of certain justices of the peace.—Each and all of the official acts of justices of the peace appointed by chapter three hundred twenty-one, Public Laws of one thousand nine hundred thirty-one, performed after the expiration of their terms on April first, one thousand nine hundred thirty-seven, and before March twenty-first, one thousand nine hundred thirty-nine, including all judgments rendered, probates taken, marriages performed, and any and all other acts whatsoever, are hereby in all respects validated, ratified and confirmed. (1939, c. 268.)

Art. 15. Jurisdiction.

§ 7-121. Jurisdiction in actions on contract.—Justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contract, except—

1. Wherein the sum demanded, exclusive of interest, exceeds two hundred dollars.

2. Wherein the title to real estate is in controversy. (Rev., s. 1419; Const., Art. 4, s. 27; Code, s. 834; C. S. 1473.)

I. Actions Ex Contractu.

II. Title to Land in Controversy.

Cross References.

See §§ 7-63, 7-124 and notes. As to petition of insolvent debtor before justice of peace for discharge from imprisonment, see §§ 23-25 to 23-27.

I. ACTIONS EX CONTRACTU.

In General.—Every action to recover a sum of money due by contract, not in excess of two hundred dollars, etc., is required by this section to be originally brought in the court of a justice of the peace, unless contrary to some other legislative enactment. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

Test of jurisdiction, see notes to section 7-63, analysis line "Essentials" II, B.

Distribution of Jurisdiction Question of Procedure.—The interpretation of the Constitution and statutes as to the distribution of jurisdiction among the superior and inferior courts, and courts of the justices of the peace, involves no rule of property, but only of procedure. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

Concurrent Jurisdiction.—Although by this section justices of the peace are given "exclusive" original jurisdiction in certain civil actions, other inferior courts are, by statute, given jurisdiction in civil actions concurrent with that of the justices of peace. For example, see Article 28 of this Chapter and §§ 7-279, 7-344, and 7-372.

Jurisdiction of Superior Court.—The superior court has no original jurisdiction of a legal cause of action, founded on contract, when in no event can the plaintiff recover as much as \$200, proper jurisdiction being in the court of a justice of the peace. *Howard v. Mutual, etc., Life Ins. Ass'n*, 125 N. C. 49, 34 S. E. 199; *Sloan v. Carolina Cent. R. Co.*, 126 N. C. 487, 36 S. E. 21. See § 7-63 and notes.

Allegations of a complaint are construed liberally in the pleader's favor with a view to substantial justice between the parties, and where the question of jurisdiction between the superior court and that of a justice of the peace arises, depending upon the amount involved, and whether the action is ex contractu or ex delicto, the courts are disposed to construe the complaint in favor of the jurisdiction chosen. *Mitchem v. Pasour*, 173 N. C. 487, 92 S. E. 322.

Judgment a Contract.—A judgment is a contract within the meaning of this section. *Moore v. Nowell*, 94 N. C. 268.

Whether Action in Tort or on Contract.—To determine whether an action is brought in tort or on contract the complaint alone will be considered, and where the com-

plaint alleges the wrongful demand of one hundred dollars by the defendant of the plaintiff's wife, as money due to the defendant under a mistake in the payment of a check, and alleges that the money was paid the defendant by plaintiff's wife upon insistent demand, the complaint alleges an action in tort within the original jurisdiction of the superior court under const. art. 4, § 27, and sections 7-121 and 7-122, and not an action on contract within the jurisdiction of a justice of the peace under this section. *Roebuck v. Short*, 196 N. C. 61, 144 S. E. 515.

Counterclaims in excess of the jurisdictional amount of a justice's court may not be recovered in that court, and are allowed to be pleaded only for the purposes of set-off and recoupment as a bar to the plaintiff's demand. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

In an action before a justice of the peace for a sum due by note and within his jurisdiction, it was held, that a counterclaim consisting of an alleged indebtedness arising out of unadjusted partnership dealings between the parties, could not be allowed; the jurisdiction to settle such matters being in a court of equity. *Love v. Rhyne*, 86 N. C. 576.

Misjoinder of Causes.—Where two causes are set out and jurisdiction can be attached on only one, the justice of the peace may try that one, rejecting the other. *Railroad v. Hardware Co.*, 135 N. C. 73, 47 S. E. 234.

Breach of Warranty.—The complaint alleged in substance that plaintiff purchased a mare from defendant, that the defendant warranted the mare to be sound, that in fact the mare had defective eyesight, which was known to defendant, that plaintiff relied upon the representation that the mare was sound, and that plaintiff was damaged in the sum of \$125.00, and, as a second cause of action, alleged that as a result of the said wrongful act of defendant, plaintiff had been obliged to feed a worthless mare to his damage in the sum of \$100.00. The complaint fails to state a cause of action for fraud in that it fails to allege scienter, but states a cause of action for breach of warranty in the sum of \$125.00, which is within the exclusive original jurisdiction of a justice of the peace, the sum claimed for feeding the mare not being within the rule for the determination of the jurisdictional amount, and therefore defendant's demurrer to the action instituted in the superior court was properly sustained. *Hill v. Snider*, 217 N. C. 437, 8 S. E. (2d) 202.

Waiver of Tort.—Where property is tortiously taken and sold, the owner may waive the tort and maintain an action to recover the proceeds. *Brittain v. Payne*, 118 N. C. 989, 24 S. E. 711, and cases cited. See also note to section 7-63. See note of Winslow v. Weiss, 66 N. C. 432, under section 7-63, analysis line "In General," II, B, 1, (a).

Same—Construction.—When the plaintiff can bring his action either in tort or upon contract, the courts, in favor of jurisdiction, will sustain the election of the plaintiff. *White v. Eley*, 145 N. C. 36, 58 S. E. 437.

To sustain jurisdiction over the subject-matter of an action, the court will liberally construe the pleadings in the pleader's favor, and where the question is whether a justice of the peace had jurisdiction in contract, and the movent contends the case was ex delicto, and that it was beyond the jurisdiction of the justice of the peace, the court will sustain its jurisdiction if it reasonably appears from the pleadings that it was tried as ex contractu in the justice's court. *Furniture Co. v. Clark*, 191 N. C. 369, 131 S. E. 731.

Indivisible Cause.—An indivisible cause of action can not be split in order that separate suits may be brought for the various parts before a justice of the peace. *Norvell v. Mecke*, 127 N. C. 401, 37 S. E. 452.

Where a single contract is made for furnishing certain specified articles, at prices fixed for each, the plaintiff cannot be allowed to "split up" the account and recover upon each item. *Jarrett v. Self*, 90 N. C. 478.

Same—Different Contracts.—Where the items of an account are incurred under different contracts an action may be brought on each item before a justice of the peace, the separate items being less than \$200. *Copeland v. Wire-less Tel. Co.*, 136 N. C. 11, 48 S. E. 501.

A creditor whose account consists of several items, either for goods sold or labor done at different times, each of which is for less than \$200, although the aggregate of the account exceeds \$200, may sue before a justice for any number of such items not exceeding \$200. *Boyle v. Robbins*, 71 N. C. 130.

Want of Jurisdiction.—The court will ex mero motu take notice of the want of jurisdiction. *Hannah v. Richmond, etc.*, R. R., 87 N. C. 351.

Objection on Appeal.—When the pleadings before a justice of the peace, in an action on contract, did not show

a want of jurisdiction and no objection was made thereto, such objection cannot be made on appeal to the superior court. *Cromer Bros. v. Marsha*, 122 N. C. 563, 29 S. E. 836.

Amount Demanded Controlling.—The justice of the peace has jurisdiction of an action upon contract where the summons used as a complaint demands, in good faith, a recovery of \$200 or less, though a greater sum could have been demanded. *Shoe Co. v. Wiseman*, 174 N. C. 716, 94 S. E. 452; *Knight v. Taylor*, 131 N. C. 84, 42 S. E. 537. The aggregate sum demanded in good faith is the test of the jurisdiction of the court, though this aggregate is made up of several causes of action. *Martin v. Goode*, 111 N. C. 288, 16 S. E. 232. For treatment of the amount as fixing jurisdiction and the good faith, etc., required, see notes under section 7-63, analysis line, "Essentials," II, B.

In an action on contract it is the sum demanded in the summons or complaint that fixes the jurisdiction. *Cromer Bros. v. Marsha*, 122 N. C. 563, 29 S. E. 836.

Principal and Interest.—The Constitution and this section limit the jurisdiction of justices of the peace in actions upon contract, to where the sum demanded does not exceed two hundred dollars, exclusive of interest; and a justice of the peace has no jurisdiction in an action to recover the balance of the principal due upon a note and interest on the original amount of the note when the original amount thereof exceeded the sum named. *Riddle v. Bridgewater Milling Co.*, 150 N. C. 689, 64 S. E. 782.

Equitable Causes.—A justice of the peace has no jurisdiction to administer or enforce an equitable cause of action. *Wilson v. Life Ins. Co.*, 155 N. C. 173, 71 S. E. 79.

A court of a justice of the peace cannot affirmatively administer an equity, and may only pass thereon as a matter of defense. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

Same—Appeal.—When the plaintiff seeks only equitable relief in a court of a justice of the peace, no jurisdiction can be acquired over the subject matter by the superior court on appeal, the proceedings being void ab initio. *Wilson v. Life Ins. Co.*, 155 N. C. 173, 71 S. E. 79.

Applied in *Miles Co. v. Powell*, 205 N. C. 30, 31, 169 S. E. 828.

II. TITLE TO LAND IN CONTROVERSY.

See section 7-124 and sections following and notes thereto.

Jurisdiction.—Justices of the peace can take no jurisdiction over a cause in which title to land is in controversy. *Brown v. Southerland*, 142 N. C. 225, 55 S. E. 108. They are prohibited by the Constitution as well as impliedly by this section. *Forsythe v. Bullock*, 74 N. C. 135, 137.

Merely allegation of the defendant that title is in controversy will not oust justices' jurisdiction. The matter must appear from the evidence or admission of the parties. *Jerome v. Setzer*, 175 N. C. 391, 95 S. E. 616.

Title Must Be between Parties to Action.—The question of title, which arrests further proceedings before the justice must be one between the original parties to the action; and jurisdiction once acquired can not be divested by the intervention of a stranger to the suit, asserting a paramount title in himself. *Davis v. Davis*, 83 N. C. 71.

Action Dismissed Judgment for Costs.—If it appears on the trial that the title to real estate is in controversy, the justice shall dismiss the action and render judgment against the plaintiff for costs. *Pasterfield v. Sawyer*, 132 N. C. 258, 260, 43 S. E. 799; *Edwards v. Cowper*, 99 N. C. 421, 6 S. E. 792, 793.

Notes Given for Purchase Price of Land.—A justice of the peace has jurisdiction of an action to recover a balance due on a note given for the purchase money of land. *McPeters v. English*, 141 N. C. 491, 54 S. E. 417.

Notes on Contract to Convey Land.—A justice of the peace has jurisdiction of an action on a note given for a contract to convey land, the only defense being payment. *Patterson v. Freeman*, 132 N. C. 357, 43 S. E. 904.

Recovery of Portion Crop as Rent.—In an action to recover one-third of the crops due as rent under an alleged contract of lease, which the jury found to exist, a justice of the peace had jurisdiction, as the title to land was not involved. *Durant v. Taylor*, 89 N. C. 351.

Where, under a will devising all of testator's land to his wife, remainder to his nephew (the plaintiff) in fee, except fifty acres in some suitable place and on certain conditions to defendant, and defendant had settled on fifty acres, claiming title thereto as being in a suitable place and conditions having been performed, an action by plaintiff for possession involves the title to land and is not within the jurisdiction of a justice of the peace. *Wright v. Harris*, 116 N. C. 460, 21 S. E. 693.

Action between Mortgagor and Mortgagee.—In an action to

to recover land the jurisdiction of the justice is excluded where the relation is that of mortgagor and mortgagee or vendor and vendee. *Hughes v. Mason*, 84 N. C. 473.

Foreclosure of Mortgage.—Because of the equity growing out of the relation of mortgagor and mortgagee when the former seeks to have the mortgaged premises foreclosed for the nonpayment of the debt, the superior court has jurisdiction, when the amount secured is for a less sum than two hundred dollars. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 141.

Landlord and Tenant Act.—A court of a justice of the peace has no jurisdiction under the landlord and tenant act to try title to land. And where it appears that title is involved or that there are equities involved as to the land a justice of the peace has no jurisdiction. *Parker v. Allen*, 84 N. C. 466.

That the vendee, in a contract for the sale of land, remained silent, when the contract was mutilated under the direction of the vendor, is not sufficient evidence of a change of the relations from vendor and vendee to landlord and tenant, to give a justice of the peace jurisdiction of an action to summarily eject the defendant vendee. *Boone v. Drake*, 109 N. C. 79, 13 S. E. 724.

In an action by a purchaser of land with warranty to recover a sum of money paid by him to free the land from a lien, the deed will be introduced to prove the covenants, the title to realty will be involved, and a justice would not have jurisdiction. *Hann v. Fletcher*, 189 N. C. 729, 128 S. E. 328.

Rule of Estoppel Gives Justice Jurisdiction.—The rule which estops a tenant to deny his landlord's title precludes all controversy as to the title in summary proceedings by the landlord, and thus gives a justice of the peace jurisdiction. *Credle v. Gibbs*, 65 N. C. 192; *Davis v. Davis*, 83 N. C. 71.

In a proceeding before a justice of the peace under the Landlord and Tenant Act, a defendant who does not deny having entered as the tenant of the plaintiff is estopped from setting up a superior title existing at the date of the lease or subsequently acquired from a third person. *Heyer v. Beatty*, 76 N. C. 28.

Penalty.—The title to land is not in controversy in a proceeding to recover a penalty prescribed by a town charter for obstructing a street. *Henderson v. Davis*, 106 N. C. 88, 11 S. E. 573.

§ 7-122. Jurisdiction in actions not on contract.

—Justices of the peace shall have concurrent jurisdiction of civil actions not founded on contract, wherein the value of the property in controversy does not exceed fifty dollars. (Rev., s. 1420; Const., Art. 4, s. 27; Code, s. 887; C. S. 1474.)

Cross Reference.—See §§ 7-63, 7-121 and notes.

Editor's Note.—Section 7-63 sets out the limits wherein the superior court exercises its original jurisdiction. This section gives the justices of the peace concurrent jurisdiction over certain classes of cases. These cases are also cognizable in the superior court since the jurisdiction herein given to the justices of the peace is not exclusive, and hence they fall within what may be termed the residuary clause contained in section 7-63.

Generally.—In actions *ex contractu* justices of the peace have jurisdiction, when the sum demanded does not exceed two hundred dollars, but in actions *ex delicto*, their jurisdiction is limited to cases wherein the value of the property does not exceed fifty dollars. *Noville v. Dew*, 94 N. C. 43.

Justices of the peace have concurrent jurisdiction with the superior courts of actions for torts where the value of the property in controversy does not exceed fifty dollars. *Harvey v. Hambright*, 98 N. C. 446, 4 S. E. 187.

It is said in *Duckworth v. Mull*, 143 N. C. 461, 55 S. E. 850, "We think that the decisions of this court, already made, lead necessarily to the conclusion that the clause of this section comprehends, and was intended to comprehend, all actions *ex delicto*; that the term, 'property in controversy,' here used as determinative of jurisdiction, by correct interpretation, means the value of the injury complained of and involved in the litigation; and where a plaintiff, in good faith, states or limits his demand in actions of this character at fifty dollars or less, the justice, as provided by the statute, has jurisdiction concurrent with the superior court to hear and determine the matter."

Damages.—A justice of the peace has jurisdiction of an action for damages not exceeding fifty dollars, and for injury to personal property, though such property be of greater value than fifty dollars. *Malloy v. City*, 122 N. C. 480, 29 S. E. 880.

Jurisdiction Essential.—A judgment rendered by a justice

of the peace in an action in which he has no jurisdiction is void. *Noville v. Dew*, 94 N. C. 43.

Remittance of Excess Will Not Give Jurisdiction.—Where, in an action of claim and delivery, it appears that the value of the property exceeds fifty dollars, it at least ousts the jurisdiction of the justice, and the plaintiff cannot confer jurisdiction by a remitter. *Noville v. Dew*, 94 N. C. 43. See section 7-63, analysis line II, B, 1, b.

Priority of Proceedings as Determining Jurisdiction.—Where two or more courts have equal and concurrent jurisdiction of a case, that court in which suit is first brought acquires jurisdiction of it, which excludes the jurisdiction of the other courts. *Childs v. Martin*, 69 N. C. 126.

Irregular Proceedings.—Where jurisdiction is concurrent, and a case is carried by appeal to the superior court, and the appellant files an answer under leave of the court and goes to trial without objection, the court will have cognizance of the matter by virtue of its original jurisdiction of the subject matter of the action, and by the consent the parties thus manifested, however irregular the proceedings may have been in the justice's court. *Boing v. Raleigh & Gaston R. Co.*, 87 N. C. 360.

Waiver of Court on Appeal.—Plaintiff brought suit in the court of a justice of the peace claiming a debt of fifty dollars, and also possession of a horse and wagon, under a certain mortgage. On appeal from the justice's judgment to the superior court plaintiff offered to remit his claim for the personal property and declare only for the debt. It was held, that he had a right to take such a course in his discretion, and that his honor erred in denying him that privilege. *Jones v. Palmer*, 83 N. C. 303.

Affidavit of Justice Not Conclusive.—Where the record of the justice of the peace has been lost, and only the judgment showing a recovery of the jurisdictional amount ex contractu appears in the trial on appeal, upon defendant's motion to dismiss for want of jurisdiction, an affidavit of the justice to the effect that the action was in tort is not conclusive. *Furniture Co. v. Clark*, 191 N. C. 369, 131 S. E. 731.

§ 7-123. Action dismissed for want of jurisdiction; remitter.—Where it appears, in any action brought before a justice, that the principal sum demanded exceeds two hundred dollars, the justice shall dismiss the action and render a judgment against the plaintiff for the costs, unless the plaintiff shall remit the excess of principal, above two hundred dollars, with the interest on said excess, and shall, at the time of filing his complaint, direct the justice to make this entry: "The plaintiff, in this action, forgives and remits to the defendant so much of the principal of this claim as is in excess of two hundred dollars, together with the interest on said excess." (Rev., s. 1421; Code, s. 835; 1868-9, c. 159, s. 3; 1876-7, c. 63; C. S. 1475.)

Excess Remitted.—Where the amount recovered exceeds \$200, the justice has jurisdiction if the plaintiff remits the excess. *Cromer v. Marsha*, 122 N. C. 563, 29 S. E. 836. *Brook v. Scott*, 159 N. C. 513, 75 S. E. 724.

It is only when the principal sum demanded exceeds \$200, that the plaintiff is required to remit the excess above that amount in order to give the justice jurisdiction. *Brantley v. Finch*, 97 N. C. 91, 1 S. E. 535.

Effect of Remittitur Where Jurisdiction Entirely Derivative.—Where a counterclaim, filed to an action brought before a justice, amounted to more than \$200.00, the want of jurisdiction as provided by this section could not be cured by entering a remittitur for the excess in the Superior Court, as the jurisdiction of the Superior Court in appeals from justices of the peace is entirely derivative, and if the justice had no jurisdiction in the action, as it was before him, the Superior Court can derive none by amendment. *Perry v. Pulley*, 206 N. C. 701, 175 S. E. 89.

Failure to Use Statutory Formula.—Objection to a failure to use the formula provided in this section should be made in the justice's court. *Cromer v. Marsha*, 122 N. C. 563, 29 S. E. 836.

Waiver.—The plaintiff having remitted the amount of damages arising on contract in excess of \$200, so as to confer jurisdiction on the court of a justice of the peace, and having taken a voluntary nonsuit in the superior court on defendant's appeal, is deemed to have waived the excess so remitted in his action on the same contract brought in the superior court, and his recovery is limited to the amount

sued for in the justice's court. *Brook v. Scott*, 159 N. C. 513, 75 S. E. 724.

Remittance of Counterclaim on Appeal.—The jurisdiction of the superior court in appeals from justices of the peace is entirely derivative, and if the justice had no jurisdiction in the action, as it was before him, the superior court can derive none by amendment. So, where a counterclaim, filed to an action brought before a justice, amounted to more than \$200, the want of jurisdiction could not be cured by entering a remittitur for the excess in the superior court. *Ijames v. McClamroch*, 92 N. C. 362.

Justice Has Jurisdiction to Recover Salary Which Failed to Equal Amount Stipulated in the "President's Re-employment Agreement."—A justice of the peace has jurisdiction of an action on contract to recover the amount by which the salary paid plaintiff failed to equal the amount stipulated in the "President's Re-employment Agreement," voluntarily signed by defendant employer, when the amount demanded does not exceed two hundred dollars. *James v. Sartin Dry Cleaning Co.*, 208 N. C. 412, 181 S. E. 341.

§ 7-124. Title to real estate in controversy as a defense.—In every action brought in a court of a justice of the peace, where the title to real estate comes in controversy, the defendant may, either with or without other matter of defense, set forth, in his answer, any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice. (Rev., s. 1422; Code, s. 836; C. S. 1476.)

Cross Reference.—See § 7-121 and notes.

Answer in Writing Necessary.—The title to real estate cannot be drawn into controversy by the defendant on a trial in a justice's court except by delivering to the justice an answer in writing that such title will come in question. *Evans v. Williamson*, 79 N. C. 87.

The evidence at the trial must tend to show that the title is in issue. *Pasterfield v. Sawyer*, 132 N. C. 258, 43 S. E. 799. And the trial will proceed until it is apparent that this is true. *McDonald v. Ingram*, 124 N. C. 272, 32 S. E. 677.

Mere allegation of defendant: that title is in controversy, see note of *Jerome v. Setzer*, 175 N. C. 391, 95 S. E. 616, under section 7-121 analysis line II.

Judgment in Action in Which Defenses Should Have Been Set Up as Bar to Subsequent Action Thereon.—A possessory action in ejectment in the court of a justice of the peace terminates in that court upon an issue of title to lands or of equitable rights therein being raised by the defendant, and in the Superior Court the defendant is required to set up his equities, if any he have, and where he fails to do so an independent action by him thereon is barred by the prior judgment, it being assumed that the court rendering the judgment had jurisdiction of the parties and the subject-matter of the action. *Ogburn v. Booker*, 197 N. C. 687, 150 S. E. 330.

§ 7-125. Title to real estate in controversy, action dismissed.—If it appears on the trial that the title to real estate is in controversy, the justice shall dismiss the action and render judgment against the plaintiff for costs. (Rev., s. 1423; Code, s. 837; C. S. 1477.)

Cross Reference.—See §§ 7-121, 7-124 and notes.

"Real Estate" Defined.—The words "real estate" in this section mean freehold estate. *Foster v. Penry*, 77 N. C. 160, 162.

Allegation in Writing Not Required.—It is not necessary that an allegation in writing that the title to real estate is in controversy be made. *Edwards v. Cowper*, 99 N. C. 421, 423, 6 S. E. 792. But the trial will proceed until it is apparent from the evidence that the question of title is involved. *McDonald v. Ingram*, 124 N. C. 272, 32 S. E. 677.

Duty of Justice to Dismiss Action.—When it appears on the trial that the title to real estate is in controversy, it is the duty of the justice to dismiss the action. *Hudson v. Hodge*, 139 N. C. 308, 51 S. E. 955.

Stated in Nesbitt v. Turrentine, 83 N. C. 536, 537; *Wright v. Harris*, 116 N. C. 460, 21 S. E. 693.

§ 7-126. Another action in Superior Court.—When an action, before a justice, is dismissed upon answer, and proof by the defendant, that the title to real estate is in controversy in the case,

the plaintiff may prosecute an action for the same cause in the superior court, and the defendant shall not be admitted in that court to deny the jurisdiction by an answer contradicting his answer in the justice's court. (Rev., s. 1424; Code, s. 838; C. S. 1478.)

Purpose of Section.—The last clause of this section was passed to prevent the hardship, which would necessarily arise if a defendant could have an action dismissed by a magistrate on his plea that title to real estate is in question, and then, when suit is brought by the same plaintiff for the same cause of action in the superior court, he should be allowed to plead that title to the land did not come in controversy, and have the cause dismissed there. To prevent such absurdity this statute was passed, so that if, on defendant's motion, it is adjudged in the magistrate's court that title to real estate will come in controversy, such finding shall be conclusive between same parties in the new action. *Peck v. Culberson*, 104 N. C. 425, 10 S. E. 511.

Dismissal upon Answer Essential.—Recourse may not be had to the provisions of this section where it does not appear that the action before the justice was dismissed upon answer and proof by defendant that the title to real estate was in controversy. *Brown v. Southerland*, 142 N. C. 225, 55 S. E. 108. See also, note of *Evans v. Williamson*, 79 N. C. 87, under section 7-124.

Where, however, there is a failure to file the written answer with the justice, the defendant is not estopped from filing such answer in the superior court and denying jurisdiction. *Evans v. Williamson*, 79 N. C. 87.

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

A justice of the peace may issue a summons or other process anywhere in his county, but he shall not be compelled to try a cause out of the township for which he was elected or appointed. (Rev., s. 1425; Code, s. 824; C. S. 1479.)

Issuance of Process When Justice Out of Township.—A justice may issue process while he is anywhere in his county, provided he hears the matter in his own township. Dictum in *Davis v. Sanderlin*, 119 N. C. 84, 87, 25 S. E. 815.

§ 7-128. Punishment for contempt in certain cases.—If any person shall profanely swear or curse in the hearing of a justice of the peace, holding court, the justice may commit him for contempt, or fine him not exceeding five dollars. (Rev., s. 1426; Code, s. 848; R. C. c. 115; 1741, c. 30; C. S. 1480.)

Cross References.—As to courts and officers empowered to punish for contempt, see § 5-6. As to acts punishable as for contempt, see § 5-8. As to penalty of witness refusing to testify in action against railroad before a justice of peace, see § 7-146.

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

(Rev., s. 1427; Const., Art. 4, s. 27; Code, s. 892; 1889, c. 504, s. 2; C. S. 1481.)

Cross References.—As to jurisdiction of justice of peace to require defendant to enter recognizance to keep the peace, see § 15-32. For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64.

Editor's Note.—This section must be construed in connection with section 7-63 which defines the jurisdiction of the superior court in criminal matters. See *State v. Cunningham*, 94 N. C. 824, 826; see also note of this case under section 7-63, analysis line, "Criminal Actions," IV.

Generally.—Until the expiration of six months (now twelve) from the commission of the offense justices of the peace have exclusive jurisdiction of all misdemeanors where the punishment cannot exceed a fifty-dollar fine or thirty days imprisonment; after the expiration of the six months (twelve) their jurisdiction is concurrent with that of the superior court. *State v. Roberts*, 98 N. C. 756, 3 S. E. 682.

Concurrent Jurisdiction.—In criminal actions, as in civil actions, although the justice of the peace has been given "exclusive" original jurisdiction in certain instances, other courts have been granted jurisdiction concurrent with that of the justice of the peace. See, for example, §§ 7-190 and 7-222.

Constitutionality.—This section is constitutional. *State v. Johnson*, 64 N. C. 581.

Legislative Power.—It is not competent for the Legislature to confer jurisdiction upon magistrates of any offense of which the punishment by law may exceed the limit as fixed by this section (and the Constitution). *State v. Fesperman*, 108 N. C. 770, 13 S. E. 14.

Where Punishment Unlimited.—Where the punishment under the particular statutes under which the defendant is being tried is unlimited or is not limited to a fine of \$50, or imprisonment for thirty days, it is not a case within the jurisdiction of a justice of the peace. *State v. Addington*, 121 N. C. 538, 27 S. E. 988.

Pleading.—In the case falling within the provisions of this section the pleadings must show affirmatively everything necessary to confer the jurisdiction relied upon. *State v. Johnson*, 64 N. C. 581.

Same—When Jurisdiction Concurrent.—It is not necessary for a bill of indictment charging assault with a deadly weapon, or with intent to commit rape, to show affirmatively the jurisdiction of the superior court, when that court and a justice's court have concurrent jurisdiction, if the latter court had not "proceeded to take cognizance of the crime within twelve months after its commission" for it is for the defendant to show, as matter of defense, the fact that jurisdiction had been thus taken. *State v. Smith*, 157 N. C. 578, 72 S. E. 853.

Variance between indictment and proof as affecting jurisdiction. see note to *State v. Fesperman*, 108 N. C. 770, 13 S. E. 14, section 7-63, analysis line, "Criminal Action," IV.

"Deadly Weapon."—A deadly weapon is not one that must, kill or that may kill, but it is one which would likely produce death or great bodily harm when used by the defendant in the manner in which it was used. *State v. Sinclair*, 120 N. C. 603, 27 S. E. 77.

It is material to show whether or not a deadly weapon was used because it is a determining factor in deciding which court has jurisdiction. *State v. Murphy*, 101 N. C. 697, 701, 8 S. E. 142.

Same—Where Question of Law or Fact.—Whether the weapon used is a deadly weapon is a question of law, where there is no dispute about the facts. *State v. Sinclair*, 120 N. C. 603, 27 S. E. 77. But where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it was used, it is proper and necessary, to submit the matter to the jury with proper instructions. *State v. Archbell*, 139 N. C. 537, 51 S. E. 801.

"Serious Damage."—The serious injury as used in this section must be such physical injury as gives rise to great bodily pain; mental anguish alone is not serious injury within the meaning of this provision. *State v. Nash*, 109 N. C. 824, 13 S. E. 874.

Where it was shown that the defendant assaulted the prosecuting witness with his fist, knocked him down, jumped on him and beat him in a cruel manner, stunning him and badly injuring his eyes, but it did not appear that the injuries were permanent, it was held, that this was "serious damage," and a justice of the peace had no jurisdiction of the offense. *State v. Shelly*, 98 N. C. 673, 4 S. E. 530.

Same—Manner of Excepting.—Exception to the jurisdiction of the superior court, or that no serious damage was done,

or no deadly weapon was used, and six months (now twelve) had not elapsed, should be made, not by a motion to quash or in arrest of judgment, but by a prayer for instruction to the jury to acquit. *State v. Earnest*, 98 N. C. 740, 4 S. E. 495. And it may be also taken advantage of under a plea of not guilty. *State v. Reaves*, 85 N. C. 553; *State v. Berry*, 83 N. C. 60.

Simple Assault.—In a case of simple assault where no deadly weapon is used and no serious damages inflicted, a justice of the peace has jurisdiction. *State v. Johnson*, 94 N. C. 863.

Upon the trial of an indictment for simple assault, the superior court *prima facie* has jurisdiction, but it is open to the defendant to show that the offense was committed within six months (now twelve) of the finding of the bill. *State v. Earnest*, 98 N. C. 740, 4 S. E. 495.

Same — Former Conviction and Acquittal. — A plea of former conviction or acquittal before a justice of the peace for a simple assault is a complete defense on a trial for the same offense in the superior court, unless it should appear in the latter that the defendant making the plea had, in fact, used a deadly weapon or inflicted serious injury, in which case, the justice not having jurisdiction, the proceedings before him would be a nullity. *State v. Robertson*, 113 N. C. 633, 18 S. E. 321.

Under this section a magistrate has original jurisdiction of simple assault and on appeal from an acquittal a plea of former jeopardy is good. *State v. Myrick*, 202 N. C. 688, 163 S. E. 803.

Cited in *State v. Hefner*, 199 N. C. 778, 281, 155 S. E. 879.

Art. 16. Dockets.

§ 7-130. Justice shall keep docket.—A civil and a criminal docket shall be furnished each justice, at the expense of the county, by the board of county commissioners, in which shall be entered a minute of every proceeding had in any action before such justice. (Rev., s. 1416; Code, s. 831; C. S. 1482.)

Not a Court of Record.—A justice's court is not a court of record. *Smith Building, etc., Co. v. Pender*, 173 N. C. 55, 91 S. E. 524; *Williams v. Bowling*, 111 N. C. 295, 16 S. E. 176.

This has been the ruling in a great number of cases but in *Harris v. Singletary*, 193 N. C. 583, 587, 137 S. E. 724, it is intimated that under the requirements of this section, a justice's court is partly one of record.—Ed. Note.

While the court of a justice of the peace is not a court of record, nevertheless, its judgments are conclusive until reversed, modified or vacated in some proceeding instituted for that purpose; and such court has the same jurisdiction to hear applications to vacate judgments rendered by it as superior courts possess over judgments rendered by them. *Whitehurst v. Transportation Co.*, 109 N. C. 342, 13 S. E. 937.

While the courts of justices of the peace are not, strictly speaking, courts of record, they possess and may exercise many of the powers of such tribunals. *Bailey v. Hester*, 101 N. C. 538, 540, 8 S. E. 164.

§ 7-131. Entries to be made.—The justice shall enter all his proceedings in a cause tried before him in his docket. No part of such proceedings must be entered on the summons, on the pleadings, or on any other paper in the cause. (Rev., s. 1470, Rule 14; Code, s. 840, Rule 13; C. S. 1483.)

Time of Docketing. — A judgment of a justice of the peace, not docketed within a year from the date of its rendition, is dormant and its lost validity can not be restored by docketing the same in the superior court, but only by a new action upon it. *Cowen v. Withrow*, 114 N. C. 558, 559, 19 S. E. 645.

§ 7-132. Dockets filed with clerk.—Each justice of the peace, as often as he has filled his docket, shall file the same with the clerk of the superior court for his county. (Rev., s. 1417; Code, s. 827; C. S. 1484.)

§ 7-133. Dockets, papers, and books delivered to successor.—When a vacancy exists, from any cause, in the office of a justice of the peace, whose docket is not filled, or when such justice

goes out of office by expiration of his term, such former justice, if living, and his personal representative, if dead, shall deliver such docket, all law and other books furnished him as a justice of the peace, and all official papers, to the clerk of the superior court for his successor, who is authorized to hear and determine any unfinished action on said docket, in the same manner as if such action had been originally brought before such successor. (Rev., s. 1418; Code, s. 828; 1885, c. 372; C. S. 1485.)

Art. 17. Fees.

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

Justices of the peace in the counties of Montgomery, Onslow, Macon, Swain, Greene, Hyde, Cherokee, Rowan, Anson, Bertie, Nash, Chowan, Alamance, Wake, Transylvania, Watauga,

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

Local Modification.—Henderson: 1941, c. 324; Jones: 1943, c. 313, s. 2; Orange: 1935, c. 358; Wake: 1937, c. 136; 1941, c. 165; Warren: 1937, c. 187.

Editor's Note.—The amendment of 1929 added Caldwell and Onslow Counties. The Acts of 1931 added Cumberland and Madison Counties.

The fee of the recorder of a city who is ex officio justice of the peace for the trial of an offense should, in proper instances, be taxed against the defendant as a part of the costs, upon the trial in the superior court, upon appeal. *State v. Lord*, 145 N. C. 479, 59 S. E. 656.

Art. 18. Process.

§ 7-135. Action begun by summons.—Civil actions in these courts shall be commenced by the issuing of a summons. (Rev., s. 1444; Code, s. 830; 1868-9, c. 159, s. 9; C. S. 1486.)

Cross Reference.—As to summons and process generally, see § 1-88 et seq.

Service by Publication.—In attachment and publication on a nonresident defendant before a justice of the peace, where defendant's property within the jurisdiction of the court has been levied on, a summons is not required. *Mills v. Hansel*, 168 N. C. 651, 85 S. E. 17. As to service by publication generally, see § 1-98 and the notes thereto.

§ 7-136. Issuance and contents of summons.—The summons shall be issued by the justice and signed by him. It shall run in the name of the state, and be directed to any constable or other lawful officer, commanding him to summon the defendant to appear and answer the complaint of the plaintiff at a place, within the county, to be therein specified, and at a time to be therein named, not exceeding thirty days from the date of the summons. It shall also state the sum de-

manded by the plaintiff or the value of the property sued for, where specific property is claimed. (Rev., s. 1445; Code, s. 832; 1874-5, c. 234; C. S. 1487.)

To Whom Directed.—The summons in a civil action before a justice of the peace must be directed to "any constable or other lawful officer." *McKee v. Angel*, 90 N. C. 60, 62.

Special Officer.—A special officer may be deputized to serve the summons issued by a justice of the peace, where the sheriff and coroner are interested. *Baker v. Brem*, 127 N. C. 322, 37 S. E. 454.

Signing.—Where a justice of the peace, because of bad eyesight, requests his secretary to sign his name to the summons, which she does in his presence and under his supervision, the summons is valid, and when the summons is issued in an action in arrest and bail and defendant therein is later arrested upon return of execution against his property unsatisfied, the manner of the issuance of the summons will not support an action for false imprisonment. *Johnson v. Chambers*, 219 N. C. 769, 14 S. E. (2d) 789.

Amount Must Be Stated.—In an action before a justice of the peace, if on contract, the summons should state the amount demanded, if for a tort, it should state the amount of damages claimed, and if for the recovery of specific property, the value of the property, and such statement in the summons gives the justice prima facie jurisdiction. *Noville v. Dew*, 94 N. C. 43, 44. A defect in this particular will not be cured by the insertion of the necessary averment in the pleadings or other process. *Leathers v. Morris*, 101 N. C. 184, 187, 7 S. E. 783.

Same—Omission by Inadvertence.—Where it is made to appear that the court would have jurisdiction if the summons had contained the proper allegation, but it was omitted by mistake or inadvertence, it may, pending the action, permit the necessary amendment. *Leathers v. Morris*, 101 N. C. 184, 187, 7 S. E. 783.

Same—Conclusiveness as Fixing Jurisdiction.—Where the amount claimed in the summons issued by a justice was \$200, and no other complaint was filed, and the amount offered in evidence amounted to \$242, but the plaintiff stated that he remitted the excess over \$200, it was held that the justice had jurisdiction. *Cromer v. Marsh*, 122 N. C. 563, 29 S. E. 836. See section 7-63, analysis line, "Previous Remission," II, B, 1, b.

Failure to Serve Summons.—Where a justice issued a summons and warrant of attachment, and publication of the warrant was made, but the summons was not served, a judgment rendered thereon is void for insufficiency of service of summons. *Ditmore v. Goins*, 128 N. C. 325, 39 S. E. 61.

After Thirty Days.—When personal service of summons in attachment cannot be made for the absence from the court's jurisdiction of a nonresident defendant having property therein, publication of summons is sufficient if made after the expiration of thirty days subsequent to service of attachment—in this case, one day thereafter—computed from the time of granting the attachment. *Mills v. Hansel*, 168 N. C. 651, 85 S. E. 17.

Presumption as to True Date.—A summons is presumed to bear the true date of its issue, but it is competent to show that it was not in fact then issued. *Currie v. Hawkins*, 118 N. E. 593, 594, 24 S. E. 476.

§ 7-137. Service and return of summons.—The officer to whom the summons is delivered shall execute the same within five days after its receipt by him or immediately, if required to do so by the plaintiff. Before proceeding to execute it, he is entitled to require of the plaintiff his fees for the service. When executed he shall immediately return the summons, with the date and manner of the service, to the justice who issued the same. (Rev., s. 1446; Code, s. 833; C. S. 1488.)

Cross References.—See §§ 7-136, 7-137 and notes. As to summons and process generally, see § 1-88 et seq. and notes.

In General.—The same requirements as to a proper service of summons in a civil action issuing from the court of a justice of the peace, must be observed by the process officer as from the superior court, section 7-149, Rule 16, and where a copy thereof is not served at the time of its reading to the defendant, the service is invalid, and the action will be dismissed on special appearance and motion, when the defendant has preserved this right by a like motion in

the court of the justice of the peace. *Pass v. Elias*, 192 N. C. 497, 135 S. E. 291.

To Whom Returnable.—A summons issued by one justice of the peace cannot be made returnable before another (except in cases of bastardy). *Williams v. Bowling*, 111 N. C. 295, 296, 16 S. E. 176.

§ 7-138. Process issued to another county.—No process shall be issued by any justice of the peace to any county other than his own, unless one or more bona fide defendants shall reside in, and also one or more bona fide defendants shall reside outside of, his county; in which case, only, he may issue process to any county in which any such nonresident defendant resides. (Rev., s. 1447; Code, s. 871; 1876-7, c. 287; C. S. 1489.)

In General.—This section being a restricted legislative grant of power when exercised, must be strictly pursued. *Durham, etc., Co. v. Marshburn*, 122 N. C. 411, 414, 29 S. E. 411. See also, *Fisher v. Bullard*, 109 N. C. 574, 13 S. E. 799.

The language of the statute would seem to make the question of jurisdiction, or the right to serve process on a defendant outside the county of the justice, to depend somewhat upon the good faith of the plaintiff in joining the defendants as parties. In certain cases, perhaps, it may be so plain that the plaintiff has no real or bona fide claim against the defendant, who is a resident of the county in which the suit is pending, that the question of misjoinder may be presented as one of law. *Marler v. Wadesboro Clothing Co.*, 150 N. C. 519, 64 S. E. 366.

Amendment as to Resident Defendant.—Where the summons was issued against a resident of a county and a nonresident of the county, and on the trial the summons was amended on striking out the name of the resident defendant, it was held, that the justice should dismiss the action. *Wooten v. Maulsby*, 69 N. C. 462.

To Whom Addressed.—When a justice of the peace issues process for nonresident defendants, it must be issued (addressed) to the officer of the county where it is to be served. *Durham, etc., Co. v. Marshburn*, 122 N. C. 411, 414, 29 S. E. 411.

Section Not Applicable to Foreign Corporations.—The provisions of this section do not apply to foreign corporations. *Fleming Co. v. Southern R. R.*, 145 N. C. 37, 58 S. E. 793.

The Municipal Court of the city of Greensboro has no jurisdiction under chapter 126, Private Laws of 1931, to determine a cause upon a contract, involving less than \$200.00, when the sole defendant is not a resident of Guilford County and summons is served in Lee county as this section and § 7-139 are applicable. *Miles Co. v. Powell*, 205 N. C. 30, 169 S. E. 828.

§ 7-139. Civil process in inferior courts.—The process of any recorder's court, county court, or other court inferior to the superior courts of the state, when such court is exercising the jurisdiction of a justice of the peace in civil matters, shall run only as does the process of the court of a justice of the peace for the county in which such court is located. (1915, c. 19; C. S. 1490.)

Cross Reference.—As to uniform practice in inferior courts where summons issued to run outside county, see §§ 1-92, 1-93.

§ 7-140. Endorsement of process to another county.—In all civil actions in courts of justices of the peace where one or more of the defendants may reside in a county other than that of the plaintiff, it shall be lawful for any justice of the peace within the county where such defendant or defendants may reside, upon proof of the handwriting of the justice of the peace who issued the process, to endorse his name on the same, or a duplicate thereof, and such process so endorsed shall be executed in like manner as if it had been originally issued by the justice endorsing it. (Rev., s. 1449; Code, s. 872; C. S. 1491.)

To Whom Addressed.—See note of *Durham, etc., Co. v. Marshburn*, 122 N. C. 411, 29 S. E. 411, under section 7-140.

§ 7-141. Certificate of clerk on process for another county.—In all cases referred to in § 7-140

it shall be lawful for the clerk of the superior court of the county in which the action is brought to certify, under the seal of his court, on the process or a duplicate thereof, that the justice of the peace who issued the same is an acting justice of the peace in his county. And in all such cases it shall be the duty of any sheriff or constable to whom it may be directed to make an entry of the date of its reception, and to execute the same as provided for the service of civil process in courts of justices of the peace, and return it by mail to the justice of the peace from whose court it issued. (Rev., s. 1450; Code, s. 873; 1870-1, c. 60, s. 2; C. S. 1492.)

Cross Reference.—See §§ 7-188, 7-190 and notes.

§ 7-142. Judgment against defendant in another county.—No justice of the peace shall enter a judgment under §§ 7-140 and 7-141 against any defendant who may be a nonresident of his county, unless it shall appear that the process was duly served upon him at least ten days before the return day of the same. (Rev., s. 1451; Code, s. 874; 1876-7, c. 57; C. S. 1493.)

Section Not Jurisdictional.—The provision of this section, that a justice of the peace shall not enter a judgment against a nonresident defendant unless it shall appear that process was duly served at least ten days before the return day, is not jurisdictional; and where, upon special appearance of defendant for the purpose of dismissing the action, he was given more than ten days thereafter to answer or defend, which he refused to do, the justice's judgment will not be disturbed. *Bank v. Carlile*, 174 N. C. 624, 94 S. E. 297.

Application.—This section applies only where a justice's summons has been issued against a defendant residing in another county. *Williams v. Iron Belt, etc., Association*, 131 N. C. 267, 42 S. E. 607.

§ 7-143. Service on foreign corporation.—Whenever any action of which a justice of the peace has jurisdiction shall be brought against a foreign corporation, which corporation is required to maintain a process agent in the state, the summons may be issued to the sheriff of the county in which such process agent resides, and when certified under the seal of his office by the clerk of the superior court of the county in which the justice issuing such summons resides to be under the hand of such justice, the sheriff of the county to which such summons shall be issued shall serve the same as in other cases and make due return thereof. No justice of the peace shall enter a judgment in such cases against any such foreign corporation unless it shall appear that the process was duly served upon such process agent at least twenty days before the return day of the same. The summons may be made returnable at a time to be therein named, not exceeding forty days from the date of such summons: Provided, this section shall not apply to actions commenced in a county where the defendant has an officer or agent upon whom process may be served: Provided, that when any foreign corporation has no process agent in this state, but has an agent who collects money for it, said agent shall be deemed a process agent within the terms of this section, and that this proviso shall apply to existing claims as well as those arising hereafter. Such service can be made in respect to a foreign corporation only when it has property, or the cause of action arose, or the plaintiff resides in this state, or when it cannot be made personally within the state upon the president, treasurer, or secretary thereof. (Rev.,

s. 1448; 1907, c. 473; Ex. Sess. 1920, c. 28; C. S. 1494.)

Cross References.—As to agents on whom service can be had, see § 1-97. See also §§ 55-38, 58-153 and notes.

Editor's Note.—The last provision of this section is new with the Ex. Sess. of 1920.

Service on Agent Valid.—Under the provision of this section, a summons issued to a foreign corporation in another county where it has a process agent, properly certified under seal of the clerk of the superior court, served on such corporation or the agent more than twenty days before the return day, is valid. *Fleming Co. v. Southern R. R.*, 145 N. C. 37, 40, 58 S. E. 793.

§ 7-144. Attendance of witnesses.—The justice, on application of either party, shall, by a subpoena or by an order in writing, on the process, direct the constable or other officer to summon witnesses to appear and give testimony at the time and place appointed for the trial. Each witness failing to appear shall forfeit and pay eight dollars to the party at whose instance he was summoned, and shall be further liable to such party for all damage sustained by nonattendance. The fine herein imposed may be recovered, on motion, before the justice who tried the action, unless the witness on a notice of five days, by affidavit or other proof, show sufficient excuse for his failure to attend. (Rev., s. 1452; Code, s. 847; C. S. 1495.)

Cross Reference.—As to power to punish for contempt, see §§ 5-6, 5-8.

In General.—The power to punish for contempt is inherent in all courts and is essential to their existence. *State v. Aiken*, 113 N. C. 651, 653, 18 S. E. 690.

Duty to Attend Court.—The duty of attending court in obedience to a subpoena is incident to citizenship. *State v. Massey*, 104 N. C. 877, 879, 10 S. E. 608.

No Bond Authorized.—A justice of the peace is not authorized to put a witness under bond to appear at a subsequent trial before the justice. *Lovick v. Atlantic Coast Line R. Co.*, 129 N. C. 427, 434, 40 S. E. 191.

§ 7-145. Subpoena issued to another county.—Justices of the peace, in all civil cases, may issue subpoenas to counties other than their own; such subpoenas shall be authenticated in the same manner as provided by law for the authentication of process. When so authenticated the sheriff, constable or other officer to whom the same is directed shall execute and return the same as provided for the return of process: Provided, that where witnesses attend in counties other than their own under such subpoena they shall receive the same per diem and mileage as witnesses who attend the superior courts: Provided further, that before issuing such subpoenas the party wanting such witness shall deposit with the justice before whom the cause is pending one day's per diem and the mileage of the witness to and returning from place of trial, which amount shall be paid to the witness on his attendance and taxed against the party cast in the trial. (Rev., s. 1453; 1893, c. 436; C. S. 1496.)

§ 7-146. Subpoena duces tecum in case against railroad.—When any action is brought against a railroad company before a justice of the peace, the justice before whom such action is made returnable shall have power to issue a subpoena to any county within the limits of the state, commanding the president or any officer, director, agent, or any one in the employment of such company, to appear before him at the time and place of trial and to produce such books, cards and other papers as the justice shall deem proper, and to give evidence in said cause; and each

witness summoned as aforesaid failing or refusing to appear and testify and produce the books and papers aforesaid in obedience to such writ shall be deemed guilty of a contempt of court and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 1454; 1885, c. 221, s. 2; C. S. 1497.)

Art. 19. Pleading and Practice.

§ 7-147. Removal of case.—In all proceedings and trials, both criminal and civil, before justices of the peace, the justice before whom the writ or summons is returnable shall, upon written request made by either party to the action before evidence is introduced, move the same to some other justice residing in the same township, or to the justice of some neighboring township if there be no other justice in said township; but no cause shall be more than once removed. (Rev., s. 1455; Code, s. 907; 1880, c. 15; 1883, c. 66; 1917, c. 48; C. S. 1498.)

Local Modification.—Mecklenburg: 1933, c. 278.

Cross Reference.—For statutes authorizing removal to inferior court other than that of another justice of the peace, see §§ 7-224, 7-317, 7-374, 7-437.

Duty of Justice.—It is the duty of a justice of the peace, upon affidavit and motion (now a written request) for a removal being filed, to remove the case to another justice residing in the same township, *State v. Ivie*, 118 N. C. 1227, 24 S. E. 539; and if there be no other justice in the same township he can remove the case to the justice of a neighboring township.

Same—Removal to Improper Justice.—If the case is removed to a justice of a neighboring township when there is another justice in the same township in which the action is commenced, the justice to whom the case is thus removed has no jurisdiction, and his judgment is void. *State v. Ivie*, 118 N. C. 1227, 24 S. E. 539; *State v. Warren*, 100 N. C. 489, 490, 492, 5 S. E. 662.

Not Applicable to Mayor's Court.—The provisions of this section apply only to courts of justice of the peace and in a prosecution for violation of a town ordinance before a mayor, the defendant is not entitled to a removal. *State v. Joyner*, 127 N. C. 541, 37 S. E. 201.

§ 7-148. Removal in case of death or incapacity.—If any justice of the peace dies or becomes incapacitated by removal, resignation or other cause, having any action, civil or criminal, pending before him, which has not been finally determined, such action shall not abate or be discontinued, but the plaintiff in such civil action, or any one on behalf of the state in such criminal action, may remove such action for further and final determination before any other justice of the peace of the same township in which the original action was pending, or before any justice of the peace of the same county when there is no other in the township, by filing the papers in said action with the justice to whom the same is removed and by giving ten days notice to the defendant of such removal; and if the plaintiff in any civil action shall fail to give such notice of removal within ten days from the happening of the death, removal, or resignation, or incapacity of such justice, then the defendant in such action may remove the same by giving like notice to the plaintiff; and if no notice is given by either party to such action within twenty days, then such action shall stand discontinued without prejudice. The justice of the peace before whom such action may be removed shall proceed to try and determine the same, but he shall demand no fees or costs which have theretofore been properly advanced by any party to such action. After such removal either party shall be entitled to all the rights

given in § 7-147. (Rev., s. 1456; 1905, c. 121; C. S. 1499.)

Cross Reference.—For statutes authorizing removal to inferior court other than that of another justice of the peace, see §§ 7-224, 7-317, 7-374, 7-437.

§ 7-149. Rules of practice:

Rule 1, Pleadings. The pleadings in these courts are—

1. The complaint of the plaintiff.

2. The answer of the defendant. (Rev., s. 1457, Code, s. 840; C. S. 1500.)

Rule 2, Complaint. The complaint must state, in a plain and direct manner, the facts constituting the cause of action. (Rev., s. 1459; Code, s. 840, Rule 3; C. S. 1500.)

Generally.—When the parties come to trial in a justice's court, the justice should require the plaintiff to state in a plain and direct manner the facts constituting the cause of action. *Smith v. Newberry*, 140 N. C. 385, 53 S. E. 234.

Where two causes of action were set forth in a warrant before a justice of the peace (treated as a complaint), the judge properly submitted the issue upon the cause of action which was sustained by the evidence. *Smith v. Newberry*, 140 N. C. 385, 53 S. E. 234.

Rule 3, Answer. The answer may contain a denial of the complaint, or of any part thereof, and also a statement, in a plain and direct manner, of any facts constituting a defense or counterclaim. (Rev., s. 1460; Code, s. 840, Rule 4; C. S. 1500.)

The pendency of another action for the same cause, may be set up in the answer, with other defenses, and any issue arising thereon may be submitted at the same time as the others growing out of the pleadings, with instructions to the jury that, if found for the defendant, the others need not be considered. *Montague v. Brown*, 104 N. C. 161, 10 S. E. 186.

Same—Waiver.—Unless this defense is set up in the answer or in some way insisted on, before the trial on the merits, it will be considered as waived. *Blackwell v. Dibrell Bros. & Co.*, 103 N. C. 270, 9 S. E. 192.

Rule 4, Demurrer. Either party may demur to a pleading of his adversary, or to any part thereof, when it is not sufficiently explicit to enable him to understand it, or contains no cause of action or defense, although it be taken as true. (Rev., s. 1461; Code, s. 840, Rule 11; C. S. 1500.)

Rule 5, Order on demurrer. If the justice deem the objection well founded, he shall order the pleading to be amended on such terms as he may think just; and if the party refuse to amend, the defective pleading shall be disregarded. (Rev., s. 1462; Code, s. 840, Rule 12; C. S. 1500.)

Rule 6, Pleadings, oral or written. The pleadings may be either oral or written; if oral, the substance must be entered by the justice on his docket; if written, they must be filed by the justice, and a reference to them be made on his docket. (Rev., s. 1458; Code, s. 840, Rule 2; C. S. 1500.)

In General.—While we liberally construe pleadings filed in the court of a justice of the peace, they must substantially conform to the statutory requirements, i. e., there shall be a complaint and answer; if oral, the justice may enter the substance on his docket, and, if written, the pleadings may be filed and reference made to them on the docket; the answer may state the facts constituting a defense or counterclaim. *Baxter v. Irvine*, 158 N. C. 277, 73 S. E. 882.

Written Pleadings.—Where the parties to an action before a justice of the peace have elected to file written pleadings, the pleadings are subject to the rule that material allegations in the complaint not denied by the answer stand admitted. *Parker v. Horton*, 176 N. C. 143, 96 S. E. 904.

Oral Pleadings.—In actions before justices of the peace the pleadings may be oral, but if so, the substance or

them must be entered on the docket, and contain, in a plain and distinct manner, the ground of the action; and if the facts relied on as a defense be new matter, notice of that, also, must be given on the docket, in a plain and direct manner. *Montague v. Brown*, 104 N. C. 161, 10 S. E. 186.

Applied in Home Bldg., etc., Ass'n v. Moore, 207 N. C. 515, 177 S. E. 633.

Rule 7, No particular form for pleadings. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is meant. (Rev., s. 1463; Code, s. 840, Rule 5; C. S. 1500.)

Technical Accuracy Not Required.—The pleadings in a justice's court need not be in any particular form or drawn with technical accuracy, but are sufficient if they "enable a person of common understanding to know what is meant," and they may not "be quashed or set aside for want of form, if the essential matters are set forth therein," and ample powers are given the Court to amend either in substance or form, at any time before or after judgment in furtherance of justice. *Aman v. Dover, etc., R. Co.*, 179 N. C. 310, 102 S. E. 392.

Informality or Irregularity.—Pleadings and proceedings in the trial of a cause should be liberally construed so as to prevent a failure of justice because of mere informality or irregularity, especially when the case is tried before a justice of the peace, where this section expressly provides that the pleadings are not required to be in any particular form and are sufficient when they "enable a person of common understanding to know what is meant." *Wilson v. Batchelor*, 182 N. C. 92, 108 S. E. 355.

Rule 8, No judgment by default. Where a defendant does not appear and answer, the plaintiff must still prove his case before he can recover. (Rev., s. 1464; Code, s. 840, Rule 6; C. S. 1500.)

Rule 9, Action on account or note. In an action or defense, founded on an account, or an instrument for the payment of money only, it is sufficient for a party to deliver the account or instrument to the justice and state that there is due him thereon from the adverse party a specified sum, which he claims to recover or set off. (Rev., s. 1465; Code, s. 840, Rule 7; C. S. 1500.)

Note for Purchase of Land.—Where an action to recover interest due upon a note, according to its terms, is cognizable in the court of a justice of the peace, his jurisdiction is not ousted by reason of the note having been executed for the purchase of land. *Parker v. Horton*, 176 N. C. 143, 96 S. E. 904.

Rule 10, Account or demand exhibited. The justice may at the joining of issue require either party, at the request of the other, at that or some other specified time to exhibit his account or demand, or state the nature thereof as far as may be in his power; and in case of his default, the justice shall preclude him from giving evidence of such parts thereof as have not been so exhibited or stated. (Rev., s. 1469; Code, s. 840, Rule 10; C. S. 1500.)

Rule 11, Variance. A variance between the evidence on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court is satisfied that the adverse party has been misled to his prejudice thereby. (Rev., s. 1466; Code, s. 840, Rule 8; C. S. 1500.)

Rule 12, No process quashed for want of form. No process or other proceeding begun before a justice of the peace, whether in a civil or a criminal action, shall be quashed or set aside for the want of form, if the essential matters are set forth therein; and the court in which any such action shall be pending shall have power to amend any warrant, process, pleading or proceeding in such action, either in form or substance, for the fur-

therance of justice, on such terms as shall be deemed just, at any time either before or after judgment. (Rev., s. 1467; Code, s. 908; R. C., cc. 3, 62, s. 22; 1794, c. 414; C. S. 1500.)

Docket Incomplete.—In bastardy proceedings the justice of the peace before whom the trial is had should take the denial of the defendant under oath, before trying the case, so as to make up the issue, and should regularly note it on his docket and in his return; and if the docket is incomplete in this respect the Superior Court judge on appeal should allow the denial to be entered *nunc pro tunc*. *State v. Currie*, 161 N. C. 275, 76 S. E. 694.

In *State v. Mills*, 181 N. C. 530, 533, 106 S. E. 677, the court said: "A clear analysis of this section (which was sec. 1-577 of the Code) is made by Justice Ashe in *State v. Vaughan*, 91 N. C. 532, showing that the exercise of the power is discretionary, and that the power itself, by gradual amendment of the statute, is very broad and finally was extended to matters of substance, whereas formerly it related only to matters of form and was confined to civil actions."

Applicable to Final Judgments Only.—Our statutes requiring a motion for a rehearing before a justice of the peace within ten days, etc., this section, rule 12, and § 7-179, allowing fifteen days for appeal from the justice's judgment, etc., apply to final judgments regularly entered, and not to judgments irregularly taken upon defective service, or void for lack of service of summons on the defendant, or other proper process to bring him before the court. *Graves v. Reidsville Lodge*, 182 N. C. 330, 109 S. E. 29.

Amendments Liberally Allowed.—While amendments to process and pleading, under our procedure, in both civil and criminal causes, are liberally allowed by this and § 1-163, this does not imply that the court has power to change the nature of the offense intended to be charged so as to charge a different offense in substance from that at first intended. *State v. Clegg*, 214 N. C. 675, 200 S. E. 371.

Rule 13, Pleadings amended. The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, when by such amendment substantial justice will be promoted. If the amendment be made after the joining of the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party, in consequence of such amendment, an adjournment shall be granted. The court may also, in its discretion, require as a condition of an amendment the payment of costs to the adverse party. (Rev., s. 1468; Code, s. 840, Rule 9; C. S. 1500.)

Power Not Reviewable.—The discretionary power to amend a complaint conferred upon a justice of the peace is not reviewable on appeal. *State v. Taylor*, 118 N. C. 1262, 1264, 24 S. E. 526.

Nature of Amendment Allowable.—The superior court has the power to amend a justice warrant in a criminal action, in form or substance, but the amendment must not change the nature of the offense intended to be charged. *State v. Vaughan*, 91 N. C. 532; *State v. Taylor*, 118 N. C. 1262, 24 S. E. 526.

Amendment of Indictment.—An indictment before a justice of the peace may be amended by the trial judge upon the trial in the Superior Court on appeal. *State v. Holt*, 195 N. C. 240, 141 S. E. 585.

The omission of the name of the party in the complaint, against whom a criminal offense is charged, will not of itself invalidate the indictment, when the warrant of arrest thereto attached and referred to contains his name and clearly indicates him as the person charged, the complaint and warrant being read together, and in this way they are sufficient in form to proceed to judgment upon conviction. *State v. Poythress*, 174 N. C. 809, 93 S. E. 919.

Words Omitted.—Where a warrant was defective due to the omission of certain words, it was held to be within the discretion of the court to permit an amendment inserting the necessary words. *Laney v. Mackey*, 144 N. C. 630, 631, 57 S. E. 386.

Allegation of Value Omitted.—Where, in an action of claim and delivery of personal property, the allegation as to the value was omitted in the summons, the Justice of the Peace properly allowed a motion to amend by filling in the blank left for such allegation. *Cox v. Grisham*, 113 N. C. 279, 18 S. E. 212.

Equitable Proceedings.—On the trial of an appeal from a

justice of the peace, of an action that sought to recover for a breach of contract, and also to enforce an equity, the trial judge properly allowed an amendment discarding the equitable proceeding. *Starke v. Cotton*, 115 N. C. 81, 20 S. E. 184.

Rule 14, Tender of judgment. The defendant may, on the return of process and before answering, make an offer in writing to allow judgment to be taken against him for an amount, to be stated in such offer, with costs. The plaintiff shall thereupon, and before any other proceeding be had in the action, determine whether he will accept or reject such offer. If he accept the offer, and give notice thereof in writing, the justice shall file the offer and the acceptance thereof, and render judgment accordingly. If notice of acceptance be not given, and if the plaintiff fail to obtain judgment for a greater amount, exclusive of costs, than has been specified in the offer, he shall not recover costs, but shall pay to the defendant his costs accruing subsequent to the offer. (Rev., s. 1471; Code, s. 840, Rule 16; C. S. 1500.)

In General.—The tender, made under the provision of this section must be a proposition (made before any defence is set up) to pay a specified sum in discharge of the plaintiff's claim, and not a sum in excess of a counterclaim. *Rand v. Harris*, 83 N. C. 486.

Money Paid into Court.—Money tendered and deposited into court by the defendant with costs accrued, "in full tender of all indebtedness of defendant to plaintiffs, if withdrawn by plaintiffs, pending the litigation, amounts to a satisfaction of their claim, and subjects the plaintiffs to all subsequently accruing costs." *Cline v. Rudisill*, 126 N. C. 523, 36 S. E. 36.

Rule 15, Continuance. Any justice before whom an action is brought may, on sufficient excuse therefor shown on the affidavit of either party or any person for him, continue such action from time to time for trial; but such continuance shall not exceed thirty days. (Rev., s. 1472; Code, s. 840, Rule 17; C. S. 1500.)

When a justice of the peace continues a criminal action for malicious prosecution upon a request of the prosecuting witness, and more than thirty days has passed without a trial, in which the prosecutor has remained inactive, the criminal proceeding is terminated under rule 15 of this section. *Winkler v. Lenoir, etc.*, *Rock Lines*, 195 N. C. 673, 143 S. E. 213.

Rule 16, Chapter on civil procedure applicable. The chapter on civil procedure, respecting forms of actions, parties to actions, the times of commencing actions, and the service of process, shall apply to justices' courts. (Rev., s. 1473; Code, s. 840, Rule 15; C. S. 1500.)

Cross Reference.—See § 7-135 and notes.

Appointment of Next Friend.—There being no statutory special method indicated by which a next friend may be appointed to represent an infant in an action properly brought in a Justice's court, the appointment should be made by the Justice of the Peace, using the same care and circumspection in investigating the fitness of the person to be appointed as is required, by the Clerk, in actions properly brought in the Superior Court. *Houser v. Bonsal & Co.*, 149 N. C. 51, 62 S. E. 776.

Rule 17, Attachment proceedings. The chapter on civil procedure is applicable to proceedings by attachment before justices of the peace, in all cases founded on contract wherein the sum demanded does not exceed two hundred dollars, and where the title to real estate is not in controversy. (Rev., s. 1474; Code, s. 853; C. S. 1500.)

Cross Reference.—As to attachments generally, see § 1-440 et seq.

Purpose.—The issuance of a warrant of attachment by a justice of the peace having jurisdiction of the action is only for the purpose of acquiring jurisdiction over a defendant

who is a nonresident of the state, and is only incidental to the relief sought in the original action, and the warrant in garnishment may run beyond the limits of the county wherein the action was brought. *Mohn v. Cressey*, 193 N. C. 568, 137 S. E. 718.

Remedy for Wrongful Issue.—An attachment wrongfully issued from the Justice's Court against a citizen of the State, transiently absent, is remedied by recordari. *Merrill v. McHone*, 126 N. C. 528, 529, 36 S. E. 35.

Rule 18, Claim and delivery and arrest and bail. The chapter on civil procedure is applicable, except as herein otherwise provided, to proceedings in justices' courts concerning claim and delivery of personal property and arrest and bail, substituting the words, "justice of the peace" for "judge," "clerk" or "clerk of the court," and inserting the words "or constable" after "sheriff," whenever they occur. (Rev., s. 1475; Code, ss. 849, 889; 1876-7, c. 251; C. S. 1500.)

Cross References.—As to arrest and bail, see 1-409 et seq. As to claim and delivery, see § 1-472 et seq.

Rule 19, Actions for damages and for conversion. All actions in a court of a justice of the peace for the recovery of damages to real estate, or for the conversion of personal property, or any injury thereto, shall be commenced and prosecuted to judgment under the same rules of procedure as provided in civil actions in a justice's court. (Rev., s. 1476; Code, s. 888; 1876-7, c. 251; C. S. 1500.)

Damages Limited to Fifty Dollars.—A Justice of the Peace under this section has jurisdiction of an action for damages, not exceeding fifty dollars, for injury to personal property, though such property be of greater value than fifty dollars. *Malloy v. Fayetteville*, 122 N. C. 480, 29 S. E. 880.

An action for damages for converting a crop of greater value than fifty dollars is not founded on an implied contract, and hence is not within the cognizance of a justice's court. *Womble v. Leach*, 83 N. C. 84.

Rule 20, Action on former judgment. On the trial of an action founded on a former judgment, the judgment itself shall be evidence of the debt, subject to such payments as have been made. (Rev., s. 1477; Code, s. 844; C. S. 1500.)

Rule 21, Rehearing of case. When a judgment has been rendered by a justice, in the absence of either party, and when such absence was caused by the sickness, excusable mistake or neglect of the party, such absent party, his agent or attorney, may, within ten days after the date of such judgment, apply for relief to the justice who awarded the same, by affidavit, setting forth the facts, which affidavit must be filed by the justice; whereupon the justice, if he deem the affidavit sufficient, shall open the case for reconsideration; and to this end, he shall issue a summons, directed to a constable, or other lawful officer, to cause the adverse party, together with the witnesses on both sides, to appear before him at a place and at a time, not exceeding twenty days, to be specified in the summons, when the complaint shall be reheard, and the same proceedings had as if the case had never been acted on. If execution has been issued on the judgment, the justice shall direct an order to the officer having such execution in his hands, commanding him to forbear all further proceedings thereon, and to return the same to the justice forthwith. (Rev., s. 1478; Code, s. 845; C. S. 1500.)

In General.—A new trial cannot be allowed in a justice's court, but the party dissatisfied with the judgment has his remedy only by appeal. But where the judgment is rendered in the absence of either party and such absence is occasioned by sickness or excusable neglect, relief may be had

by filing an affidavit before the justice, setting forth the grounds therefor, within ten days after judgment. *Gambill v. Gambill*, 89 N. C. 201.

This and the other sections of the Code regulating procedure before justices of the peace, which makes the general provisions of the chapter applicable, do not confer on a nonresident defendant the right to a rehearing, or, which is the same thing, a new trial, in the justice's court after judgment, upon failure of personal service and a good defense shown; and the remedy is appeal, so that the action may be heard de novo in the superior court, where he will be permitted to interpose his defense. *Thompson v. Lynchburg Notion Co.*, 160 N. C. 519, 76 S. E. 470.

Inexcusable Neglect.—Where the local agent of an incorporated company appeared on the return day of a summons, before a justice of the peace, and procured a continuance for ten days, within which time it had an opportunity to employ counsel to represent it, but it neglected to do so until the day of the trial, when, because of delay in the mail, the counsel was not able to appear until after the trial, it was held to be inexcusable neglect. *Finlayson v. American Accident Co.*, 109 N. C. 196, 13 S. E. 739.

Justices of the peace have power to rehear cases decided by them, when mistake, surprise or excusable neglect is shown, and the application is made in ten days after the date of the judgment. After the lapse of that time, they can not rehear their judgments for such cause. *Navassa Guano Co. v. Bridgers*, 93 N. C. 439.

Statute of Limitations.—Where a judgment was rendered by a Justice of the Peace and upon a rehearing granted by him a similar judgment was rendered, the Statute of Limitations began to run from the date of the latter, the first judgment having been vacated. *Salmon v. McLean*, 116 N. C. 209, 21 S. E. 178.

Art. 20. Jury Trial.

§ 7-150. Parties entitled to a jury trial.—When an issue of fact shall be joined before a justice, on demand of either party thereto, he shall cause a jury of six men to be summoned, who shall try the same. (Const., Art. 4, s. 27; C. S. 1501.)

Cross Reference.—As to jury trial in justice of peace court in criminal actions, see §§ 15-156 to 15-158.

§ 7-151. Jury trial waived.—A trial by jury must be demanded at the time of joining the issue of fact, and if neither party demand at such time a jury, they shall be deemed to have waived a trial by jury. (Rev., s. 1431; Code, s. 857; C. S. 1502.)

The "Due Process" Clause.—The requirements of the Federal Constitution that no person shall be deprived of his property without due process of law does not imply that all trials in the state courts affecting property must be by jury, but it is met if the trial be had according to the settled course of judicial proceedings. *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554.

Rights Preserved on Appeal.—When a legislative act creates a court of original jurisdiction for the trial of petty misdemeanors and prescribes an appeal to the superior court, the constitutional right of trial by jury is preserved. *State v. Shine*, 149 N. C. 480, 62 S. E. 1080.

Waiver.—If the defendant, after having been duly summoned, fails to appear and answer before a justice of the peace he thereby waives and loses the right to demand a trial by jury. *Durham v. Wilson*, 104 N. C. 595, 598, 10 S. E. 683.

§ 7-152. Number constituting the jury.—Six jurors shall constitute a jury in a justice's court, but, by consent of both parties, a less number may constitute it. (Rev., s. 1440; Code, s. 866; C. S. 1503.)

§ 7-153. Jury list furnished.—The clerk of the board of commissioners shall furnish, on demand, to each justice of the peace in the county, a list of the jurors for the township for which such justice is elected or appointed. (Rev., s. 1428; Code, s. 854; C. S. 1504.)

§ 7-154. Names kept in jury box.—Each justice shall keep a jury box, having two divisions

marked respectively number one and number two, and having two locks, the key to be kept by the justice. He shall cause the names on his jury list to be written on small scrolls of paper of equal size, and to be placed in the jury box, in division marked number one, until drawn out for the trial of an issue as required by law. (Rev., ss. 1429, 1430; Code, ss. 855, 856; C. S. 1505.)

Cross Reference.—See section 9-2 and notes thereto.

§ 7-155. Fees deposited for jury trial.—Before a party is entitled to a jury he shall deposit with the justice the sum of three dollars for jury fees, and the justice shall pay to all persons who attend, pursuant to the summons, as well to those who do not actually serve as to those who do serve, twenty-five cents each, to be included in the judgment as part of the costs, in case the party demanding the jury recover judgment, but not otherwise. The justice shall refund to the party the fees of all jurors who do not attend. (Rev., s. 1432; Code, s. 869; C. S. 1506.)

§ 7-156. Jury drawn and trial postponed.—When a trial by jury is demanded, the justice shall immediately, in the presence of the parties, proceed to draw the names of twelve jurors from division marked number one of the jury box; and the trial of the cause shall thereupon be postponed to a time and place to be fixed by the justice. (Rev., s. 1433; Code, s. 858; C. S. 1507.)

Constitutional Provisions.—The method by which jurors are to be selected and summoned is not provided for in the constitution, and there is no limitation therein upon the power of the General Assembly to regulate it. *State v. Brittain*, 143 N. C. 668, 57 S. E. 352.

§ 7-157. Summoning the jury.—A list of the jurors so drawn shall be immediately delivered by the justice to any constable, or other lawful officer, with an order indorsed thereon, directing him to summon the persons named in the list to appear as jurors at the time and place fixed for the trial; and it is the duty of the officer to proceed forthwith to summon such jurors, or so many of them as can be found, according to the order; and he shall make return thereof at the time and place appointed, stating in his return the names of the jurors summoned by him. For performing the aforementioned duties, he shall receive the fee allowed by law for summoning jurors. The preceding sentence shall not apply to the counties of Beaufort, Brunswick, Cabarrus, Edgecombe, Forsyth, Gaston, Gates, Guilford, Halifax, Martin, McDowell, Orange, Pasquotank, Rowan, Transylvania, and Wake. (Rev., s. 1434; Code, s. 859; 1935, c. 309; C. S. 1508.)

§ 7-158. Selection of jury.—At the time and place appointed, and on return of the order, if the trial be not further adjourned, and if adjourned, then at the time and place to which the trial shall be adjourned, the justice shall proceed, in the presence of the parties, to draw from the jurors summoned the names of six persons to constitute the jury for the trial of the issue. (Rev., s. 1435; Code, s. 860; C. S. 1509.)

§ 7-159. Challenges.—Each party shall be entitled to challenge, peremptorily, two of the persons drawn as jurors. (Rev., s. 1436; Code, s. 861; C. S. 1510.)

§ 7-160. Names returned to the jury box.—The scrolls containing the names of jurors not summoned, if any, and of those summoned but not drawn, and of those drawn but challenged and set aside, must be returned by the justice to his jury box, in division marked number one: Provided, that the scrolls containing the names of such as are not legally liable or legally qualified to serve as jurors shall be destroyed. (Rev., s. 1437; Code, s. 862; C. S. 1511.)

§ 7-161. Names of jurors serving.—The scrolls containing the names of the jurors who serve on the trial of an issue must be placed in the jury box in division marked number two, until all the scrolls in division marked number one have been drawn out. As often as that may happen, the whole number of scrolls shall be returned to division marked number one, to be drawn out as in the first instance. (Rev., s. 1441; Code, s. 868; C. S. 1512.)

§ 7-162. Tales jurors summoned.—If a competent and indifferent jury is not obtained from the twelve jurors drawn, as before specified, the justice may direct others to be summoned from the bystanders, sufficient to complete the jury. (Rev., s. 1438; Code, s. 863; C. S. 1513.)

§ 7-163. No juror to serve out of township.—No person is compelled to serve as a juror in a justice's court out of his own township, except as a talesman. (Rev., s. 1439; Code, s. 867; C. S. 1514.)

§ 7-164. Additional deposit for jury fees on adjournment.—No adjournment shall be granted after the return of the jury, unless the party asking the same shall, in addition to the other conditions imposed on him by law or by the justice, deposit with the justice, to be immediately paid to the jurors attending, the sum of twenty-five cents each, such amount to be in no case included in the judgment as part of the costs. On such adjournment, the jurors shall attend at the time and place appointed, without further summons or notice; and the fees for the jury, deposited with the justice in the beginning, shall remain in his hands until the jury are impaneled on the trial, and shall be then immediately paid to the jurors or to the party entitled thereto. (Rev., s. 1442; Code, s. 870; C. S. 1515.)

§ 7-165. Jury sworn and impaneled; verdict; judgment.—The jury shall be sworn and impaneled by the justice, who shall record their verdict in his docket and enter a judgment in the case according to such verdict. (Rev., s. 1443; Code, s. 864; C. S. 1516.)

Art. 21. Judgment and Execution.

§ 7-166. Justice's judgment docketed; lien and execution.—A justice of the peace, on the demand of a party in whose favor he has rendered a judgment, shall give a transcript thereof which may be filed and docketed in the office of the superior court clerk of the county where the judgment was rendered. And in such case he shall also deliver to the party against whom such judgment was rendered, or his attorney, a transcript of any stay of execution issued, or which may thereafter be issued, by him on such judgment, which may be in like manner filed and docketed in the office of the clerk of such court.

The time of the receipt of the transcript by the clerk shall be noted thereon and entered on the docket; and from that time the judgment shall be a judgment of the superior court in all respects for the purposes of lien and execution. The execution thereon shall be issued by the clerk of the superior court to the sheriff of the county, and shall have the same effect, and be executed in the same manner, as other executions of the superior court; but in case a stay of execution upon such judgment shall be granted, as provided by law, execution shall not be issued thereon by the clerk of the superior court until the expiration of such stay. A certified transcript of such judgment may be filed and docketed in the superior court clerk's office of any other county, and with like effect, in every respect, as in the county where the judgment was rendered, except that it shall be a lien only from the time of filing and docketing such transcript. (Rev., s. 1479; Code, s. 839; C. S. 1517.)

Cross Reference.—As to removing judgment of justice of peace to another county for execution, see § 7-169.

Generally.—A judgment in a justice's court does not create a lien upon the property of the defendant. To have this effect a transcript of the judgment must be filed and docketed in the office of the superior court clerk of the county wherein the judgment is rendered. *Ledbetter v. Osborne*, 66 N. C. 379, 380.

Judgment Conclusive.—Where a judgment was obtained before a justice of the peace and docketed in the office of the superior court clerk, the court has no power upon motion to set aside said judgment and enter the cause upon the civil issue docket. *Ledbetter v. Osborne*, 66 N. C. 379.

Amendments of the judgment before the magistrate, or of the transcript, can be made only before the tribunal which gave it; no court has original power to amend the records of another court. *McAden v. Banister*, 63 N. C. 479.

Presumed Regular.—Though the signature of the justice of the peace is not attached to the judgment, it is presumed from the term of the certificate of authentication that it was entered up regularly and in proper form. *Surratt v. Crawford*, 87 N. C. 372, 374.

Priorities.—If a number of justice's judgments be docketed in the superior court, they will, under this section, be a lien upon the land of the defendant from the time when they were docketed, and will have a priority over a judgment obtained in court by another person against the same defendant at a subsequent time, and though an execution be issued on the latter and the sheriff levies it on the land and advertises it for sale, yet, if before the sale executions are issued on a part of the justice's docketed judgments, and are placed in the hands of the sheriff, the proceeds of the sale of the land must be first applied to the payment of all the justice's judgments. *Perry v. Morris*, 65 N. C. 221.

Same—Fractional Parts of a Day.—The law takes notice of the fractional part of a day when there is a conflict between creditors arising as to the application of money received on justice's judgment filed and docketed on the same day. *Bates v. Hinsdale*, 65 N. C. 423.

Where Docketed.—A judgment given by a magistrate in one county cannot be docketed in another, unless previously docketed in the former county; and what is allowed to be docketed in the latter county is the transcript of judgment as docketed in the former. *McAden v. Banister*, 63 N. C. 479.

Docketing in different counties, see section 7-169.

Same—Its Nature in Superior Court.—If the judgment has been docketed in the superior court and subsequently vacated by the justice of the peace, the defendant may, upon motion, have the judgment therein set aside; such docketing, however, only operates as a judgment of the superior court for the purposes of lien. *Whitehurst v. Merchants, etc., Co.*, 109 N. C. 342, 13 S. E. 937.

A judgment of a justice of the peace, duly docketed in the superior court, becomes a judgment of the superior court, and may be enforced by execution at any time within ten years from the date of such docketing. *McIlhenny v. Wilmington, Sav., etc., Co.*, 108 N. C. 311, 12 S. E. 100; *Essex Inv. Co. v. Pickelsimer*, 210 N. C. 541, 187 S. E. 813. See also section 1-234 and notes thereto.

The judgment as actually docketed is the only authority for the execution named; the form of the docketed judgment

depends upon that of the transcript actually sent. *McAden v. Banister*, 63 N. C. 479.

§ 7-167. Effect of judgment on appeal.—In cases of appeal to the superior court from a justice's judgment docketed in such court, when judgment is rendered in the superior court on such appeal, the lien acquired by the docketing of such justice's judgment shall merge into the judgment of the superior court, and continue as a lien from the date of the docketing of such justice's judgment, and be superior to any other judgment docketed subsequent to the date of the justice's judgment, except prior attachment liens and judgment on the same. The clerk of the superior court shall carry forward and tax into the judgment of the superior court all costs incurred in the justice's court, including transcript and docketing, as well as all costs incurred in the superior court, and shall issue execution only on the judgment rendered in the superior court, and not upon the justice's judgment. When the judgment of the superior court is satisfied, it shall be a satisfaction of the justice's judgment, and the clerk shall note such satisfaction on the record of the justice's judgment. (Rev., s. 1479; 1903, c. 179; C. S. 1518.)

Effect of Appeal.—An appeal from a judgment of the justice of the peace does not deprive the plaintiff of the right to have the judgment docketed, nor does it take away the lien of the judgment. *Durham v. Anders*, 128 N. C. 207, 38 S. E. 832.

§ 7-168. Entries made by clerk when judgment is rendered.—Whenever a transcript of a judgment taken before a justice of the peace is docketed on the judgment docket of the superior court and the same is afterwards reversed, modified, or affirmed in the superior court on appeal by a final judgment, the clerk of said court shall within ten days thereafter enter on the judgment docket where the said transcript was first docketed, the word "reversed," "modified," or "affirmed," as the case may be, and further refer to the book and page where can be found the judgment reversing, modifying, or affirming the former judgment. Any clerk failing to perform such duties as are required of him in this section shall pay to any person all such damages as he may have sustained by such failure. (Rev., s. 1479; 1907, c. 880; C. S. 1519.)

§ 7-169. Justice's judgment removed to another county.—Any person who may desire to have a justice's judgment in his favor removed to another county to be enforced against the goods and chattels of the defendant must obtain from the justice who rendered the judgment a transcript thereof, under his hand; and must further procure a certificate from the clerk of the superior court of the county where the judgment was rendered, under the seal of his court, that the justice who gave the judgment was, at the rendition thereof, a justice of the county. On such transcript of the judgment, thus certified, any justice in any other county may award execution for the sum therein expressed. (Rev., s. 1480; Code, s. 846; C. S. 1520.)

Cross Reference.—As to execution issuing on judgment rendered in a justice of the peace court when docketed in the office of the clerk of the superior court, see § 7-166.

Docketing in Different Counties.—The fact that a judgment docketed in one county is afterwards docketed in another, does not deprive it of the lien it had on the defendant's land in the first county. *Perry v. Morris*, 65 N. C. 221.

Docketing in the county where the judgment was rendered is necessary before the same can be docketed in another county. *McAden v. Banister*, 63 N. C. 479.

Same—The Transcript Docketed.—The transcript is what is allowed, by this section, to be docketed in the county other than that where the judgment was rendered. *McAden v. Banister*, 63 N. C. 479.

§ 7-170. Issue and return of execution.—Execution may be issued on a judgment, rendered in a justice's court, at any time within one year after the rendition thereof, and shall be returnable sixty days from the date of the same. (Rev., s. 1481; Code, s. 840, Rule 14; C. S. 1521.)

Failure to Docket.—The lost vitality of a judgment not docketed within one year from its rendition cannot be restored by placing it on the docket of the superior court. *Cowen v. Withrow*, 114 N. C. 558, 19 S. E. 645; *Woodard v. Paxton*, 101 N. C. 26, 28, 7 S. E. 469, nor will such docketing in the superior court arrest the running of the statute of limitation. *Daniel v. Laughlin*, 87 N. C. 433, 434.

Same—Rights of Purchaser.—A purchaser under an execution on a judgment of a justice of the peace docketed after the lapse of one year acquires no title although he be a stranger to the judgment and without notice. *Cowen v. Withrow*, 114 N. C. 558, 19 S. E. 645.

Execution may be issued by the justice of the peace unless the cause has been removed to the superior court. *Bailey v. Hester*, 101 N. C. 538, 8 S. E. 164, and he may likewise recall the execution where it is improvidently issued. *Id.*

Application of Proceeds.—A justice of the peace has no jurisdiction to direct the application by a sheriff, of the proceeds of an execution issued by another justice of the peace upon the ground that the latter was null and void. *Cary v. Allegood*, 121 N. C. 54, 28 S. E. 61.

§ 7-171. Levy and lien of execution.—Executions issued by a justice, which must be directed to any constable or other lawful officer of the county, shall be a lien on the goods and chattels of the defendant named therein, from the levy thereof only, but shall not be levied on or enforced in any manner against real estate; but when a justice's judgment shall be made a judgment of the superior court, as is elsewhere provided, the execution shall be capable of being levied and collected out of any property of the defendant in execution, and it shall be a lien on the real estate of said defendant from the time when it becomes a judgment of the superior court. (Rev., s. 1482; Code, s. 841; 1868-9, c. 159, s. 5; C. S. 1522.)

To Whom Directed.—Execution from a justice's court must be directed to "any constable or other lawful officer of the county," and if it comes into the hands of the sheriff, he must obey it. *McGloughan v. Mitchell*, 126 N. C. 681, 36 S. E. 164. But a constable cannot serve process addressed to the sheriff, nor can a sheriff serve process addressed to a constable. *Id.*

Same—Appraisers.—A constable to whom an execution from the court of a justice of the peace has been delivered may summon appraisers and administer to them the prescribed oaths. *McAuley v. Morris*, 101 N. C. 369, 7 S. E. 883.

Personal Property.—It is not necessary, under this section, that the judgment be docketed in the superior court, to entitle the judgment creditor to an execution against personal property. *McAuley v. Morris*, 101 N. C. 369, 373, 7 S. E. 883.

Real Property.—A judgment of a justice of the peace, when duly docketed in the office of the superior court clerk, becomes a judgment of that court to all intents and purposes, and is a lien upon all of the real estate of the defendant in the county. *Dysart v. Brandreth*, 118 N. C. 968, 23 S. E. 966.

§ 7-172. Stay of execution.—In all actions founded on contract, whereon judgments are rendered in justices' courts, stay of execution, if prayed for at the trial by the defendant or his attorney, shall be granted by the justices in the following manner: For any sum not exceeding twenty-five dollars, one month; for any sum above twenty-five dollars and not exceeding

fifty dollars, three months; for any sum above fifty dollars and not exceeding one hundred dollars, four months; for any sum above one hundred dollars, six months. But no stay of execution shall be allowed in any action wherein judgment is rendered on a former judgment taken before a justice of the peace. (Rev., s. 1483; Code, s. 842; 1868-9, c. 272; C. S. 1523.)

§ 7-173. Security on stay of execution.—The party praying for a stay of execution shall, within ten days after the trial, give sufficient security, approved by the justice, for payment of the judgment, with interest thereon till paid, and cost; and the acknowledgment of the surety, entered by the justice in his docket and signed by the surety, shall be sufficient to bind such surety. If the judgment be not discharged at the time to which execution has been stayed, the justice who awarded the judgment shall issue execution against the principal, or surety, or both. (Rev., s. 1484; Code, s. 843; C. S. 1524.)

Generally.—An undertaking that the appellant shall pay all costs that may be awarded against him on an appeal from a justice's court, and that if the judgment or any part thereof be affirmed, or the appeal dismissed, the appellant shall pay the amount directed to be paid by the judgment, is in compliance with the statute, and does not restrict the obligation to pay the judgment (if affirmed) as rendered in the justice's court, but the signers are bound to pay such as may be rendered in the superior court against the appellant. It is not necessary, to bind the appellant party to a suit, that he should sign the undertaking. *Walker v. Williams*, 88 N. C. 7.

Judgment Remains Unimpaired.—Although the execution on the judgment may be stayed on giving it undertaking as herein provided for, the force and effect of the judgment remains unchanged. *Dunham v. Andres*, 128 N. C. 207, 38 S. E. 832.

§ 7-174. Stay of execution on appeal.—In all cases of appeal from justices' courts, if the appellant desires a stay of execution of the judgment, he may, at any time, apply to the clerk of the appellate court for leave to give the undertaking as provided in a subsequent section; and the clerk, upon the undertaking being given, shall make an order that all proceedings on the judgment be stayed. Instead of before the clerk of the appellate court, the appellant may give the undertaking before the justice who tried the cause, who shall indorse his approval thereon. (Rev., ss. 1485, 1486; Code, ss. 882, 883; 1869-70, c. 187; C. S. 1525.)

Mortgage as Substitute for Undertaking.—There is no statutory provision that allows a mortgage of real or personal property to be given in lieu of the undertaking on appeal from a justice's judgment, required by this section. *Comron v. Standland*, 103 N. C. 207, 9 S. E. 317. Yet, if the defendant give and the plaintiff accept such mortgage, it is valid and can be enforced. The stay of the execution is a valuable and sufficient consideration to support the mortgage. *Id.*

Judgment Remains Unimpaired.—See note of *Dunham v. Andres*, 128 N. C. 207, 38 S. E. 832, section 7-173.

Action on Bond.—In an action on a bond given to stay execution on an appeal from a justice's judgment, it is not necessary to allege that the plaintiff has sustained damage on account of the appeal. *McMinn v. Patton*, 92 N. C. 371.

§ 7-175. Nature of undertaking.—The undertaking shall be in writing, executed by one or more sufficient sureties, to be approved by the justice or clerk making the order, to the effect that if judgment be rendered against the appellant, the sureties will pay the amount together with all costs awarded against the appellant, and

when judgment shall be rendered against the appellant, the appellate court shall give judgment against the said sureties. And in the event that said defendant shall prior to entry of the final judgment be adjudicated a bankrupt, then and in that event, the surety or sureties on said bond shall remain bound as if they were co-debtors with the defendant and the plaintiff may continue the prosecution of the action against said sureties, as if they were co-defendants in the cause. (Rev., s. 1487; Code, s. 884; 1879, c. 68; 1933, c. 251, s. 1; C. S. 1526.)

Editor's Note.—By Public Laws 1933, c. 251, was added the sentence, appearing at the end of this section, which provides for liability of sureties in case defendant is adjudicated a bankrupt.

Substantial Compliance Sufficient.—A literal compliance with the provisions of this section is unnecessary—a substantial compliance is sufficient. *McMinn v. Patton*, 92 N. C. 571.

Surety's Liability Attaches When Final Judgment Rendered against Principal.—The liability of a surety on a bond given in accordance with this section to stay execution of a judgment of the justice of the peace pending appeal, as provided by § 7-174, attaches when or if final judgment is rendered against the principal, and where the principal has been relieved of liability by a discharge in bankruptcy pending the appeal, plaintiff's claim being filed in the schedule in bankruptcy, no final judgment is rendered against the principal, and the surety may not be held liable on the stay bond. Note: this decision was given on the basis that chapter 251, Public Laws of 1933, amending this section, is prospective in effect and does not apply to bonds executed prior to its effect. *Sutton v. Davis*, 205 N. C. 464, 171 S. E. 738.

Mortgage as substitute for undertaking, see note of *Comron v. Standland*, 103 N. C. 207, 9 S. E. 317, section 7-174.

Effect of Bankruptcy.—Where a judgment was rendered against the defendant before a justice of the peace, and an undertaking filed as provided for by this section, and pending the appeal be obtained a discharge in bankruptcy, it was held, that the sureties were not liable. *Laffoon v. Kerner*, 138 N. C. 281, 50 S. E. 654.

The *Laffoon* case, supra, was decided prior to the 1933 amendment to this section and must be read in the light of the law as it existed prior to the amendment. For a discussion of the *Laffoon* case and the change effected by the 1933 amendment, see 11 N. C. Law Rev., 221.

§ 7-176. Execution stayed upon order given.—A delivery of a certified copy of the order, hereinafter mentioned, to the justice of the peace shall stay the issuing of an execution on the judgment; if it has been issued, the service of a certified copy of such order on the officer holding the execution shall stay further proceedings thereon. A certified copy of such order shall also be served on the respondent, or on his agent or attorney, within ten days after the making thereof. (Rev., s. 1488; Code, s. 885; C. S. 1527.)

Art. 22. Appeal.

§ 7-177. No new trial; either party may appeal.—A new trial is not allowed in a justice's court in any case whatever; but either party dissatisfied with the judgment in such court may appeal therefrom to the superior court, as hereinafter prescribed. (Rev., s. 1489; Code, s. 865; C. S. 1528.)

Cross References.—As to appeal from court of justice of peace being first heard in recorder's court, see § 7-243; in county civil court, see § 7-373; in special county court, see § 7-427. As to rehearing when judgment rendered against party absent because of sickness, excusable mistake or neglect, see Rule 21 of § 7-149.

New Trial Not Allowed.—When both parties to an action are present at the trial in a justice court, and the case is heard and judgment rendered, a new trial cannot be allowed. The party dissatisfied must appeal to the superior court. *Froneburger v. Lee*, 66 N. C. 333.

Strict compliance with the requirements for perfecting

the appeal given by this section is required. *Green v. Hobgood*, 74 N. C. 234.

Time for Taking.—See note of *Hahn v. Guilford*, 87 N. C. 172, section 7-179.

Rehearing.—See note of *Salmon v. McLean*, 116 N. C. 209, 21 S. E. 178, section 7-149, Rule 21.

Bastardy Proceeding.—A bastardy proceeding, being a civil action, is subject to appeal by either party. *State v. Liles*, 134 N. C. 735, 736, 742, 47 S. E. 750.

Cited in *State v. Goff*, 205 N. C. 545, 550, 172 S. E. 407.

§ 7-178. Appeal does not stay execution.—No appeal shall prevent the issuing of an execution on a judgment, or work a stay thereof, except as provided for by giving an undertaking and obtaining an order to stay execution. (Rev., s. 1490; Code, s. 875; 1876-7, c. 251, s. 6; C. S. 1529.)

An appeal from a justice of the peace does not vacate the judgment nor does it suspend its operation. *Dunham v. Anders*, 128 N. C. 207, 211, 38 S. E. 832.

§ 7-179. Manner of taking appeal.—The appellant shall, within ten days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process not personally served, and the defendant did not appear and answer, he shall have fifteen days, after personal notice of the rendition of the judgment, to serve the notice of appeal herein provided for. (Rev., s. 1491; Code, s. 876; 1876-7, c. 251, s. 7; C. S. 1530.)

This section contemplates and applies to causes of which the court has acquired jurisdiction, and does not affect a case which enables one to obtain relief from a judgment entered against him when the court for lack of service was without jurisdiction to make any orders in any way affecting the rights of person or property. *Graves v. Reidsville Lodge*, 182 N. C. 330, 332, 109 S. E. 29.

Justice of Peace Included.—The principal both as to the right and procedure for a defendant against whom service of summons has not been made, or the same waived, to have the judgment set aside applies to the courts of justice of the peace as well as to those of more extensive jurisdiction. *Graves v. Reidsville Lodge*, 182 N. C. 330, 109 S. E. 29.

Duty of Justice.—A justice of the peace who takes a case under advisement and later renders judgment must notify the parties thereof to afford them opportunity to appeal in accordance with the provisions of the statute. *Blacker v. Bullard*, 196 N. C. 696, 146 S. E. 807.

Time.—An appeal must be taken to the next term of the appellate court. *Hahn v. Guilford*, 87 N. C. 172.

From the decision of a Justice of the Peace in a bastardy proceeding either the woman or the defendant may appeal to the Superior Court, but the appeal must be taken to the next term. The Superior Court has no right to dispense with this requirement. *Helsabeck v. Grubbs*, 171 N. C. 377, 88 S. E. 473. The "next term" means any term, civil or criminal, which begins after the expiration of the ten days allowed for serving the notice of appeal. *State v. Fleming*, 204 N. C. 40, 42, 167 S. E. 483.

The carbon copy of a letter from the secretary of the Industrial Commission to the attorney for the defendant is not notice of appeal as herein contemplated and cannot be construed as a compliance with this section and § 7-180. *Higdon v. Nantahala Power, etc., Co.*, 207 N. C. 39, 41, 175 S. E. 710.

Service of Notice.—Where judgment is given on process not personally served, but served by publication, and the defendant does not appear at the trial, the defendant is entitled to take fifteen days notice of judgment in which to serve notice of his appeal. *Thompson v. Lynchburg Notion Co.*, 160 N. C. 519, 76 S. E. 470.

Same—Discretion.—Although, where an appeal from a justice of the peace is regularly docketed in due time in the superior court, and proper notice of the appeal has not been given, a judge may, in his discretion, permit notice of appeal to be given, yet he has no discretion to revive an appeal lost by delay and to permit the same to be docketed at a subsequent term to the one to which it should have been returned. *Davenport v. Grisson*, 113 N. C. 38, 39, 18 S. E. 78.

Same—Time of Service.—In an appeal from a justice of the peace to the superior court, notice must be served by an officer (unless service is accepted or the appeal is taken at the trial), and within ten days both upon the

justice who tried the case and upon the appellee, and upon failure to give such notice, unless the judge, in his discretion, permits the notice to be given at the trial, the appeal should be dismissed. *State v. Johnson*, 109 N. C. 852, 13 S. E. 843.

Same—Excusable Neglect.—Where the judgment is rendered in the absence of either party and such absence is occasioned by sickness or excusable neglect, relief may be had by filing an affidavit before the justice, setting forth the grounds therefor, within ten days after judgment. *Gambill v. Gambill*, 89 N. C. 201. See also, *Dunn v. Patrich*, 156 N. C. 248, 72 S. E. 220.

Actual Service.—Where the defendant is actually served with summons he is bound to take notice of the rendition of judgment. *Spaugh v. Boner*, 85 N. C. 208, 209.

Service by Officer.—The notice of an appeal from a justice of the peace, when the notice is not given on the trial, must be served by an officer. *Clark v. Deloatch Mills Mfg. Co.*, 110 N. C. 111, 14 S. E. 518.

Appeals under Workmen's Compensation Act shall, in so far as is reasonable and consonant with the language of the act and legislative intent, conform to this section. *Summrell v. Chilean Nitrate Sales Corp.*, 218 N. C. 451, 11 S. E. (2d) 304.

§ 7-180. No written notice of appeal in open court.—Where any party prays an appeal from a judgment rendered in a justice's court, and the adverse party is present in person or by attorney at the time of the prayer, the appellant shall not be compelled to give any written notice of appeal either to the justice or to the adverse party. (Rev., s. 1492; Code, s. 877; 1869-70, c. 187; 1876-7, c. 251, s. 8; C. S. 1531.)

Party Present.—Where the party is present when the appeal is prayed for, no written notice is required. *State v. Crouse*, 86 N. C. 617, 620.

Applicability of Estoppel.—Where the defendant upon judgment being rendered against him in a justice's court appealed in open court, and afterwards told the justice not to send up the papers, who thereupon delayed in so doing, and thereafter the defendant changed his mind and filed with the clerk of the superior court a bond sufficient to cover the plaintiff's claim and costs: Held, that it was not error in the court below to refuse to dismiss the appeal. *Suttle v. Green*, 78 N. C. 76.

§ 7-181. Justice's return on appeal.—The justice shall, within ten days after the service of the notice of appeal on him, make a return to the appellate court and file with the clerk thereof the papers, proceedings and judgment in the case, with the notice of appeal served on him. He may be compelled to make such return by attachment. But no justice shall be bound to make such return until the fees, prescribed by law for his service, be paid him. The fee so paid shall be included in the costs, in case the judgment appealed from is reversed. (Rev., s. 1493; Code, s. 878; C. S. 1532.)

Payment of Fees Necessary.—Officers of the court are not compelled to perform their duties until fees prescribed by law are paid or tendered them, but they must be demanded by them before laches can be imputed to litigants. *West v. Reynolds*, 94 N. C. 333.

Statement of Evidence Not Sent Up.—The requirement of this section that the justice file with the clerk, "the papers, proceedings and judgment in the case," does not include a statement of the evidence, unless there was an exception by one of the parties. *London v. Headen*, 76 N. C. 72, 74.

Liability of Justice.—The sending up an appeal to the superior court by the justice of the peace upon the payment of the cost is a judicial act, and no action for damages will lie against him for failing to send up the papers in apt time. *Simonds v. Carson*, 182 N. C. 82, 108 S. E. 353.

Power of Justice Ends upon Transmission of Appeal.—After a justice of the peace has transmitted an appeal from his judgment and all the papers to the superior court, he has no power to grant a motion to set aside his judgment for want of jurisdiction. *Forbes v. McGuire*, 116 N. C. 449, 21 S. E. 178.

Remedy Where Justice Fails in His Duty.—A motion

in the superior court for a recordari or an attachment under this section is the remedy given an appellant for the failure of the justice to send up an appeal, and it is no legal excuse for the appellant to show that he had paid to the justice his fees and those of the clerk, and that the justice had failed to docket it as required by the statutes. The appellant would thus make the justice his agent and for his neglect he would be responsible. *MacKenzie v. Davidson County Develop. Co.*, 151 N. C. 276, 65 S. E. 1003.

Failure to Sign Return.—The failure of a justice of the peace to sign the return of notice of appeal does not vitiate the proceedings in the superior court, where the appellant had given notice of appeal and paid the justice's fee, and the appellee made no motion for any purpose, but made a general appearance in the superior court at the trial in person and by attorney. *Hawks v. Hall*, 139 N. C. 176, 51 S. E. 857.

§ 7-182. Defective return amended.—If the return be defective, the judge or clerk of the appellate court may direct a further or amended return as often as may be necessary, and may compel a compliance with the order by attachment. (Rev., s. 1494; Code, s. 879; C. S. 1533.)

Defective Return.—If the justice's return is defective, the judge may direct a further or amended return. *Hawks v. Hall*, 139 N. C. 176, 51 S. E. 857.

§ 7-183. Restitution ordered upon reversal of judgment.—If the judgment appealed from, or any part thereof, be paid or collected, and the judgment be afterwards reversed, the appellate court shall order the amount paid or collected to be restored, with interest from the time of such payment or collection. The order may be obtained on proof of the facts made at or after the hearing of the appeal, on a previous notice of six days. If the order be obtained before the judgment of reversal is entered, the amount may be included in the judgment. (Rev., s. 1495; Code, s. 886; C. S. 1534.)

Involuntary Payments.—This section only applies where there has been an involuntary payment of or on the judgment. *Cowell v. Gregory*, 130 N. C. 80, 40 S. E. 849. See the dissenting opinion, holding that payment of a collectible judgment rendered by a court of competent jurisdiction is involuntary.

Art. 23. Forms.

§ 7-184. Forms to be used in justice's court.—The following forms, or substantially similar ones, shall be sufficient in all cases of proceedings in civil actions, provided for in this article:

[No. 1]

Summons

North Carolina, County, Township.

A. B.	} Before, Justice of the Peace.
against	
C. D.	

State of North Carolina, to any constable or other lawful officer of County—Greeting:

We command you to summon C. D. to appear before G. W. H., Esq., one of the justices of the peace for the county of, on the day of, 19...., at his office (or elsewhere, as the justice may appoint the place of trial), in Township, to answer A. B. in a civil action for the recovery of dollars; and have you then and there this precept with the date and manner of its service.

Herein fail not. Witness our said justice, this day of, 19....

G. W. H.
Justice of the Peace.

[No. 2]

Summons on Allowing Application to Rehear

(Title, etc., as in No. 1)

Whereas, A. B., plaintiff above named (or C. D., defendant above named), has applied by affidavit, which is filed, for a rehearing in the above-entitled action, wherein judgment was rendered against the said plaintiff (or defendant), in his absence, at the trial thereof, before the undersigned on the day of, 19....; and such application having been allowed, and the cause opened for reconsideration;

Now, therefore, we command you to summon the said plaintiff (or defendant) to appear before G. W. H., Esq., one of the justices of the peace for the county of, on the day of, 19...., at, in said county, when and where the complaint will be reheard and the same proceedings be had as if the case had not been acted on; and have you then and there this precept with the date and manner of its service.

Herein fail not. Witness our said justice, this day of, 19....

G. W. H.....
Justice of the Peace.

[No. 3]

Affidavit to Obtain Attachment

(Title as in No. 1)

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to the plaintiff in the sum of dollars (state any cause of action founded on contract, specifying the amount of the claim and the grounds thereof).

2. That the said defendant (State any fact or facts, so as to bring the case within one of the classes in which an attachment may issue. The facts must be stated positively and affirmatively, not merely upon information and belief, except where a fact is alleged with a particular intent. The intent in such case may be stated as on information and belief. See No. 4.)

A.....B.....

Sworn to and subscribed before me, this..... day of, 19....

G. W. H.....
Justice of the Peace.

[No. 4]

Another Form of Affidavit to Obtain Attachment

(Title, etc., as in No. 1)

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to plaintiff in the sum of dollars for goods sold and delivered to said defendant by the plaintiff on or about the day of, 19....

2. That the said defendant has departed from this state, or keeps himself concealed therein, with intent, as defendant is informed and believes, to avoid the service of a summons (or with intent, etc., to defraud defendant's creditors).

A. B.....

(Sworn to, etc., as in No. 3.)

[No. 5]

Affidavit against a Foreign Corporation

North Carolina, County.

A.....B.....	} Before..... Justice of the Peace.
against	
The Highland Mining Co.	

A. B., the plaintiff above named, being duly sworn, deposes and says:

1. That the defendant above named is indebted to the plaintiff in the sum of dollars, for the use and occupation of certain premises, by permission of plaintiff, from the day of, 19...., until the day of, 19....

2. That the defendant is a foreign corporation, created under the laws of the state of

3. That the cause of action above stated arose in this state.

A. B.....

(Sworn to, etc., as in No. 3.)

[No. 6]

Undertaking upon Attachment

(Title as in No. 1 or No. 5)

Whereas, the plaintiff above named is about to apply for a warrant of attachment against the property of the above-named defendant:

Now, therefore, we, J. W. B., of County, and W. D. M., of County, undertake in the sum of dollars (the sum must be at least two hundred dollars), that if the said warrant be granted, and the defendant recover judgment in this action, or the attachment be set aside by order of the court, the plaintiff shall pay all costs that may be awarded to defendant in the same, and all damages which he may sustain by reason of such attachment.

J. W. B.....

W. D. M.....

Signed and delivered in the presence of G. W. H., Esq., this day of, 19....

G. W. H.....
Justice of the Peace.

[No. 7]

Warrant of Attachment

(Title as in No. 1 or No. 5)

State of North Carolina, to any constable or other lawful officer of County—
Greeting:

It appearing by affidavit to the undersigned that a cause of action exists in favor of the plaintiff against the defendant for the sum of dollars, and that the defendant is not a resident of this state (or otherwise, as the fact may be), and the plaintiff having given the undertaking as required by law:

Now, therefore, you are commanded forthwith to attach and safely keep all the property of the said defendant C. D. in your county, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, with costs and expenses; and have you this warrant before G. W. H., one of the justices of the peace for your county, at his office in said county, on the day of, 19.., with your proceedings hereon.

Witness our said justice, this day of
....., 19.....

G. W. H.....
Justice of the Peace.

[No. 8]

Officer's Return to be Indorsed on Attachment

I, O. P. M., constable (or sheriff) of County, do hereby return that, by virtue of the within attachment, I have seized and taken into my possession the tangible personal property (or, have levied on the real estate, as the case may be) of the defendant within named, specified in the inventory hereto annexed.

Dated this day of 19....

O. P. M.....
Constable (or Sheriff).

[No. 9]

Inventory of Property Attached to Above Return

(Title as in No. 1 or No. 5)

I do hereby certify that the following is a true and just inventory of all the property seized or levied on by me under a warrant of attachment, issued in the above-entitled action by G. W. H., Esq., with a statement of the books, vouchers, papers, rights and credits taken into my custody by virtue of said warrant. (Insert list of property by items.) I do further certify that the following property mentioned in the above inventory is perishable, and that the expense of keeping the same until the termination of the suit would exceed one-fifth of its value; and I do hereby apply to this court for authority to sell the same. (Insert a list of perishable property.)

Dated this day of 19....

O. P. M.....
Constable (or Sheriff.)

[No. 10]

Order Directing Sale of Perishable Property

(Title as in No. 1 or No. 5)

It appearing by the inventory returned by O. P. M., constable (or sheriff), under the warrant of attachment granted in this action, that the following property mentioned in said inventory is perishable, to wit: (Insert here the list of perishable property.)

It is therefore ordered that the said property be sold by the said officer at public auction, at such time and place as he shall deem advisable, and that the said officer give notice of such sale as the sale of personal property on execution.

It is further ordered that the proceeds of such sale be retained by said officer, and disposed of in the same manner as the property itself, if the same had not been sold.

Dated this day of 19....

G. W. H.....
Justice of the Peace.

[No. 11]

Notice of Levy on Property not Capable of Manual Delivery

To H. B.....:

Take notice that by warrant of attachment issued in this action, a certified copy of which is

herewith served upon you, I have levied upon, and do hereby levy upon, your indebtedness, amounting to dollars or thereabouts, to the defendant above named. (Describe as particularly as possible the shares, debts or property levied upon.)

Dated this day of 19....

O. P. M.....
Constable (or Sheriff.)

The officer will indorse on the copy of the attachment served with the above notice the following certificate:

I do hereby certify that the within is a true copy of the warrant of attachment in my possession, issued in this action, and of the whole thereof.

Dated this day of 19....

O. P. M.....
Constable (or Sheriff.)

[No. 12]

Order Directing Third Person (H. B.) to Appear and be Examined

(Title as in No. 1 or No. 5)

It appearing to me by the certificate of O. P. M., constable (or sheriff) of said county, that the said officer, with a warrant of attachment against the property of C. D., the defendant in this action, has applied to H. B. for the purpose of levying upon a debt owing to the defendant by said H. B. (or upon property of said defendant held by said H. B., or otherwise), and that the said H. B. refuses to furnish said officer with a certificate designating the amount of the debt owing by said H. B. to the defendant, or the amount and description of the property held by said H. B. for the benefit of the defendant:

Now, therefore, I do order and require the said H. B. to attend before me at my office on the day of 19...., and be examined on oath concerning the same.

Dated this day of 19.....

G. W. H.....
Justice of the Peace.

[No. 13]

Attachment to Enforce Obedience to Above Order

(Title as in No. 1 or No. 5)

State of North Carolina, to any constable or other lawful officer of County —
Greeting:

Whereas, it appears that H. B. was duly served on the day of 19....., with an order issued by G. W. H., Esq., one of our justices of the peace for said county, requiring said H. B. to attend before said justice at his office, in said county, on the day of 19...., and be examined on oath concerning a certain debt owing to the defendant, named in the above action, by the said H. B. (or property held by the said H. B. for the benefit of the defendant, or otherwise, as the case may be);

And whereas, the said H. B., in contempt of said order, has refused or neglected, and doth still refuse or neglect, to appear and be examined on oath, as in said order he is required to do:

Now, therefore, we command you that you forthwith attach the said H. B., so as to have his

body before G. W. H., Esq., one of our justices of the peace for your county, on the day of, 19, at his office, in said county, then and there to answer, touching the contempt which he, as is alleged, hath committed against our authority; and further, to perform and abide by such order as our said justice shall make in this behalf. And have you then and there this writ, with a return, under your hand, of your proceedings thereon.

Hereof fail not, at your peril.

Witness, our said justice, this day of
19

G. W. H.....
Justice of the Peace.

Cross Reference.—As to power to punish for contempt, see § 5-6.

[No. 14]

Undertaking on Discharge of Attachment

(Title of the cause as in No. 1)

Whereas, the property of the above-named C. D. has been attached, and the defendant desires a discharge of said attachment on giving security according to law:

Now, therefore, we, B. B., of County, and D. D., of County, undertake in the sum of dollars (the sum named must be at least double the amount claimed by plaintiff), that if the said attachment be discharged we will pay to the plaintiff, on demand, the amount of the judgment that may be recovered against the defendant in this action.

Dated this day of, 19....

(Signed) B. B.....
D. D.....

Signed and delivered in the presence of G. W. H., Esq., this day of

G. W. H.....
Justice of the Peace.

Acknowledgment and Affidavit of Sureties

North Carolina, County.

On this day of, 19...., before me personally appeared the above named B. B. and D. D., known to me to be the persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

And the said B. B. and D. D., being severally sworn, each for himself, says that he is a resident of the State of North Carolina and a householder (or freeholder) therein.

B. B.....
D. D.....

Sworn and subscribed before me the day above written.

G. W. H.....
Justice of the Peace.

[No. 15]

Order Vacating Attachment on Security being Given

(Title as in No. 1 or No. 5)

The defendant having appeared in this action and applied to discharge the attachment on giving security, and the said defendant having delivered to the court an undertaking in due form of law, which has been duly approved by the court:

It is ordered that the attachment issued in this action on the day of, 19...., be and the same is hereby vacated and discharged, and the defendant is released therefrom in all respects. It is further ordered that any and all proceeds of sales and money collected by O. P. M., constable (or sheriff), and all property attached, now in said officer's possession, be paid and delivered to the said defendant or his agent.

Dated this day of, 19....

G. W. H.....
Justice of the Peace.

[No. 16]

Form of Publication to be Made by Plaintiff in Attachment

(Title as in No. 1)

[Amount sued for] due by note (or otherwise as the fact may be). Warrant of attachment returnable before G. W. H., Esq., a justice of the peace for County, North Carolina, at his office (or otherwise as the case may be), on the day of, 19...., when and where the defendant is required to appear and answer the complaint.

Dated this day of, 19....

A. B....., Plaintiff.

[No. 17]

Affidavit for Arrest on Debt Fraudulently Contracted

(Title as in No. 1)

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to the plaintiff in the sum of dollars on an inland bill of exchange, drawn on the day of, 19.... by defendant on the First National Bank of Charlotte, North Carolina, payable at sight to the order of plaintiff.

2. That on the day of, 19...., the defendant applied to the plaintiff to purchase a bill of goods amounting to dollars, which the plaintiff offered to sell to the defendant for cash; that the defendant, contriving to defraud the plaintiff, represented that he had money on deposit at said National Bank for more than the amount of the proposed purchase, and offered to give plaintiff a sight draft on said bank; that the plaintiff, relying upon the representations of the said defendant, and solely induced thereby, sold and delivered a bill of goods amounting to dollars to the defendant, who thereupon drew the sight order on said bank above referred to; that on the day of, 19...., the plaintiff presented said draft at said bank for acceptance, when the same was not accepted for want of any funds in said bank to the credit of the defendant; that notice of nonacceptance was given to the defendant, who has wholly refused to pay the draft or any part thereof; that the representations made as aforesaid by the defendant were, and each and every of them was, as deponent is informed and believes, untrue; and that the defendant, as deponent is informed and believes, did not have, nor expect to have, any funds on deposit at said bank at the making of the

representations above mentioned, but said defendant was then and is now wholly insolvent.

A. B.

Sworn to and subscribed before me, this.... day of, 19....

G. W. H.....
Justice of the Peace.

[No. 18]

Undertaking on Arrest

(Title as in No. 1)

Whereas, the plaintiff above named is about to apply (or has applied) for an order to arrest the defendant, C. D.;

Now, therefore, we, J. J., of County, and P. P., of County, undertake, in the sum of dollars (the sum must be at least one hundred dollars), that if the said defendant recover judgment in this action the plaintiff will pay all costs that may be awarded to the said defendant and all damages which he may sustain by reason of his arrest in this action.

J. J.
P. P.

Signed in my presence, this day of, 19....

G. W. H.....
Justice of the Peace

[No. 19]

Order of Arrest

(Title as in No. 1)

North Carolina, County, Township.

To any constable or other lawful officer of said county:

For the causes stated in the annexed affidavit, you are required forthwith to arrest C. D., the defendant named above, and hold him to bail in the sum of dollars (the sum should be the amount of the plaintiff's claim), and to return this order before the undersigned at his office in said county, on the day of, 19....; of which return you will give notice to plaintiff or his attorney.

Dated this day, 19....

G. W. H.
Justice of the Peace.

[No. 20]

Undertaking of Bail on Arrest

(Title as in No. 1)

Whereas, the above named defendant, C. D., has been arrested in this action;

Now, therefore, we, B. B., of County, and D. D., of County, undertake, in the sum of dollars (the sum should be the same as mentioned in the order of arrest), that if the defendant is discharged from arrest he shall at all times render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce judgment therein.

B. B.
D. D.

Signed in my presence, this day of, 19....

G. W. H.
Justice of the Peace.

[No. 21]

Notice of Exception to Bail

(Title as in No. 1)

To O. P. M., constable (or sheriff) of the county of.....:

Take notice, that the plaintiff does not accept the bail offered by the defendant in this action (and if the undertaking is defective in form or otherwise, add also), and further he excepts to the form and sufficiency of the undertaking.

Yours, etc.,

A. B., Plaintiff.

(or M. W. N., Attorney for Plaintiff.)

Dated this day of, 19....

[No. 22]

Notice of Justification of Bail

(Title as in No. 1)

To A. B., Plaintiff (or M. W. N., attorney for plaintiff):

Take notice, that the bail in this action will justify before G. W. H., Esq., a justice of the peace for said county, at the office of said justice, in said county, on the day of, 19....

Dated this day of, 19....

C. D.

(or, M. W. N., Attorney for
C. D.), Defendant.

[No. 23]

Notice of Other Bail

(Title as in No. 1)

Take notice that R. S., of County (physician), and Y. Y., of County (farmer), are proposed as bail, in addition to (or in place of) B. B. and D. D., the bail already put in; and that they will justify (conclude as in last form).
Date, etc.

[No. 24]

Justification of Bail

(Title as in No. 1)

On this day of, 19, before G. W. H., Esq., a justice of the peace for said county, personally appeared B. B. and D. D. (or R. S. and Y. Y., as the case may be), the bail given by the defendant C. D. in this action, for the purpose of justifying pursuant to notice; and the said B. B., being duly sworn, says:

1. That he is a resident and householder (or freeholder) in this state;

2. That he is worth the sum ofdollars (the amount specified in the order of arrest), exclusive of property exempt from execution.

And the said D. D., being duly sworn, says:

(As with the other bail.)

(And so on with each bail offered.)

(Signatures of bail.)

Examination taken and sworn to before me, this day of, 19....

G. W. H.
Justice of the Peace.

[No. 25]

Allowance of Bail

(Title as in No. 1)

The bail of the defendant, C. D., within men-

tioned, having appeared before me and justified, I do find the said bail sufficient, and allow the same.

Dated this day of, 19....

G. W. H.....

Justice of the Peace.

[No. 26]

Subpoena to Testify

State of North Carolina, County.

To S. T., greeting: (the justice may insert any number of necessary names.)

You (and each of you) are commanded to appear personally before G. W. H., Esq., a justice of the peace for said county, at his office in said county, on the day of, 19....., to give evidence in a certain civil action now pending before said justice, and then and there to be tried, between A. B., plaintiff, and C. D., defendant, on the part of the defendant (or plaintiff).^{*} Herein fail not, under the penalty prescribed by law. Witness our said justice, this day of, 19

G. W. H.....

Justice of the Peace

[No. 27]

N. B.—The justice may, instead of a formal subpoena, indorse on the summons or other process an order for witnesses, substantially as follows:

The officer to whom the within process is directed will summon the following persons as witnesses for the plaintiff:; and the following as witnesses for the defendant:; and will notify all such witnesses to appear and testify at the time and place within named for the return of this process.

Dated this day of, 19

G. W. H.....

Justice of the Peace.

[No. 28]

Subpoena Duces Tecum

If any witness has a paper or document which a party desires as evidence at the trial, the justice will pursue the form No. 26 as far down as the asterisk (*) and then add the following clause:

And you, S. T., are also commanded to bring with you and there produce as evidence a certain bond (describe particularly) which is now in your possession or under your control, together with all papers, documents, writings or instruments in your custody, or under your control. (Conclude as in form No. 26.)

[No. 29]

Form of Oath of Witness

You swear that the evidence you will give as to the matters in difference between A. B., plaintiff, and C. D., defendant, shall be the truth, the whole truth, and nothing but the truth. So help you, God.

[No. 30]

Proceedings against Defaulting Witness

When a witness, under subpoena, fails to attend, the justice will note the fact in his docket by some such entry as the following:

R. P., a witness summoned on behalf of the plaintiff, called and failed.

If the party who suffers by default of the witness wishes to move for the penalty against him, he will serve substantially the following notice on the witness:

(Title as in No. 1)

To R. P.:

Take notice, that on the day of, 19, the plaintiff in the above action will move G. W. H., Esq., the justice before whom the trial of said action was had, on the day of, 19, for judgment against you for the sum of dollars, forfeited by reason of your failure to appear and give evidence on said trial as you were summoned to do.

Dated this day of, 19

A. B., Plaintiff.

The justice will enter the proceedings on the foregoing notice on his docket as follows:

A.	B.	} Justice's Court. Motion for penalty against R. P., defaulting witness.
against		
C.	D.	

..... day of, 19, A. B., above named, appears, and according to a notice filed and duly served on R. P., moved for the penalty of dollars forfeited by the said R. P. by reason of his failure to attend and give evidence on the trial of a cause, wherein A. B. was plaintiff and C. D. was defendant, tried before me at my office on the day of, 19, as appears by entry duly made on my docket; when and where the said R. P., a witness summoned on the part of the plaintiff in that action, was called and did fail.

R. P. appears and assigns for excuse "high water," and offers his own affidavit, which is filed. He also offers as a witness in his behalf S. S., who, being duly sworn, testifies that (state what S. S. says about the condition of the water at the time). R. P., having no other evidence, closed the case on his part. Whereupon A. B. offered M. Y. as a witness, who, being sworn, testifies (state what witness says).

Neither party having any other evidence, and after hearing all the proofs and allegations submitted for and against the motion, it is adjudged, on motion of A. B., that A. B. do recover of R. P. the sum of dollars, penalty forfeited by reason of the premises, and the further sum of dollars, costs of this motion.

[No. 31]

Form of a Venire

The justice will make a list of the persons drawn by him as jurors, and indorse thereon substantially as follows:

To O. P. M., constable of County:

You are hereby directed to summon the persons named within to appear as jurors before me at my office in your county, on the, day of, 19, for trial of a civil action now pending between A. B., plaintiff, and C. D., defendant, then and there to be tried. And have you then and there the names of the jurors you shall summon, with this precept.

Dated this day of, 19.....

G. W. H.....

Justice of the Peace.

[No. 32]

Form of Juror's Oath

You swear well and truly to try the matter in difference between A. B., plaintiff, and C. D., defendant, and a verdict to give thereon according to the evidence in the cause. So help you, God.

[No. 33]

Form of Oath to Constable in Charge of the Jury

You swear that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial together in some private and convenient place, without any meat or drink, except such as may be ordered by the court; that you will not suffer any communication, orally or otherwise, to be made to them, and that you will not communicate with them yourself, orally or otherwise, unless by order of the court. So help you, God.

[No. 34]

Summons against Defaulting Juror to Show Cause

State of North Carolina, to any constable or other lawful officer of County—
Greeting:

We command you to summon R. S. to appear before G. W. H., Esq., a justice of the peace for your county, at his office in said county, on the day of, 19, to show cause why he, the said R. S., should not be fined according to law for his nonattendance as a juror before our said justice at his office in said county on the day of, 19, in a certain cause then and there pending, in which A. B. was plaintiff and C. D. was defendant; and have you then and there this precept, with the date and manner of your service thereof.

Witness, our said justice, this day of,
19

G. W. H.
Justice of the Peace.

[No. 35]

Demurrer to Complaint

(Title as in No. 1.)

The defendant demurs to the complaint in this action, for that the said complaint does not state facts sufficient to constitute a cause of action (or, for that the said complaint is not sufficiently explicit to enable this defendant to understand it.)

(Signature of defendant or defendant's attorney.)

[No. 36]

Demurrer to Answer

(Title as in No. 1 or No. 5)

The plaintiff demurs to the answer of the defendant, for that the facts stated in the answer are not legally sufficient to constitute a defense to this action (or, for that the said answer is not sufficiently explicit to make this plaintiff understand it.)

(Signature of plaintiff or plaintiff's attorney.)

[No. 37]

Judgment upon Demurrer

NOTE.— If the justice thinks the objection

raised by the demurrer to the pleadings is well founded, he will make this entry on his docket:

"Demurrer to the complaint (or to the answer) filed, heard and sustained; and whereupon it is ordered that the said pleading be amended without cost (or upon payment of costs, as the case may be)."

This order to amend the defective pleading is a matter of course, and is the only judgment which the justice can render upon demurrer. He cannot give a final judgment in the cause at this stage, for the party may choose to amend his pleadings and try the case on the facts. If, however, the party refuse to amend the defective pleading, the justice will disregard the same, and proceed to render final judgment, as follows:

"The plaintiff (or defendant) having refused to amend his complaint (or his answer) demurred to, it is adjudged that the defendant go without day and recover of the plaintiff the sum of dollars, costs of this action (or that the plaintiff recover of the defendant the sum of dollars, damages, and the further sum of dollars, costs of this action.)"

If the justice deem the objection, raised by the demurrer, not well founded, he will enter in his docket as follows: "Demurrer to the complaint (or to the answer) filed, heard and overruled," and he will then proceed to the evidence in the cause.

[No. 38]

Entry in Docket

NOTE.—The following is offered as a general precedent of the manner in which the justice will make the entries in his docket:

(Title as in No. 1)

....., 19 Summons issued; returnable on the instant at my office.

....., 19 Summons returned, served on defendant by O. P. M., constable, on the instant, both parties appear, the plaintiff in person, the defendant by R. H. R., Esq., attorney.

The plaintiff complains on a promissory note executed by the defendant to him, dated, 19, payable one day after date, for \$....., and also for goods sold and delivered to the defendant, and claims damages for \$

The defendant answers and denies each and every allegation in the complaint, and claims a setoff of \$..... for wood sold and delivered to the plaintiff, and also of \$..... for work and labor performed for the plaintiff.

On joining issue of fact as above, the action is, by consent of parties, adjourned to the instant, at my office.

A venire is also issued at the plaintiff's (or defendant's) demand, returnable at the time and place last mentioned.

....., 19, The parties appear and proceed to the trial of the cause. The following jurors are returned as summoned upon the venire by O. P. M., constable. (Insert the names of all jurors summoned.) The following jurors, who are returned as summoned, do not appear. (Insert their names.) The following jurors appear according to the summons. (Insert their names.) The following jurors are sworn to try the action. (Insert their names.)

H. P. and J. M., witnesses for the plaintiff, and W. F., a witness for the defendant, are sworn and testify; J. S., a witness on the part of the defendant, is offered, but objected to by the plaintiff on the ground (state the ground), and rejected.

Having heard the evidence (and the arguments of a counsel, if any), the cause is submitted to the jury, who retire, under charge of O. P. M., a constable duly sworn for that purpose, and afterwards return in open court and publicly deliver their verdict, by which they find in favor of the plaintiff for \$..... damages; whereupon, I adjudged that the plaintiff do recover of the defendant—

Damages, - - - - - \$.....

Costs, - - - - -

....., 19 Execution issued for above judgment to O. P. M., constable.

....., 19 Notice of appeal served on me by defendant; my fee paid and return to the appeal made by me.

N. B.—If the action is tried by the justice without a jury, all that relates to the venire and the verdict in the above form must be left out, and the judgment will be entered as follows:

After hearing the proofs and allegations of the respective parties, I do adjudge that the plaintiff recover, etc. (as above).

[No. 39]

**Form of Notice of Appeal to the Superior Court,
Where a New Trial of the Whole Matter
is to be Had**

(Title as in No. 1)

To G. W. H., Esq., a justice of the peace for said county.

Take notice, that the defendant in the above action appeals to the Superior Court from the judgment rendered therein by you on the day of, 19...., in favor of the plaintiff for the sum of sixty-five dollars damages and the further sum of three dollars and seventy-five cents costs, and that this appeal is founded upon the ground that the said judgment is contrary to law and evidence.

Dated this day of, 19....

W. W.

Attorney for Appellant.

[No. 40]

Return to Notice of Appeal

A..... B..... }
against } County of
C..... D..... }

To the Superior Court of County:

An appeal having been taken in this action by the defendant, I, G. W. H., the justice before whom the same was tried, in pursuance of the notice of appeal hereto annexed, do hereby certify and return that the following proceedings were had by and before me in said action:

On the first of February, one thousand eight hundred and sixty-nine, at the request of the plaintiff, I issued a summons in his favor and against the defendant, which is herewith sent. Said summons was, on the return day thereof, returned before me at my office; and at the same time and place the parties personally appeared.

The plaintiff complained for goods sold and delivered to defendant to the amount of \$75. The defendant denied the right of the plaintiff to recover that amount for the goods, on the ground that he had paid, at or shortly after the purchase of said goods, dollars thereon; and he also claimed to have a setoff against the plaintiff to the amount of \$85 for board and lodging furnished to plaintiff and work and labor done for him; and he claimed to be entitled to judgment against the plaintiff for \$.....

Both parties introduced evidence upon the claims so made by them, and after hearing their proofs and allegations, I rendered judgment in favor of the plaintiff and against the defendant, on the tenth of February, eighteen hundred and sixty-nine, for \$65 damages, and for the further sum of \$3.75, costs of the action.

I also certify that on the eleventh of February, eighteen hundred and sixty-nine, the defendant served the annexed notice of appeal on me, and at the same time paid me my fee of \$1 for making my return.

All of which I send, together with the process, pleadings, and other papers in the cause. Dated this 15th day of February, 1904.

G. W. H.....

Justice of the Peace.

N. B.—If the cause was tried by a jury, state the fact and set forth the verdict, with the judgment thereon. It is not necessary to set out in the return a copy of any process, pleading, affidavit or other paper. It is sufficient to refer to such a paper as filed and as herewith sent.

[No. 41]

Where the Sum Demanded Exceeds Two Hundred Dollars

It appearing that the sum demanded by the plaintiff in this action exceeds two hundred dollars, it is ordered that the action be dismissed, and judgment is rendered against A. B., plaintiff, for the sum of dollars, costs.

(Date and sign.)

[No. 42]

Where the Title to Real Estate is in Question

N. B.—The defendant, if he wishes to make answer to title, must file a written answer to the complaint, setting forth the facts.

Answer of Title

(Title as in No. 1)

The defendant answers to the complaint:

1. That no allegation thereof is true.
2. That the plaintiff ought not to have or maintain his action against the defendant, because the premises mentioned and described in the complaint, at the time when the rent and render, for which said action is brought, is alleged to be due, was and is now the land and freehold of one J. D., and not that of the plaintiff; nor was the plaintiff then, nor is he now, entitled to the possession thereof; and the defendant further answers that the title to said premises was, at the time aforesaid, and is now, in said J. D., and will come in question on the trial of this action.

Dated this day of, 19....

C. D....., Defendant

It appearing from the answer and proof of the defendant that the title to real estate is in controversy in this action, it is ordered that the action be dismissed, and judgment is rendered against the plaintiff for dollars, costs.

[No. 43]

Tender of Judgment

(Title as in No. 1)

To C. D.....:

Take notice, that the defendant hereby offers to allow judgment to be taken against him by the plaintiff in the above action for the sum of fifty dollars, with costs.

Dated this day of, 19....

C. D....., Defendant.

[No. 44]

Acceptance of Tender of Judgment

(Title as in No. 1)

To A. B.....:

Take notice, that the plaintiff hereby accepts the offer to allow the plaintiff to take judgment in the above action for the sum of fifty dollars, with costs, and the justice will enter up judgment accordingly.

Dated this day of, 19....

A. B....., Plaintiff.

[No. 45]

Form of Judgment on Tender

(Title as in No. 1)

N. B.—The justice will state all the proceedings in the action from the issuing of the summons down to the appearance of the parties and the complaint of the plaintiff, and then proceed as follows:

Whereupon, the said defendant, before answering said complaint, made and served an offer, in writing, to allow the plaintiff to take judgment against him for the sum of fifty dollars with costs;* and the said plaintiff thereupon accepted such offer, and gave notice thereof to the defendant in writing; said offer and acceptance thereof being filed;

Now, therefore, judgment is accordingly rendered in favor of the plaintiff and against the defendant for the sum of fifty dollars damages, and the further sum of one dollar, costs.

If notice of acceptance is not given, the entry will be as follows:

(Follow the foregoing form down to the asterisk (*) and then add):

And the said plaintiff having refused to accept such offer, the defendant answered the complaint by denying, etc. (state the defense of the defendant down to the judgment, which, in case the plaintiff fails to recover more than the sum mentioned in the offer, will be entered thus):

After hearing the proof and allegations of the respective parties, I adjudge that the plaintiff do recover the sum of fifty dollars damages, and the further sum of one dollar, costs.

I further adjudge that the defendant do recover of the plaintiff the sum of two dollars and seventy-five cents, costs accruing in the action subsequent to the offer of the defendant referred to.

[No. 46]

General Form—Execution

(Title as in No. 1)

State of North Carolina, to any constable or other lawful officer of County—Greeting:

Whereas, judgment has been rendered by G. W. H., Esq., a justice of the peace for said county, against C. D., in favor of A. B., for the sum of... dollars damages, and the further sum of dollars costs, on theday of, 19....;

You are therefore commanded forthwith to levy of the goods and chattels of the said C. D. (excepting such goods and chattels as are by law exempt from execution) the amount of such judgment, with interest from the date thereof until the money is recovered.

And make due return, according to law, in sixty days from the date hereof.

Dated thisday of, 19....

G. W. H.....

Justice of the Peace.

[No. 47]

Execution in Attachment

(Title as in No. 1)

State of North Carolina, to any constable or other lawful officer of.....county—Greeting:

Whereas, in pursuance of a warrant of attachment, dated the.....day of....., 19...., issued by G. W. H., Esq., a justice of the peace of said county, in an action wherein A. B. was plaintiff and C. D. defendant, the following property of defendant was, on the day of, 19..., duly levied on and attached:

(Here insert a list of property)

And whereas, judgment was rendered in said action, on the.....day of....., in favor of said plaintiff, and against the said defendant in the sum of.....dollars:

Therefore, we command you that you satisfy the said judgment out of the property so attached as aforesaid, by the sale of the same or so much thereof as shall be sufficient to satisfy the said judgment; and if a sufficient sum be not realized therefrom, then you satisfy the said judgment out of any other goods and chattels of the said judgment debtor within your county.

And make due return thereof according to law within sixty days from the date hereof.

Witness, our said justice, this.....day of, 19....

G. W. H.....

Justice of the Peace

[No. 48]

Record of Conviction of a Contempt

The justice will make an entry in his docket stating the particular circumstances of the contempt, of which the following is offered as an example:

Whereas, on the.....day of....., 19....., while engaged in the trial of an action (or other judicial act, as the case may be) in which A. B. was plaintiff and C. D. was defendant, at my office in.....County, M. B. did willfully and contemptuously interrupt me, and did then and there conduct himself so disorderly and insolently to-

wards me, and by making a loud noise did disturb the proceedings on said trial (or other judicial act) and impair the respect due to the authority of the law; and on being ordered by me to cease making such noise and disturbance, the said M. B. refused so to do, but on the contrary did publicly declare and with loud voice (state whatever offensive words were used); and whereas, when immediately called upon by me to answer for the said contempt said M. B. did not make any defence thereto, nor excuse himself therefrom; the said M. B. is therefore convicted of the contempt aforesaid, and is adjudged to pay a fine of five dollars and be imprisoned in the county jail for the term of two days, and until he pays such fine or is duly discharged from imprisonment according to law.

G. W. H.
Justice of the Peace

[No. 49]

Warrant of Commitment for a Contempt

(Title as in No. 1)

State of North Carolina, to the keeper of the common jail ofCounty—Greeting:

Whereas, etc. (recite the record of conviction so as to show the entire matter of contempt, together with the judgment therefor, and then proceed as follows):

Therefore, you are hereby commanded to receive the said M. B. into your custody in the said jail, and him there safely keep during the said term of two days, and until he pays the said fine or is duly discharged according to law.

Herein fail not.

Dated this.....day of.....,19....

G. W. H.
Justice of the Peace.
(Rev., s. 1496; Code, s. 909; C. S. 1535.)

SUBCHAPTER VI. RECORDERS' COURTS.

Art. 24. Municipal Recorders' Courts.

§ 7-185. In what cities and towns established; court of record.—In each city and town in the state, which has acquired a population of one thousand or over by the last federal census, a recorder's court for such municipality may be established, which shall be a court of record and shall be maintained pursuant to the provisions of this subchapter. (1919, c. 277, ss. 1, 2; 1925, c. 32, s. 1; C. S. 1536.)

Local Modification.—Richmond: 1941, c. 60, s. 1.

Cross References.—As to abolishing municipal recorder's court, see § 7-212. See also, note to § 7-278.

Constitutionality.—Where the question of the constitutionality of this section establishing recorders' courts by a general act is the subject of the action, and pending the appeal the Legislature has withdrawn the effect or operation of the statute from a certain county (Caldwell) wherein the establishment of the court was the subject of injunctive relief, the cause of action abates and the appeal will be dismissed at the cost of each party, and the order restraining the establishment of the particular court will continue to be effective. *Coffey v. Rader*, 182 N. C. 689, 110 S. E. 106.

Cited in *Stephens v. Dowell*, 208 N. C. 555, 181 S. E. 629; *State v. Boykin*, 211 N. C. 407, 191 S. E. 18.

§ 7-186. Recorder's election and qualification; term of office and salary.—The court shall be presided over by a recorder, who may be a licensed attorney at law, and who shall be of good

moral character and, at the time of his appointment or election, a qualified elector of the municipality. The first recorder, upon the establishment of such court, shall be elected by the governing body of the municipality, either at the time of the establishment of the court or within thirty days thereafter, and he shall hold office until the next municipal election and until his successor is duly elected and qualified. If a vacancy occur in the office at any time, the same shall be filled by the election of a successor for the unexpired term by the governing body of the municipality, at the regular or special meeting called for that purpose. After the first elected recorder each succeeding recorder shall be nominated and elected in the municipality in the same manner and at the same time as is now provided by law for the elective officers of the municipality, and in the general election for such officers. Before entering upon the duties of his office the recorder shall take and subscribe an oath of office, as is now provided by law for a justice of the peace, and shall file the same with the clerk of the board of the city or town. The salary of the recorder shall be determined and fixed in advance by the governing body of the city or town, and shall not be increased or decreased during the term of his office, and shall be paid out of the funds of the municipality: Provided, that the governing body of such city or town is hereby authorized to provide a schedule of fees to be charged by said recorder. (1919, c. 277, s. 2; 1925, c. 32, s. 2; 1943, c. 543; C. S. 1537.)

Cross References.—As to forms of oath required of justice of peace, see § 11-11. As to oaths required of public officials generally, see §§ 11-6, 11-7, Const., Art. VI, s. 7. As to penalty for failure to take oaths, see § 128-5.

Editor's Note.—The act of 1925 added two provisos to the section. The 1943 amendment struck out the second proviso making the recorder eligible to hold the office of mayor.

Mandamus to Compel Appointment.—When it appears on appeal to the Supreme Court from admitted facts that a board of aldermen of an incorporated town are acting in violation of a command of the statute that they elect a recorder in the manner specified therein, a mandamus will issue, in view of the public interests involved. *Battle v. Rocky Mount*, 156 N. C. 329, 72 S. E. 354.

Constitutional Provisions.—It is held in *State v. Bateman*, 162 N. C. 588, 77 S. E. 768, that a former requirement that the recorder must be "a licensed attorney at law" is unconstitutional, on the ground that it does not lie within the power of the legislature to add to the constitutional disqualifications to hold office.

§ 7-187. Time and place of holding court.—The court shall be opened for the trial of criminal cases at least one day of each week, to be fixed by the governing body of the municipality, and shall continue its session from day to day until all business is legally disposed of. The court shall be held in the city or town hall, or other place provided therefor, and other sessions of the court may be called by the recorder, as necessity may require. (1919, c. 277, s. 3; C. S. 1538.)

§ 7-188. No subsequent change of judgment.—When a case has been finally disposed of and judgment pronounced therein, it shall not thereafter be reopened or the judgment or sentence rendered therein be modified, changed or stricken out by the recorder after the adjournment of the regular weekly term or after the adjournment of any special term called by the recorder. (1919, c. 277, s. 3; C. S. 1539.)

§ 7-189. Procedure in the court.—The recorder shall preside over the court and try and determine all criminal actions coming before him, the jurisdiction of which is conferred by this article, and the proceedings of the court shall be the same as are now prescribed for courts of justices of the peace and for the superior court so far as the same may reasonably apply. (1919, c. 277, s. 9; C. S. 1540.)

§ 7-190. Criminal jurisdiction.—The court shall have the following jurisdiction within the following named territory:

1. Original, exclusive, and concurrent jurisdiction, as the case may be, of all offenses committed within the corporate limits of the municipality which are now or may hereafter be given to justices of the peace under the constitution and general laws of the state, including all offenses of which the mayor or other municipal court now has jurisdiction.

2. Original and concurrent jurisdiction with justices of the peace of all offenses committed outside the corporate limits of the municipality and within a radius of five miles thereof, which is now or may hereafter be given to justices of the peace under the constitution and general laws of the state.

3. Exclusive, original jurisdiction of all other criminal offenses committed within the corporate limits of such municipality and outside, but within a radius of five miles thereof, which are below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors.

4. Concurrent jurisdiction with justices of the peace to hear and bind over to the superior court all persons charged with any crime committed within the territory above mentioned, of which the recorder's court is not herein given final jurisdiction.

5. All jurisdiction given by the general laws of the state to justices of the peace, or to the superior court, to punish for contempt, to issue writs ad testificandum, and other process to require the attendance of witnesses and to enforce the orders and judgments of the court. (1919, c. 277, s. 4; 1925, c. 32, s. 3; C. S. 1541.)

Cross References.—For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64; for statutory definition of felony, see § 14-1.

Editor's Note.—In the second and third provisions of this section, the five mile radius is new with the acts of 1925; heretofore the jurisdictional limits herein mentioned was confined to a radius of two miles of the corporate limits of the municipality.

Conflicting Jurisdiction of Magistrate and City Courts.—The legislature may constitutionally grant a city court exclusive jurisdiction of offenses occurring within the city limits and embraced within the jurisdiction of a justice of the peace. *State v. Baskerville*, 141 N. C. 811, 53 S. E. 742; but such exclusive jurisdiction cannot extend beyond the city limits. *State v. Doster*, 157 N. C. 634, 73 S. E. 111.

Jurisdiction Given Over Crimes Below Grade of Felony.—In order that recorder's courts might be permitted to take cognizance of crime and try criminals without indictment, all crimes below the degree of felony have been declared to be "petty misdemeanors" by subsection (3) of this section. *State v. Boykin*, 211 N. C. 407, 412, 191 S. E. 18.

§ 7-191. Jurisdiction to recover penalties.—The recorder's court shall also have jurisdiction to try all actions for the recovery of penalties imposed by law, or by any ordinance of the municipi-

ality in which the court is located, for any offense committed within the corporate limits of the municipality or outside thereof within five miles of the corporate limits, and all such penalties shall be recovered in the name of the municipality. (1919, c. 277, s. 10; 1925, c. 32, s. 4; C. S. 1542.)

Editor's Note.—The acts of 1925 extended the radius to five miles of the corporate limits, while under the statute as it formerly stood, the radius was two miles of the corporate limits.

§ 7-192. Disposition of cases when jurisdiction not final.—In all cases heard by the recorder against any person for any offense whereof the court has not final jurisdiction and in which probable cause of guilt is found, such person shall be bound in a bond or recognizance with sufficient surety to appear at the next succeeding term of the superior court of the county for the trial of criminal cases, and in default of such bond or recognizance he shall be committed to the common jail of the county to await trial; but in all capital cases such person shall be committed to the common jail of the county without bail. (1919, c. 5; C. S. 1543.)

§ 7-193. Disposition of cases when jurisdiction final.—All persons pleading guilty or convicted in the court of any offense of which the court has final jurisdiction shall be fined or imprisoned, according to law, and any person entering a plea of guilty, or who may be convicted of any such offense, shall also pay the costs of the prosecution. (1919, c. 277, s. 7; C. S. 1544.)

§ 7-194. Sentences to be imposed.—When any person is convicted, or pleads guilty, of any offense of which the court has final jurisdiction, the recorder may sentence him to the common jail of the county in which the court is held, and assign him to work on the public roads of the county as provided by law; or when such person is a woman or an infant of immature years, the recorder may sentence him or her to the city or county workhouse or state reformatory, or other penal institution provided by law for such purposes. If there is no chain-gang in the county in which the court is held, the recorder may sentence the person to work upon the public roads of any other county provided with a chain-gang for the working of public roads, as authorized by the general laws of the state. (1919, c. 277, s. 8; C. S. 1545.)

Cross References.—As to sentencing prisoners for work under the supervision of the State Highway and Public Works Commission, see §§ 148-30 and 148-32. See also § 7-244.

§ 7-195. Appeal to superior court.—Any person convicted of any offense of which the recorder has final jurisdiction may appeal to the superior court of the county from any judgment or sentence of the recorder, in the same manner as is now provided for appeals from courts of justices of the peace. Upon such appeal the defendant shall be required to give bond or recognizance with sufficient surety for his appearance at the next term of the superior court; and in default thereof the recorder shall commit him to the county jail of the county until he shall give bond or be otherwise discharged by law. (1919, c. 277, ss. 5, 9; C. S. 1546.)

Local Modification.—Pitt: 1937, c. 134.

§ 7-196. Costs paid to the municipality.—All costs incurred in issuing warrants and serving the same in cases where the recorder has not final jurisdiction, and for the service of process arising in such cases when the process is served by the officer of the municipality, except as hereinafter provided, shall be paid to the municipality; and officers serving process issued from said court shall be allowed the same fees as are now allowed sheriffs in like cases, the same, when collected, to be paid over as herein provided. Where such officer is not an officer of a municipality such costs shall be dealt with as is now provided by law. (1919, c. 277, s. 6; C. S. 1547.)

§ 7-197. Seal of court.—The recorder's court shall have a seal with the impression, "The Recorder's Court of the City of _____," which seal shall be used in the attestation of writs, warrants, or other process, acts, judgments, or decrees of the court, in the same manner and to the same effect as the seal of other courts in the state; but no process issuing from the court, to be executed within the county in which court is held, shall require attestation by seal. (1919, c. 277, s. 11; C. S. 1548.)

§ 7-198. Issuance and service of process.—The recorder may issue process to the chief of police of the municipality in which the court is held, or to the sheriff, constable, or other lawful officer of the county in which the municipality is located, or to any other county in the state; and such process, when attested by the seal of the court, shall run anywhere in the state, and shall be executed by all public officers authorized to execute process, and be returned by them according to law.

The summons, warrant of arrest, and every other writ, process, or precept issuing from a recorder's court or other court inferior to the superior court, except justices of the peace, may be signed by the recorder, vice recorder, or presiding justice of the court, or by the clerk of the court or deputy clerk, where the court has a clerk or deputy. (1919, cc. 157, 277, s. 12; C. S. 1549.)

Proper Proceeding.—Under the proceedings established in "recorder's courts," the complaint and warrant—which, if necessary, must be construed together—have been established as the proper proceeding, just as has come down from the common law as to crimes the punishment of which is within the jurisdiction of a justice of the peace. *State v. Boykin*, 211 N. C. 407, 412, 191 S. E. 18.

§ 7-199. Vice recorder; election and duties.—The governing body of the municipality shall, at the same time and in the same manner as is provided in this article for the election of the first recorder, elect a vice recorder, who shall have the jurisdiction and authority conferred upon the recorder when the recorder shall be prevented from attending to his duties on account of sickness or other temporary disability or by reason of his temporary absence. The vice recorder shall receive the compensation allowed to the recorder for such services for the time that he may render such service, the compensation of the vice recorder to be deducted from the salary of the recorder, and the vice recorder shall be thereafter elected by the governing body of the municipality for the same term as the recorder is elected, and any vacancy occurring in the office of vice recorder shall be filled in the same manner as is

provided for the filling of vacancies in the office of recorder. (1919, c. 277, s. 13; C. S. 1550.)

§ 7-200. Clerk of court; election and duties; removal; fees.—The clerk of the recorder's court shall be elected by the governing body of the city or town at the same time and for the same term as the vice recorder, and all vacancies in the office of the clerk of the court shall be filled in the manner provided for filling vacancies in the office of vice recorder. Before entering upon the duties of his office, the clerk shall enter into a bond, with sufficient surety, in a sum to be fixed by the governing body of the municipality, not to exceed five thousand dollars, payable to the state, conditioned upon the true and faithful performance of his duties as such clerk and for the faithful accounting for and paying over of all money which may come into his hands by virtue of his office. The bond shall be approved by the governing body and shall be filed with the clerk of the superior court of the county. The clerk shall make monthly settlements with the county and city treasurers for all money which has come into his hands belonging to either. The clerk of the governing body of the municipality shall ex officio discharge the duties of the clerk of the court, unless the governing body shall elect some other person to discharge the duties. The governing body of the municipality shall have the right to remove the clerk of the court, either for incapacity or for neglect of the duties of his office; and in case of a vacancy for any cause the office shall be filled in the manner hereinbefore provided. Provided, that the governing body of the municipality is hereby authorized to provide a schedule of fees to be charged by the clerk of said court. (1919, c. 277, ss. 15, 18; 1925, c. 32, s. 5; C. S. 1551.)

Editor's Note.—The last provision of this section is new with the Acts of 1925.

Cited in *Stephens v. Dowell*, 208 N. C. 555, 181 S. E. 629.

§ 7-201. Clerk to keep records.—It shall be the duty of the clerk of the court to keep an accurate and true record of all costs, fines, penalties, forfeitures, and punishments by the court imposed, and the record shall show the name and residence of the offender, the nature of the offense, the date of the hearing of the trial, and the punishment imposed, which record shall at all times be open to inspection by any of the city authorities, or other person having business relating to the court. The clerk shall keep a permanent docket for recording all the processes issued by the court, which shall conform to the dockets kept by the clerk of the superior court. He shall also keep in proper files, to be provided by the city, a record of all cases which shall be disposed of in the court and the disposition made thereof. (1919, c. 277, s. 17; C. S. 1552.)

§ 7-202. Clerk to issue process.—The clerk of the court shall have all the power and authority now conferred upon justices of the peace to issue warrants for the arrest of all persons charged with the commission of offenses within the territory fixed in this article which warrants, however, shall be made returnable before the recorder of said court at the next sitting thereof, and shall be issued only upon affidavit made as now re-

quired by law to support warrants issued by justices of the peace. The clerk shall also have all power and authority of justices of the peace or clerk of the superior court to issue subpoenas or other process, to run anywhere within the state; and when such subpoenas or other process shall run beyond the county in which the court is located the same shall be attested by the seal of the court, and shall also be signed by the recorder. (1919, c. 277, s. 18; C. S. 1553.)

§ 7-203. Prosecuting attorney; duties and salary.—There shall be a prosecuting attorney in the court, who shall appear for the prosecution in all cases therein and, when specially requested by the governing body of the municipality and the recorder, shall assist in the prosecution of all cases which may be bound over or appealed from the court to the superior court; for his services he shall be paid such amount per annum as may be fixed by the governing body, at the same time and in the same manner as is provided for fixing the salary of the recorder. The prosecuting attorney may, or may not, perform the duties of city attorney, in the discretion of the governing body of the municipality: Provided, that the governing body of any such municipality is hereby authorized to provide a schedule of fees to be charged by said prosecuting attorney. (1919, c. 277, s. 16; 1925, c. 32, s. 6; C. S. 1554.)

Editor's Note.—The last provision of this section is new with the Acts of 1925.

§ 7-204. Jury trial, as in justice's court.—In all trials in the court, upon demand for a jury by the defendant or the prosecuting attorney representing the state, the recorder shall try the same as is now provided in actions before justices of the peace wherein a jury is demanded, and the same procedure as is now provided by law for jury trials before justices of the peace shall apply: Provided, however, that the compensation allowed jurors in all cases wherein the superior court has heretofore had final jurisdiction shall be the same as is allowed jurors in the superior court of the county in which the recorder's court is established. (1919, c. 277, s. 24; C. S. 1555.)

Local Modification.—Burke: 1931, c. 335; Craven: 1929, c. 115, s. 1; Hoke: Pub. Loc. 1937, c. 408; Pitt: 1937, c. 134.

§ 7-205. Continuances, recognizances, and transcripts.—The recorder's court shall have the same authority to grant continuances, take bonds and recognizances, and render judgments on forfeited bonds and recognizances, as is now vested by law in the superior courts, and the procedure regulating the issuing and service of notices against defendants and their sureties upon bonds and recognizances, and all other proceedings in taking and enforcing judgments in such cases, shall be the same as in the superior court in like cases. Transcripts of any judgments rendered may be docketed in the superior court of the county in which such court is held, in the same manner and with the same effect as judgments of other courts docketed as provided by law. (1919, c. 277, s. 21; C. S. 1556.)

§ 7-206. Officers' fees; fines and penalties paid.—In each case disposed of by the recorder where the defendant is convicted or pleads guilty, there shall, in addition to other lawful costs, be allowed

the following fees, to be taxed as a part of the costs against the defendant, viz: For recorder, one dollar in each case involving the breach of a municipal ordinance and any crime or offense of which a justice of the peace has final jurisdiction, and a fee of two dollars in all other cases; for the prosecuting attorney, one dollar in all cases of violation of municipal ordinances and of any crime or offense of which a justice of the peace has final jurisdiction, and in all other cases a fee as now provided by law for solicitors prosecuting in the superior court; and for the clerk of such court the same fees as are now allowed to clerks of the superior court in similar cases; but in all cases of the breach of municipal ordinances and cases of which a justice of the peace has final jurisdiction and in which the defendant pleads guilty, the fee herein allowed a prosecuting attorney may be remitted by the recorder in his discretion. All costs recovered and collected in the court, except as herein otherwise provided, shall belong to the municipality and be paid into the treasury thereof. All fines and penalties collected shall be paid by the clerk of the court to the county treasurer as provided by law, and all fees allowed by law for an arrest or serving other process in a criminal action, when the same shall have been made by the chief of police or other officer who shall be on a salary, shall be paid over to the treasurer of the municipality for the use of the same, and to reimburse it for the expense of maintaining and supporting the court. (1919, c. 277, s. 14; C. S. 1557.)

Local Modification.—Cabarrus: 1937, c. 279; Harnett: 1933, c. 75, s. 1(g).

Cross Reference.—For sections authorizing the governing bodies of municipalities to fix certain fees, see §§ 7-186, 7-200, 7-203.

§ 7-207. County to pay for offenders' work on roads.—Whenever, under any judgment of the court, any defendant is sentenced to work upon the public roads or other public work in the county, or to pay a fine and the costs of the prosecution, or costs only, and the defendant shall in fact work out the sentence or fine and costs, or either, upon the public roads or other public works, as aforesaid, then the county shall be liable for and shall pay to the treasurer of the municipality one-half the amount of the costs taxed in the cause: Provided, the sentence imposed shall be of sufficient length to reimburse the county for one-half of such costs. (1919, c. 277, s. 19; C. S. 1558.)

§ 7-208. Prosecutor may be taxed with costs.—The recorder shall have full power, in any case in which he shall adjudge that the prosecution was not required by the public interests, to tax the prosecutor with the costs of such action; and in the event the recorder shall adjudge that prosecution is frivolous or malicious, he may imprison the prosecutor for the nonpayment of such costs, as provided by law for similar cases in other courts. When the costs are paid, they shall belong to the city. (1919, c. 277, s. 20; C. S. 1559.)

§ 7-209. Justice of the peace to bind defendants to recorder's court; procedure thereon.—In case any justice of the peace residing within the territory above mentioned shall bind any person over for any offense committed within said terri-

tory, of which the justice has committing, but not final, jurisdiction, but of which the recorder's court has final jurisdiction, then such justice of the peace, instead of binding the defendant over to the superior court of the county, shall bind him to appear at the recorder's court on the day succeeding the trial before the justice, at ten o'clock a. m. The justice of the peace shall at once turn over the case to the clerk of said court, and the clerk shall, upon receipt of the same, enter the case upon the docket of the court, and the recorder shall try such person either upon the original warrant under which he was bound over or upon a new warrant to be issued by him for such offense. In all cases the recorder shall have the right to amend any warrant issued by him or by the clerk of the court, or sent up by any justice of the peace as hereinbefore provided, in the same manner and to the same extent as justices of the peace are now authorized by law to make amendments to warrants in justices' courts. (1919, c. 277, s. 22; C. S. 1560.)

§ 7-210. Transfer of certain cases to recorder's court.—All cases which shall be pending in any recorder's, police, mayor's, or other municipal court in the counties where the courts provided for in this article shall be established shall, after the election and qualification of the recorder and other officers authorized and required by this article, be transferred to the recorders' courts of the respective municipalities, to be tried in the manner and in accordance with the procedure provided; but no case pending in the superior court of any county at the time this article takes effect shall be transferred to the recorder's court, except by order of the presiding judge thereof. No cause shall be removed from the recorder's court as is now provided for the removal of cases from one justice of the peace to another. (1919, c. 277, s. 23; C. S. 1561.)

§ 7-211. Jurisdiction of justice of the peace after three months delay.—If any criminal offense committed within the jurisdiction of any recorder's court, of which said court is given original, exclusive and final jurisdiction, is not prosecuted to a final termination within three months after the commission of the offense, any justice of the peace within the territory shall acquire jurisdiction to issue his warrant, apprehend the offender, and dispose of such warrant as is now provided by law. (1919, c. 277, s. 23; C. S. 1562.)

§ 7-212. How municipal recorders' courts may be abolished.—The governing body of any municipality shall have the same power, to be exercised in the same manner, subject to the same limitations, to abolish municipal recorders' courts as is given the board of commissioners of any county to discontinue a county recorder's court, under the provisions of § 7-239. (1919, c. 277, s. 35; C. S. 1582.)

§ 7-213. Extension of jurisdiction. — In any city or town within the state of North Carolina, having a population of five thousand inhabitants or more, where there is now maintained a recorder's court under and by virtue of the law, or in which a recorder's court may be hereafter established and maintained, it shall be lawful for the governing body of any such city or town, and the

board of county commissioners of the county in which such city or town shall be located, to extend the jurisdiction of the recorder's court in such city or town to the township in which such city or town is located, in the manner described in the following sections. (1921, c. 216, s. 1; C. S. 1562(a).)

§ 7-214. Meeting of town and county authorities; election.—Whenever the governing body of any city or town, as described in § 7-213, and the board of county commissioners of the county in which the same shall be located, shall desire to extend the jurisdiction of the recorder's court in such city or town to include the whole township, as set forth in § 7-213, the mayor of such city or town and the chairman of such board of county commissioners shall call a joint meeting of the two boards, to be held at any place within such township as they may agree upon, and if a majority of each of such boards, at such meeting, shall by a joint resolution vote in favor of the extension of the jurisdiction of the recorder's court as herein described, then at such joint meeting the governing body of the town or city, and the board of county commissioners of the county, shall pass a joint resolution calling an election, submitting to the voters of the entire township the question of the extension of said municipal court, and that election shall be conducted by the county commissioners in the same manner as is prescribed for the conduct of elections for the establishment of municipal recorders' courts by the governing bodies of cities and towns, in so far as said procedure is applicable; the result of the election shall be recorded in the minutes of the county commissioners and certified to and recorded in the minutes of the governing body of the town or city; the form of the ballot shall be as prescribed in § 163-155, subsec. (e), and if by such election such resolution is adopted it shall have the effect of conferring upon the recorder's court in such city or town the same powers, authority, and jurisdiction as to offenses or crimes committed within the township in which such city or town is located as such court would have had if the same had been committed in such city or town: Provided, however, that the extension of the jurisdiction of such recorder's court as herein described shall not have the effect of in any way extending or affecting in any manner whatsoever any ordinance or other law pertaining exclusively to such city or town. (1921, c. 216, s. 2; C. S. 1562(b).)

§ 7-215. Police powers. — Whenever the jurisdiction of any recorder's court shall have been extended as described in §§ 7-213 to 7-216, such action shall thereupon confer upon the police officers of such city or town the same powers and authority in making arrests for crimes and offenses committed anywhere within the township in which such city or town shall be located, as is now or may hereafter be conferred upon sheriffs or their deputies within their respective counties. (1921, c. 216, s. 3; C. S. 1562(c).)

§ 7-216. Resolution for extension filed with each board as records.—Whenever the governing board of any city or town and the county commissioners of the county shall have adopted the

resolution extending the jurisdiction of the recorder's court as described in §§ 7-213 to 7-216, a copy of such resolution duly signed by the mayor and clerk of such city or town, and the chairman and clerk of such board of county commissioners, shall be duly filed with each board, and shall be kept and maintained as a part of their official records. (1921, c. 216, s. 4; C. S. 1562(d).)

§ 7-217. Jurisdiction not to extend to other municipalities.—No court hereafter established by the governing body of any city or town shall have jurisdiction over the territory within the corporate limits of any other incorporated city or town, or outside the county in which the city or town establishing such court is located. (1925, c. 280.)

Local Modification.—Craven, Edgecombe, Nash, Robeson: 1925, c. 280.

Art. 25. County Recorders' Courts.

§ 7-218. Established by county commissioners.—In any county in which a municipal recorder's court may not be established under the provisions of this subchapter, or in which such court has in fact not been established in the county-seat, the board of commissioners may, in their discretion, establish a recorder's court for the entire county, which shall be a court of record and shall be held at the county seat, or other place within the county provided by the board of commissioners. (1919, c. 277, s. 25; 1921, c. 110, s. 1; 1943, c. 543; C. S. 1563.)

Local Modification.—Caldwell: Pub. Loc. 1931, c. 138; Henderson: 1927, c. 103; 1937, c. 97; 1939, c. 238; Richmond: 1941, c. 60; Swain: Pub. Loc. 1939, c. 499.

Editor's Note.—The 1943 amendment added at the end of this section the following words "or other place within the county provided by the board of commissioners."

Stated in *State v. Norris*, 206 N. C. 191, 195, 173 S. E. 14.

§ 7-219. Recorder's election, qualification, and term of office.—The court shall be presided over by a recorder, who shall have the same qualifications as provided for recorders of municipalities. The first recorder shall be elected by the board of commissioners of the county, either at the time of the establishment of the court or within thirty days thereafter, and shall hold the office until the next regular election wherein county officers are elected, and until his successor shall be duly elected and qualified; and should a vacancy occur in said office at any time, the same shall be filled by the election of a successor with the qualifications herein provided, for the unexpired term, by the board of county commissioners at a regular or special meeting called for that purpose. The successor of the first recorder herein provided for and each succeeding recorder shall be nominated and elected in the county in the same manner and at the same time as is now provided by law for the nomination and election of the elective officers of the county and in the general election for such elective officers. Before entering upon the duties of his office the recorder shall take and subscribe an oath of office as is now provided by law for justices of the peace, and shall file the same with the clerk of the superior court of the county, who shall duly record the same in a book kept for that purpose. The recorder's salary shall be fixed in advance by the board of commissioners,

and paid out of the county funds upon vouchers, and shall not be increased or decreased during his term. (1919, c. 277, s. 25; C. S. 1564.)

Local Modification.—Henderson: 1939, c. 238; Mecklenburg: 1937, c. 253; Perquimans: 1943, c. 742; Scotland: 1925, c. 171.

Cross References.—As to forms of oaths required of justice of the peace, see §§ 11-6, 11-7, 11-11; Const., Art. VI, § 7. As to penalty for failure to take oaths, see § 128-5.

§ 7-220. Time and place for holding court.—The court shall be open for the trial of all criminal causes of which it has jurisdiction at least one day of each week, to be fixed by the board of county commissioners, and shall continue its session from day to day until all business is transacted by trial, continuance, or otherwise. The session of the court shall be held in the county courthouse or other place within the county provided by the board of commissioners for that purpose. Special sessions of the court may be called by the recorder as the necessities may require. (1919, c. 277, s. 26; C. S. 1565.)

§ 7-221. No subsequent change of judgment.—When any case has been finally disposed of by the recorder and judgment pronounced therein, the case shall not thereafter be reopened or the judgment or sentence rendered therein changed, modified or stricken out by the recorder after the adjournment of the regular weekly term of court or after the adjournment of any special term of court by the recorder. (1919, c. 277, s. 26; C. S. 1566.)

§ 7-222. Criminal jurisdiction.—The court shall have jurisdiction in all criminal cases arising in the county which are now or may hereafter be given to a justice of the peace, and, in addition to the jurisdiction conferred by this section, shall have exclusive original jurisdiction of all other criminal offenses committed in the county below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors: Provided, however, that where a special court or recorder's court shall legally exist within such county by virtue of a special act of the legislature passed before the amendments to the constitution in reference thereto, then the county recorder's court, as established in this article, shall not have jurisdiction of criminal cases within the territory of such existing recorder's court, so as to interfere with or conflict with the existing recorder's court, but shall have concurrent jurisdiction where the jurisdiction of the two courts covers the same causes or the same subject-matter. This article and the establishment of any court thereunder shall not be construed to repeal, modify or in anywise affect any existing special court or recorder's court by virtue of such former special acts herein referred to. (1919, c. 277, s. 27; C. S. 1567.)

Local Modification.—Franklin: 1943, c. 350.

Cross Reference.—For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64.

§ 7-223. Jurisdiction and powers as in municipal court.—The recorders of county courts provided for in this article shall be vested with all the jurisdiction and authority conferred upon recorders of municipal courts, in like manner and to the same extent as if such jurisdiction and authority had been specifically in this section set forth, in so far as such jurisdiction and authority are applicable

to such courts, and the provisions of this subchapter relative to municipal recorders' courts shall in all things apply to the county recorders' courts where same are not inconsistent and in so far as same are practically applicable: Provided, this section shall not take away the jurisdiction of a mayor to try breaches of ordinances when such city has no other municipal court. (1919, c. 277, s. 34; C. S. 1568.)

Local Modification.—Bertie: 1943, c. 772; Nash: c. 768.

§ 7-224. Removal of cases from justices' courts.

—When, upon written request made before entering on the trial of any cause before any justice of the peace, it shall appear proper for the cause to be removed for trial to some other justice, as is now provided by law, the cause may be removed for trial to the recorder's court of the county. (1919, c. 277, s. 28; 1921, c. 110, s. 3; C. S. 1569.)

Local Modification.—Cleveland, Lenoir: 1933, c. 277; 1939, c. 63; Mecklenburg: 1933, c. 277; 1937, c. 386.

Editor's Note.—Prior to Public Laws of 1921 this section read "upon affidavit, etc.," instead of "upon written request, etc.," as it now stands.

§ 7-225. Defendants bound by justice to recorder's court.—In all criminal cases heard by a justice of the peace or other committing magistrate of the county against any person for any offense included within the exclusive jurisdiction of the recorder's court as provided in this article, and in which probable cause of guilt is found, such person shall be bound in a personal recognizance or surety to appear at the next succeeding session of the recorder's court of the county, for trial; and in default of such surety such person shall be committed to the common jail of the county to await a trial: Provided, that in the event any justice of the peace or other committing magistrate shall bind over to the superior court any person accused of a crime within the jurisdiction of the county recorder's court, the clerk of the superior court shall, upon his own motion, transfer all papers in the case to the recorder's court, and the case shall then stand for trial at the next succeeding term of said recorder's court as if the defendant had been bound over to the recorder's court in the first instance: and Provided further, that in the event any justice of the peace or other committing magistrate shall bind over to the recorder's court any person charged with an offense beyond the jurisdiction of said court, the said recorder shall cause the accused person to enter into a new bond with sufficient surety for his appearance at the next succeeding term of the superior court of the county, and shall transmit all papers in the case to the said superior court, but this shall be done without additional cost to the accused person. (1919, c. 277, s. 29; 1921, c. 110, s. 4; C. S. 1570.)

Local Modification.—Vance, Warren: Pub. Loc. 1927, c. 438.

§ 7-226. Notice to accused of transfer; trial; obligation of bond.—Whenever the clerk of the superior court shall transfer the papers in any case from the superior court to a county recorder's court, he shall at the same time issue a notice to the accused person and his surety, informing them that the cause has been so transferred and requiring the accused person to appear at the next succeeding

term of said recorder's court for trial, and, upon the service of said notice upon the accused person and his surety, at least five days before the beginning of the next succeeding term of the recorder's court, the case shall stand for trial at said term and the bond given by the accused person for his appearance at the next term of the superior court shall in all respects be valid and binding to compel the appearance of the accused person at the said next succeeding term of said recorder's court, and in case said notice is not served on the accused person and his surety at least five days before the beginning of the next succeeding term of the recorder's court, then the case shall not be tried without the consent of the accused person until the following term of the recorder's court. (1921, c. 110, s. 5; C. S. 1570(a).)

§ 7-227. Trials upon warrants; by whom warrants issued.—All trials of criminal causes in said court shall be upon warrant issued by the clerk of the superior court or deputy clerk provided for in this article, or by the recorder or by any justice of the peace of the county. In either event such warrant shall be issued upon affidavit duly made and subscribed, setting forth the complaint against the defendant: Provided, the recorder shall have authority to amend the warrant and to allow amendment of the affidavit at any time before judgment. (1919, c. 277, s. 30; 1921, c. 110, s. 6; C. S. 1571.)

Cited in *State v. Turner*, 220 N. C. 437, 17 S. E. (2d) 501.

§ 7-228. Jury trial as in municipal court.—In all trials in county recorders' courts, upon demand for a jury by the defendant or the prosecuting attorney representing the state, a jury shall be had in the same manner and under the same provisions as are set forth in this subchapter in reference to municipal courts, so far as the same may be practically applicable to a county court. (1919, c. 277, s. 40; C. S. 1572.)

Local Modification.—Burke: 1931, c. 335; Cabarrus: 1939, c. 347; Craven: 1929, c. 115; Henderson: 1933, c. 316; Hoke: Pub. Loc. 1937, c. 408; Pasquotank: 1941, c. 213; Perquimans: 1929, c. 25; Tyrrell: 1943, c. 177.

§ 7-229. Sentence imposed; fines and costs paid.

—Whenever any person shall be convicted or plead guilty of any offense of which the court has final jurisdiction the recorder may sentence him to the common jail of the county in which the court shall be held, and assign him to work on the public roads of the county where provision has been made therefor; but if no provision has been made for working convicts upon the public roads in the county, then the recorder may sentence such person to be worked upon the public roads of any other county within the judicial district or any county within any adjoining judicial district which has made such provision: Provided, that in case the person so convicted or pleading guilty shall be a woman or an infant of immature years, then the recorder may assign him or her to the county workhouse, reformatory, or other penal institution located in the county; or if there be none, any similar institution that may be located outside of the county to which judges of the superior court are authorized to sentence such person under the general laws of the state. All fines imposed by the court shall be collected by the clerk of such court or the

deputy clerk thereof in the same manner as the clerk of the superior court collects fines imposed by the superior court; and, where a defendant is convicted and fails to pay the costs of such conviction, the county shall pay such costs as is allowed by law in similar cases before the superior court. (1919, c. 277, s. 32; 1925, c. 308; C. S. 1573.)

Cross Reference.—As to sentencing prisoners for work under the supervision of the State Highway and Public Works Commission, see §§ 148-30 and 148-32.

§ 7-230. Appeals to superior court.—Any person convicted of any offense of which the county recorder has final jurisdiction may appeal to the superior court from any judgment or sentence of the court in the same manner as is now provided for appeals from the courts of justices of the peace; and any person tried before the recorder for any offense of which the court has not final jurisdiction shall, upon the recorder's finding probable cause of guilt, be bound over to the superior court in the same manner as is provided by law in similar cases before justices of the peace. (1919, c. 277, s. 33; C. S. 1574.)

Derivative Jurisdiction.—When the Superior Court sits upon an appeal from a judgment of a justice of the peace in a criminal action, or a judgment of a recorder's court under this section, it is sometimes said to be acting under the derivative jurisdiction of the court from which appeal is taken; the trial is had upon the warrant issued by the court which had jurisdiction and which is required to be transmitted to the court with the return to the appeal. *State v. Boykin*, 211 N. C. 407, 412, 191 S. E. 18.

Where the case is beyond the jurisdiction of the inferior court, it does not reach the Superior Court under this section by appeal, but by the process of "binding over," and in such case only is an indictment necessary. *Id.*

§ 7-231. Clerk of superior court ex officio clerk of county recorder's court.—The clerk of the superior court of any county in which a county recorder's court shall be established shall be ex officio clerk of such court. He shall keep separate criminal dockets in his office for such court in the same manner as he keeps criminal dockets in the superior court; he shall otherwise possess all the powers and functions conferred upon, and discharge all the duties required of, clerks of the superior court under the general law; and he shall be liable upon his official bond as clerk of the superior court for all of his official acts and conduct in reference thereto. Whenever the clerk of the Superior Court acts ex-officio as clerk of the Recorder's Court or General County Court, any assistant clerk or deputy clerk of the Superior Court in his office shall have power and authority to take affidavits, issue warrants and other process, administer oaths to witnesses and to perform any other duty in connection with said court under the direction of the clerk of the Superior Court, and for the acts of said assistant or deputy clerk, the clerk of the Superior Court shall be liable on his official bond to the same extent that he would have been liable if he had done the act himself. The preceding sentence shall not apply to recorder's courts in Bladen, Brunswick, Camden, Gates, Halifax, Martin, Moore, Orange, Perquimans, Forsyth and Vance Counties. (1919, c. 277, s. 36; 1935, c. 345; C. S. 1575.)

Local Modification.—Columbus: 1925, c. 232.

Editor's Note.—The last two sentences in above section were added by Public Laws 1935, chapter 345.

Cited in *State v. Boykin*, 211 N. C. 407, 191 S. E. 18.

§ 7-232. Deputy clerk may be appointed.—In-

stead of having the clerk of the Superior Court to act ex-officio as clerk of the Recorder's Court or General County Court, the board of commissioners of any county wherein a county Recorder's Court or General County Court may be established may, at the time of the establishment of said court or at the time of fixing the county budget for any succeeding year, call upon the clerk of the Superior Court to appoint a special deputy to act as clerk of the Recorder's Court or General County Court, and the clerk of the Superior Court shall within sixty days thereafter appoint a special deputy to act as clerk of the Recorder's Court or General County Court, unless the time for good cause shall be extended by the Board of County Commissioners. Said special deputy clerk shall assist the clerk of the Superior Court with the duties of his office and shall have all the power and authority in reference to the county Recorder's Court or General County Court conferred upon the clerk of the Superior Court by the preceding section, and he shall do all things in reference to said Recorder's Court or General County Court under the direction of the clerk of the Superior Court of the county as fully as the clerk of the Superior Court would otherwise be authorized to do. The Board of Commissioners may require and fix the official bond of said special deputy clerk for the faithful performance of his duties and fix his salary, which shall be fixed before he enters upon his duties and shall not be lowered during his term of office. His term of office shall be for the same time as the term of the recorder of said court, unless he shall be sooner removed by the clerk of the Superior Court for cause, and shall cease at any time that the court itself shall cease to exist. This section shall not apply to Bladen, Brunswick, Camden, Gates, Guilford, Halifax, Lee, Martin, Moore, Orange, Perquimans, Forsyth and Vance Counties. (1919, c. 277, s. 36; 1935, c. 346; C. S. 1576.)

Editor's Note.—The amendment of 1935 changed this section in such a manner that a comparison is necessary in order to determine its effect.

§ 7-233. Compensation of clerk when no deputy appointed.—When no deputy clerk is appointed or elected by the board of commissioners, they are authorized to pay annually to the clerk of superior court an amount fixed by the board, which shall be in addition to any salary or fees theretofore allowed by law to the clerk of superior court, and which shall be in compensation for the services rendered by him as clerk of the county recorder's court. Such compensation shall be paid to the clerk of superior court so long as he shall perform the duties of clerk ex officio of the county recorder's court. (1919, c. 277, s. 36; C. S. 1577.)

§ 7-234. Deputy clerk to take oath of office.—If any deputy clerk shall be appointed as provided in this article he shall take the oath required of deputy clerks under the general law, and in addition thereto shall take and subscribe to an oath to perform faithfully all the duties required of him under this article, both of which oaths shall be recorded in the office of the clerk of the superior court, and such deputy clerk is further authorized to perform all duties of deputy clerk under the general law in addition to

the duties set forth in this article. (1919, c. 277, s. 37; C. S. 1578.)

Cross Reference.—As to oaths required, see §§ 2-13, 11-6, 11-7, 11-11; Const., Art. VI, s. 7.

§ 7-235. Prosecuting attorney may be elected.—

The board of commissioners of any county availing itself of the provisions of this article may elect, at the same time, in the same manner, and for the same term as herein provided for the election of a deputy clerk, a prosecuting attorney for said court, and fix his compensation in such amount as they may deem suitable for the services to be rendered: Provided, that the board may require the county attorney to discharge the duties of prosecuting attorney in said court, and fix his compensation accordingly. (1919, c. 277, s. 38; C. S. 1579.)

Local Modification.—Montgomery: 1929, c. 112; Washington: 1941, c. 164.

§ 7-236. Fees for issuing and serving process.—

All justices of the peace, constables and sheriffs issuing or serving warrants or other process returnable to the recorder's court shall have the same fees as are now prescribed by law, which fees shall be collected and paid out in the same manner and by the same officers as collect and distribute such fees in the superior court. (1919, c. 277, s. 31; C. S. 1580.)

§ 7-237. Costs and fees taxed as in municipal court.—

Except as provided in § 7-238, there shall be taxed in the county recorder's court the same costs and fees for the benefit of the officers thereof as provided for municipal recorder's court. Such costs and fees shall be collected by the clerk and paid over monthly to the treasurer of the county as county funds to be dealt with by the commissioners. (1919, c. 277, s. 39; C. S. 1581.)

Cross Reference.—See § 7-206.

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

In cases in which the recorder or judge and the solicitor of the county recorders' courts shall be paid salaries, in lieu of fees for such recorder or judge or solicitor, the clerk of the recorder's court shall tax against the defendant who is convicted, or who confesses his guilt, or upon whom judgment is suspended in said court in cases originally within the jurisdiction of the justice of the peace a tax fee of three dollars in each case, and in all other cases within the jurisdiction of the said recorder's court a tax fee of six dollars, and these several sums when collected shall be paid over by said clerk to the treasurer or financial agent of the county, to be kept by him as a separate and distinct fund to be known as the recorder's court fund. This fund shall be used only in paying the salary of the recorder and prosecuting attorney of said court, and the other expenses of the court. (1921, c. 110, s. 13; C. S. 1598(a).)

§ 7-239. Courts may be discontinued after two years.—

The board of commissioners of any county which has established a county recorder's court under the provisions of this article are authorized, after two years trial of the court, to discontinue the same at any time thereafter if in their judgment the public interest shall require it. If any such court shall be so discontinued, the

action or resolution must be taken or adopted at least six months prior to the next general election, and shall not go into effect until the term of office of the recorder shall expire. (1919, c. 277, s. 35; C. S. 1582.)

Art. 26. Municipal-County Courts.

§ 7-240. Established for entire county.—

The governing body of any municipality possessing a population of two thousand or over, according to the last federal census, in which the county courthouse is located, and the board of commissioners of the county, shall have the power, at a joint meeting of the two bodies, by joint resolution, in the manner hereinafter provided, to establish a recorder's court so as to include the entire county, outside of other municipalities therein possessing a population of two thousand or over. After the adoption of such joint resolution such municipal recorder's court shall possess all the powers and functions and exercise all the territorial jurisdiction in this subchapter conferred upon both municipal and county recorder's court under the procedure herein provided for, and subject to the provisions herein in reference to concurrent jurisdiction where a special or recorder's court exists under prior special acts in any portion of the county. (1919, c. 277, s. 41; C. S. 1583.)

Local Modification.—Richmond: 1941, c. 60.

§ 7-241. Election of recorder.—

If the territorial jurisdiction of such municipal recorder's court is extended to the entire county, as set forth in the preceding section, then the first recorder shall be selected for the term and in the manner hereinbefore set forth, by a joint meeting of the governing body of such municipality and the board of commissioners of the county, and such recorder shall be thereafter nominated and elected as is provided for herein for the nomination and election of a county recorder. Such recorder shall be a resident of the municipality, and in all other respects the court shall be conducted under the proceedings herein provided for municipal courts. (1919, c. 277, s. 42; C. S. 1584.)

Local Modification.—Lenoir, Onslow, Sampson: 1925, c. 233; 1927, c. 170.

§ 7-242. Mayor's jurisdiction continued, when.—

In case the jurisdiction of the recorder's court of any municipality in any county shall not be extended in the manner authorized in this article, and no county recorder's court shall be established therein, then the mayors of the various cities and towns in such county shall continue to have all the powers and functions and exercise all the jurisdiction now conferred upon such officials by the general law for municipal corporations. (1919, c. 277, s. 43; C. S. 1585.)

Art. 27. Provisions Applicable to All Record-ers' Courts.

§ 7-243. Appeals from justices of the peace.—

In all cases where there is an appeal from a justice of the peace, such appeal shall be first heard in the recorder's court, in the manner provided herein for hearing causes within the jurisdiction of a justice of the peace originating in the recorder's court. (1919, c. 277, s. 54½; C. S. 1597.)

Object.—One of the objects of this and related sections

was to relieve the congested dockets of the Superior Court. *State v. Baldwin*, 205 N. C. 174, 175, 170 S. E. 645.

Under the general provisions of this section, an appeal from a conviction of simple assault in a justice's court must first be taken to the recorder's court and not the Superior Court in the counties affected by the act. *Id.*

§ 7-244. Offenders may be sentenced to city chain-gang.—In case any municipality possessing a population of two thousand or over, as provided for herein, in which a recorder's court shall be established pursuant to the provisions of this subchapter, shall now or hereafter establish and maintain a city chain-gang, or workhouse or other penal institutions for the imprisonment and working of city prisoners, any recorder may sentence any person convicted of any offense committed within said municipality and punishable by imprisonment, to be imprisoned and worked on such city chain-gang, or in such workhouse or other penal institutions, for such time as the recorder may in his discretion determine in accordance with the law. (1919, c. 277, s. 44; C. S. 1586.)

Local Modification.—Richmond: 1941, c. 60.

Cross Reference.—See § 7-194 and notes.

§ 7-245. Recorders' courts substituted for other special courts.—Wherever there has been established in any county, city, or town a recorder's court or other special court, which, under the provisions of this subchapter, might have been established hereunder, whether it shall possess exactly the same jurisdiction and functions or not, the board of commissioners of the county or the governing body of such city or town, or the governing body of such city or town and the board of commissioners of the county acting jointly, may abolish such existing court and adopt any one of the courts herein provided for by appropriate resolution of such boards. (1919, c. 277, s. 45; C. S. 1587.)

Art. 28. Civil Jurisdiction of Recorders' Courts.

§ 7-246. Civil jurisdiction may be conferred.—The board of county commissioners of any county in which there is a city or town with a population of not less than ten thousand inhabitants, in which city or town there has been established a municipal recorder's court, under the provisions of this subchapter, or in which there is a municipal recorder's court established by law may confer upon such recorder's court jurisdiction to try and determine civil actions, as hereinafter provided, wherein the party plaintiff or defendant is a resident of such county, or is doing business in the county. Such jurisdiction may be conferred by resolution by the board of county commissioners of any county, entered upon their minutes, and the board of county commissioners of the county may likewise confer civil jurisdiction on the county recorder's court to try and determine civil actions as hereinafter provided wherein one or more of the parties, plaintiff or defendant, is a resident of said county or is doing business therein. (1919, c. 277, s. 47; 1921, c. 110, s. 7; 1933, c. 166; C. S. 1589.)

Local Modification.—Carteret: 1933, c. 379; Richmond: 1941, c. 60; Surry: Pub. Loc. 1927, c. 133, s. 1.

Editor's Note.—Prior to the Amendment of 1933, Public Laws 1933, c. 166, this section applied in cities or towns of not less than 10,000 "nor more than 25,000" inhabitants. The quoted clause was omitted by the amendment.

Constitutionality.—A similar statute authorizing the board

of commissioners of a county having a recorder's court to allot stated civil jurisdiction to said court by the adoption of a resolution to that effect was held to be unconstitutional as an unlawful delegation of legislative powers. *Durham Provision Co. v. Daves*, 190 N. C. 7, 123 S. E. 593.

§ 7-247. Extent of jurisdiction.—The jurisdiction of such municipal and county recorders' courts in civil actions shall be as follows: (a) Jurisdiction concurrent with that of the justices of the peace within the county; (b) jurisdiction concurrent with the superior court in all actions founded on contract, wherein the amount involved exclusive of interest and costs does not exceed one thousand dollars; (c) jurisdiction concurrent with the superior court in actions not founded upon contract wherein the amount involved exclusive of interest and costs does not exceed the sum of five hundred dollars. (1919, c. 277, s. 48; 1921, c. 110, s. 8; C. S. 1590.)

Local Modification.—Carteret: 1933, c. 379; Mecklenburg: 1933, c. 174.

§ 7-248. Procedure in civil actions.—The rules of practice, issuing and serving process, and filing pleadings shall conform, as near as may be, to the practice in the superior court: Provided, it shall not be necessary to file written pleadings in any action of which justices of the peace now have jurisdiction. The process shall be returnable directly to the court; and no civil process shall be issued by any recorder's court to any county other than that in which the court is located. (1919, c. 277, s. 56; 1921, c. 110, s. 9; C. S. 1591.)

Local Modification.—Carteret: 1933, c. 379.

Cross Reference.—As to uniform practice in inferior courts where summons issued to run outside county, see §§ 1-92, 1-93.

Editor's Note.—Prior to the amendment in 1921, it was necessary to file written pleadings in an action of which the justice of the peace had jurisdiction.

§ 7-249. Trial by jury in civil actions.—In all civil actions the parties shall be deemed to have waived a trial by jury unless demand for such trial is made before the trial begins. The demand shall be in writing and signed by the party making it, or his attorney, and accompanied by a deposit of five dollars to insure the payment of the jury tax: Provided, such demand shall not be used to the prejudice of the party making it. (1919, c. 277, s. 49; 1921, c. 110, s. 10; C. S. 1592.)

Local Modification.—Craven: 1929, c. 115, s. 1; Hoke: Pub. Loc. 1937, c. 408.

Editor's Note.—The amendment in 1921 changed the amount of the deposit from three to five dollars.

§ 7-250. Jurors drawn and summoned.—If a trial by jury is demanded, the recorder shall continue the cause until a day to be set, and the recorder, together with the attorneys for all parties, shall immediately proceed to the office of the register of deeds of the county and cause to be drawn a jury of eighteen, observing as nearly as may be the rule for drawing a jury for the superior court. The recorder shall issue the proper writ to the sheriff of the county, commanding him to summon the jurors so drawn to appear at the court on the day set for the trial of the action. (1919, c. 277, s. 50; C. S. 1593.)

Local Modification.—Craven: 1929, c. 115, s. 1; Hoke: Pub. Loc. 1937, c. 408.

§ 7-251. Talesmen and challenges.—The recorder shall have the right to call in bystanders according to the practice in the superior court

as nearly as the same is applicable, and each party shall have the same causes of challenge as in the superior court. (1919, c. 277, s. 51; C. S. 1594.)

Local Modification.—Craven: 1929, c. 115, s. 1; Hoke: Pub. Loc. 1937, c. 408.

§ 7-252. Jury as in superior court.—The jury shall be a jury of twelve, and the trial shall be conducted as nearly as possible as in the superior court. (1919, c. 277, s. 52; C. S. 1595.)

Local Modification.—Craven: 1929, c. 115, s. 1; Hoke: Pub. Loc. 1937, c. 408; Surry: Pub. Loc. 1927, c. 133, s. 2.

§ 7-253. Appeals to superior court.—Appeals may be taken from the recorder's court to the superior court of the county in term time, for errors assigned in matters of law, in the same manner as now provided for appeals from the superior court to the supreme court, with the exception that the record may be typewritten instead of printed, and only one copy thereof shall be required. The time for taking and perfecting appeals shall be counted from the end of the term. Upon such appeal the superior court may either affirm or modify the judgment of the recorder's court, or remand the cause for a new trial. From the judgment of the superior court an appeal may be taken to the supreme court: Provided, that appeals from a county recorder's court to the superior court of the said county shall be tried de novo in the superior court. (1919, c. 277, ss. 53, 54; 1921, c. 110, s. 11; C. S. 1596.)

Editor's Note.—The last provision contained in this section is new with the Acts of 1921.

§ 7-254. Enforcement of judgments.—Orders to stay execution shall be the same as in appeals from the superior court to the supreme court. Judgments of the recorder's court may be enforced by executions issued by the clerk thereof, returnable within twenty days. Transcripts of such judgments may be docketed in the superior court, as now provided for judgments of justices of the peace; and the judgment, when docketed, shall in all respects be a judgment of the superior court as if rendered by such court, and shall be subject to the same statute of limitations and the statutes relating to revival of executions: Provided, that a judgment of the recorder's court shall not be a lien upon real estate until docketed in the superior court. (1919, c. 277, s. 55; 1921, c. 110, s. 12; C. S. 1598.)

Editor's Note.—The last provision, herein contained, providing docketing in the superior court before the judgment shall be a lien upon real estate, is new with the Acts of 1921.

§ 7-255. Costs in civil actions.—In all civil actions the clerk shall tax against the losing party the sum of three dollars in cases originally within the jurisdiction of the justice of the peace, and the sum of six dollars in all other cases, and all sums so collected shall be disposed of as provided for tax fees in criminal actions in § 7-238. (1921, c. 110, s. 13; C. S. 1598(a).)

Cross Reference.—See also §§ 7-206 and 7-237.

Art. 29. Elections to Establish Recorders' Courts.

§ 7-256. Election required.—The courts provided for in this subchapter shall be established

upon elections held as set forth in this article, except county recorders' courts which may be established by the county commissioners of any county without a popular vote. (1919, c. 277, s. 58; 1921, c. 110, s. 14; C. S. 1599.)

Editor's Note.—The excepting clause in this section was placed herein by the Acts of 1921.

§ 7-257. Municipal recorder's court.—The governing body of any city or town which may, under the terms of this subchapter, establish a court, prior to its establishment shall pass a resolution, if in their judgment such court should be established, reciting such fact and calling an election at a date to be fixed, which shall be not less than thirty days nor more than two years from the passage of the resolution, at which election there shall be submitted to the qualified voters of the city the question of establishing such court. The form of the ballot shall be as prescribed in § 163-155, subsec. (e). (1919, c. 277, s. 58; 1939, c. 201; C. S. 1600.)

Editor's Note.—The 1939 amendment substituted "two years" for "sixty days" formerly appearing in the eighth line of this section.

§ 7-258. Notice of election.—Notice of such election shall be given, signed by the clerk of the city or town or the mayor thereof, containing in substance the resolution, the date of the election, and a reference to this subchapter, which notice shall be published once a week for four successive weeks prior to said election in some newspaper published in the city or town. (1919, c. 277, s. 59; C. S. 1601.)

§ 7-259. New registration may be ordered.—The governing body of such city or town may in its discretion order a new registration of the voters for any election authorized hereunder. (1919, c. 277, s. 60; C. S. 1602.)

§ 7-260. Manner of holding election.—The election shall be held, reported, and recorded in the city or town, under the laws governing general elections as near as may be applicable to the city or town. The result of the election shall be reported to, canvassed and declared by the governing body of the city or town, and recorded upon the minutes thereof. If the majority of the votes cast is declared in favor of such court, it shall be established, and not otherwise. (1919, c. 277, s. 61; C. S. 1603.)

Cross Reference.—As to general election laws, see § 163-148 et seq.

§ 7-261. Another election after two years.—If the majority of the votes cast at such election is against the court, another election for the same purpose may thereafter be called, but not within less than two years from the first or any succeeding election in reference thereto. (1919, c. 277, s. 62; C. S. 1604.)

§ 7-262. Municipal courts with jurisdiction over the entire county.—The courts provided for in article twenty-six of this subchapter shall be established in the following manner: The governing body of the city and the board of county commissioners of the county, at a joint meeting, shall pass a joint resolution calling an election submitting to the voters of the entire county the question of the establishment of said court. The election shall be conducted by the county com-

missioners in the same manner as is prescribed for the conduct of elections for the establishment of municipal recorders' courts by the governing bodies of cities and towns, in so far as said procedure is applicable; the result of the election shall be recorded in the minutes of the county commissioners and certified to and recorded in the minutes of the governing body of the city. The form of the ballot shall be as prescribed in § 163-155, subsec. (e). (1919, c. 277, s. 62; C. S. 1606.)

§ 7-263. Expense of elections paid.—The expense of conducting the elections for "municipal courts" and "municipal-county courts" shall be borne by the city or municipality concerned. (1919, c. 277, s. 63; C. S. 1607.)

§ 7-264. Certain districts and counties not included.—This subchapter shall not apply to the following judicial districts: the tenth, except as to Granville and Orange counties; the eleventh; the seventeenth; the eighteenth, except as to Rutherford and Transylvania counties; the nineteenth; and the twentieth, except as to Cherokee, Jackson, Haywood and Swain counties; nor shall it apply to the counties of Chatham, Columbus, Johnston, New Hanover, and Robeson. (1919, c. 277, s. 64; 1921, c. 110, s. 16; Ex. Sess. 1921, cc. 59, 80; 1923, cc. 19, 40; 1925, c. 162; Pub. Loc. 1927, cc. 214, 545; 1929, cc. 17, 111, 114, 130, 340; 1931, cc. 3, 19; 1933, c. 142; 1935, c. 396; 1939, c. 204; 1941, c. 338; C. S. 1608.)

Local Modification.—Alexander: 1939, c. 204; Halifax: 1931, c. 3; Hyde: 1935, c. 396; 1941, c. 134.

SUBCHAPTER VII. GENERAL COUNTY COURTS.

Art. 30. Establishment, Organization and Jurisdiction.

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

Local Modification.—Caswell: 1931, c. 17; 1933, c. 405; 1937, c. 54; Cherokee: Pub. Loc. 1927, c. 87; Henderson: 1927, c. 103; Richmond: 1941, c. 60, s. 1; Transylvania: 1931, c. 1; Wilson: 1931, c. 61; 1935, cc. 29, 149, s. 1.

Editor's Note.—See note to § 7-278.

In General.—Under this section the Legislature may create courts inferior to Superior Court if provision is made for appeal to the Superior Court. *Jones v. Standard Oil Co.*, 202 N. C. 328, 162 S. E. 741.

The establishment of a General County Court by the board of commissioners of a county under the provisions of this and related sections, will not be held invalid as being an unlawful exercise of legislative power, the jurisdiction of such courts being prescribed by the Legislature and the board of commissioners being clothed merely with the power to find the facts in regard to the necessity and expediency of such court, and their acts in establishing such courts having been ratified by the Legislature. *State on Relation of Meador v. Thomas*, 205 N. C. 142, 170 S. E. 110.

Enactment of Acts of Commissioners in Creating Courts.—The acts of the county commissioners in the organization of general county courts, heretofore organized, as provided by ch. 216 of the Public Laws of 1923 and ch. 85 of the Public Laws, extra session 1924, and all amendments thereto, were ratified and declared to be the acts of the General Assembly of North Carolina by the Acts 1927, ch. 232, sec. 1.

§ 7-266. Creation by board of commissioners without election.—If in the opinion of the board of commissioners of any county, the public interests will be best promoted by so doing, they may establish a general county court under this article, by resolution which shall, in brief, recite the reasons for the establishment thereof, and further recite that, in the opinion of the board of commissioners, it is not necessary that an election be called upon the establishment of such court as herein provided for, and upon the adoption of such resolution the board of commissioners may establish said court without holding such election. (Ex. Sess. 1924, c. 85, s. 2.)

Local Modification.—Henderson: 1927, c. 103; Person: 1929, c. 246.

Cited in *Efird v. Board of Com'rs*, 219 N. C. 96, 12 S. E. (2d) 889.

§ 7-267. Abolishing the court.—Whenever in the opinion of the board of commissioners of any county in which a court has been established under this article, the conditions prevailing in such county are such as to no longer require the said court, such board of county commissioners may, by proper resolution reciting in brief the reasons therefor, abolish said court: Provided, no such court shall be abolished except at the end of the terms of office of the judge and solicitor, unless such judge and solicitor shall voluntarily tender their resignations, setting forth, in brief, that in their opinion the existence of the said court is no longer necessary, in which event the board of commissioners may forthwith abolish the same. (Ex. Sess. 1924, c. 85, s. 2.)

Cited in *Efird v. Board of Com'rs*, 219 N. C. 96, 12 S. E. (2d) 889.

§ 7-268. Transfer of criminal cases.—Upon the establishment of the general county court, as in this article authorized, the clerk of the superior court shall immediately transfer from the superior court to such general county court all criminal actions pending in the superior court of which the general county court has jurisdiction, as in this article conferred, and the general county court shall immediately proceed to try and dispose of such criminal actions. (Ex. Sess. 1924, c. 85, s. 2.)

This and related sections modify § 15-177. See *State v. Baldwin*, 205 N. C. 174, 170 S. E. 645.

§ 7-269. Transfer of civil cases.—Transfers may be made in term of any civil action in the superior

court to the general county court, and from the general county court to the superior court by the presiding judge of said respective courts, by consent, or upon motion of which due notice has been given, when, in the opinion of the presiding judge of the court from which the transfer is to be made, the ends of justice will be best served and promoted by such transfer. (Ex. Sess. 1924, c. 85, s. 2; 1933, c. 127.)

Editor's Note.—This section was rewritten by Public Laws 1933, c. 127. Many changes were effected for a determination of which a comparison with the old section is necessary.

Referring to this section, 11 N. C. Law Rev., 216, says the 1933 amendment amends the Act of 1924, ch. 85, which authorized the judge of the Superior Court to transfer civil actions to the General County Court for trial. The amendment allows the judge of either the Superior Court or the General County Court to transfer cases to the other court for trial, either by consent or by motion upon notice.

§ 7-270. Costs.—Cost in both criminal and civil actions shall be taxed and collected as now provided by law. (Ex. Sess. 1924, c. 85, s. 2.)

§ 7-271. Judge; election, term of office, vacancy in office, qualification, salary, office.—The court shall be presided over by the judge, who may be a licensed attorney at law, and at the time of his election he shall be a qualified elector in the county. The first judge of the court upon the establishment of said court shall be elected by the board of county commissioners within thirty days after the establishment of said court, and he shall hold his office until January first, following the next general election of county officers and until his successor is elected and qualified. If a vacancy occurs in the office of judge of said court, the same shall be filled by the election of a successor for the unexpired term by the board of county commissioners. After the first elected judge by the board of county commissioners, each succeeding judge shall be elected by a vote of the qualified electors of the county at the next general election before the expiration of the term of office and when other county officers are elected, and shall hold his office for a term of four years beginning January first following his election, and until his successor is elected and qualified. Before entering upon the duties of his office, the judge shall take and subscribe an oath of office, as is now provided by law for justices of the peace, and he shall file the same with the clerk of the superior court of the county. The salary of said judge shall be fixed by the board of commissioners of the county, and shall not be decreased during the term of office, and it shall be paid monthly out of the funds of the county. The judge shall reside in the county and shall be provided by the county commissioners with an office at the county-seat. The terms of said court shall be held in the courthouse, except as otherwise provided in § 7-265, but they shall at no time inconvenience or discommode the superior court of the county while the superior court in term is using the courthouse. If in the opinion of the board of commissioners the best interests of the county will be promoted thereby, the said board may appoint such judge, fixing his term of office, in which event the judge so appointed shall hold office pursuant to such appointment, and shall not be elected by a vote as herein provided

for. (1923, c. 216, s. 2; Ex. Sess. 1924, c. 85, s. 1; C. S. 1608(g).)

Local Modification.—Duplin: 1943, c. 264; Scotland: 1925, c. 172.

Cross References.—As to forms of oaths required of justices of peace, see § 11-11. As to oaths required of public officials generally, see §§ 11-6, 11-7; Const., Art. VI, s. 7.

Editor's Note.—This section was amended in 1924 by striking out a provision fixing the salary at not less than \$3600 not to be increased; by striking out the provision denying the judge the power to practice law in other courts, and by adding the last sentence.

Election of Judge by Commissioners Constitutional.—Under the Const., Art. IV, § 30, the legislature may provide for the election of officers of inferior courts, and the word "election" does not necessarily import a popular election and the delegation to the county commissioners of the power to elect judges is not an unlawful delegation of legislative powers. *State ex rel. Meador v. Thomas*, 205 N. C. 142, 170 S. E. 110.

§ 7-272. Terms of court.—The court shall open for the transaction of business and trial of causes the first Monday of each month and continue until all matters before the court are disposed of. (1923, c. 216, s. 2; C. S. 1608(h).)

§ 7-273. Prosecuting officer; duties, election, salary, etc.—There shall be a prosecuting attorney of the general county court, to be known officially as prosecutor, who shall appear for the state and prosecute in all criminal cases being tried in said court, and for his services he shall be paid such salary as may be fixed by the board of county commissioners. He shall be elected by the board of county commissioners for the first term as herein provided for the election of the judge, and thereafter by the qualified electors of the county in the same manner as is provided herein for the election of the judge; and vacancies in the office of the prosecutor shall be filled by the board of county commissioners as they are herein authorized to fill vacancies in the office of judge. If requested to do so by the judge, the prosecutor shall represent the county in prosecution of criminal appeals from this court in the superior court. The salary of the prosecutor shall be paid monthly out of the county funds. If in the opinion of the board of commissioners the best interests of the county will be promoted thereby, the said board may appoint such solicitor, fixing his term of office, in which event the solicitor so appointed shall hold office pursuant to such appointment, and shall not be elected by a vote as herein provided for. (1923, c. 216, s. 3; Ex. Sess. 1924, c. 85, s. 1; 1925, c. 250, s. 1; C. S. 1608(i).)

Local Modification.—Duplin: 1943, c. 264; Henderson: 1927, c. 103.

Editor's Note.—This section was amended in 1924 by striking out a provision limiting the salary to a minimum of \$1,000. The last sentence was also added by that amendment.

The 1925 amendment struck out the word "judge" in the last sentence and substituted the word "solicitor."

§ 7-274. Superior court clerk as clerk ex officio; salary, bond, etc.—The clerk of the superior court of the county shall be ex officio clerk of the general county court, herein provided for, and in addition to the salary and fees paid him as clerk of the superior court, he shall be paid such additional compensation as the county commissioners of the county may fix, to be paid monthly out of the county funds. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him to the same extent as he is bound as clerk of the superior court. The

Clerk of said Court or any deputy thereof, upon application and the making of proper affidavit, as provided by law, shall have power and authority to issue any criminal warrant or warrants in said Court and make the same returnable before the Judge thereof, at any time or times designated for the trial of criminal cases. The last sentence shall not apply to the following counties: New Hanover, Caldwell, Henderson, Ashe, Hoke, Lincoln, Wayne, Wilkes, Nash, Edgecombe, Alexander, Rockingham, Duplin, Union, Alleghany, Halifax, Alamance, Clay, Yancey, Dare, Wake, Hertford, Jackson, Mecklenburg, Craven, Vance, Person, Robeson, Johnston, Yadkin, Davidson, Haywood, Pitt, Tyrrell, Hyde, Watauga, Durham, Scotland, Forsyth and Camden. (1923, c. 216, s. 4; 1931, c. 233; C. S. 1608(j).)

§ 7-275. Sheriff; duties; additional allowance.—The sheriff of the county or his deputy appointed shall attend upon the terms of this court in the same manner and with the same power and authority as he does and has in attendance upon the superior courts of the county. The county commissioners of the county are authorized to make said sheriff such additional allowances as they may fix for such services in addition to his salary and fees fixed by law. (1923, c. 216, s. 5; C. S. 1608(k).)

§ 7-276. Fees of clerk and sheriff.—In those counties in which the clerk of the superior court and sheriff are paid fees, and not salaries, such clerk and sheriff shall receive the same fees for services rendered in the general county court as they would have received had such services been rendered in the superior court. (Ex. Sess. 1924, c. 85, s. 5½.)

Local Modification.—Scotland: 1925, c. 172.

§ 7-277. Separate records to be kept by clerk; blanks, books and stationery.—The clerk of the said general county court shall keep separate records, criminal and civil, for the use of said court, to be furnished by the county commissioners, and they shall also provide all such necessary blanks, forms, books and stationery as may be needed by said court. And the said clerk shall keep the same in his office of clerk of the superior court. (1923, c. 216, s. 6; C. S. 1608(l).)

§ 7-278. Criminal jurisdiction, extent.—The general county court, herein provided for, shall have the following jurisdiction in criminal actions within the county:

1. Original, exclusive and concurrent jurisdiction, as the case may be, of all offenses within said county which are now or may hereafter be given to justices of the peace under the constitution and general laws of the state, including all offenses of which mayors of towns or other municipal courts now have jurisdiction.

2. Original and concurrent jurisdiction with justices of the peace to hear and bind over to the superior court all persons charged with any crime within the territory of the general county court, and of which said court is not herein given final jurisdiction.

3. To punish for contempt to the same extent in the manner allowed by law to the superior courts of this state; to issue writs ad

testificandum and other process to compel the attendance of witnesses and to enforce the orders and judgments of the court in the same manner allowed by law to the superior courts of this state.

4. The general county court shall have jurisdiction in all criminal cases arising in the county which are now or may hereafter be given to a justice of the peace, and in addition thereto shall have exclusive original jurisdiction of all other criminal offenses committed in the county below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors. In all criminal cases heard by a justice of the peace or other committing magistrate of the county against any person for any offense included within the exclusive jurisdiction of the general county court, as herein provided for, and in which probable cause of guilt is found, such person shall be bound in a personal recognizance, or surety, to appear at the next first Monday of the month next succeeding before the general county court for trial, and in default of surety such person shall be committed to the county jail to await trial.

5. In counties in which there is a special court or courts for cities and towns, the jurisdiction of the general county court in criminal actions shall be concurrent with the jurisdiction conferred upon such special courts. (1923, c. 216, s. 13; 1924, c. 85, s. 1; C. S. 1608(m).)

Cross Reference.—For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64.

Editor's Note.—The fifth paragraph was added by the 1924 amendment.

In General.—This section as enacted was one of many general provisions applicable to the several courts provided by the act. The last clause has reference to the jurisdiction exercised by the statutory courts in all criminal matters arising in the county which are given to justices of the peace. *State v. Baldwin*, 205 N. C. 174, 175, 170 S. E. 645.

When the amendment of 1924 is construed in pari materia with both § 7-265 et seq., and § 7-185 et seq., it has a prospective purpose and means that when general county courts exist or are created in counties where special courts for cities and towns shall be, or shall have been created, or are in contemporaneous existence, their jurisdiction shall be as defined in the amendment, that is, concurrent with the jurisdiction conferred upon such special courts. In re *Barnes*, 212 N. C. 735, 738, 194 S. E. 499.

Warrant on Appeal.—Upon conviction in a county court of a misdemeanor within the final jurisdiction of such court, upon a warrant sworn out before a justice of the peace, on appeal the superior court has derivative jurisdiction to try defendant upon the same warrant without a bill of indictment found by the grand jury. *State v. Shine*, 222 N. C. 237, 22 S. E. (2d) 447.

§ 7-279. Civil jurisdiction, extent.—The jurisdiction of the general county court in civil actions shall be as follows:

1. Jurisdiction concurrent with that of the justices of the peace of the county;

2. Jurisdiction concurrent with the superior court in all actions founded on contract;

3. Jurisdiction concurrent with the superior court in all actions not founded upon contract;

4. Jurisdiction concurrent with the superior court in all actions to try title to lands and to prevent trespass thereon and to restrain waste thereof;

5. Jurisdiction concurrent with the superior court in all actions pending in said court to issue and grant temporary and permanent restraining orders and injunctions;

6. Jurisdiction concurrent with the superior court of all actions and proceedings for divorce and alimony, or either;

7. Jurisdiction concurrent with the superior court in all matters pending in said court for the appointment of receivers, as provided in §§ 1-501, et seq.;

8. Jurisdiction concurrent with the superior court to appoint receivers. (1923, c. 216, s. 14; 1935, c. 171; 1937, c. 58; C. S. 1608(n).)

Local Modification.—Bertie: 1935, c. 179.

Editor's Note.—The 1935 amendment added subsection 6 to this section, and the 1937 amendment added subsections 7 and 8. See 12 N. C. Law Rev., 39.

§ 7-280. Election, requirement of.—The general county court, herein provided for, shall be established upon elections as set forth in this article, except as otherwise provided in §§ 7-265 and 7-266. (1923, c. 216, s. 20; C. S. 1608(o).)

Cross Reference.—As to when court may be established without election, see §§ 7-265 and 7-266.

Cited in State ex rel. Meador v. Thomas, 205 N. C. 142, 145, 170 S. E. 110.

§ 7-281. Resolution by county commissioners; time for election; ballots.—The board of commissioners of the county shall pass a resolution, if in their judgment such court should be established, reciting such fact and calling an election at a date to be fixed, which shall not be less than thirty days nor more than sixty days from the passage of the resolution, at which election there shall be submitted to the qualified voters of the county the question of establishing such court. The form of the ballot shall be as provided in § 163-155, subsec. (e). (1923, c. 216, s. 21; C. S. 1608(p).)

§ 7-282. Notice of election; publication.—Notice of such election shall be given at least thirty days prior to the day of election, signed by the chairman of the board of county commissioners and containing in substance the resolution passed by the board, the date of the election and a reference to the act creating the court, and which notice shall be published once a week for four successive weeks prior to said election in some newspaper published in the county and a copy thereof shall be posted at the courthouse door. (1923, c. 216, s. 22; C. S. 1608(q).)

§ 7-283. Law governing elections; election officers; registration.—Any election held under the provisions of this law shall be conducted in the same manner as is now or may hereafter be prescribed by law for holding elections for the members of the general assembly, except as herein otherwise stated. The board of county commissioners shall appoint the registrars and judges of election and any other election officers necessary for holding said election, and registration and challenge of voters shall be conducted in the same manner as is now or may hereafter be provided for election of the members of the general assembly, except as herein set forth. The said board of county commissioners may or may not, in their discretion, order a new registration for any election held under this law. In case no new registration is ordered the registration books of each voting precinct shall be kept open for twenty days prior to the election for the purpose of allowing electors to register who have not theretofore registered in the township or

voting precinct, of their residence, and who are entitled to register for said election; and the registration books shall close on Saturday next preceding the election and the registrar shall transcribe the names of all persons who have registered for former elections in their township, or voting precincts, and are otherwise qualified electors at said election upon a new registration book. The registrars are authorized and directed to register any person legally qualified and entitled to vote in their respective townships or voting precincts who apply for such purpose, in the same manner and under the same rules and regulations as now or hereafter may be provided for registering electors for the general election in said county. (1923, c. 216, s. 23; C. S. 1608(r).)

Cross Reference.—As to general election laws, see § 163-148 et seq.

§ 7-284. Count and return of votes; canvass of returns; effect; expense.—The vote cast at said election shall be counted at the close of the polls by the election officers and returned to the clerk of the said board of county commissioners of said county by a member of said election officers on the second day next succeeding the day of said election; and the said board of county commissioners, at their next regular meeting, or at a called meeting, shall tabulate and declare the result of the election, all of which shall be recorded in the minutes of said board of county commissioners, and no other recording and declaring of the result of said election shall be necessary. If a majority of the votes cast at said election is declared in favor of such court, it shall be established, and not otherwise. The expenses of said election shall be paid by the county commissioners out of the county fund. (1923, c. 216, s. 24; C. S. 1608(s).)

§ 7-285. Application of article.—This article shall not apply to any county in which there has been established a court, inferior to the superior court, by whatever name called, by a special act, nor shall this article apply to the following counties: Granville, Henderson, Iredell, New Hanover, Pasquotank, Randolph and Wake; nor shall it apply to the counties in the seventeenth (17th) and nineteenth (19th) judicial districts, except Buncombe county. (Ex. Sess. 1924, c. 85, s. 2; 1925, c. 9; 1927, c. 103, ss. 1, 2; 1929, c. 159, s. 1; 1931, c. 19; 1937, c. 439.)

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

Editor's Note.—The county of Randolph was added to the list of counties to which this article does not apply by the 1925 amendment. The 1927 amendment made an exception in the case of Henderson County. The act of 1931 struck out the exception as to counties in the sixteenth judicial district.

Art. 31. Practice and Procedure.

§ 7-286. Procedure; issuance and return of process.—The rules of procedure, issuing process and filing pleadings shall conform as nearly as may be to the practice in the superior courts. The process shall be returnable directly to the court, and may issue out of the court to any county in the state: Provided, that civil process in cases within the jurisdiction now exercised by justices of the peace shall not run outside of or beyond the county in which such court sits.

Motions for the change of venue or removal

of cases from the general county courts to the superior courts of counties other than the one in which the said court sits may be made and acted upon, and the causes for removal shall be the same as prescribed by law for similar motions in the superior courts.

The provisions of the chapters on civil procedure and criminal procedure, and all amendments thereof, shall apply as nearly as may be to the general county courts, and the judges and the clerks of said courts, in all causes pending in said courts, shall have rights, privileges, powers and immunities similar in all respects to those conferred by law on the judges and clerks of the superior courts of the state, and shall be subject to similar duties and liabilities: Provided, that this section shall not extend the jurisdiction of said judges and clerks, nor infringe in any manner upon the jurisdiction of the superior courts, except as provided in articles thirty and thirty-one of this chapter.

All motions and petitions for removal of actions from the general county court to the district court of the United States shall be presented to, be heard and determined by the judge of the general county court, with the right of appeal from any order or ruling of said judge to the superior court. (1923, c. 216, s. 7; 1925, c. 242, s. 2; 1925, c. 250, s. 2; 1933, c. 128, s. 1; C. S. 1608(t).)

Local Modification.—Richmond: 1941, c. 60.

Editor's Note.—The first 1925 amendment made several changes in this section and the second 1925 amendment added the proviso at the end of the third paragraph. The 1933 amendment added the last paragraph.

§ 7-287. Trial by jury; waiver; deposit for jury fee.—In all civil actions the parties shall be deemed to have waived a jury trial unless demand shall be made therefor in the pleadings of the parties to the action when same are filed. The demand shall be in writing and signed by the party making it, or by his attorney, and accompanied by a deposit of three dollars to insure the payment of the jury tax: Provided, such demand shall not be used to the prejudice of the party making it. Any defendant in a criminal action may demand a trial by jury, in which event such defendant shall not be required to deposit the sum of three dollars. Such jury shall be drawn as herein otherwise provided for. (1923, c. 216, s. 8; Ex. Sess. 1924, c. 85, s. 1; 1937, c. 56; C. S. 1608(u).)

Local Modification.—Duplin: 1937, c. 85.

Editor's Note.—The last two sentences of this section were added by the 1924 amendment.

Prior to the 1937 amendment demand for jury trial was required to be made "before the trial begins."

Cited in *Crafford v. Lafayette Life Ins. Co.*, 198 N. C. 269, 151 S. E. 249.

§ 7-288. Continuance if jury demanded; drawing of jury; list.—If a jury trial is demanded, the judge shall continue the case until a day to be set, and the judge, together with the attorneys for all parties, shall proceed to the office of the register of deeds of the county and cause to be drawn a jury of eighteen men, observing as nearly as may be the rule for drawing a jury for the superior court. The judge shall issue the proper writ to the sheriff of the county commanding him to summon the jurors so drawn to appear at the court on the day set for the trial of the action. It

shall be the duty of the register of deeds to prepare a list of jurors for this the general county court identical with the list prepared for the superior court, and the jury shall be drawn out of the box containing such list. Provided, that the Judge of said Court may in his discretion, if and when a sufficient number of cases are at issue in which jury trial has been demanded to warrant such action, cause a jury of not less than eighteen, not more than twenty-four men to be drawn for a certain week of a term, setting such cases for trial during such time, and in such cases the juries shall be drawn in the same manner as now provided for the drawing of juries for the superior court. The proviso shall not apply to the following counties: New Hanover, Caldwell, Henderson, Ashe, Hoke, Lincoln, Wayne, Wilkes, Nash, Edgecombe, Alexander, Rockingham, Duplin, Union, Alleghany, Halifax, Alamance, Clay, Yancey, Dare, Wake, Hertford, Jackson, Mecklenburg, Craven, Vance, Person, Robeson, Johnston, Yadkin, Davidson, Haywood, Pitt, Tyrrell, Hyde, Watauga, Durham, Scotland, Forsyth and Camden. (1923, c. 216, s. 9; 1931, c. 233, s. 2; C. S. 1608(v).)

§ 7-289. Talesmen; challenges.—The judge shall have the right to call in talesmen to serve as jurors according to the practice of the superior court as nearly as the same is applicable, and to direct the sheriff to summon a sufficient number of talesmen to serve during any one week for the proper dispatch of the business of the court. (1923, c. 216, s. 10; C. S. 1608(w).)

§ 7-290. Process; authentication; service; return.—All civil summons in actions begun in the general county court shall be served at least ten days before the return day named therein, and shall be returnable on the first Monday of the month next succeeding the issue thereof, unless the same be issued within less than ten days before the first Monday of the month next succeeding its issuing, in which event it shall be made returnable on the first Monday of the second succeeding month next after the date of the issue thereof; and when the summons shall be issued more than ten days before the first Monday of the month next succeeding its issuing, and shall be executed by the proper officer within less than ten days of the return day named therein, it shall be returned as if executed in proper time, and the case placed on the summons docket and continued to the first Monday of the month next succeeding the return day thereof, at which time it shall be treated in all respects as if that had been the return day named therein. The summons shall run in the name of the state, be signed by the clerk of the court in which the action is brought, and shall be directed to the sheriff or other proper officer of the county. (1923, c. 216, s. 11; C. S. 1608(x).)

§ 7-291. Pleadings; time for filing.—The complaint shall be filed by the return day named in the summons and the answer, demurrer or other pleadings on the part of the defendant shall be filed within twenty (20) days thereafter: Provided, if a copy of the complaint be served on the defendant at the time of the service of the summons, then the defendant shall have only twenty (20) days from

the date of such service to file an answer, demurrer or otherwise plead. If the answer contains a counterclaim against the plaintiff or plaintiffs or any of them, such answer shall be served upon the plaintiff or plaintiffs against whom such counterclaim is pleaded or against the attorney or attorneys of record of such plaintiff or plaintiffs; the plaintiff or plaintiffs against whom such counterclaim shall be pleaded shall have twenty (20) days after the service thereof within which to answer or reply to such counterclaim. If a counterclaim is pleaded against any of the plaintiffs and no copy of the answer containing such counterclaim shall be served as herein provided for, such counterclaim shall be deemed to be denied as fully as if the plaintiff or plaintiffs had filed an answer or reply denying the same. All other replies, if any, shall be filed within twenty (20) days from the filing of the answer. For good cause shown and found by the judge, the judge may extend the time for the filing of any of the pleadings provided for in this article on the part of the plaintiff or on the part of the defendant. (1923, c. 216, s. 12; 1925, c. 250, s. 3; C. S. 1608(y).)

Editor's Note.—This section was amended in 1925 to make it conform to other sections now appearing as sections 1-125 and 1-140.

§ 7-292. Criminal appeals to superior court; cases bound over to superior court.—Any person convicted of any offense of which the general county court has final jurisdiction may appeal to the superior court of the county from any judgment or sentence of the court in the same manner as is now provided for appeals from justices of the peace; and any person tried before the general county court for any offense of which said court has not final jurisdiction shall, if probable cause be found, be bound over to the superior court in the same manner as is provided by law in similar cases before a justice of the peace. The judge may, upon proper affidavit, issue criminal warrants returnable before him in or out of term. All persons convicted in said court may be sentenced to the roads, or county farms, or jail, as the judge may determine. (1923, c. 216, s. 15; C. S. 1608(z).)

§ 7-293. Amendments in pleadings and warrants.—The judge shall have power in his discretion to allow amendments in pleadings and warrants, to the same extent as is allowed in the superior courts of the state. (1923, c. 216, s. 16; C. S. 1608(aa).)

§ 7-294. Jury trials, conduct of.—The jury in the general county court shall be a jury of twelve and the trial shall be conducted as nearly as possible as in the superior court. (1923, c. 216, s. 17; C. S. 1608(bb).)

§ 7-295. Appeals to superior court in civil actions; time; record; judgment; appeal to supreme court.—Appeals in civil actions may be taken from the general county court to the superior court of the county in term time for errors assigned in matters of law in the same manner as is now provided for appeals from the superior court to the supreme court except that appellant shall file in duplicate statement of case on appeal, as settled, containing the exceptions and assignments of error, which, together with the original record, shall be transmitted by the clerk of the general county court to the superior

court, as the complete record on appeal in said court; that briefs shall not be required to be filed on said appeal, by either party, unless requested by the judge of the superior court; the record on appeal to the superior court shall be docketed before the next term of the superior court ensuing after the case on appeal shall have been settled by the agreement of the parties or by order of the court, and the case shall stand for argument at the next term of the superior court ensuing after the record on appeal shall have been docketed ten days, unless otherwise ordered by the court. The time for taking and perfecting appeals shall be counted from the end of the term of the general county court at which such trial is had. Upon such appeal the superior court may either affirm or modify the judgment of the general county court, or remand the cause for a new trial. From the judgment of the superior court an appeal may be taken to the supreme court as is now provided by law. (1923, c. 216, s. 18; 1933, c. 109; 1937, c. 84; C. S. 1608(cc).)

Editor's Note.—Prior to Public Laws 1933, c. 109, the exception at the end of the first sentence of this section merely provided that the record might be typewritten and that only two copies should be required. This was omitted and the present exception inserted in lieu thereof.

The 1937 amendment inserted that part of the first sentence after the semi-colon and further provides as follows: "This act shall apply to all cases tried before the ratification of this act in which an appeal has been entered and time for service of case on appeal and counterclaim or exceptions has been extended by order of court with consent of council for parties."

"If any section of this act should be held to be invalid, such invalidity shall not affect the validity of any other section."

Assignment of Error.—In the absence of assignments of error appearing in the transcript on an appeal to the Supreme Court, the appeal will ordinarily be dismissed on the motion of the appellee. *Smith v. The Texas Co.*, 200 N. C. 39, 41, 156 S. E. 160.

In the exercise of its appellate jurisdiction under this section, the Supreme Court may consider and pass only on the contention of the appellant that there was error in matters of law at the hearing in the Superior Court. This contention must, however, be presented to this Court by assignments of error based on exceptions to specific rulings of the judge of the Superior Court, on the assignments of error appearing in the case on appeal filed in the Superior Court. *Id.*

Sending Record Up.—Where an appeal is taken from a county court under this section it is not desirable that the entire record in the Superior Court be sent up, but only such parts as relate to the questions to be reviewed with only material exceptions, properly stated, grouped and sufficiently compiled to enable the court to understand them without searching through the record. *Baker v. Clayton*, 202 N. C. 741, 164 S. E. 233.

See 11 N. C. Law Rev., 217, where it is pointed out that the 1933 amendment changes this section, so that instead of following the practice in appeals from the Superior Court to the Supreme Court, the appellant may file in duplicate the statement of the case on appeal, and this with the original records in the case shall be transmitted to the clerk of the Superior Court as the complete record on appeal. Briefs are not required to be filed by either party, unless requested by the judge of the Superior Court.

Superior Court Sits as an Appellate Court.—In hearing civil cases on appeal from the general county court, the Superior Court sits as an appellate court, subject to review by the Supreme Court. *Jenkins v. Castelleo*, 208 N. C. 406, 408, 181 S. E. 266, citing *Cecil v. Snow Lbr. Co.*, 197 N. C. 81, 147 S. E. 735.

The jurisdiction of the superior court on an appeal from a general county court is an appellate jurisdiction limited to matters of law only which are properly presented by errors assigned, and the superior court may either affirm or modify the judgment of the general county court or remand the cause for a new trial. *Robinson v. McAlhanev*, 216 N. C. 674, 6 S. E. (2d) 517.

In Granting a New Trial It Is Essential That the Superior Court Specifically State the Rulings upon Exceptions.—Where an appeal is taken from the general county court to the Superior Court for errors assigned in matters

of law, as authorized by this section, and a new trial is granted by the Superior Court, it is essential that the rulings upon exceptions granting the new trial be specifically stated, so that in case of appeal to the Supreme Court, they may be separately assigned as error in accordance with Rule 19(3) of the Rules of Practice in the Supreme Court, and properly considered on appeal. *Jenkins v. Castelleo*, 208 N. C. 406, 181 S. E. 266.

Where the record is not docketed in the Superior Court within the time prescribed, the appeal is properly dismissed, it being formerly provided that appeals from the general county court shall be governed by the rules governing appeals from the Superior Courts to the Supreme Court, and dismissal in such circumstances is mandatory under Rule of Practice in the Supreme Court No. 5. *Grogg v. Graybeal*, 209 N. C. 575, 184 S. E. 85, decided prior to the 1937 amendment.

The superior court has discretionary authority to reinstate an appeal from a general county court upon motion made at the same term the appeal is dismissed for failure of appellant to comply with the statutory requirements governing such appeals. This section provides that such appeals shall be governed by the rules for appeals from the superior court to the supreme court, and such procedure is provided by the rules of practice in the supreme court (Rule 17), and the superior court obtains jurisdiction through the motion to reinstate aptly made, and may pass upon the motion at that or a subsequent term. *West v. Woolworth Co.*, 214 N. C. 214, 198 S. E. 659.

§ 7-296. Enforcement of judgments; stay of execution, etc.—Orders to stay execution on judgments entered in the general county court shall be the same as in appeals from the superior court to the supreme court. Judgments of the general county court may be enforced by execution issued by the clerk thereof, returnable within twenty days. Transcripts of such judgments may be docketed in the superior court as now provided for judgments of justices of the peace, and the judgment when docketed shall in all respects be a judgment of the superior court in the same manner and to same extent as if rendered by the superior court, and shall be subject to the same statutes of limitations and the statutes relating to the revival of judgments in the superior court and issuing executions thereon. (1923, c. 216, s. 19; C. S. 1608(dd).)

When the judgment of a general county court is docketed in the Superior Court of the county it becomes a judgment of the Superior Court in like manner as transcribed judgments of justices of the peace under § 7-166, and the general county court has no further jurisdiction of the case, and may not thereafter hear a motion for the appointment of a receiver for the judgment debtor. *Essex Inv. Co. v. Pickelsimer*, 210 N. C. 541, 187 S. E. 813.

In an action for subsistence without divorce tried in the general county court, judgment was rendered in favor of plaintiff, which judgment was duly docketed in the office of the clerk of the superior court of the county. Thereafter order was entered in the general county court reducing the amount of the monthly allowance. Upon the abolition of the general county court, the judge thereof, pursuant to previous notice given to the county bar, entered a general order transferring all cases then pending to the superior court of the county. Thereafter defendant failed to further comply with the orders for the payment of subsistence and plaintiff moved in the superior court for an order that defendant show cause why he should not be adjudged in contempt and for an order increasing the amount of subsistence. Defendant entered a special appearance and demurred to the jurisdiction of the superior court. It was held that upon the docketing of the judgment in the superior court, it acquired jurisdiction of the cause, and defendant's demurrer to the jurisdiction was properly overruled under this section. *Brooks v. Brooks*, 220 N. C. 16, 16 S. E. (2d) 403.

Art. 32. District County Courts.

§ 7-297. May be established in two or more contiguous counties in same judicial district; jurisdiction.—In any two or more contiguous and adjoining counties of any judicial district of this

State there may be established, under the general powers and authority contained in articles thirty and thirty-one, of this chapter, except as herein otherwise provided, a court of civil and criminal jurisdiction, maintained pursuant to this sub-chapter and the said articles thirty and thirty-one, not inconsistent herewith, a court of record, to be known as and designated a district county court, and containing all the authority, jurisdiction, rights, powers and duties, compensations and fees, as provided in the articles aforesaid, except as herein otherwise provided. (1931, c. 70.)

Local Modification.—Richmond: 1941, c. 60.

§ 7-298. Judge of court; election; term of office; oath of office and salary.—The court shall be presided over by a judge, who may be a licensed attorney at law, and at the time of his election he shall be a qualified elector in one of the counties composing the said district county court.

The first judge of said court, upon its establishment as hereinafter provided, shall be elected by the several boards of commissioners of the counties establishing the said district courts, each board being entitled to one vote to be cast in accordance with the majority vote of each board, at any joint meeting of said boards of commissioners, as hereinafter provided, within sixty days after the establishment, and he shall hold his office until January first, following the next general election of county officers, and until his successor is elected and qualified. Any vacancy arising in the office of judge of said court shall be filled by the several boards of commissioners of the counties establishing the said district court, in joint meeting assembled, which shall be called by the chairman of the board of commissioners of the county in which such judge resided at the time of his death or removal, or resignation.

At the joint meeting of said boards of commissioners when an election of the judge of said court is made, the said commissioners shall also fix the salary of said judge, which salary together with the salary of the prosecuting attorney hereinafter provided for shall be paid from the costs taxed and collected in the trial of all actions in said court to which costs provided for there shall be added a trial fee of five dollars and if there be a deficiency in the payment of said salaries from said costs as herein provided for, the said deficiency shall be proportionately paid by the several counties composing the said district county court, in proportion as the population of each county shall bear to the whole of the counties creating said court, on the basis of the most recent federal decennial census.

The judge shall reside in one of the counties of said district; he shall take the oath of office prescribed in section 7-271; hold his terms of court in the county courthouse in each county of his district, and shall not be permitted to practice law during his tenure of office in any of the courts of the State.

His successor shall be nominated and elected by a vote of the qualified electors of the several counties embraced within the jurisdiction of said district at the next general election before the expiration of the term of office and when other county officers are elected, in the same manner,

and as provided by law for the nomination and election of judges of the Superior Court, and he shall hold his office for a term of four years beginning January first next following his election, and until his successor is elected and qualified; except, however, in instances of an appointment to fill a vacancy, in which case he shall hold through the unexpired term of his predecessor in office, and until his successor is elected and qualified. (1931, c. 70; 1943, c. 543.)

The 1943 amendment struck out the words "one thousand nine hundred thirty census" at the end of the third paragraph of this section and inserted in lieu thereof the words "most recent federal decennial census."

§ 7-299. Present county courts may be changed to district courts.—In any county where a county court has been heretofore created and now exists under and by virtue of article thirty, of this chapter, where it is desired to change said court from a county court to a district county court, under the provisions of this article, its board of commissioners may, by proper resolution, reciting in brief the reasons therefor, abolish the said county court and establish for said county, in the manner provided in this article, a district county court; and in such event, the judge and solicitor of the said county court shall thereupon be named and elected as judge and solicitor of said district county court until the expiration of the time for which they were elected as officers of the said county court, and until their successors are duly elected and qualified. (1931, c. 70.)

§ 7-300. When court to be held.—The court shall be open for the transaction of business and trial of cases at least once a week in each county in each month in districts composed of four counties, or less, and at least once in every eight weeks in districts composed of more than four counties, which week or the time of holding said court for each of said counties shall be determined and declared by said joint meeting of said commissioners upon recommendation of the bars of the several counties composing said district, or majority of the resident lawyers of said counties, and certified by said commissioners to each superior court clerk of the several counties within the district. (1931, c. 70.)

§ 7-301. Prosecuting attorneys.—There shall be a prosecuting attorney of the said district court, known officially as the prosecuting attorney, and he shall appear for the State and prosecute all criminal actions in said county courts of his district; and for his services he shall be paid such salary as may be fixed by the boards of county commissioners of the several counties composing the district.

The said prosecuting attorney shall be elected by the respective boards of commissioners in the same manner as hereinbefore provided for the election of a judge thereof. He shall hold his office until January first next following the first general election for county officers, and at the said first general election following his election by the said boards of commissioners, and thereafter at each subsequent general election for county officers, he shall be nominated and elected by the duly qualified electors of the counties composing said district, under the general laws governing the nomination and election of district

officers, or solicitors of the several judicial districts.

Any vacancy arising in the said office of prosecuting attorney shall be filled by the board of commissioners of the counties composing the district, in the same manner as hereinbefore provided for the election of the judge thereof; and the compensation or salary of the said prosecuting attorney shall be paid by the several counties composing the district in the same proportion, or basis provided for payment of the salary of the judge, and shall be payable monthly out of the funds of the counties composing said district court. If requested to do so by the judge, the prosecuting attorney shall represent the county in prosecuting any appeal of a criminal action from said district court in the Superior Court. (1931, c. 70.)

§ 7-302. Clerks; duties and compensation.—The several clerks of the superior court in the several counties of said district court shall ex-officio be clerk of said district court of each and all terms held within the respective counties of each, and subject to all the rights, duties and liabilities provided for in sections 7-274 and 7-277. The clerk of said court or any deputy thereof, upon application and the making of proper affidavit, as provided by law, shall have power and authority to issue any criminal warrant or warrants in said court and make the same returnable before the judge thereof, at any time or times designated for the trial of criminal cases. The last sentence shall not apply to the following counties: New Hanover, Caldwell, Henderson, Ashe, Hoke, Lincoln, Wayne, Wilkes, Nash, Edgecombe, Alexander, Rockingham, Duplin, Union, Alleghany, Halifax, Alamance, Clay, Yancey, Dare, Wake, Hertford, Jackson, Mecklenburg, Craven, Vance, Person, Robeson, Johnston, Yadkin, Davidson, Haywood, Pitt, Tyrrell, Hyde, Watauga, Durham, Scotland, Forsyth and Camden. (1931, c. 70, s. 1; c. 233.)

§ 7-303. Sheriffs; duties and compensation.—The several sheriffs of the several counties of said district court, or their duly constituted deputies, shall attend upon each term of this court within their respective counties, and be subject to and possess the same power and authority and additional compensation as authorized under § 7-275. (1931, c. 70.)

§ 7-304. Jurisdiction.—The said county district courts shall have the same criminal and civil jurisdiction as that of the general county court, and as fixed and defined in §§ 7-278 and 7-279. (1931, c. 70.)

§ 7-305. Procedure to establish.—Upon a petition signed by a majority of the resident licensed attorneys at law, of not less than two counties of the State within any one judicial district, and duly verified to that effect, addressed to and filed with the Governor, praying the establishment of a general county district court for any two or more of the counties named in the petition, the Governor shall transmit a copy of the petition to each of the respective boards of county commissioners, and at the same time he shall issue an order to each of said boards directing a joint meeting of the same at the courthouse

of one of the said counties at such time and place as he may designate in said order.

The several boards of commissioners, or any two or more of them, if in their judgment the said court shall be established, shall, at such meeting, or at such later meeting within thirty days thereafter to which they may adjourn, pass a resolution reciting the petition for said court, and declaring the same to be established in and for each of the respective counties thus approving and voting for the said resolution.

A majority vote of two or more of the several boards of commissioners participating in the said proceedings for the passage of the said resolution shall be sufficient for the establishment of said court, and it shall thereupon become an established court in and for the counties voting for the resolution; and thereupon a certified copy of the minutes of said meeting, the said petition and resolution, executed by any one of the commissioners present, attested by one member of each of the several boards participating in the said proceedings and voting for said court, shall be transmitted to the clerk of the Superior Court of the several counties participating and adopting the resolution, and also recorded in the minutes of said commissioners' meetings of the several counties composing the district. (1931, c. 70.)

§ 7-306. Practice and procedure.—The practice and procedure of the said county district courts shall be the same as that of the general county court, and as prescribed in §§ 7-286 to 7-296. (1931, c. 70.)

§ 7-307. Abolishing the court.—Whenever in the opinion of the board of commissioners of any county in which a court has been established under the provisions of this article, the conditions prevailing in such county are such as to no longer require the said court, such board of county commissioners may, by proper resolution, reciting in brief the reasons therefor, duly certify the same to the chairman of the board of commissioners of each other county composing, forming and creating the said district court; whereupon the respective boards of commissioners of the several counties embraced in said district court, shall meet at the courthouse of the county in which the judge resides on the third Monday of the month next following the receipt of the certified copy of the resolution aforesaid, or the subsequent and next following Monday first and abolish the said county court for the county having adopted the resolution aforesaid, which shall go into effect as to the county abolishing said court at the end of the term to which the judge has been elected. If, upon the abolition of the said county court, as to the county adopting the resolution aforesaid, as many as two other counties forming, composing and making up the said district court, desire the same continued in full force and effect within their respective counties the said commissioners shall readjust the salary and compensation of the judge and prosecuting attorney of said court on the basis hereinbefore provided to take effect at the end of the term to which the said judge has been elected, and the said county court shall continue in full force and effect within the other counties remaining, forming and composing the same,

with no impairment of the rights, powers, duties, and authorities conferred by this article. But said court may, at any time, at a meeting held pursuant to a resolution, certified as aforesaid, subject to the provisions hereinbefore recited, abolish the said court in each, all or any of the counties in the districts; and in such event the Clerk of Court shall transfer all cases pending therein to the Superior Court of his respective county. (1931, c. 70.)

SUBCHAPTER VIII. CIVIL COUNTY COURTS.

Art. 33. With Jurisdiction Not to Exceed \$3000.

§ 7-308. Establishment.—An inferior court with civil jurisdiction only as hereinafter provided may be established by the board of county commissioners of any county in this state upon the petition of a majority of the resident practicing attorneys within the county. (1925, c. 135, s. 1.)

§ 7-309. Jurisdiction.—The said court shall have exclusive original jurisdiction in all civil actions, matters, and proceedings, including all proceedings whatever ancillary, provisional and remedial to civil actions founded on contract or tort, wherein the superior court now has exclusive original jurisdiction: Provided, that the sum demanded or the value of the property in controversy shall not exceed three thousand dollars (\$3,000).

Said court shall have jurisdiction concurrent with the Superior Court in all actions to try title to land and to prevent trespass thereon and to restrain waste thereof: Provided, the sum demanded or the value of property in controversy shall not exceed three thousand dollars (\$3,000).

The said court shall have jurisdiction with the Superior Court in all actions pending in said court to issue and grant temporary restraining orders and injunctions: Provided, that the sum demanded or the value of the property in controversy shall not exceed three thousand dollars (\$3,000). (1925, c. 135, s. 2.)

§ 7-310. Juries in such court; drawing jury; challenges.—In the trial of civil actions in said court either the plaintiff at the time of filing the complaint or the defendant at the time of filing the answer may in his pleadings demand and have a jury trial as provided in the trial of causes in the Superior Court; failure to demand a jury trial at the time herein provided shall be deemed a waiver of the right to a trial by jury. The judge of said court, when in his opinion the ends of justice would be best served by submitting the issues to the jury, may have a jury called of his own motion and submit to it such issues as he may deem material.

Jurors shall receive the same compensation as is now provided by law for jurors serving in the Superior Court, to be paid out of the treasury of said county on presentation of a ticket duly issued by the clerk of said court; the clerk of said court shall tax the sum of three dollars as cost of jury in all jury cases and the same shall be collected by said clerks and paid into the county treasury of said county.

The commissioners of said county at their regular meeting on the first Monday of April, in the year nineteen hundred and twenty-five,

and each two years thereafter, shall cause names of their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose which must have two divisions marked "No. 1" and "No. 2," respectively, and two locks to same, the keys of one to be kept by the sheriff of said county and the other to be kept by the chairman of the board of commissioners of said county, the box to be kept by the clerk of said board, which box shall be marked "County Court." The names in this box shall be drawn for juries acting as jurors in the said county court and when a jury is demanded in said court the sheriff shall cause to be drawn from said box out of partition "No. 1," by a child not more than ten years of age fifteen scrolls and the scrolls so drawn to make the jury shall be put into partition marked "No. 2," and in all other respects the jury shall be drawn as juries are drawn in the Superior Court. The jurors of this court shall have the same qualifications as provided for jurors in the trial of causes in the Superior Court. The said jurors shall be summoned to attend under the mandate from the clerk of said county court directed to the sheriff of said county: Provided, that for sufficient cause the judge of this court may issue an order to the board of county commissioners that no jury be drawn for such term or terms of this court, as may seem best to him.

The challenges allowed in the trial of causes in said county court shall be the same in number and for the same causes as are allowed in the trial of causes in the Superior Court; all jurors drawn from the box shall be regular jurors. The said court shall have the same power to summon tales jurors as the Superior Court now has and when a jury trial is had the jury shall be twelve in number. (1925, c. 135, s. 3.)

§ 7-311. Terms; docket.—The judge and clerk of said county court are hereby authorized to fix the terms of said court and to make up the docket of said court upon consulting with the bar association of said county. (1925, c. 135, s. 4.)

§ 7-312. Witnesses; how summoned.—Witnesses shall be summoned by subpoena issued by the clerk of said court as now provided for the summoning of witnesses for the trial of causes in the superior court and shall be allowed the same compensation to be taxed as cost by the clerk of this court. (1925, c. 135, s. 5.)

§ 7-313. Appeals.—Appeals may be taken by either the plaintiff or the defendant from the said county court to the Superior Court of said county in term time for errors assigned in matters of law in the same manner and under the same requirements as are now provided by law for appeals from the Superior Court to the Supreme Court, with the exception that the record may be typewritten instead of printed and only one copy thereof shall be required. The time for taking and perfecting the appeals shall be counted from the end of the term. Upon appeals from said county court the Superior Court may either affirm, modify and affirm the judgment of said county court or remand the cause to the county court for a new trial.

The bonds to stay executions shall be the same

as now required for appeals from the Superior Court to the Supreme Court. The judgment of the Superior Court shall be certified to said county court; final judgment may be rendered unless there is an appeal to the Supreme Court. In case of appeal to the Supreme Court upon filing of the certificate from the Supreme Court to the Superior Court said certificate shall be transmitted by the clerk thereof to the clerk of this court. (1925, c. 135, s. 6.)

An appeal to the Superior Court from the granting or refusal of a restraining order by the county court may be taken to the next term of the Superior Court without the necessity of serving statement of case on appeal, counter-case or exceptions, etc., the case having been heard on the pleadings and the record in the Superior Court consisting of the summons, complaint, answer, orders, judgment and assignment of errors. *Thomason v. Swenson*, 204 N. C. 759, 169 S. E. 620.

§ 7-314. How actions commenced.—All actions shall be commenced in said court by summons running in the name of the State and issued by the clerk of said county court and shall be returnable as is provided by law for summons in the Superior Court. The plaintiff shall file and retain complaint on or before the return day of such summons; the defendant shall file a written answer or demurrer and shall make his motions in writing during the term to which the summons is returnable and the case shall stand for trial at the next succeeding term. (1925, c. 135, s. 7.)

§ 7-315. Judgments.—The judgments of said court may be enforced by execution issued by the clerk thereof, returnable within twenty days. Transcripts of said judgments shall be docketed in the Superior Court of said county and become judgments of the Superior Court as now provided for executions and transcripts of judgments from the courts of justices of the peace with the same limitations as are now provided for judgments of justices of the peace. (1925, c. 135, s. 8.)

Cross Reference.—As to docketing judgments of courts of justices of the peace in superior court, see § 7-166.

§ 7-316. Process of the court.—The process of said court while exercising the jurisdiction of a justice of the peace shall not run outside of said county. In all other cases these processes shall run as processes issue out of the Superior Court. (1925, c. 135, s. 9.)

§ 7-317. Removal of cause before justice.—When, upon affidavit made before entering upon the trial of any cause before any justice of the peace in said county, it shall appear proper for said cause to be removed for trial to some other justice of the peace, as is now provided by law, said cause may be removed for trial to the said county court. (1925, c. 135, s. 10.)

Local Modification.—Mecklenburg: 1933, c. 279.

§ 7-318. Rules of practice.—The rules of practice as prescribed by law for the superior court for the trial of all causes shall apply in this court, supplemented, however, by such rules and regulations as may be prescribed by the judge of this court relating to causes pending therein. (1925, c. 135, s. 11.)

§ 7-319. Bonds for costs; duties of clerk.—The statutes about bonds for costs and about

suits without bonds for costs that now apply to the Superior Court shall also apply to this court. Wherever the statute provides for a thing to be done by the clerk of the Superior Court or by the judge of the Superior Court or by either, the same thing shall be performed by the clerk of said county court or by the judge of said county court in causes in said county court; this provision shall apply especially to all provisional remedies as now provided by statute except special proceedings. (1925, c. 135, s. 12.)

§ 7-320. Costs.—In all causes removed to or brought into the said county court the costs shall be the same as in the Superior Court. All cost shall be paid to or collected by the clerk of said county court in the same manner as in the Superior Court and be paid by the said clerk of said county court into the treasury of said county: Provided, that for the service of process the fees shall be paid to the officer serving the process. The officers shall perform all the duties in said county court as provided in the Superior Court and receive therefor the same fees as allowed for the same service performed in the Superior Court. (1925, c. 135, s. 13.)

§ 7-321. Appointment and compensation of judge; substitute; vacancies.—After the ratification of this article and the establishment of such court by any county, it shall be the duty of the clerk of the board of commissioners of such county to immediately notify the Governor who shall appoint a judge to preside over such court, and each fourth year thereafter it shall be the duty of the Governor to appoint the judge of each such county court who shall preside over said court, who shall be learned in the law, of good moral character, and who shall at the time of his appointment and qualification be an elector in and for said county; that the said judge shall hold office for a term of four years and until his successor is appointed and qualified. And before entering upon the duties of his office the said judge shall take and subscribe an oath of office as is now provided by law for the judges of the Superior Court and file the same with the clerk of the Superior Court of said county; and the said clerk shall record the same. Said judge shall receive a salary of one hundred dollars (\$100) a week for each week that he is engaged in holding court, payable in equal weekly installments out of the treasury of said county.

The said judge shall not by reason of his office be prohibited from practicing the profession of attorney at law in other courts of this State except as to matters pending in connection with or growing out of said county court.

When the said judge is unable to preside over said court on account of sickness or absence for other cause he shall appoint some other person learned in the law who shall take the same oath and possess the same qualifications as provided for the judge, to act as a substitute judge with all the powers and duties of the judge, and the compensation of said substitute judge shall be paid by the said judge.

Any vacancy occurring in the office of judge shall be filled by the Governor of the State. (1925, c. 135, s. 14.)

Cross References.—As to forms of oath required of supe-

rior court judges, see §§ 11-6, 11-7, 11-11; Const., Art. VI, s. 7.

§ 7-322. Compensation of clerk; vacancy; files, books, stationery, etc.—The clerk of the superior court of said county by himself or his deputies shall ex officio perform the duties of clerk of said county court and shall be paid a sum not less than one thousand dollars (\$1,000) annually, the amount to be determined by the board of commissioners of said county and paid out of the treasury of said county as full compensation for his duties as clerk of said county court. Upon the failure of the clerk of the Superior Court of said county to qualify under this article or in case of any vacancy in the office of clerk of the said county court such vacancy shall be filled by the board of commissioners of said county. The necessary files, books, stationery and other material of that nature shall be furnished to the clerk of said county court by said county. (1925, c. 135, s. 15.)

§ 7-323. Stenographer; fees.—There shall be an official stenographer of this court whose duty shall be the same as the official stenographer of the Superior Court of said county. Said stenographer's fees shall be the same in amount as the fees of the official stenographer of the superior court of said county and shall be taxed as costs. (1925, c. 135, s. 16.)

§ 7-324. Procedure.—The procedure of said county court, except that hereinbefore provided, shall follow the rules and principles laid down in the chapter on civil procedure and amendments thereto in so far as the same may be adapted to the needs and requirements of the said county court. (1925, c. 135, s. 17.)

§ 7-325. Records.—There shall be dockets, files, and records kept of all proceedings in the said county court, conforming as nearly as possible to the records of the superior court. (1925, c. 135, s. 18.)

§ 7-326. To be court of record.—The said county court shall be a court of record and the clerk thereof shall be provided with a seal of said court. (1925, c. 135, s. 19.)

§ 7-327. Pending cases.—All cases pending in the superior court of said county and in the courts of the justices of the peace of said county on the date the court is established shall be tried in the courts wherein they are pending. (1925, c. 135, s. 20.)

§ 7-328. First session.—The presiding judge of said county court shall hold the first session of said county court within thirty days after his appointment by the Governor, and other sessions shall be held as provided in this article. (1925, c. 135, s. 21.)

§ 7-329. Discontinuance of court.—The board of commissioners of any county may discontinue such court on written petition signed by the majority of the practicing attorneys of such county. (1925, c. 135, s. 22.)

§ 7-330. Existing laws not repealed.—This article shall not be construed to repeal chapter seven, nor shall it repeal or affect any act establishing any inferior court now existing or

that may hereafter be created under the existing law but shall be construed to be supplemental to the existing law and a method by which county courts may be established. (1925, c. 135, s. 23.)

§ 7-331. Article not applicable to certain counties.—The provisions of this article shall not apply to the following counties: Burke, Hyde, Avery, Alexander, Clay, Catawba, Mitchell, Madison, Graham, Swain, Henderson, Duplin, Jackson, Davie, Cherokee, Stokes, Lincoln, Wilkes, Johnston, Person, Pamlico, Watauga, Haywood, Vance, Robeson, Craven, Caldwell, Hoke, Yancey, Anson, Pender, Macon, Onslow, Bladen, Alleghany and Scotland: Provided, this article shall not apply to any of the counties of the present Sixteenth and Seventeenth Judicial Districts. (1925, c. 135, s. 24.)

Art. 34. With Jurisdiction Not to Exceed \$5000.

§ 7-332. Establishment.—In addition to the plan for a general county court provided for in articles 30 and 31, of this chapter, there may be established by the board of county commissioners in any county, a court of civil jurisdiction, which shall be a court of record and which shall be maintained pursuant to this article, and which court shall be called the county civil court, and shall have civil jurisdiction as provided in this article. (1925, c. 167, s. 1.)

Cross References.—As to forms of oaths required of superior court judges, see §§ 11-6, 11-7, 11-11; Const., Art. VI, s. 7.

§ 7-333. Qualification, election, and term of judge; office.—The county civil court shall be presided over by a judge, who may be an attorney at law, and shall reside and be a qualified elector in the county during his term of office, and shall be permitted to practice law during his term of office. The first judge of the county civil court shall be elected by the board of county commissioners at the time of the establishment of said court, and he shall hold his office until January first, following the next general election of county officers within said county, and until his successor is elected and qualified, and if a vacancy occurs in the office of judge, it shall be filled by the election of a successor for the unexpired term by the board of county commissioners. Each succeeding judge shall be elected by a vote of the qualified electors of the county at the next general election before the expiration of the term of office in the same manner as other county officers are nominated and elected, and shall hold office for a term of four years, beginning January first, following his election and until his successor is elected and qualified, unless said court is abolished. The judge shall qualify by taking and subscribing an oath of office as is now provided by law for a judge of the Superior Court, which shall be filed with the clerk. The salary of said judge shall be fixed by the board of commissioners of the county, which shall not be decreased during the term of office; to be paid in monthly installments by the county. The judge shall be provided by the county board of commissioners with an office and a suitable and convenient room for holding court at the county seat. (1925, c. 167, s. 2.)

§ 7-334. Substitute judge.—When the judge of said county civil court is unable to hold court on

account of sickness, absence, disqualification, or other cause, he shall appoint some other person learned in the law, who shall take the same oath and possess the same qualifications as provided for a judge, to act as substitute judge, who shall be invested with all the powers and duties of the judge, and his compensation during his appointment shall be paid by the said judge. (1925, c. 167, s. 3.)

§ 7-335. Terms of court; calendar.—The court shall open for the transaction of business and trial of cases on the first Monday of each month and continue until the matters of the court are disposed of, and it shall be the duty of the judge to prepare a calendar of cases for trial, on which jury cases shall have precedence. (1925, c. 167, s. 4.)

§ 7-336. Clerk of court.—The clerk of the superior court of the county shall be ex officio clerk of the court, and in addition to the salary or fees paid him as clerk of the Superior Court, he shall be paid such additional compensation as the county commissioners of the county may fix to be paid monthly out of the county funds, and the board of county commissioners be and are hereby authorized and empowered to provide for salary or fees for such additional deputies as he may need. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him as clerk, to the same extent as he is bound as clerk of the Superior Court. (1925, c. 167, s. 5.)

§ 7-337. Sheriff.—The sheriff of the county, or his deputies, appointed, shall attend upon the terms of this court in the same manner and with the same power and authority as he does and has in attendance upon the superior court of the county. The county commissioners of the county are authorized to make said sheriff such additional allowances as they may fix for such services, in addition to his salary or fees fixed by law. (1925, c. 167, s. 6.)

§ 7-338. Records; blanks, forms, books, stationery.—The clerk of the court shall keep separate records for the use of the said court to be furnished by the county commissioners, and they shall also provide such necessary blanks, forms, books, and stationery as may be needed by the court, and the clerk shall keep the same in the office of the clerk of the Superior Court. (1925, c. 167, s. 7.)

§ 7-339. Juries.—The jury in said court shall be a jury of twelve and the trial shall be conducted as nearly as possible as in the Superior Court. In all actions the parties shall be deemed to have waived a jury trial, unless demand shall be made therefor, as hereinafter provided, in writing. The plaintiff in filing the complaint, or the defendant at the time of filing answer, may in the pleadings demand a jury trial, or in cases transferred from the Superior Court to the said court, either party may demand jury trial, in writing, signed by the party making it or his attorney, which must be made at the time of such transfer. Any demand for a jury trial shall be accompanied by a deposit of five dollars (\$5.00), to insure the payment of the jury tax, except in cases brought in forma pauperis, provided such

demand shall not be used to the prejudice of the party making it. (1925, c. 167, s. 8.)

§ 7-340. Jury list; summons.—It shall be the duty of the board of county commissioners, upon the establishment of a court as herein provided, and every two years thereafter, to prepare a list of jurors, identical with the list prepared for the Superior Court and subject to the same rules and regulations, and mark said jury box as the county civil court box, from which the jury shall be drawn. The judge of the court shall issue the proper writ to the sheriff of the county to summons the jurors for the court in the same manner as juries are ordered and drawn in the Superior Court. (1925, c. 167, s. 9.)

§ 7-341. Talesmen.—The judge shall have the right to call in talesmen to serve as jurors, according to the practice of the superior court, and to direct the sheriff to summons a sufficient number of talesmen to serve during any one week for the proper dispatch of the business of the court. (1925, c. 167, s. 10.)

§ 7-342. Procedure, process, pleadings, etc.—The procedure, practice, processes, pleadings and procuring evidence and judgments shall conform as near as may be to the courts having concurrent jurisdiction with this court. (1925, c. 167, s. 11.)

§ 7-343. Appeals.—Appeals in all actions may be taken from the court to the Superior Court of the county in term time for errors assigned in matters of law in the same manner as is now provided for appeals from the Superior Court to the Supreme Court, with the exception that the record may be typewritten instead of printed, and only two copies shall be required; one for the court and the other for the opposing counsel. The time for taking and prosecuting appeals shall be counted from the end of the calendar month of the court at which such trial is had. It shall be the duty of any judge of the Superior Court holding the courts in any county, where a court is established under the provisions of this article, to allot sufficient and adequate time during each regular term of the Superior Court held in such county for the hearing of appeals from the county civil court of such county. Upon such appeal the Superior Court may either affirm or modify and affirm the judgment of the county civil court or remand the cause for a new trial. From the judgment of the Superior Court an appeal may be taken to the Supreme Court, as is now provided by law. Orders to stay execution on judgments entered in the court shall be the same as in appeals from the Superior Court to the Supreme Court, and judgments of said court may be enforced by execution by the clerk thereof, returnable within twenty days, and transcripts of such judgments may be docketed in the superior court as now provided for judgments of justices of the peace, and when docketed shall, in all respects, be judgments in the superior court in the same manner and to the same extent as if rendered by the superior court. (1925, c. 167, s. 12.)

§ 7-344. Jurisdiction.—The county civil court shall have jurisdiction only in civil matters, and as follows:

(1) Jurisdiction concurrent with that of the justices of the peace of the county;

(2) Jurisdiction concurrent with the Superior Court in all actions founded on contract wherein the amount demanded shall not exceed the sum of five thousand dollars (\$5,000), exclusive of interest and cost;

(3) Jurisdiction concurrent with the Superior Court in all actions not founded upon contract; wherein the amount demanded shall not exceed the sum of five thousand dollars (\$5,000), exclusive of interest and cost;

(4) Jurisdiction concurrent with the Superior Court in all actions to try title to lands and to prevent trespass thereon and to restrain waste thereof;

(5) Jurisdiction concurrent with the Superior Court in all actions pending in said court to issue and grant temporary and permanent restraining orders and injunctions. (1925, c. 167, s. 13.)

§ 7-345. Stenographer; fees.—There shall be an official stenographer of the court whose duties and fees shall be the same and taxed as those of the official stenographer of the superior court. (1925, c. 167, s. 14.)

§ 7-346. Disqualification of judge.—Where the judge is disqualified to try any case, it shall be removed for trial to the superior court of the county, in which the court is located or ore tenus to the substitute judge. (1925, c. 167, s. 15.)

§ 7-347. Pending cases, transfer.—By consent of plaintiff and defendant any case, within the jurisdiction of the court, pending in the superior court may be transferred to the docket of the county civil court, and there tried. (1925, c. 167, s. 16.)

§ 7-348. Abolishing court.—This court may be abolished by resolution of the board of county commissioners of any county for such county by giving written notice of such intention six months prior to the end of the term of any presiding judge thereof, to become effective at the end of such term of office; and, in case of the abolition of the court, cases then pending shall be transferred to the Superior Court. (1925, c. 167, s. 17.)

§ 7-349. Existing laws not repealed.—This article shall not be construed to repeal any existing laws by which a county court may be created or to effect or repeal any court now or hereafter created under existing laws and shall only be construed to be an additional method by which a county court may be established. (1925, c. 167, s. 18.)

§ 7-350. Article inapplicable to certain counties.—This article shall not apply to the counties of Bladen, Jones, Bertie, Caldwell, Craven, Columbus, Gaston, Henderson, Mitchell, Vance. (1925, c. 167, s. 19.)

Art. 35. With Jurisdiction Not to Exceed \$1500.

§ 7-351. Establishment.—In addition to the plans now provided by law for the establishment of courts inferior to the superior court, there may be established by resolution of a majority of the members of the board of county commissioners of any county in the state a court of civil jurisdiction, which shall be a court of record, shall be

called County Civil Court and shall have civil jurisdiction as provided in this article. (1937, c. 437, s. 1.)

Local Modification.—Caswell, Wayne: 1937, c. 437, s. 30.

§ 7-352. Qualification of judge.—The county civil court shall be presided over by a judge, who may be an attorney at law, who shall at the time of appointment and qualification be an elector in and for said county, and he shall not by reason of his term of office be prohibited from practicing the profession of attorney at law in other courts except as to matters pending in connection with or growing out of said county civil court. (1937, c. 437, s. 2.)

§ 7-353. Appointment of judge; vacancies; substitute judge.—After the ratification of this article and the establishment of such court by any county, it shall be the duty of the clerk of the board of commissioners of such county to immediately notify the governor of the state, who shall appoint a judge to preside over such court, and each second year thereafter it shall be the duty of the governor of the state to appoint the judge of each such county civil court, who shall preside over said court; the said judge shall hold office for a term of two years and until his successor is appointed and qualified. Any vacancy occurring in the office of judge shall be filled by the governor of the state.

When the judge of said county civil court is unable to hold court on account of sickness, absence, disqualification or other cause, the governor of the state shall appoint some other person, who shall take the same oath and possess the same qualifications as provided for a judge, to act as substitute judge, who shall be invested with all the powers and duties of the judge. At the time of fixing the salary for the judge, the board of county commissioners shall fix a per diem compensation for the substitute judge which shall be paid out of the salary fixed for the judge. (1937, c. 437, s. 3.)

§ 7-354. Oath of judge.—Before entering upon the duties of his office, the said judge shall take and subscribe an oath of office as is now provided by law for the judges of the superior court, and file the same with the clerk of the superior court of said county; and said clerk shall record the same. (1937, c. 437, s. 4.)

Cross References.—As to forms of oaths required of superior court judges, see §§ 11-6, 11-7, 11-11; Const., Art. VI, s. 7.

§ 7-355. Salary of judge.—The salary of said judge shall be fixed by the board of commissioners of the county, shall not be decreased during the term of office, and shall be paid in monthly installments out of the funds of the county. The judge shall be provided by the county board of commissioners with a suitable and convenient room for holding court at the county-seat. (1937, c. 437, s. 5.)

§ 7-356. Disqualification of judge.—Where the judge is disqualified by reason of interest in any case, it shall be removed for trial to the superior court of the county. (1937, c. 437, s. 6.)

§ 7-357. Clerk of court.—The clerk of the superior court shall be ex officio clerk of the county civil court established under the provisions of this article, and he shall have as nearly as pos-

sible the same duties, powers and responsibilities with reference to the county civil court as he has in his capacity as clerk of the superior court. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him as clerk of the county civil court to the same extent as he is bound as clerk of superior court. In addition to the salary or fees paid him as clerk of superior court, the clerk of the county civil court shall be paid such additional reasonable compensation as the board of county commissioners may fix; and the board of county commissioners are hereby authorized and empowered to provide the salary of such additional deputy or deputies as he may need. (1937, c. 437, s. 7.)

§ 7-358. Oath of clerks.—The clerks of the county civil court, before entering on the duties of their office, shall take and subscribe, before some officer authorized by law to administer an oath, the oath required under general law, and in addition thereto shall take and subscribe to an oath to perform faithfully all the duties required of them under this article and file such oaths with the register of deeds for the county. (1937, c. 437, s. 8.)

Cross References.—As to forms of oaths required of clerk of the superior court, see §§ 11-6, 11-7, 11-11; Const., Art. VI, s. 7.

§ 7-359. Appointment and removal of deputies.—Each clerk of the county civil court shall have the authority to appoint deputy clerks and the authority to revoke such appointments at will. He shall make a record of each appointment and furnish a transcript of such record to the register of deeds, who shall record the same in the record of deeds and make a cross-index thereof. When the appointment of any deputy clerk is revoked, the clerk shall write on the margin of the records of such appointment the word "revoked" and the date of revocation, and sign his name thereto. (1937, c. 437, s. 9.)

§ 7-360. Oath and power of deputies.—If any deputy clerk shall be appointed as provided in this article, he shall take and subscribe to the oaths prescribed for clerks. Each deputy clerk appointed as herein provided shall have as nearly as possible the same powers and duties, with reference to the county civil court, as a deputy clerk of the superior court has with reference to the superior court. (1937, c. 437, s. 10.)

§ 7-361. Sheriff.—The sheriff of the county, or his deputies appointed, shall attend upon this court in the same manner and with the same power and authority as he does and has in attendance upon the superior court of the county. The board of county commissioners of the county are authorized to make said sheriff such additional allowances as they may deem necessary and proper for such services, in addition to his salary or fees now fixed by law. (1937, c. 437, s. 11.)

§ 7-362. Stenographer.—The board of county commissioners shall appoint an official stenographer of the court, whose duties shall be the same as those of the official stenographer of the superior court, and the compensation shall be fixed and paid by the board of county commissioners. (1937, c. 437, s. 12.)

§ 7-363. Jury trial.—In the trial of actions in said court any party is entitled to the right of trial by jury as is provided in the trial of causes in the superior court, unless said right of trial by jury shall be waived as hereinafter provided. (1937, c. 437, s. 13.)

§ 7-364. Waiver of jury trial; jurisdiction concurrent with superior court.—In those cases in which written pleadings are required to be filed, the parties shall be conclusively presumed to have expressly waived their right to trial by jury, unless at the time of the filing of the complaint or petition the plaintiff, in writing, demands a jury trial; or, at the time of the filing of the answer or other pleading which raises an issue of fact, the defendant or other party filing such pleading demands, in writing, a jury trial. (1937, c. 437, s. 13(a).)

§ 7-365. Waiver of jury trial; jurisdiction concurrent with justice of peace.—In those cases in which no written pleadings are required, the parties shall be conclusively presumed to have expressly waived their right to trial by jury, unless at the time of the issuance of summons the plaintiff or petitioner, in writing, demands a jury trial; or the defendant, at any time before the commencement of the trial, in writing, demands a jury trial. (1937, c. 437, s. 13(b).)

§ 7-366. Jury trial in cases instituted in superior court or before magistrate.—In those cases which were or may hereafter be instituted before a justice of the peace and removed or appealed to this court, and in those cases which were or may hereafter be instituted in superior court and removed to this court, a jury trial will be conclusively presumed to have been expressly waived unless the party desiring a trial by jury shall make a demand therefor, in writing, at any time before the case is called for trial; in which event the number of the jury shall be as herein elsewhere provided. (1937, c. 437, s. 13(c).)

§ 7-367. Jury of six; demand and deposit for jury of twelve.—The jury of said court shall be a jury of six unless, at any time before the calling of the cause for trial, either party, who has not waived the right to trial by jury by failing to demand a jury trial in apt time as provided herein, or otherwise, demands a trial by a jury of twelve, in which event a jury of twelve shall be impaneled: Provided, that in those cases in which a jury of twelve is demanded the party shall, at the time of making the demand, pay to the clerk of said court a deposit of five dollars to insure the payment of the jury tax: Provided further, that where a party making such demand for a jury of twelve makes affidavit and satisfies the judge or clerk of said court that he is unable to make the deposit, such party shall not be required to make the same. The deposit for jury of twelve shall be returned to the party making it when the jury tax is paid by the losing party against whom the costs are taxed. (1937, c. 437, s. 13(d).)

§ 7-368. Judge may impanel jury on own motion.—The judge of said court, when in his opinion the ends of justice would be best served by submitting an issue or issues to the jury, may call a jury of his own motion and submit to it such

issue or issues as he may deem material. (1937, c. 437, s. 13(e).)

§ 7-369. Drawing juries; summons of jurors; pay of jurors.—The regular jurors shall be drawn from the superior court jury box; the drawing and summoning of said jurors shall be in the same manner as jurors are drawn and summoned for the superior court: Provided, however, only twelve jurors shall be drawn and summoned for any one week of court unless the judge specifies that a larger number shall be drawn. The judge of each county civil court, at least thirty days in advance, shall notify the chairman of the board of county commissioners when a jury will be needed.

Jurors shall receive the same compensation as is provided by law for jurors serving in the superior court, to be paid out of the treasury of said county on presentation of a ticket duly issued by the clerk of said court. (1937, c. 437, s. 14.)

§ 7-370. Talesmen.—The judge shall have the right to call in talesmen to serve as jurors, according to the practice of the superior court, and to direct the sheriff to summon a sufficient number of talesmen to serve during any one week or a portion thereof for the proper dispatch of the business of the court. (1937, c. 437, s. 15.)

§ 7-371. When court opens; terms of court.—The county civil courts shall be open for the transaction of business within their jurisdiction whenever matters before the court require attention, except for the trial of issues of fact requiring a jury and the trial of contested causes wherein the county civil court is exercising jurisdiction concurrent with that of the superior court, which shall be heard in term time.

The judge of the county civil court is hereby authorized to fix the terms of said court upon consulting with the clerk of the court and the members of the bar of the county. (1937, c. 437, s. 16.)

§ 7-372. Jurisdiction.—The county civil court shall have jurisdiction only in civil matters and as follows:

(1) Jurisdiction concurrent with that of the justices of the peace of the county;

(2) Jurisdiction concurrent with the superior court in all actions founded on contract wherein the amount demanded shall not exceed the sum of one thousand five hundred dollars, exclusive of interest and costs;

(3) Jurisdiction concurrent with the superior court in all actions not founded on contract wherein the amount demanded shall not exceed the sum of one thousand five hundred dollars, exclusive of interests and costs;

(4) Jurisdiction concurrent with the superior court in all actions to try title to lands, to prevent trespass thereon, and to restrain waste thereof wherein the value of the land does not exceed the sum of one thousand five hundred dollars;

(5) Jurisdiction concurrent with the superior court in all actions and proceedings for divorce and alimony, or either, and to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper. (1937, c. 437, s. 17.)

§ 7-373. Appeals from justice of the peace.—In all cases where there is an appeal from a jus-

tice of the peace of a county wherein a county civil court has been established under the provisions of this article, such appeal shall be first heard de novo in the county civil court in the manner provided herein for hearing causes within the jurisdiction of a justice of the peace originating in the said county civil court. Said appeals shall be docketed in the county civil court within the same time limit and in the same manner as such appeals are now required to be docketed in the superior court. (1937, c. 437, s. 18.)

§ 7-374. Removal of cause before justice of peace.—When, upon affidavit made before entering upon the trial of any cause before any justice of the peace of said county, it shall appear proper for said cause to be removed for trial to some other justice of the peace, as is now provided by law, said cause shall be removed for trial to the said county civil court. (1937, c. 437, s. 19.)

§ 7-375. Pending cases, transfer.—By written consent of plaintiff and defendant filed with the clerk of superior court, any case within the jurisdiction of the county civil court, now or hereafter pending in the superior court, may be transferred to the docket of the county civil court and there tried; if a jury trial is desired, it shall be expressed in the agreement to transfer the case; otherwise, the right to trial by jury shall be conclusively presumed to have been expressly waived. (1937, c. 437, s. 20.)

§ 7-376. Records; blanks, forms, books, stationery.—The clerk of the county civil court shall keep separate records for use of the said court to be furnished by the county commissioners, and they shall also provide such necessary blanks, forms, books, and stationery and office equipment as may be needed by the court; the clerk shall keep the same in the office of the clerk of such court. (1937, c. 437, s. 21.)

§ 7-377. Processes; pleadings; procedure, etc.—When the county civil court is exercising jurisdiction concurrent with that of the superior court, the rules of processes, pleadings, procedure, practice, and procuring evidence and judgment shall conform as nearly as possible to those of the superior court.

When the county civil court is exercising jurisdiction concurrent with that of justices of the peace, actions shall be commenced in the county civil court by summons issued and signed by the clerk or deputy; and orders to seize property in claim and delivery proceedings, warrants of attachment and subpoena may be issued by the clerk or deputy and the other rules of processes, pleadings, procedure, practice, and procuring evidence and judgments shall conform as nearly as possible to those of the courts of the justices of the peace of the county. (1937, c. 437, s. 22.)

§ 7-378. Appeal to superior court; time for perfecting appeal; record on appeal; briefs; judgment; appeal to supreme court.—Appeals in actions may be taken from the county civil court within ten days from date of rendition of judgment to the superior court of the county in term time, for errors assigned in matters of law or legal inference, in the same manner as is provided for appeals from the superior court to the supreme court, except as follows:

(1) The appellant shall cause a copy of the statement of case on appeal to be served on the respondent within thirty days from the entry of the appeal taken, and the respondent, within fifteen days after such service, shall return the copy with his approval or specific amendments endorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case.

(2) The appellant shall file one typewritten copy of the statement of case on appeal, as settled, containing the exceptions and assignments of error, which, together with the original record, shall be transmitted by the clerk of the county civil court to the superior court as the complete record on appeal in said court.

(3) The record in the case on appeal to the superior court must be docketed in the superior court within ten days after the date of settling the case on appeal. If the appellant shall fail to perfect his appeal within the prescribed time, the appellee may file with the clerk of superior court a certificate of the clerk of court from which the appeal comes showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant and the date of the settling of case on appeal, if any has been settled, with his motion to docket and dismiss said appeal at appellant's cost, which motion shall be allowed at the first regular term or any succeeding regular term of the superior court.

(4) Appellant shall file one typewritten brief with the clerk of superior court, and shall immediately mail or deliver to appellee's counsel a carbon typewritten copy thereof. If appellant's brief has not been filed with the clerk of superior court, and no copy has been delivered to appellee's counsel within three weeks from the date of settling the case on appeal, the appeal will be dismissed on motion of appellee at the next regular term or any succeeding regular term of the superior court, unless for good cause shown the court shall give appellant further time to file his brief.

(5) Appellee shall file one typewritten brief and a carbon copy thereof with the clerk of superior court within five weeks from the date of settling the case on appeal; the copy of same will be furnished counsel for appellant by the clerk of superior court, on application. On failure of the appellee to file his brief by the time required, the case will be heard and determined at the next regular term or any succeeding regular term of the superior court without argument from appellee, unless for good cause shown the court shall give appellee further time to file his brief.

(6) It shall be the duty of any judge of the superior court holding court in any county where a court is established under the provisions of this article, to allot sufficient and adequate time during each regular term of the superior court held in such county for the hearing of appeals from the county civil court of such county: Provided, no such appeal shall be heard until five days has ex-

pired since the filing of appellee's brief or since the time appellee's brief should have been filed.

(7) Upon such appeal, the superior court may either affirm or modify the judgment of the county civil court or remand the cause for a new trial.

(8) From the judgment of the superior court an appeal may be taken to the supreme court as is now provided by law. (1937, c. 437, s. 23.)

§ 7-379. Stay of execution; enforcement of judgments, etc.—Orders to stay execution on judgments entered in the county civil court shall be the same as in appeals from the superior court to the supreme court.

Judgments of the county civil court shall be docketed in the judgment docket of the superior court as is provided for judgments of the superior court, and the judgment when docketed shall in all respects be a judgment of the superior court in the same manner and to the same extent as if rendered by the superior court, and shall be subject to the same statute of limitations and the statutes relating to the revival of judgments in the superior court and issuing executions thereon. (1937, c. 437, s. 24.)

§ 7-380. Court seal.—The county civil court shall have a seal with the impression "..... County Civil Court," which shall be used in attestation of all summons, other processes, acts, or judgments of said court whenever required, and in the same manner and in the same effect as the seal of other courts of record in the state of North Carolina. (1937, c. 437, s. 25.)

§ 7-381. Costs and fees.—There shall be taxed in the county civil court the same costs and fees for services of the officers thereof as provided for the court having concurrent jurisdiction; such costs and fees shall be taxed and collected by the clerk and paid over monthly to the treasurer of the county as county funds to be dealt with by the commissioners. (1937, c. 437, s. 26.)

§ 7-382. Abolishing court.—This court may be abolished by resolution of a majority of the board of county commissioners of any county for such county by giving written notice of such intention six months prior to the end of the term of any presiding judge thereof, to become effective at the end of such term of office; and in case of the abolition of the court, cases then pending shall be transferred to the superior court and there tried. (1937, c. 437, s. 27.)

§ 7-383. Existing laws not repealed.—This article shall not be construed to repeal or modify any existing laws by which a county court may be created or to affect or repeal any court now or hereafter created under existing laws, and shall only be construed to be an additional method by which a county court may be established. (1937, c. 437, s. 28.)

SUBCHAPTER IX. COUNTY CRIMINAL COURTS.

Art. 36. County Criminal Courts.

§ 7-384. Counties authorized to establish county criminal courts.—In each county in this State there may be established a court of criminal jurisdiction, which shall be a court of record, and it shall be maintained pursuant to the provisions

of this article, and said court shall be called the county criminal court, and shall have jurisdiction over the entire county in which said court shall be established. (1931, c. 89, s. 1.)

§ 7-385. Established by resolution of county commissioners.—If, in the opinion of the board of commissioners of any county, the public interest will be best promoted by so doing, they may establish a County Court under the provisions of this article, by resolution which shall in brief recite the reasons for the establishment thereof, and further recite that in the opinion of the board of commissioners it is not necessary that an election be called for the establishment of said court, as herein provided, and upon the adoption of such resolution the board of commissioners may establish said court without holding such election. (1931, c. 89, s. 2.)

§ 7-386. Court may be abolished by resolution.—Whenever in the opinion of the board of commissioners of any county in which a court has been established under this article, the conditions prevailing in such county are such as to no longer require the said court, such board of commissioners may, by proper resolution, reciting in brief the reasons therefore, abolish said court. (1931, c. 89, s. 3.)

§ 7-387. Transfer of cases from docket of Superior Court.—Upon the establishment of the County Court, as in this article authorized, the clerk of the Superior Court shall immediately transfer from the Superior Court to such County Court all criminal actions pending in the Superior Court of which the County Court has jurisdiction, as in this article conferred, and the County Court shall immediately proceed to try and dispose of such criminal actions. (1931, c. 89, s. 4.)

§ 7-388. Appointment of judge; associate judge.—The court shall be presided over by a judge, who may be licensed to practice law, and who, at the time of his election or appointment, shall be a qualified elector in the county. The board of commissioners of the county shall appoint such judge, whose term of office shall be two (2) years from the date of his appointment, and until his successor shall have been appointed and qualified, or until the court shall be abolished, as herein provided. In the event of a vacancy by death or resignation, appointment shall be for the unexpired term of the previous judge. The salary of said judge shall be fixed by the board of commissioners of the county, and the same shall be paid monthly out of the general county fund. In each county in which the court is established, under the provisions of this article, there shall be appointed by the board of commissioners of said county an associate judge, who shall preside as judge of the county court, and with like authority of the regular judge, in the event of sickness or absence from the county of the regular judge, or in the event that the regular judge should be disqualified by relationship to the parties in interest, or from other cause. The associate judge shall take the same oath of office required by the judge of the county court, and shall be paid such compensation for his services as may be provided by the board of commissioners. The compensation which shall be paid to the associate judge

shall be deducted from the salary to be paid to the regular county judge as herein provided. He shall be appointed at the time fixed for the appointment of the judge of the County Court, and for the same term as herein provided for a regular judge of the county, with the authority on the part of the board of commissioners to fill the vacancy in the event of death or resignation. (1931, c. 89, s. 5.)

§ 7-389. Appointment of prosecuting attorney.

—There shall be a prosecuting attorney of said County Court, to be known as the prosecuting attorney, who shall appear for the State and prosecute all criminal cases being tried in said court, and for his services he shall be paid such salary as may be fixed by the board of commissioners, to be paid monthly from the general county fund. The board of commissioners shall appoint such prosecuting attorney, whose term of office shall be two (2) years from the date of his appointment, and until his successor shall have been appointed and qualified, or until the court shall be abolished, as herein provided, except in the event of a vacancy in the office of prosecuting attorney, either by death or resignation, the appointment to fill such vacancy shall be for the unexpired term of the previous prosecuting attorney. (1931, c. 89, s. 6.)

§ 7-390. Clerk of court; term of office; fees; bond; sheriff.—In those counties in which the clerk of the superior court and sheriff are paid fees and not salaries, such clerks and sheriffs shall receive the same fees for services rendered in a county court as they would have received had such services been rendered in the superior court.

The Clerk of the Superior Court shall, ex-officio, be Clerk of the County Court, and in all counties in which the Clerk of the Superior Court is paid fees, the Clerk of the Superior Court shall have the right and privilege to resign as Clerk of the County Court, and in the event of such resignation the board of commissioners shall have the authority to appoint a Clerk of the County Court, whose term of office shall be two (2) years, and whose term of office shall expire at the time fixed for the termination of the office of the judge of said court, and the appointment of the Clerk of the County Court shall thereafter be made by the board of commissioners at the same time when the appointment of the judge of said court is made by said board of commissioners. He will receive the same fees for services rendered as clerks of the Superior Courts. In all counties in which the Clerks of the Superior Court are paid salaries the board of commissioners are authorized, in their discretion, to provide additional compensation to such clerks for their services rendered as Clerk of the County Court.

In the event that the Clerk of the Superior Court shall resign as Clerk of the County Court as herein provided, upon the appointment of a Clerk to the County Court, he shall be required to enter into a bond in such sum as may be fixed by the board of commissioners for the faithful performance of the duties of his office. (1931, c. 89, s. 7.)

Local Modification.—Lee: 1941, c. 330.

§ 7-391. Oath of judge; prosecuting attorney.

—The judge of the county court, before entering upon the duties of his office, shall take the prescribed oath required of judges of the Superior Court, and such oath shall be recorded by the Clerk of the Superior Court of the county. The prosecuting attorney, before entering upon the duties of his office, shall take the prescribed oath required of solicitors of the Superior Court, and said oath shall be recorded by the Clerk of the Superior Court of the county. (1931, c. 89, s. 8.)

Cross References.—As to forms of oaths, see §§ 11-6, 11-7, 11-11; Const., Art. VI, s. 7.

§ 7-392. Court seal.—The County Criminal Court shall have a seal with the impression "County Court of.....County," which shall be used in attestation of all writs, warrants, or other processes, acts, or judgments of said court whenever required, and in the same manner and in the same effect as the seal of other courts of record in the State of North Carolina. (1931, c. 89, s. 9.)

§ 7-393. Jurisdiction; appeal; judgment docket.—The jurisdiction of the County Court shall be as follows:

(a) Said court shall have final exclusive and original jurisdiction of all criminal offenses committed in the county below the grade of a felony, as now defined by law, except as to offenses over which justices of the peace have final jurisdiction, and all such offenses whereof said court is given jurisdiction are hereby declared to be petty misdemeanors.

(b) To punish for contempt to the same extent and in the same manner allowed by law to the Superior Court of this State; to issue writs ad testificandum and other processes to compel the attendance of witnesses and to enforce the orders and judgments of the court in the same manner allowed by law to the Superior Courts of this State.

(c) The judge of the County Court shall have all the power and jurisdiction and authority now conferred by law upon the Superior Court to sentence any person who pleads guilty or who is convicted in said court of a misdemeanor for which the punishment prescribed by law is imprisonment, to be imprisoned in the common jail of the county and to be assigned to work on the public roads under the supervision of the state highway and public works commission and the clerk of said court shall issue commitments therefor in the same manner as now provided by law for the Clerks of the Superior Court.

(d) Any person convicted in said court shall have the right of appeal to the Superior Court of said county, and upon such appeal the trial in the Superior Court shall be de novo.

(e) The County Court shall have exclusive preliminary jurisdiction over all offenses whereof exclusive jurisdiction is not given to said court, and shall hear and determine all warrants charging such offenses, and in the event that the court finds probable cause, shall bind the defendant over to the Superior Court, requiring such bond as the court may fix for the appearance of the defendant at the next ensuing term of the Superior Court of said county for the trial of criminal causes; and all justices of the peace is-

suing warrants wherein the defendant or defendants are charged with the commission of an offense whereof the Superior Court has jurisdiction, shall make said warrants returnable before the said County Court.

(f) The judge of the County Court shall have the same authority as the judge of the Superior Court to render judgments upon all appearance bonds, and such other bonds as are authorized by law, when default has been made. All such judgments shall be certified to and docketed upon the civil judgment docket in the Superior Court of the county in which the court is held, and shall be cross-indexed as other judgments, and shall, from the time of docketing, have the same force and effect as judgments of the Superior Court. (1931, c. 89, s. 10; 1931, c. 241; 1937, c. 123.)

Local Modification.—Burke: 1935, c. 298; 1939, c. 226.

Cross Reference.—For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64.

Editor's Note.—Public Laws 1937, c. 123, repealed Public Laws 1931, c. 241, relative to civil jurisdiction of recorder's court in Gates county.

§ 7-394. Jury trials.—In all cases coming before the said County Court a jury may be demanded by either the State or the defendant, or the court may, upon its own motion, order a jury trial in any case where, in the judgment of the court, the ends of justice would be better met by submitting the case to a jury. The board of commissioners of the county in which said County Court is established are hereby required to furnish the clerk of said County Court with a list of jurors of said county, and in any case where a jury trial is to be had a jury of twelve (12) shall be drawn from the said list of jurors so furnished by the board of commissioners. The names of the jurors shall be drawn from the box as now provided in cases in the Superior Court in drawing a special venire; Provided, however, the defendant may waive a jury drawn from the box, in which event the court shall direct the sheriff to summons bystanders or tales jurors to serve as jurors in said cases, and the judge of the County Court shall have like authority as is now existing by the judge of the Superior Court to order the summons of tales jurors to serve in said court where the jurors drawn from the box shall be legally challenged or shall be otherwise disqualified to serve as such jurors. The causes of challenge of jurors in the County Court shall be the same as now provided for challenges of jurors in the Superior Court. The fees of jurors shall be the same as now paid jurors in the Superior Court, and shall be paid from the general county fund, and a jury tax of fifteen (\$15.00) dollars in such cases shall be taxed in the bill of costs. (1931, c. 89, s. 11.)

Local Modification.—Lee: 1939, c. 213; Onslow: 1941, c. 303.

§ 7-395. Process.—The warrants, subpoenas, and other processes of law issued by said court shall be directed to the sheriff or other lawful officer of the county to which said process is directed, and service thereof shall be lawfully made when made by the sheriff, deputy sheriff, of the county, or any other constable of said county, or by any rural policeman of said county, or municipal officer, and all warrants and subpoenas and other processes issued by the clerk of said

county, when attested by the seal of said county, shall run anywhere in the State of North Carolina, and shall be executed by all officers in the same manner and way as processes now issued by the Superior Court. (1931, c. 89, s. 12.)

§ 7-396. Duties of judge; bond on appeal or on being bound over.—The judge of the County Court shall preside over said court and shall direct and determine all actions coming before him, the jurisdiction of which is conferred by this article, and in all cases where the defendant or defendants shall crave an appeal to the superior court, and in cases where the court has preliminary jurisdiction, and probable cause is found, the defendant shall be required to give bond, with sufficient surety, to be fixed by the court, conditioned upon the defendant's appearance at the next ensuing term of the Superior Court of said county for the trial of criminal causes, and in default thereof the court shall commit the defendant to the common jail of said county until said defendant shall have given bond or shall have been otherwise discharged according to law, except in capital cases, when the court shall find probable cause, he shall bind the defendant over to the superior court without bond. (1931, c. 89, s. 13.)

§ 7-397. When prosecuting attorney's fee taxed in bill of costs.—In all cases where the defendant shall plead guilty, or shall be convicted, there shall be taxed in the bill of costs a fee of eight dollars (\$8.00) in lieu of prosecuting attorney's fee, which shall be paid by the defendant, and shall be paid into the general county fund. In the event the defendant is confined to jail or confined to jail and assigned to work on the public roads such fee shall not be taxed as a part of the cost. (1931, c. 89, s. 14.)

§ 7-398. Complete record to be kept by clerk; docket.—It shall be the duty of the clerk of said court to keep an accurate account and true record of all costs, fines, penalties, forfeitures, and punishments of said court imposed under the provisions of this article, and said record shall show the name of each offender, the name of the offense, the date of the hearing of the trial, and the punishment imposed, and the board of commissioners shall provide dockets for recording all of the processes issued by said court, which shall conform to the docket kept by the clerk of the Superior Court, and shall also provide proper files to properly keep a record of all cases which shall be disposed of in said court, and the disposition that has been made of the same. (1931, c. 89, s. 15.)

§ 7-399. Warrants returnable to court.—All warrants for crimes whereof the County Court shall have jurisdiction may be issued by any Justice of the Peace of said county, or mayor of any incorporated town, as provided by law, and shall be made returnable before the County Court at the next ensuing term thereof. (1931, c. 89, s. 16.)

§ 7-400. Service fees to officers except where they are on salary.—The cost of issuing and serving warrants, subpoenas, and other processes of law by said court shall be payable to the officers issuing or serving them, and shall be payable to the clerk of said court as is now done in cases

determined by the superior court, except in those counties where officials are paid salaries and are not allowed fees, in which cases the costs so taxed shall be paid into the office of the clerk of said court, to be paid by him to the county treasurer or depository of said county, in the same manner and way as is now provided for similar fees in the Superior Court. (1931, c. 89, s. 17.)

§ 7-401. Regular and special terms; place of sessions.—There shall be held a regular term of the County Court established under the provisions of this article on the second Tuesday in each month: Provided, however, special terms may be held at any time by order of the judge of said court for the purpose of disposing of cases where pleas of guilty shall be entered and for the trial of cases where the defendants are confined to prison. At all regular terms the court shall continue in session until all cases are tried, continued, or otherwise disposed of according to law: Provided, however, the board of county commissioners in any county in which a County Court is established under the provisions of this article by proper resolution duly entered upon the minutes of said board, may, in the exercise of their discretion, fix other days than the days provided in this article on which regular terms of said court may be held: Provided, further, when a regular term of the County Court to be held under the terms fixed by this article shall conflict with a term of the Superior Court in said county, the regular term of the County Court shall be held on the first Tuesday following the termination of said term of the Superior Court, as fixed by law. All sessions of said County Court shall be held in the court house of the county in which said court is established. (1931, c. 89, s. 18.)

§ 7-402. Judge and prosecuting attorney may practice law in other courts.—In the event of the appointment of a licensed lawyer as judge or prosecuting attorney of said County Court, nothing in this article shall prevent the said judge or the prosecuting attorney appointed under the provisions of this article from practicing law in matters in which he is in no way connected by reason of his said office, or in courts in the State in matters which have not been heard or will not be heard in the County Court of which he is an officer. (1931, c. 89, s. 19.)

§ 7-403. Other County Court Acts not affected.—Nothing in this article shall be construed to repeal, alter, or amend any law heretofore enacted authorizing the establishment of county courts in the several counties of the State, but this article shall be construed to be in addition to and supplemental to such acts, and any court established under the provisions of this article shall be restricted and limited to all the provisions herein contained. (1931, c. 89, s. 20.)

§ 7-404. Certain counties excepted from provisions of article.—This article shall not apply to the counties of Alexander, Alleghany, Ashe, Beaufort, Bertie, Bladen, Brunswick, Buncombe, Camden, Caswell, Catawba, Chowan, Clay, Cleveland, Craven, Cumberland, Currituck, Dare, Davidson, Davie, Duplin, Durham, Edgecombe,

Franklin, Greene, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Jackson, Johnston, Lincoln, Macon, Madison, Montgomery, New Hanover, Northampton, Orange, Pamlico, Pasquotank, Perquimans, Pitt, Randolph, Robeson, Rockingham, Rowan, Sampson, Scotland, Stanly, Surry, Swain, Transylvania, Vance, Wake, Warren, Watauga, Wayne, Wilkes, Yancey and Richmond. (1931, c. 89, s. 21, c. 270; 1935, c. 8; 1939, c. 41.)

Editor's Note.—Cabarrus county was omitted by the amendment of 1935.

The 1939 amendment omitted Yadkin county.

SUBCHAPTER X. SPECIAL COUNTY COURTS.

Art. 37. Special County Courts.

§ 7-405. Establishment upon resolution of county commissioners.—In addition to the plans now provided for the establishment of courts inferior to the superior court, there may be established by resolution of all of the members of the board of county commissioners of any county in the state a court of criminal and civil jurisdiction, which shall be a court of record and shall be called a special county court and shall have criminal and civil jurisdiction as herein provided: Provided, that the board of county commissioners may by proper resolution, establish a special county court having only criminal jurisdiction or only civil jurisdiction or having both criminal and civil jurisdiction as herein provided. (1939, c. 357, s. 1.)

§ 7-406. Qualifications of judge and solicitor.—The judge of said court shall be an elector in and for said county at the time of appointment and qualification, and shall be a man of good moral character. The solicitor of the county shall be an elector in and for said county, shall be a man of good moral character and a licensed attorney at law. (1939, c. 357, s. 2.)

§ 7-407. Appointment of judge.—After the establishment of such court by any county, it shall be the duty of the clerk of the board of commissioners of such county to immediately notify the governor of the state, who shall appoint a judge to preside over such court, and each second year thereafter it shall be the duty of the governor of the state to appoint the judge of each such county court who shall preside over said court, and the said judge shall hold office for a term of two years, and until his successor is appointed and qualified. Any vacancy occurring in the office of judge shall be filled by the governor of the state. (1939, c. 357, s. 3.)

Local Modification.—Richmond: 1941, c. 60, s. 2, repealed by 1943, c. 254, ss. 1, 3.

§ 7-408. Appointment of prosecuting attorney and clerk.—The board of commissioners of any county availing itself of the provisions of this article may elect or appoint and for the same term as herein provided for the appointment of the judge of this court, a prosecuting attorney and clerk for said court. (1939, c. 357, s. 4.)

Local Modification.—Richmond: 1941, c. 60, ss. 3, 4; 1943, c. 254, ss. 1, 4.

§ 7-409. Appointment of acting attorney or judge in absence of regular official.—Whenever,

for any reason, the prosecuting attorney is temporarily absent, the judge shall appoint some other practicing attorney in the county to act as prosecuting attorney, and in case of temporary absence of the judge, either on account of sickness or other cause, the judge of said court shall appoint a judge to hold court during the absence of the regular judge. (1939, c. 357, s. 5.)

§ 7-410. Compensation of judge and solicitor.—The salary of the judge and solicitor and clerk shall be fixed by the board of commissioners of the county, and shall be paid monthly out of the funds of the county. (1939, c. 357, s. 6.)

Local Modification.—Richmond: 1941, c. 60, s. 5.

§ 7-411. Oaths of judge and solicitor.—Before entering upon the duties of office, the judge and solicitor shall take and subscribe an oath as is now provided by law for the judges and solicitors of the superior court, and file the same with the clerk of the superior court of the county, and the clerk shall record the same. (1939, c. 357, s. 7.)

Cross References.—As to forms of oaths, see §§ 11-6, 11-7, 11-11; Const., Art. VI, s. 7.

§ 7-412. Appointment of temporary judge, etc.—Where the judge is disqualified by reason of interest in any case, he may appoint a temporary judge to hear said case, or said case may be removed to the superior court for trial in the county. (1939, c. 357, s. 8.)

§ 7-413. Duties and liabilities of clerk.—The clerk of the special county court established under the provisions of this article shall have as nearly as possible the same duties, powers, and responsibilities with reference to the special county court as a clerk of the superior court. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him as clerk of the special county court to the same extent as a clerk of the superior court. (1939, c. 357, s. 9.)

§ 7-414. Oath of office of clerk.—The clerk of the special county court before entering on the duties of the office, shall take and subscribe, before some officer authorized by law to administer an oath, the oath required under general law, and in addition thereto shall take and subscribe to an oath to perform faithfully all the duties required of him under this article and file such oath with the register of deeds for the county. (1939, c. 357, s. 10.)

Cross References.—As to forms of oaths, see §§ 11-6, 11-7, 11-11; Const., Art. VI, § 7.

§ 7-415. Attendance upon court by sheriff or deputies.—The sheriff of the county, or his deputies, shall attend upon this court in the same manner and with the same power and authority as he does and has in attendance upon the superior court of the county. (1939, c. 357, s. 11.)

§ 7-416. Appointment of court stenographer.—In the trial of any case in the special county court where a stenographer is deemed necessary, the judge of said court shall appoint a stenographer, and the fees for such work shall be taxed as part of the court cost in said case. (1939, c. 357, s. 12.)

§ 7-417. Right of jury trial in civil actions.—In the trial of civil actions in said court, any

party is entitled to the right of trial by jury as is provided in the trial of causes in the superior court, unless said right of trial by jury shall be waived as hereinafter provided. (1939, c. 357, s. 13.)

§ 7-418. Jury trial where no written pleadings are filed.—In those cases in which no written pleadings are required, the parties shall be conclusively presumed to have expressly waived their right to trial by jury, unless at the time of the issuance of the summons, the plaintiff, or petitioner, in writing, demands a jury trial, or the defendant at any time before the commencement of the trial, in writing, demands a jury trial. (1939, c. 357, s. 14.)

§ 7-419. Jury trial where written pleadings are filed.—In those cases in which written pleadings are required to be filed, the parties shall be conclusively presumed to have expressly waived their right to trial by jury, unless at the time of the filing of the complaint or petition, the plaintiff, in writing, demands a jury trial, or unless at the time of the filing of the answer, or other pleading raising an issue of fact, the defendant or other party filing such pleading demands, in writing, a jury trial. (1939, c. 357, s. 15.)

§ 7-420. Jury trial where cases appealed or removed.—In those cases which were or may hereafter be instituted before a justice of the peace and removed or appealed to this court, and in those cases which were or may hereafter be instituted in superior court, and removed to this court, a jury trial shall be conclusively presumed to have been expressly waived unless the party desiring a trial by jury shall make a demand therefor, in writing, at any time before the case is called for trial, in which event the number of the jury shall be as herein elsewhere provided. (1939, c. 357, s. 16.)

§ 7-421. Number of jurors; deposit on demand for jury trial.—The jury of said court shall be a jury of six in all civil cases where a jury is demanded: Provided, that in those cases in which a jury is demanded the party shall at the time of making the demand pay to the clerk of the said court a deposit of six dollars (\$6.00) to insure the payment of the jury tax: Provided, further, that where a party making such demand for a jury trial makes affidavit and satisfies the judge or clerk of the said court that he is unable to make the deposit, such party shall not be required to make the same. The deposit for a jury shall be returned to the party making it when the cost is paid by the losing party, against whom the cost is taxed. (1939, c. 357, s. 17.)

§ 7-422. Continuance of trial upon demand for jury; drawing and summoning of jury; compensation of jurors.—When a trial by jury is demanded in civil or criminal cases, the judge shall continue the cause until a day to be set, and the judge, together with the attorneys representing all parties shall immediately proceed to the office of the register of deeds of the county and cause to be drawn a jury of twelve, observing as nearly as may be the rule for drawing a jury for the superior court. The judge shall issue the proper writ to the sheriff of the county, commanding him to summon the jurors so drawn to appear at the court on the day set for the trial of the ac-

tion. Such jurors shall receive the same compensation as is provided by law for jurors serving in the superior court, and are to be paid out of the treasury of said county on presentation of a ticket duly issued by the clerk of said court. (1939, c. 357, s. 18.)

§ 7-423. Jury trials in criminal actions.—In all criminal actions, upon demand of the defendant or the prosecuting attorney, a jury of six shall be summoned in the same manner as provided for summoning jurors in civil actions. (1939, c. 357, s. 19.)

§ 7-424. Talesmen may serve as jurors.—In all criminal and civil actions, the judge shall have the right to call in talesmen to serve as jurors, according to the practice of the superior court, and to direct the sheriff to call in a sufficient number of talesmen to serve during any one week or part of a week for the proper dispatch of the business of the court. (1939, c. 357, s. 20.)

§ 7-425. Sessions of court.—The special county court shall be open for the trial of all criminal cases of which it has jurisdiction at least one day of each week, and shall also be open at least once each month for the trial of all civil causes of which it has jurisdiction, said days to be fixed by the board of county commissioners, and shall continue its session from day to day until all business is transacted by trial, continuance or otherwise. The session of the court shall be held in the county court house or other place within the county provided by the board of county commissioners for that purpose. Special sessions of the court may be called by the judge as the necessities may require. (1939, c. 357, s. 21.)

§ 7-426. Civil jurisdiction of court.—The special county court shall have jurisdiction in civil matters as follows:

1. Jurisdiction concurrent with that of the justices of the peace of the county.

2. Jurisdiction concurrent with the superior court in all actions founded on contracts wherein the amount demanded shall not exceed the sum of fifteen hundred dollars (\$1500.00), exclusive of interest and cost.

3. Jurisdiction concurrent with that of the superior court in all actions not founded on contracts wherein the amount demanded shall not exceed the sum of one thousand dollars (\$1000.00), exclusive of interest and cost.

4. Jurisdiction concurrent with the superior court in all attachment and claim and delivery proceedings wherein the value of the property demanded does not exceed the sum of one thousand dollars (\$1000.00), exclusive of interest and cost. (1939, c. 357, s. 22.)

§ 7-427. Procedure for hearing of appeals from courts of justices of the peace.—In all cases where there is an appeal from a justice of the peace of a county wherein a special county court has been established under the provisions of this article, such appeal shall be first heard de novo in the special county court. All appeals from justices of the peace in civil cases shall be heard in the same manner provided herein for hearing causes within the jurisdiction of a justice of the peace originating in the said special county court,

and said appeals shall be docketed in the special county court within the same time limit and in the same manner as such appeals are now required to be docketed in the superior court. (1939, c. 357, s. 23.)

§ 7-428. Transfer of cases from superior court.—By written consent of a plaintiff and defendant filed with the clerk of the superior court, any civil case within the jurisdiction of the special county court, now or hereafter pending, in the superior court, may be transferred to the docket of the special county court, and there tried. If a jury trial is desired, it shall be expressed in the agreement to transfer the case; otherwise the right to trial by jury shall be conclusively presumed to have been expressly waived. (1939, c. 357, s. 24.)

§ 7-429. Separate records, equipment, etc., furnished by commissioners.—The clerk of the special county court shall keep separate records for use of said court to be furnished by the county commissioners, and they shall also provide necessary blanks, forms, books and such stationery and office equipment as may be needed by the court. The clerk shall keep the same in the office of the clerk of such court. (1939, c. 357, s. 25.)

§ 7-430. Procedure in civil actions.—In civil cases when the special county court is exercising jurisdiction concurrent with that of the superior court, as now established, the rules of procedure, pleadings, practice, and admission of evidence, and judgment shall conform as nearly as possible to those of the superior court. In civil cases where the special county court is exercising jurisdiction concurrent with that of justices of the peace, actions shall be commenced in the special county court by summons issued and signed by the clerk or deputy, and orders to seize property in claim and delivery proceedings, warrants of attachment and subpoena may be issued by the clerk or deputy and the other rules of processes, pleadings, procedure, practice and procuring evidence and judgments shall conform as nearly as possible to those of the courts of the justices of the peace. (1939, c. 357, s. 26.)

§ 7-431. Orders to stay execution; judgments.—Orders to stay execution on judgments entered in the special county court shall be the same as in appeals from the superior court to the supreme court. Judgments of the county court shall be docketed in the judgment docket of the superior court, as is provided for judgments of the superior court, and the judgments when docketed shall in all respects be judgments of the superior court in the same manner and to the same extent as if rendered by the superior court, and shall be subject to the same statute of limitations and the statutes relating to the revival of judgments in the superior court and issuing executions thereon. (1939, c. 357, s. 27.)

§ 7-432. Seal of court.—The county court shall have a seal with the impression "..... County Special Court", which shall be used in attestation of all summons, other processes, etc., acts, or judgments of said court whenever required, and in the same manner and to the same effect as the seal of other courts of record in the state of North Carolina. (1939, c. 357, s. 28.)

§ 7-433. Costs and fees.—There shall be taxed in the special county court the same costs and fees for services of the officers thereof as provided for the court having concurrent jurisdiction; such costs and fees shall be taxed and collected by the clerk and paid over to the proper officers who are entitled to receive them. (1939, c. 357, s. 29.)

Local Modification.—Richmond: 1941, c. 60, s. 5½.

§ 7-434. Reopening of cases and modification of judgments.—When any case has been finally disposed of by the judge of the court and judgment pronounced therein, the case shall not thereafter be reopened or the judgment or sentence rendered therein changed, modified or stricken out by the judge after the adjournment of the regular weekly term of court or after the adjournment of any special term of court. (1939, c. 357, s. 30.)

§ 7-435. Criminal jurisdiction.—The court shall have concurrent jurisdiction in all criminal cases arising in the county which are now or may hereafter be given to a justice of the peace, and, in addition to the jurisdiction conferred by this section, shall have exclusive original jurisdiction of all other criminal offenses committed in the county below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors: Provided, however, that where a special county court or recorder's court shall legally exist within such county by virtue of a special act of the legislature passed before the amendment of the constitution in reference thereto, then the special county court, as herein established, shall not have jurisdiction of criminal cases within the territory of such existing recorder's court, so as to interfere or conflict with the existing recorder's court, but shall have concurrent jurisdiction where the jurisdiction of the two courts covers the same causes or the same subject matter. This article and the establishment of any court thereunder shall not be construed to repeal, modify or in anywise affect any existing special court or recorder's court by virtue of such former special acts herein referred to. (1939, c. 357, s. 31.)

Local Modification.—Richmond: 1943, c. 254, s. 5.

Cross Reference.—For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64.

§ 7-436. Judges vested with jurisdiction of municipal recorders.—The judges of special county courts herein provided for shall be vested with all the jurisdiction and authority conferred upon recorders of municipal courts, in like manner and to the same extent as if such jurisdiction and authority had been specially in this section set forth, in so far as such jurisdiction and authority are applicable to such courts, and the provisions of existing law relative to municipal recorder's courts shall in all things apply to the special county courts where the same are not inconsistent and in so far as same are practically applicable: Provided, that this section shall not take away the jurisdiction of a mayor to try breaches of ordinances when such city has no other municipal court. (1939, c. 357, s. 32.)

§ 7-437. Removal of cases from courts of justices of peace.—When, upon written request

made before entering on the trial of any cause before any justice of the peace, it shall appear proper for the cause to be removed for trial to some other justice, as is now provided by law, the cause may be removed for trial to the special county court of the county. (1939, c. 357, s. 33.)

§ 7-438. Criminal cases bound over by justices of the peace.—In all criminal cases heard by a justice of the peace or other committing magistrate of the county against any person for any offense included within the exclusive jurisdiction of the special county court as provided in this article, and in which probable cause of guilt is found, such person shall be bound in a personal recognizance or surety to appear at the next succeeding session of the special county court of the county, for trial; and in default of such surety such person shall be committed to the common jail of the county to await a trial: Provided, that in the event any justice of the peace or other committing magistrate shall bind over to the superior court any person accused of a crime within the jurisdiction of the special county court, the clerk of the superior court shall, upon his own motion, transfer all papers in the case to the special county court, and the case shall then stand for trial at the next succeeding term of said special county court, as if the defendant had been bound over to the said court in the first instance: Provided, further, that in the event any justice of the peace or other committing magistrate shall bind over to the special county court any person charged with an offense beyond the jurisdiction of said court, the said judge shall cause the accused person to enter into a new bond with sufficient surety for his appearance at the next succeeding term of the superior court of the county, and shall transmit all papers in the case to the said superior court, but this shall be done without additional cost to the accused person. (1939, c. 357, s. 34.)

§ 7-439. Notice to accused person and surety in cases transferred from superior court.—Whenever the clerk of the superior court shall transfer the papers in any case from the superior court to a special county court, he shall at the same time issue a notice to the accused person and his surety, informing them that the cause has been so transferred and requiring the accused person to appear at the next succeeding term of said special county court for trial, and, upon the service of said notice upon the accused person and his surety, at least five days before the beginning of the next succeeding term of the special county court, the case shall stand for trial at said term and the bond given by the accused person for his appearance at the next term of the superior court shall in all respects be valid and binding to compel the appearance of the accused person at the said next succeeding term of said special county court, and in case said notice is not served on the accused person and his surety at least five days before the beginning of the next succeeding term of the special county court, then the case shall not be tried without the consent of the accused person until the following term of the special county court. (1939, c. 357, s. 35.)

§ 7-440. Issuance of warrant in criminal causes.—All trials of criminal causes in said court

shall be upon warrant issued by the clerk of said court or deputy clerk herein provided for or by the judge or by any justice of the peace of the county. In either event such warrant shall be issued upon affidavit duly made and subscribed, setting forth the complaint against the defendant: Provided, the judge shall have authority to amend the warrant and to allow amendment of the affidavit at any time before judgment. (1939, c. 357, s. 36.)

§ 7-441. Punishment upon conviction.—Whenever any person shall be convicted or plead guilty of any offense of which the court has final jurisdiction the judge may sentence him to the common jail of the county in which the court shall be held, and assign him to work on the public roads, under the supervision of the state highway and public works commission: Provided, that in case the person so convicted or pleading guilty shall be a woman or an infant of immature years, then the judge may assign him or her to the county workhouse, reformatory, or other penal institution located in the county; or if there be none, any similar institution that may be located outside of the county to which judges of the superior court are authorized to sentence such person under the general laws of the state. All fines imposed by the court shall be collected by the clerk of such court or the deputy clerk thereof in the same manner as the clerk of the superior court; and, where a defendant is convicted and fails to pay the costs of such conviction, the county shall pay such costs as are allowed by law in similar cases before the superior court. (1939, c. 357, s. 37.)

§ 7-442. Appeals to superior court.—Any person convicted of any offense of which the county court has final jurisdiction may appeal to the superior court from any judgment or sentence of the court in the same manner as is now provided for appeals from the courts of justices of the peace; and any person tried before the judge for any offense of which the court has not final jurisdiction shall, upon the judge's finding probable cause of guilt, be bound over to the superior court in the same manner as is provided by law in similar cases before justices of the peace. (1939, c. 357, s. 38.)

§ 7-443. Fees for issuance and service of war-

rants.—All justices of the peace, constables and sheriffs issuing or serving warrants or other process returnable to the special county court shall have the same fees as are now prescribed by law, which fees shall be collected and paid out in the same manner and by the same officers as collect and distribute such fees in the superior court. (1939, c. 357, s. 39.)

§ 7-444. Costs and fees as county funds.—There shall be taxed in the special county court the same costs and fees for the benefit of the officers thereof as provided for municipal recorder's court. Such costs and fees shall be collected by the clerk and paid over monthly to the treasurer of the county as county funds to be dealt with by the commissioners. (1939, c. 357, s. 40.)

§ 7-445. Abolition of court by resolution of commissioners.—Any court established under this article may be abolished by resolution of a majority of the board of county commissioners for such county by giving written notice of such intention one month prior thereto; and in case of the abolition of the court, cases then pending shall be transferred to the superior court and there tried. (1939, c. 357, s. 41.)

§ 7-446. Counties exempt.—This article shall not apply to the counties of Alamance, Alexander, Anson, Ashe, Avery, Beaufort, Bertie, Bladen, Brunswick, Burke, Caldwell, Carteret, Catawba, Chatham, Chowan, Clay, Cleveland, Columbus, Craven, Dare, Duplin, Edgecombe, Franklin, Forsyth, Gaston, Gates, Granville, Greene, Halifax, Harnett, Hoke, Hyde, Iredell, Johnston, Jones, Lee, Lenior, Lincoln, Madison, Mecklenburg, Mitchell, Nash, New Hanover, Northampton, Onslow, Pasquotank, Pender, Perquimans, Robeson, Rutherford, Sampson, Stanly, Surry, Union, Vance, Wake, Warren, Wayne, Washington and Wilson. (1939, c. 357, s. 42.)

§ 7-447. Construction of article.—This article shall not be construed to repeal or modify any existing laws by which a county court may be created or to affect or repeal any court now or hereafter created under existing laws, and shall only be construed to be an additional method by which a special county court may be established for criminal, civil, or criminal and civil jurisdictions. (1939, c. 357, s. 43.)

Chapter 8. Evidence.

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act of the general assembly certified by the secretary of state shall be received in evidence in every court. (Rev., ss. 1592, 1593; Code, ss. 1339, 1340; R. C., c. 44, ss. 4, 5; 1826, c. 7; C. S. 1747.)

Public Statute Admissible.—Where the public printer has

published a certain act with other public acts of the general assembly, it is made, presumptively at least, a part of the public laws of the State and every person having occasion to do so has the right to read it in evidence in any court of the State as the law. *Wrought Iron Range Co. v. Carver*, 118 N. C. 328, 337, 24 S. E. 352.

Private Statute Not Admissible.—The statute incorporating the North Carolina Railroad Company is a private act; and it is error to permit it to be read and commented on to the court or jury until it has been properly introduced as evidence. *Durham v. Richmond, etc., R. Co.*, 108 N. C. 399, 400, 402, 12 S. E. 1040, 13 S. E. 1.

Same—Question of Law.—Whether the statute, or some enactment in it, is public or private, is a question of law, which the court must determine, in the absence of statutory enactment declaring and settling its nature. *Durham v. Richmond, etc., R. Co.*, 108 N. C. 399, 400, 12 S. E. 1040; 13 S. E. 1.

Journal of Legislature.—A copy of the journal of the Legislature deposited with the Secretary of State is not evidence for any purpose. *Wilson v. Markley*, 133 N. C. 616, 623, 45 S. E. 1023. The court said: "It is the journal, which we understand to be the original, which is to be filed in the office of the Secretary of State, and it is this original or an exemplification made therefrom by him which, when competent, is to be used in evidence." *Id.*

§ 8-2. Martin's collection of private acts.—Any private act published by Francis X. Martin, in his collection of private acts, shall be received in evidence in every court. (Rev., s. 1593; Code, s. 1340; R. C., c. 44, s. 5; 1826, c. 7, s. 2; C. S. 1748.)

§ 8-3. Laws of other states or foreign countries.—A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance, by the executive thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the judicial tribunals thereof, shall be evidence of the statute, law, proclamation, edict, decree, or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of the reports of cases, adjudged in the courts thereof, shall also be admitted as evidence of the unwritten or common law thereof. And either party may also exhibit a copy of the law of such state, territory, or foreign country, duly certified by the secretary of state of this state as having been copied from a printed volume of the laws of such state, territory or country, on file in the state or supreme court library, or in the offices of the governor or secretary of state. (Rev., s. 1594; Code, s. 1338; R. C., c. 44, s. 3; 1823, c. 1193, ss. 1, 3; C. C. P., s. 360; C. S. 1749.)

Foreign Laws Must Be Proved.—The courts will not take judicial notice of the statutes and laws in the different states which may have changed the common law. *Miller v. Atlantic, etc., R. Co.*, 154 N. C. 441, 70 S. E. 838.

Same—Question of Fact.—What is the statute law of another state is a question of fact to be proved like any other fact. *Gooch v. Faucett*, 122 N. C. 270, 29 S. E. 362. See also *Miller v. Atlantic, etc., R. Co.*, 154 N. C. 441, 70 S. E. 838.

Same—Burden of Proof.—The proof of the laws of another state must be shown in evidence by the party relying on them, in the manner prescribed by the provisions of this section. *Miller v. Atlantic, etc., R. Co.*, 154 N. C. 441, 70 S. E. 838.

Where a party to an action contends that the law of another state controls the disposition of the issues involved, he is required, under this section, to show statute or written law or controlling decisions thereon, or such facts as would make the laws of that state applicable. *Kelly Springfield Tire Co. v. Lester*, 192 N. C. 642, 135 S. E. 778.

Instructions to Jury.—Where the foreign law has been

proved it is the duty of the court to instruct the jury as to the meaning of the law, its applicability to the case at hand, and its effect on the case, and it is error to refer the whole case to the jury without instructions. *Hooper v. Moore*, 50 N. C. 130.

Publication of Foreign Laws Admissible.—A book purporting to be the publication of the statute laws of another state, and to be published by the authority of such state, is admissible as evidence of such laws. *Balk v. Harris*, 122 N. C. 64, 30 S. E. 318; *Copeland v. Collins*, 122 N. C. 619, 621, 30 S. E. 315.

Same—Printed Copy Admissible.—By the terms of this section, a printed copy of the acts of the legislature of another state, is admissible in our courts to prove the statute law of such other state. *State v. Behrman*, 114 N. C. 797, 804, 19 S. E. 220. Under the law as it stood prior to the enactment of this section, a printed copy of the acts of the legislature of a foreign state was not admissible in evidence. *Id.*

United States Agricultural Regulations Judicially Noticed.—The regulations of the United States Agricultural Department, concerning the transportation of cattle, are not foreign laws within the meaning of this section, and the courts are required to take judicial notice of them. *State v. Railroad*, 141 N. C. 846, 54 S. E. 294.

Presumption as Regards Common Law.—In the absence of proof to the contrary, the common law will generally be presumed to be in force in a sister state, except in those states whose jurisprudence is not founded on the common law. *Miller v. Atlantic, etc., R. Co.*, 154 N. C. 441, 70 S. E. 838. See also the luminous treatment of the subject generally in *Chamberlayne on Evidence*, vol. I, sec. 584 et seq.

Same—Question for Jury.—Where the common law of another state is proved, the court must leave the evidence of what that law is to the jury and cannot inform them what the law is. *Moore v. Gwynn*, 27 N. C. 187.

Witnesses.—Any person who claims to know the provisions of the common or unwritten laws of a foreign country may, under this section, testify to and explain them before courts and juries. *State v. Behrman*, 114 N. C. 797, 802, 19 S. E. 220.

An examination of the cases will show that an attempt to prevent the admission of the testimony of a party who professes to know the state of the unwritten law of a foreign state, has quite frequently been made by the litigating parties. The basis of this attempt, and the reasons given in support thereof, has been different in a large number of the decided cases. One of the grounds, frequently resorted to as a means for the exclusion of this evidence, is the fact that the particular witness has not been shown to be and perhaps could not be an expert. This point, however, has been of little avail to the party contesting the admissibility of the evidence, since the construction placed on this section has been that it is not the legislative intent that expert evidence be required in such a case. In reaching this conclusion much weight has been attached to the wording that the common law of another state may be proved as "a fact."—*Ed. Note.*

The law of another State may be proven in transitory actions brought in the courts of this State by witnesses learned in the law of such other State, and by its authorized statutes and reports of decisions of its courts of last resort, and when properly offered in evidence they must be interpreted by our courts as matters of law. *Howard v. Howard*, 200 N. C. 574, 158 S. E. 101.

A transcript of a statute, once duly certified by the Secretary of State in the manner prescribed by our law, is evidence at all times of its being in force according to its terms unless a repeal is shown. *State v. Cheek*, 35 N. C. 114, 116.

Same—Applicable to Criminal and Civil Cases.—The certificate of the Secretary of State, in relation to the statutes of another state, given in pursuance of this section is evidence in criminal and civil cases. *State v. Patterson*, 24 N. C. 346.

§ 8-4. Judicial notice of laws of United States, other States and foreign countries.—When any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this State. (1931, c. 30.)

Cross Reference.—As to judicial notice of private statutes, see § 1-157.

Editor's Note.—The act from which this section was codified provided that it should not apply in the trial of any cause of action which accrued prior to its ratification on February 16, 1931.

Survival of Action under Law of Another State.—In an action to recover for the alleged tortious conversion of personalty by a nonresident, instituted in this state after the death of the nonresident, against his personal representative, the failure of the complaint to allege that the cause of action survived under the laws of the state in which it arose does not render the complaint demurrable. *Suskin v. Hodges*, 216 N. C. 333, 4 S. E. (2d) 891.

§ 8-5. Town ordinances certified.—In the trial of appeals from mayors' courts, when the offense charged is the violation of a town ordinance, a copy of the ordinance alleged to have been violated, certified by the mayor, shall be prima facie evidence of the existence of such ordinance. (Rev., s. 1595; 1899, c. 277, s. 2; C. S. 1750.)

Cross References.—As to duty of mayor to certify ordinance on appeal, see § 160-16. As to how ordinances are pleaded and proved, see § 160-272.

When Certification Unnecessary.—The certification of a town ordinance as required by this section, is only prima facie evidence of its existence, and this is unnecessary when the ordinance has been proven by the production of the official records of the town by the proper officer, which shows its passage. *State v. Razook*, 179 N. C. 708, 103 S. E. 67.

Evidence Insufficient to Rebut Prima Facie Case.—When the defendant, convicted of the violation of a city ordinance, on appeal introduces in evidence the minutes of the meeting of the governing authorities of the town held on the date when the purported ordinance was alleged to have been adopted, which does not show its passage on that date, it is not conclusive that the ordinance had not been passed at some other time, against the statutory certificate of the mayor that it was in existence at the time of the defendant's conviction. *State v. Gill*, 195 N. C. 425, 142 S. E. 328.

Art. 2. Grants, Deeds and Wills.

§ 8-6. Copies certified by secretary of state.—Copies of the plats and certificates of survey, or their accompanying warrants, and all abstracts of grants, which may be filed in the office of the secretary of state, certified by him as true copies, shall be as good evidence, in any court, as the original. (Rev., s. 1596; Code, s. 1341; R. C., c. 44, s. 6; 1822, c. 1154; C. S. 1751.)

In General.—This section does not make the copies better evidence than the original; and where there is a material discrepancy, it is for the jury to find as a fact which one is correct. *Richards v. Ritter Lumber Co.*, 158 N. C. 54, 73 S. E. 485.

Certification by Clerk of Secretary of State.—See sec. 8-9.

Abstract Competent to Show Title.—Abstracts of grants in the usual form, duly certified as correct copies by the Secretary of State and recorded in the office of the register of deeds, are competent to show title out of the State. *Marshall v. Corbett*, 137 N. C. 555, 50 S. E. 210.

§ 8-7. Certified copies of grants and abstracts.—For the purpose of showing title from the state of North Carolina to the grantee or grantees therein named and for the lands therein described, duly certified copies of all grants and of all memoranda and abstracts of grants on record in the office of the secretary of state, given in abstract or in full, and with or without the signature of the governor and the great seal of the state appearing upon such record, shall be competent evidence in the courts of this state or of the United States or of any territory of the United States, and in the absence of the production of the original grant shall be conclusive evidence of a grant from the state to the grantee

or grantees named and for the lands described therein. (1915, c. 249, s. 1; C. S. 1752.)

Section Constitutional.—This section is constitutional and valid. *Howell v. Hurley*, 170 N. C. 401, 87 S. E. 107.

Copy Conclusive as to Regularity of Original.—An abstract of a grant of the State's land by the Secretary of State imports the regularity of its issuance, and that the constitutional mandate of affixing the seal of the original had been legally complied with, though the abstract gives no indication thereof, the regularity of the official conduct in granting the original being presumed; and the abstract may be introduced as competent evidence on the trial of an action involving the title to the lands described in the grant, by one claiming under it. *Howell v. Hurley*, 170 N. C. 401, 87 S. E. 107.

§ 8-8. Certified copies of grants and abstracts recorded.—Duly certified copies of such grants and of such memoranda and abstracts of grants may be recorded in the county where the lands therein described are situated, and the records thereof in such counties, or certified copies thereof, shall likewise be competent evidence for the purpose of showing title from the state of North Carolina to the grantee or grantees named and for the lands described therein. (1915, c. 249, s. 2; C. S. 1753.)

Cross Reference.—As to registration of certified copies of any deeds or writings, and their use in evidence, see § 47-31.

§ 8-9. Copies of grants certified by clerk of secretary of state validated.—All copies of grants heretofore issued from the office of the secretary of state, duly certified under the great seal of the state, and to which the name of the secretary has been written or affixed by the clerk of the said secretary of state, are hereby ratified and approved and declared to be good and valid copies of the original grants and admissible in evidence in all courts of this state when duly registered in the counties in which the land lies; all such copies heretofore registered in said counties are hereby declared to be lawful and regular in all respects as if the same had been signed by the secretary of state in person and duly registered. (Rev., s. 1597; 1901, c. 613; C. S. 1754.)

Editor's Note.—Prior to the enactment of this section it was consistently held that the clerk of the Secretary of State had no power to certify and affix the great seal of the state to copies of grants and other papers from the Secretary of State's office. *Beam v. Jennings*, 96 N. C. 82, 2 S. E. 245, but such acts on the part of the clerk are now validated by the provisions of this section.

§ 8-10. Copies of grants in Burke.—Copies of grants issued by the state within the county of Burke prior to the destruction of the records of said county by General Stoneman in the year one thousand eight hundred and sixty-five, shall be admitted in evidence in all actions when the same are duly registered; and when the original grants are lost, destroyed or cannot be found after due search, it shall be presumed that the same were duly registered within the time prescribed by law, as provided upon the face of original grant. (Rev., s. 1610; 1901, c. 513; C. S. 1755.)

Cross Reference.—As to copies of destroyed record as evidence generally, see § 98-1 et seq.

§ 8-11. Copies of grants in Moore.—Copies of grants for land situated in Moore county and the counties of which Moore was a part, entered in a book, and the book being certified un-

der the seal of the secretary of state, shall have the force and effect of the originals and be evidence in all courts. (Rev., s. 1613; 1903, c. 214; C. S. 1756.)

§ 8-12. Copies of grants in Onslow.—The copies of grants made by the register of deeds of Onslow county under laws of 1907, chapter 434, of grants, abstracts of grants, and other documents pertaining to titles of land in Onslow county issued prior to the year one thousand eight hundred, and contained in a book called Book of Transcribed Grants Issued Prior to One Thousand Eight Hundred, duly authenticated as prescribed in said chapter 434 of the laws of one thousand nine hundred and seven, shall be received as evidence in all courts of the state, and certified copies therefrom shall be received as evidence. (1907, c. 434; C. S. 1757.)

§ 8-13. Certain deeds dated before 1835 evidence of due execution.—In all actions hereafter instituted in which the title or ownership of any lands situated in North Carolina is at issue or in dispute, any deed or release, or a duly certified copy thereof, in which the people of the state of North Carolina are grantees and bearing date prior to the year one thousand eight hundred and thirty-five and purporting to have been filed and recorded in the office of the secretary of state of North Carolina prior to said year and now on file and of record in said office, and executed or purporting to have been executed by any person or persons as the representatives or agents or for or on behalf of any society, tribe, nation or aggregation of persons, whether signed or executed individually or in their representative capacity, and any such deed or release having been authorized to be executed by an act of the general assembly of North Carolina by the properly authorized agents of such society, tribe, nation or aggregation of persons, shall be prima facie evidence that the person or persons signing or executing any such deed or release were the properly authorized agent or agents of such society, tribe, nation or aggregation of persons. Any recitals or statements of fact in any such deed or release shall be prima facie evidence of the truth thereof in any such actions. (1915, c. 75; C. S. 1758.)

§ 8-14. Certified copies of maps of Cherokee lands.—Certified copies by the secretary of state of the copies, or parts thereof, of the maps of the Cherokee lands and of the Cherokee Country, as provided for and described in chapter one hundred and seventy-five of the laws of one thousand nine hundred and eleven, shall have the same force and effect and be entitled to the same force and effect as evidence as certified copies of the whole or parts of the original maps. (1911, c. 175; C. S. 1759.)

§ 8-15. Certified copies of certain surveys and maps obtained from the state of Tennessee.—A certified copy of the report of the survey made by the North Carolina commissioners, McDowell, Vance and Matthews, of that portion of the state of Tennessee extending from a point on the Virginia line to a point on the Smoky Mountain west of the Pigeon River, as obtained and filed by the secretary of state under the

provisions of chapter one hundred and sixty-two of the laws of one thousand nine hundred and thirteen, shall, when certified under the hand and seal of the secretary of state, be competent evidence in the trial of any action in the courts of the state. (1913, c. 162; C. S. 1760.)

§ 8-16. Evidence of title under H. E. McCulloch grants.—In all actions or suits, wherein it may be necessary for either party to prove title, by virtue of a grant or grants made by the king of Great Britain or Earl Granville to Henry McCulloch, or Henry Eustace McCulloch, it shall be sufficient for such party, in the usual manner, to give evidence of the grant or conveyance from the king of Great Britain or Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, and the mesne conveyances thereafter, without giving any evidence of the deed or deeds of release, relinquishment or confirmation of Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, or the power or powers of attorney by which the conveyances from the said Henry McCulloch, or Henry Eustace McCulloch, purport to have been made. (Rev., s. 1600; Code, s. 1336; R. C., c. 44, s. 1; 1819, c. 1021; C. S. 1761.)

§ 8-17. Conveyances or certified copies evidence of title under McCulloch.—In all trials where the title of either plaintiff or defendant shall be derived from Henry Eustace McCulloch, or Henry McCulloch, out of their tracts number one and three, it shall not be required of such party to produce, in support of his title, either the original grant from the crown to the proprietors, or a registered copy thereof; but in all such cases the grant or deed executed by such reputed proprietors, or by his or their lawful attorney, or a certified copy thereof, shall be deemed and held sufficient proof of the title of such proprietors, in the same manner as though the original grants were produced in evidence. (Rev., s. 1601; Code, s. 1337; R. C., c. 44, s. 2; 1807, c. 724; C. S. 1762.)

§ 8-18. Certified copies of registered instruments evidence.—A copy of the record of any deed, mortgage, power of attorney, or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of the county where the original or duly certified copy has been registered, may be given in evidence in any of the courts of the state where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court. (Rev., s. 1598; Code, s. 1251; 1893, c. 119, s. 2; R. C., c. 37, s. 16; 1846, c. 68, s. 1; C. S. 1763.)

Cross Reference.—As to recordation and use in evidence of certified copies generally, see § 47-31.

Editor's Note.—The provisions of this section permitting the reception of the copies herein mentioned as evidence,

constitute a statutory exception to the rule of the best evidence. Under this rule it is well established that a party is required to introduce that kind of proof which affords the greatest certainty of the fact in question. In other words he will not be permitted to offer evidence of little weight when he is in possession of much better evidence. However this rule is not without its numerous exceptions, the foundation of which is that the primary object of all rules of evidence is to promote the administration of justice, and wherever general convenience requires it, the general rule will be bent or construed so as to meet the exigency.

The limitation placed on the exception contained in this section must be noted. The certified copies are admissible in evidence "unless by rule or order of the court, * * * such party shall have been previously required to produce the original * * *," in which case the general rule again becomes applicable and the original must be produced or its absence accounted for.

Certified Copy as Evidence.—The record of a registered deed is competent evidence without producing the original where no rule of court for the production of the original has been issued. *Ratliff v. Ratliff*, 131 N. C. 425, 42 S. E. 887.

Copy of Registered Bond.—The "registry" or copy of the record of a bond to make title to land made by a deceased person, under which a deed has been made by the administrator of said obligor, is within the spirit and meaning of this section, and is admissible without accounting for the absence of the original. *Doe v. Shelton*, 46 N. C. 370.

Same—Official Bond.—Inasmuch as the duly certified copy of the record of any instrument required to be registered is admissible as full and sufficient evidence of such instrument, and as the register of deeds is required to register and keep the bond of the superior court clerk, a duly certified copy of the record of such bond is competent evidence of its provisions. *State v. Baird*, 118 N. C. 854, 24 S. E. 668.

Lack of Seal No Effect.—A copy of a grant from the register's office, which affirmatively shows that it was issued under the great seal of the state, is admissible in evidence, though the registry does not show the impress of the seal, or scroll to indicate it. *Aycock v. Raleigh, etc., Railroad*, 89 N. C. 321. And while the seal may be necessary to authenticate the grant, it will be presumed to have been affixed as required by law. *Id.*

Signature of Clerk Essential.—The failure of the clerk to sign his name to the certificate for registration, a requirement found in the provisions of sec. 47-14, renders the instrument inadmissible as evidence under this section. *Woodliff v. Woodliff*, 192 N. C. 634, 135 S. E. 612.

Production of Original to Correct Mistakes.—The original deed may be shown in evidence to correct an omission by the register of deeds of the signature of the justice of the peace before whom the deed was acknowledged. *Brown v. Hutchinson*, 155 N. C. 205, 71 S. E. 302.

Parol Evidence to Explain Variance.—Where the original deed was lost, and it was contended that there was a material variance between the certified copy and the original deed, parol evidence to prove the correct description contained in the original instrument was rejected, this section being construed as to have no application to such a case. *Hooper v. Justice*, 111 N. C. 418, 422, 16 S. E. 626.

Time and Manner of Objecting.—A party against whom the registry of a deed (or other instrument), or a copy thereof has been introduced in evidence, can not then raise the objection that there is a variance between such registry, or copy, and the original instrument; if he desired to avail himself of such objection he should have required the production of the original in the way provided by this section. *Devereux v. McMahon*, 108 N. C. 134, 12 S. E. 902.

Issue of Tenancy in Common.—Where defendant in partition proceedings denies the allegations in the petition that petitioner is a tenant in common with defendants and seized of an undivided fee simple interest in the land, but does not plead sole seizin, petitioner is not required to prove title as in an action in ejectment, and petitioner's record evidence is held sufficient to be submitted to the jury upon the sole issue of whether petitioner is a tenant in common with defendants in the land. *Talley v. Murchison*, 212 N. C. 205, 193 S. E. 148.

§ 8-19. Common survey of contiguous tracts evidence.—Whenever any person owns several tracts of land which are contiguous or adjoining, but held under different deeds and different surveys, it may be lawful for any such person to have all such bodies of land included in one common

survey by running around the lines of the outer tracts, and thereupon the possession of any part of said land covered by such common survey shall be deemed and held in law as a possession of the whole and every part thereof: Provided, that nothing in this section shall be construed to affect the rights or claims of persons which have already accrued to any part of said land. In all cases where such common surveys are made as directed by this section, the same may be recorded and registered as in cases of deeds, and shall be evidence in like manner. (Rev., s. 1505; Code, s. 1277; 1869-70, c. 34, ss. 1, 2; C. S. 1764.)

When Possession of Part Equivalent to Whole.—Under the provisions of this section, by recording and registering a survey of the outer lines of several contiguous tracts, so as to exhibit their outer boundaries, as if the whole territory had been covered by one tract, a possession at any one point on either of the separate tracts will become equivalent to a possession of "the whole and every part." *McNamee v. Alexander*, 109 N. C. 242, 244, 13 S. E. 777.

Sufficiency of Proof.—The surveyor's testimony that the map is correct is sufficient to make it competent. *Greenleaf v. Bartlett*, 146 N. C. 495, 60 S. E. 419.

§ 8-20. Certified copies registered in another county and used in evidence.—A copy from the office of the register of deeds of any county of the record of any deed, mortgage, power of attorney or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of such county, may, upon presentation to the register of deeds of any other county, be registered without further proof, and the record thereof, or a duly certified copy of the same, may be given in evidence in any court in the state where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court. (Rev., s. 1599; Code, s. 1253; 1893, c. 119, s. 3; R. C., c. 37, s. 16; 1846, c. 68; C. S. 1765.)

As to variance between original and copy, see note of *Ratliff v. Ratliff*, 131 N. C. 425, 42 S. E. 887, under section 8-18.

§ 8-21. Deeds and records thereof lost, presumed to be in due form.—Whenever it is shown in any judicial proceeding that a deed or conveyance of real estate has been lost or destroyed, and that the same had been registered, and that the register's book containing the copy has been destroyed by fire or other accident, so that a copy thereof cannot be had, it shall be presumed and held, unless the contents be shown to have been otherwise, that such deed or conveyance transferred an estate in fee simple, if the grantor was entitled to such an estate at the time of conveyance, and that it was made upon sufficient consideration. (Rev., s. 1602; Code, s. 1348; R. C., c. 44, s. 14; 1854, c. 17; C. S. 1766.)

Cross Reference.—As to burnt and lost records, see § 98-1 et seq.

Presumption of Regularity.—The registration of a deed

is presumed to be correct. *Cochran v. Linville Imp. Co.*, 127 N. C. 386, 394, 37 S. E. 496.

§ 8-22. Local: recitals in tax deeds in Haywood and Henderson.—In all legal controversies touching lands in the counties of Haywood and Henderson, in which either party shall claim title under any sale for taxes alleged to have been due and laid, in and for the year one thousand seven hundred and ninety-six, or any preceding year, the recital contained in the deed or assurance, made by the sheriff or other officer conveying or assuring the same, of the taxes having been laid and assessed, and of the same having remained due and unpaid, shall be held and taken to be prima facie evidence of the truth of each and every of the matters so recited. (Rev., s. 1606; Code, s. 1346; R. C., c. 44, s. 11; C. S. 1767.)

§ 8-23. Local: copies of records from Tyrrell.—Copies of records of the county of Tyrrell between the years one thousand seven hundred and thirty-five and one thousand seven hundred and ninety-nine, when copied in a book and certified to by the clerk of the superior court of Tyrrell county as to the records of his office and by the register of deeds as to the records of his office, and deposited in their respective offices in Washington county, shall be treated in all respects as original records and received as evidence in all courts of Washington county. (Rev., s. 1612; 1903, c. 199; C. S. 1768.)

§ 8-24. Local: records of partition in Duplin.—The transcripts made by the clerk of the superior court of Duplin county, in accordance with chapter three hundred and ninety-five of the laws of one thousand nine hundred and seven, of the reports of committees relating to the partition of real estate on file in his office prior and up to the year one thousand eight hundred and fifty-six, entered and indexed in a book entitled Reports of Committees, A, and the reports of committees beginning with and subsequent to the year one thousand eight hundred and fifty-six, entered and indexed in a book entitled Reports of Committees, B, shall be as competent evidence as are the original reports of the committees. (1907, c. 395, ss. 3, 4; C. S. 1769.)

§ 8-25. Local: records of wills in Duplin.—The transcripts made by the clerk of the superior court of Duplin county, in accordance with chapter three hundred and ninety-five of the laws of one thousand nine hundred and seven, of all wills and entries of probate and dates of registration appearing on the same, on file in his office prior and up to the January term of the county court of Duplin county, one thousand eight hundred and thirty, and entered in a book designated as Record of Wills, A, and duly indexed as provided by law, shall be as competent evidence in any court as are the originals of such wills. (1907, c. 395, ss. 1, 2; C. S. 1770.)

§ 8-26. Local: records of deeds and wills in Anson.—The copies of the deeds and deed books and of the wills and will books made in Anson county under the act of March second, one thousand nine hundred and five, shall have the same force and effect as the original deeds and deed books copied and as the original wills and will books copied, and shall take the place of said

original deeds and deed books and wills and will books as evidence in all court procedure; and wherever said deed books or will books are ordered or directed to be produced in court by subpoena or other order of court, the copies made under such act shall be produced, unless the court shall specially order the production of the original books, and the copies so produced in court shall have the same validity and effect and be used for the same purposes, with the same effect, as the original books. (Rev., s. 1615; 1905, c. 663, s. 3; C. S. 1771.)

§ 8-27. Local: records of wills in Brunswick.—Under the provisions of chapter one hundred and six of the laws of one thousand nine hundred and eight, authorizing and directing that all unrecorded wills, dated prior to January first, one thousand eight hundred and seventy-five, on file in the office of the clerk of the superior court of Brunswick county, and which have been duly proved in the form required by law, and bearing the adjudication certificate of the proper officer, shall be recorded in the book of wills in the said office and properly indexed; that all wills recorded in the minutes of the court of pleas and quarter sessions or other books of record in said office shall be transcribed and indexed in the book of wills in said office; and that all wills recorded in the office of the register of deeds of said county shall be properly indexed in the book kept for the purpose in the office of the clerk of the superior court of the county; the record of any instrument or certified copy thereof, recorded under the provisions of this article, shall be admitted in evidence in the trial of any cause, subject to the same rules upon which other wills are admitted. (1908, s. 106; C. S. 1772.)

§ 8-28. Copies of wills.—Copies of wills, duly certified by the proper officer, may be given in evidence in any proceeding wherein the contents of the will may be competent evidence. (Rev., s. 1603; Code, s. 2175; R. C., c. 119, s. 21; 1784, c. 225, s. 6; C. S. 1773.)

Cross Reference.—As to probate of copy of lost will, see §§ 98-4, 98-5.

Certified Copy as Evidence.—Under this section a certified copy of a will is competent evidence in any case wherein the contents of the will would be competent evidence. *Hampton v. Hardin*, 88 N. C. 592, 594.

Copy of Will Made in Another State.—See annotations under sec. 8-32.

§ 8-29. Copies of wills in secretary of state's office.—Copies of wills filed or recorded in the office of the secretary of state, attested by the secretary, may be given in evidence in any court, and shall be taken as sufficient proof of the devise of real estate, and are declared good and effectual to pass the estate therein devised: Provided, that no such will may be given in evidence in any court nor taken as sufficient proof of the devise unless a certificate of probate appear thereon. (Rev., s. 1607; Code, s. 2181; R. C., c. 44, s. 12; 1852, c. 172; 1856-7, c. 22; C. S. 1774.)

§ 8-30. Copies of wills recorded in wrong county.—Whereas, by reason of the uncertainty of the boundary lines of many of the counties of the state, wills have been proved, recorded and registered in the wrong county, whereby titles are insecure; for remedy whereof: The registry

or duly certified copy of the record of any will, duly recorded, may be given in evidence in any of the courts of this state. (Rev., s. 1608; Code, s. 2182; 1858-9, c. 18; C. S. 1775.)

§ 8-31. Copy of will proved and lost before recorded.—When any will which has been proved and ordered to be recorded was destroyed during the war between the states, before it was recorded, a copy of such will, so entitled to be admitted to record, though not certified by any officer, shall, when the court shall be satisfied of the genuineness thereof, be ordered to be recorded, and shall be received in evidence whenever the original or duly certified exemplification would be; and such copies may be proved and admitted to record under the same rules, regulations and restrictions as are prescribed in chapter 98 entitled Burnt and Lost Records. (Rev., s. 1609; Code, s. 2183; 1866-7, c. 127; C. S. 1776.)

§ 8-32. Certified copies of deeds and wills from other states.—In cases where inhabitants of other states or territories, by will or deed, devise or convey property situated in this state, and the original will or deed cannot be obtained for registration in the county where the land lies, or where the property shall be in dispute, a copy of said will or deed (after the same has been proved and registered or deposited, agreeable to the laws of the state where the person died or made the same) being properly certified, either according to the act of congress or by the proper officer of the said state or territory, shall be read as evidence. (Rev., s. 1619; Code, s. 1344; R. C., c. 44, s. 9; 1802, c. 623; C. S. 1777.)

In General.—Records of other states, to be used in evidence in this state, must have the attestation of the clerk of the court whose record is offered, and the seal of the court, if it have one. If there be no seal, this must appear in the certificate of the clerk, and the judge, chief justice, or presiding magistrate of such court must certify that the record is properly attested. *Riley v. Carter*, 158 N. C. 484, 487, 74 S. E. 463; *Kinsey v. Rumborgh*, 96 N. C. 193, 2 S. E. 174; *Hunter v. Kelly*, 92 N. C. 285.

Test for Admission under Section.—The copy, to be admissible in evidence, must be of such a will as would be admitted to record in North Carolina; hence where a will was executed in Tennessee and from the certificate of probate on the exemplified copy produced here, it appears that but one witness swore that he subscribed the will as witness in the presence of the testator and the other witness to the will did not appear to have been sworn at all, it was held that such a will should not be read in evidence. *Blount v. Patton*, 9 N. C. 237.

Properly Authenticated Copy Admissible.—A copy of a will made in another state, with its probate certified by the judge of the court in which it was proved, and accompanied by the testimonial of the governor of that state, that the person who gave that certificate was the proper officer to take such probate, and to certify the same, is a sufficient authentication of the will to authorize its reception as evidence in our courts. *Knight v. Wall*, 19 N. C. 125.

Incomplete Authentication.—Where a will, proved in another state, bore the certificate of the clerk of the court wherein the probate was had, to the oath of the attesting witnesses, but had no other authentication, it was held inadmissible in evidence. *Hunter v. Kelly*, 92 N. C. 285, 287.

§ 8-33. Copies of lost records in Bladen.—The clerk of the superior court of Bladen county shall transcribe the judgment docket and index books and the will books in his office, and all other books in said office containing records made since the year one thousand eight hundred and sixty-eight, and the records so transcribed shall have the same force and effect as the

original records would have, and shall be received in evidence as the original records and be prima facie evidence of their correctness and of the sufficiency of their probate, though the probates are lost and are not transcribed. (Rev., s. 1611; 1895, c. 415; 1903, c. 65; C. S. 1778.)

Art. 3. Public Records.

§ 8-34. Copies of official writings.—Copies of all official bonds, writings, papers, or documents, recorded or filed as records in any court, or public office, or lodged in the office of the governor, treasurer, auditor, secretary of state, attorney general or adjutant general, shall be as competent evidence as the originals, when certified by the keeper of such records or writings under the seal of his office when there is such seal, or under his hand when there is no such seal, unless the court shall order the production of the original. Copies of the records of the board of county commissioners shall be evidence when certified by the clerk of the board under his hand and seal of the county. (Rev., s. 1616; Code, ss. 715, 1342; R. C., c. 44, s. 8; 1792, c. 368, s. 11; 1871-2, c. 91; 1868-9, c. 20, s. 21; C. S. 1779.)

Copy Defined.—A copy, within the meaning of this section is a transcript of the original—a writing exactly like another writing. *State v. Champion*, 116 N. C. 987, 989, 21 S. E. 700. See also *Wiggins v. Rogers*, 175 N. C. 67, 94 S. E. 685.

The Copy Certified.—The power of an officer, who is the keeper of certain public records, to certify copies is confined to a certification of their contents as they appear by the records themselves, and the records must, therefore, be so certified, for he has no authority to certify to the substance of them, nor that any particular fact, as a date, appears on them. *Wiggins v. Rogers*, 175 N. C. 67, 94 S. E. 685.

A "Copy" of the Instrument Required.—This section makes competent only the "copies" of official records, etc., and a mere certified statement from the register's office is only evidence of the correctness of the record, and can not be admitted in evidence in place of the original record. *State v. Champion*, 116 N. C. 987, 989, 21 S. E. 700. (Cited and approved in *Wiggins v. Rogers*, 175 N. C. 67, 94 S. E. 685.)

Original Record Admitted.—This section does not prevent the admission in evidence of the original record itself. *State v. Voight*, 90 N. C. 741, 745; *State v. Abernathy*, 94 N. C. 545. See also *Riley & Co. v. Carter*, 165 N. C. 334, 81 S. E. 414; *State v. Hunter*, 94 N. C. 829; *Blalock v. Whisnant*, 216 N. C. 417, 5 S. E. (2d) 130.

Some hesitancy was at first shown by the court in reaching this conclusion, due to a contrary ruling in the earlier cases. However, it is now well settled that it would be little less than an absurdity to exclude the best possible evidence, when adduced, merely because an inferior evidence, by copy, is made admissible (by statute or otherwise).

On this point, it is said by Mr. Greenleaf: "As to the proof of records, this is done by the mere production of the records, without more, or by copy." Again in the same section, "Where a record is the gist of the issue, if it is not in the same court, it should be proved by an exemplification." *Greenleaf on Evidence*, sec. 501.

In reference to these clauses it is said in *Gray v. Davis*, 27 Conn. 447, cited and approved in *State v. Voight*, supra: "But he (the author) does not say, and it is obvious he does not mean, that the contents of a record can not in any court be proved by the original record itself, if it can be produced, but only to state the manner in which proof may be and usually is made."

There can be no doubt as to the soundness of this ruling, but it would seem that the conclusion would best be placed on the actual wording of this section instead of dealing in such broad inferences. The Legislature has specifically said that the copies, herein made admissible, "shall be as competent evidence as the originals." From the very phraseology of this section it does not seem plausible to say it was intended that the admission of the copies should serve to exclude the original record itself.—Ed. Note.

Original Record Lost.—A certified copy of a petition in a suit is admissible in evidence upon proof of the loss of the original records. *Weeks v. McPhail*, 128 N. C. 130, 132, 38 S. E. 472. See also 5 N. C. Enc. Dig. 511 et seq.

Where a superior court record is lost, a certified copy of the transcript of the same in the Supreme Court is sufficient evidence of the record. *Aiken v. Lyon*, 127 N. C. 171, 175, 37 S. E. 199.

Incriminating Evidence Contained in Document.—Where the document admitted under the provisions of this section contains incriminating evidence, the defense often interposed by the accused is that to admit such paper would be in violation of the constitutional right of the defendant on trial for crime to have opportunity to confront his accusers and the witnesses offered to sustain the charge. It is settled, however, that this section is not violative of this constitutional right, since these provisions constitute a well-recognized exception to the privilege given by the constitution. *State v. Dowdy*, 145 N. C. 432, 436, 58 S. E. 1002; *State v. Behrman*, 114 N. C. 797, 804, 19 S. E. 220. In reference to this point Mr. Greenleaf says: "The constitutional clause purported merely to adopt the general principle of the hearsay rule, that there must be confrontation, but it did not purport to enumerate all the exceptions and limitations to that principle. There were then a number of well-established exceptions, and there might be others in the future. The Constitution indorsed the general principle, subject to these exceptions, merely naming and describing it sufficiently to indicate the principle intended." Greenleaf on Evidence, section 163.—Ed. Note.

§ 8-35. Authenticated copies of public records.

—All copies of bonds, contracts, notes, mortgages, or other papers relating to or connected with any loan, account, settlement of any account or any part thereof, or other transaction, between the United States or any state thereof or any corporation all of whose stock is beneficially owned by the United States or any state thereof, either directly or indirectly, and any person, natural or artificial; or extracts therefrom when complete on any one subject, or copies from the books or papers on file, or records of any public office of the state or the United States or of any corporation all of whose stock is beneficially owned by the United States or by any state thereof, directly or indirectly, shall be received in evidence and entitled to full faith and credit in any of the courts of this state when certified to by the chief officer or agent in charge of such public office or of such office of such corporation, or by the secretary or an assistant secretary of such corporation, to be true copies, and authenticated under the seal of the office, department, or corporation concerned. Any such certificate shall be prima facie evidence of the genuineness of such certificate and seal, the truth of the statements made in such certificate, and the official character of the person by which it purports to have been executed. (Rev., s. 1617; 1891, c. 501; 1939, c. 149; C. S. 1780.)

Cross References.—As to records judicially noticed, see § 8-3 and notes thereto, and also §§ 8-4, 1-157.

Editor's Note.—The 1939 amendment so changed this section that a comparison here is not practicable.

The matters appearing in transcript of any paper on file or records of any public office of the State or United States, being relevant to an account which a referee was directed to take, are admissible in evidence by virtue of the provisions of this section. *Wallace Bros. v. Douglas*, 114 N. C. 450, 19 S. E. 668. See also, *Hinton v. Lake Drummond Canal Co.*, 166 N. C. 484, 82 S. E. 844.

Authentication Essential.—Proper authentication is essential to the admission in evidence of the copies of the original records, and papers purporting to be exemplification from the treasury department of the United States, not authenticated, will not be admitted. *Mott v. Ramsay*, 92 N. C. 152.

Parol Evidence Inadmissible.—The contents of the original record may not be proved by parol evidence under this section, but must be shown by a certified copy. *National Surety Co. v. Brock*, 176 N. C. 507, 97 S. E. 417.

§ 8-36. Authenticated copy of record of administration.—When letters testamentary or of administration on the goods and chattels of any person deceased, being an inhabitant in another state or territory, have been granted, or a return or inventory of the estate has been made, a copy of the record of administration or of the letters testamentary, and a copy of an inventory or return of the effects of the deceased, after the same has been granted or made, agreeable to the laws of the state where the same has been done, being properly certified, either according to the act of congress or by the proper officer of such state or territory, shall be allowed as evidence. (Rev. s. 1618; Code, s. 1343; R. C., c. 44, s. 7; 1834, c. 4; C. S. 1781.)

§ 8-37. Certificate of commissioner of motor vehicles as to ownership of automobile.—In all civil actions, arising out of an injury to person or property by reason of the operation of a motor vehicle of any kind, evidence as to the display numbers on a particular car, a copy of the record kept by the commissioner of motor vehicles of such display numbers and the persons who obtained them, certified under the hand and seal of said commissioner of motor vehicles shall be competent evidence of the ownership of the motor vehicle inflicting the injury or doing the damage. (1931, c. 88, s. 1; 1943, c. 650.)

Cross Reference.—As to registration and certificate of title for motor vehicles generally, see § 20-50 et seq.

Editor's Note.—The 1943 amendment substituted "commissioner of motor vehicles" for "commissioner of revenue."

Art. 4. Other Writings in Evidence.

§ 8-38. Proof by attesting witness not required.

—It is not necessary to prove by the attesting witness instruments to the validity of which the attestation is not requisite, and such instruments may be proved by admission or otherwise as if there had been no attesting witness thereto: Provided, that this section shall not affect the method and manner of proving instruments for registration. (Rev., s. 1604; 1905, c. 204; C. S. 1782.)

Cross Reference.—As to essentials of registration, see § 47-1 et seq. and § 31-12 et seq.

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

—In all actions for the possession of or title to any real estate parol testimony may be introduced to identify the land sued for, and fit it to the description contained in the paper writing offered as evidence of title or of the right of possession, and if from this evidence the jury is satisfied that the land in question is the identical land intended to be conveyed by the parties to such paper-writing, then such paper-writing shall be deemed and taken to be sufficient in law to pass such title to or interest in such land as it purports to pass: Provided, that such paper-writing is in all other respects sufficient to pass such title or interest. (Rev., s. 1605; 1891, c. 465, s. 1; C. S. 1783.)

Cross Reference.—As to vagueness of description in deeds, see § 39-2 and notes thereto.

In General.—A deed which fails to describe any land is as void now as it was before the passage of this section. *Moore v. Fowle*, 139 N. C. 51, 53, 51 S. E. 796. But a description by name, where lands have a known name, is sufficient. *Id.*

This section applies only where there is a description which can be aided by parol, but not when there is no

description. *Harris v. Woodward*, 130 N. C. 580, 41 S. E. 790; *Hemphill v. Annis*, 119 N. C. 514, 26 S. E. 152; *Lowe v. Harris*, 112 N. C. 473, 17 S. E. 539.

This rule has been sanctioned by the courts, not only upon the idea that there must be a certain subject matter, but because its observance is essential to a proper enforcement of the statute of frauds. *Blow v. Vaughan*, 105 N. C. 198, 10 S. E. 891.

Ambiguous or Indefinite Terms.—Where the written terms contained in the contract are sufficient to pass the property, but are ambiguous or indefinite, then parol evidence of the expressions of the parties and attendant facts and circumstances may be heard to aid in ascertaining the correct meaning of the terms used, but not to alter or add to what has been written. *Ward v. Gay*, 137 N. C. 399, 49 S. E. 884.

Not Retroactive in Operation.—There is a general presumption against the retroactive operation of a statute where it would impair vested rights, therefore this section cannot be held to operate retrospectively so as to allow parol testimony to locate land referred to and ambiguously described in a contract made before the passage of the section. *Lowe v. Harris*, 112 N. C. 473, 17 S. E. 539. *Shepherd, C. J.*, concurs, but further holds that the word "description" used in this section imports such description as can be aided by parol proof. *Id.*

When Description Sufficient.—A description of land in a deed as all that tract of land in two certain counties, lying on "both sides of old road between" designated points, and bounded by lands of named owners, "and others," being parts of certain State grants, conveyed by the patentee or enterer to certain grantees, etc., is sufficient to admit of parol evidence in aid of the identification of the lands as those intended to be conveyed. *Buckhorn Land, etc., Co. v. Yarbrough*, 179 N. C. 335, 102 S. E. 630.

While parol evidence is competent to "fit the description to the thing," it is not competent to establish a line or corner when the instrument by its terms wholly fails to identify such line or corner; in other words, it is competent to find but not to make a corner. *Holmes v. Sapphire Valley Co.*, 121 N. C. 410, 28 S. E. 545.

Applied in *McKay v. Bullard*, 219 N. C. 589, 14 S. E. (2d) 657.

§ 8-40. Proof of handwriting by comparison.—In all trials in this state, when it may otherwise be competent and relevant to compare handwritings, a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute: Provided, this shall not apply to actions pending on March 5, 1913. (1913, c. 52; C. S. 1784.)

In General.—The principle, formerly recognized in this State, that confined the proof of handwriting to the testimony of a competent witness in comparing that sought to be established with handwriting either admitted or proven to be that of the party, has been changed by this section, and where the disputed writing has been rendered competent under this principle, it may, in actions instituted after March 5, 1913, be submitted to the jury, together with that admitted or proven. *Newton v. Newton*, 182 N. C. 54, 108 S. E. 336.

Rule under Prior Law.—Before the passage of this section it was incompetent for a handwriting expert to testify to the genuineness of the signature of a party to a writing, his testimony being based upon a comparison with another signature, not admitted to be genuine or requiring proof that it is so. *Boyd v. Leatherwood*, 165 N. C. 614, 81 S. E. 1025.

Same—Reasons.—In the cases decided under the prior law three reasons are given for excluding as incompetent a comparison by an expert witness of a signature or writing, not admitted to be genuine or connected with the case on trial, with a signature or writing which has been offered in writing, where the genuineness of the latter is drawn in question: (1) There is danger of fraud in the selecting of writings offered as specimens for the occasion. (2) The genuineness of specimens offered may be contested, and thus numberless collateral issues may be raised to confuse the jury and divert their attention from the real issue. (3) The opposing party may be surprised

by the introduction of specimens, not admitted to be genuine, and for want of notice may fail to produce and offer evidence within his reach, tending to show their spurious character. 1 *Greenleaf on Ev.*, secs. 578 to 580; *Fuller v. Fox*, 101 N. C. 119, 7 S. E. 589; *Outlaw v. Hurdle*, 46 N. C. 150; *Tuttle v. Rainey*, 98 N. C. 513, 4 S. E. 475; *Pope v. Askew*, 23 N. C. 16. This rule was recognized in the more recent cases. *Martin v. Knight*, 147 N. C. 564, 61 S. E. 447; *Nicholson v. Eureka Lumber Co.*, 156 N. C. 59, 72 S. E. 86, 36 L. R. A. (N. S.) 162; *Boyd v. Leatherwood*, 165 N. C. 614, 616, 81 S. E. 1025.

Expert and Non-Expert Distinguished.—A comparison of handwriting is in some states permitted to be made by the jury or experts, and in others only by experts in the presence of the jury. Where a witness has acquired a knowledge of the person's writing, he compares a disputed signature or writing with an exemplar in his own mind. But when he testifies as an expert he must first be furnished, as the basis of his testimony, with some specimen the genuineness of which may be insisted on before the jury. *Tunstall v. Cobb*, 109 N. C. 316, 320, 14 S. E. 28.

Not Essential to See Person Write.—When the contents of letters written by a party to an action are relevant to the inquiry, it is not required that the witness should have seen the person write before he is permitted to identify the letter by the handwriting, for it is sufficient if he can do so from correspondence formerly had between them. *Universal Oil, etc., Co. v. Burney*, 174 N. C. 382, 93 S. E. 912.

Comparison by Jury.—Where payment of a note sued on is pleaded and the genuineness of the signature of the payee to a receipt for the amount is in dispute, and an expert in handwriting has given his opinion upon comparing with a magnifying glass the disputed signature with the genuine one, it is not error for the trial judge to permit the jury, while deliberating upon their verdict, to make the comparison with the magnifying glass for themselves, when it does not appear that it could have been to the prejudice of the appellant. As to whether this is otherwise permitted under the provisions of this section, *quære?* *Goding v. Pope*, 194 N. C. 403, 140 S. E. 21.

Analogy to Proof of Agency.—In *Newton v. Newton*, 182 N. C. 54, 55, 108 S. E. 336, the court said: "As we understand the statute, the admission of testimony as to the genuineness of a writing by comparison of handwriting is now on the same basis as the declarations of agents. The court determines whether there is *prima facie* evidence of agency or of the genuineness of the writing admitted as a basis of comparison, and then the testimony of the witnesses and 'the writings' (in the plural) themselves are submitted to the jury."

Handwriting Irrelevant—Exclusion Harmless Error.—In this case the handwriting sought to be introduced as evidence before the jury and to be considered by them was irrelevant, and the action of the court in refusing to let the writing be submitted to the jury, to determine its genuineness, under the statute, was a harmless error. *Newton v. Newton*, 182 N. C. 54, 108 S. E. 336.

Cited in *In re Will of Shemwell*, 197 N. C. 332, 333, 148 S. E. 469; *In re Williams' Will*, 215 N. C. 259, 1 S. E. (2d) 857.

§ 8-41. Bills of lading in evidence.—In all actions by or against common carriers in which it shall be thought necessary to introduce in evidence any bills of lading issued by said common carrier or by a connecting carrier, it shall be competent to introduce in evidence any paper-writing purporting to be the original bill of lading, or a duplicate thereof, upon proof that such paper purporting to be such bill of lading or duplicate was received in due course of mail from consignor or agent of said carrier or connecting carrier, or delivered by said common carrier to the consignee or other person entitled to the possession of the property for which said paper purports to be the bill of lading: Provided, that such purported bill of lading shall not be declared to be the bill of lading unless the said purported bill of lading is first exhibited by the plaintiff or his agent or attorney to the defendant or its attorney, or its agent upon whom process may be served, ten days before the trial where the

point of shipment is in the state, and twenty days when the point of shipment is without the state. Upon such proof and introduction of the bill of lading, the due execution thereof shall be prima facie established. (1915, c. 287; C. S. 1785.)

Cross Reference.—As to definitions of bills of lading, see §§ 21-2, 21-3.

§ 8-42. Book accounts under sixty dollars.—

When any person shall bring an action upon a contract, or shall plead, or give notice of, a set-off or counterclaim for goods, wares and merchandise by him sold and delivered, or for work done and performed, he shall file his account with his complaint, or with his plea or notice of setoff or counterclaim, and if upon the trial of the issue, or executing a writ of inquiry of damages in such action, he shall declare upon his oath that the matter in dispute is a book account, and that he hath no means to prove the delivery of any of the articles which he then shall propose to prove by himself but by this book, in that case such book may be given in evidence, if he shall make out by his own oath that it doth contain a true account of all the dealings, or the last settlement of accounts between himself and the opposing party, and that all the articles therein contained, and by him so proved, were bona fide delivered, and that he hath given the opposing party all just credits; and such book and oath shall be received as evidence for the several articles so proved to be delivered within two years next before the commencement of the action, but not for any article of a longer standing, nor for any greater amount than sixty dollars. (Rev., s. 1622; Code, s. 591; R. C., c. 15, s. 1; 1756, c. 57, ss. 2, 6, 7; C. S. 1786.)

Terms Construed.—In an early case, the words "to make out on his oath" and "to prove," used in this section, are construed to be synonymous terms. *Kitchen v. Tyson*, 7 N. C. 314.

Other Sections.—Notwithstanding the restrictions contained in sec. 8-51, in relation to a person's testifying as to any matter between himself and a deceased person, when his executor or administrator is a party, he may, as heretofore, be permitted to testify under this section. *Leggett v. Glover*, 71 N. C. 211. See also, *Nall v. Kelly*, 169 N. C. 717, 86 S. E. 627 and cases cited.

This section is applicable only to actions brought under the "book-debt law," hence in an action on a contract for sawing timber, it is not necessary to set out the items in the pleadings. *McPhail v. Johnson*, 115 N. C. 298, 302, 20 S. E. 373.

Swearing as to Price of Goods.—It is competent for a party under this section to swear to the price, as well as to the delivery of the articles stated in his account. *Colbert v. Piercy*, 25 N. C. 77.

Same—Cross-Examination.—It is competent for the opposite party to cross-examine the party, taking his oath as required by this section, both as to the article and the prices charged, with a view to contradict or discredit him, as he might do in regard to any other witness swearing to the account, the party so swearing being considered as a witness in his own cause. *Colbert v. Piercy*, 25 N. C. 77.

Where Original Account Exceeds Sixty Dollars.—Under this section, a plaintiff may prove by his own oath a balance of sixty dollars, due to him, although his account produced appears to have been originally for more than sixty dollars, but is reduced by credits below that amount. *McWilliams v. Cosby*, 26 N. C. 110.

Same—Dismissal of Part for Jurisdictional Purposes.—Where divers dealings are included in an account, the aggregate of which exceeds sixty dollars, the plaintiff can omit, or give credit for any item he may choose, so as to bring the case within the jurisdiction of a single magistrate. *Waldo & Co. v. Jolly*, 49 N. C. 173, 174. But after thus obtaining jurisdiction the plaintiff can not prove the account under this section for he is required to swear that the account rendered contains a true account of all the dealings. *Id.*

Proof of Set-Off Allowed.—The defendant may, under

this section, prove a set-off. *Webber v. Webber*, 79 N. C. 572, 573, 575.

Same—Book and Oath Not Exclusive Evidence.—The book and the oath under this section are not evidence that the book contains all the credits and a full and true account of all the dealings between the parties, so as to show that nothing is due to the other party. *Alexander v. Smoot*, 35 N. C. 461.

Books of Decedent Admissible.—Under this section it is admissible to the amount of sixty dollars to offer the book accounts of a decedent, containing charges against third persons, and made by him. *Bland v. Warren*, 65 N. C. 372.

Unverified Entries on Own Book.—A party to an action may not show unverified entries of credit in his behalf on his own books involved in a disputed account, the same not falling within the intent and meaning of this section and secs. 8-43 and 8-44, especially when it has not been made to appear that the person having made them is dead or can not be had to give his sworn statement of the transaction. *Branch v. Ayscue*, 186 N. C. 219, 119 S. E. 201.

§ 8-43. Book accounts proved by personal representative.—In all actions where executors and administrators are parties, such book account for all articles delivered within two years previous to the death of the deceased may be proved under the like circumstances, rules and conditions; and in such case, the executor or administrator may prove by himself that he found the account so stated on the books of the deceased; that there are no witnesses, to his knowledge, capable of proving the delivery of the articles which he shall propose to prove by said book, and that he believes the same to be just, and doth not know of any other or further credit to be given than what is therein mentioned: Provided, that if two years shall not have elapsed previous to the death of the deceased, the executor or administrator may prove the said book account, if the suit shall be commenced within three years from the delivery of the articles: Provided further, that whenever by the aforesaid proviso the time of proving a book account in manner aforesaid is enlarged as to the one party, to the same extent shall be enlarged the time as to the other party. (Rev., s. 1623; Code, s. 592; R. C., c. 15, s. 2; 1756, c. 57, s. 2; 1796, c. 465; C. S. 1787.)

An administrator may, under this section, offer in evidence the book accounts of a decedent, containing charges against third persons, and made by him. *Bland v. Warren*, 65 N. C. 372.

§ 8-44. Copies of book accounts in evidence.—

A copy from the book of accounts proved in manner above directed may be given in evidence in any such action or setoff as aforesaid, and shall be as available as if such book had been produced, unless the party opposing such proof shall give notice to the adverse party or his attorney, at the joining of the issue, or ten days before the trial, that he will require the book to be produced at the trial; and in that case no such copy shall be admitted as evidence. (Rev., s. 1624; Code, s. 593; R. C., c. 15, s. 3; 1756, c. 57, s. 3; C. C. P., s. 343c; C. S. 1788.)

Production of Original after Notice.—In all cases under this and the two preceding sections, it is the duty of the party, who wishes to prove his debt by his own oath, to produce the original account when notice to that effect has been given to him by the other party. *Coxe v. Skeen*, 25 N. C. 443, 445.

A voluntary destruction of the original will not authorize the introduction of a copy. *Coxe v. Skeen*, 25 N. C. 443, 445.

§ 8-45. Itemized and verified accounts.—In any actions instituted in any court of this state

upon an account for goods sold and delivered, for rents, for services rendered, or labor performed, or upon any oral contract for money loaned, a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness. (Rev., s. 1625; 1897, c. 480; 1917, c. 32; 1941, c. 104; C. S. 1789.)

Editor's Note.—Prior to the amendment in 1917 (ratified February 12, 1917) this section was applicable only to accounts for goods sold and delivered. See *La Salle Extension University v. Ogburn*, 174 N. C. 427, 93 S. E. 986; *Nall v. Kelly*, 169 N. C. 717, 86 S. E. 627. Even before the amendment of this section, where the case was not instituted "upon an account for goods sold and delivered," which fact took the proceedings beyond the operative force of this section, the case was not necessarily dismissed on this account, when the additional evidence offered served to enable the jury to determine the amount of damages to which the plaintiff was entitled. See *Gainesville, etc., Hospital Ass'n v. Hobbs*, 153 N. C. 188, 195, 69 S. E. 79. The 1941 amendment inserted the words "for rents" in this section.

Purpose.—This section was designed to facilitate the collection of such accounts where there was no bona fide dispute, and to relieve the plaintiff in such instances of the expense and delay of formally taking depositions. *Nall v. Kelly*, 169 N. C. 717, 86 S. E. 627.

Verification Essential.—An itemized account to be prima facie evidence of its correctness must be properly verified and stated so as to show an indebtedness. *Knight v. Taylor*, 131 N. C. 84, 42 S. E. 537.

Competency of Witness Required.—Under the terms of this section, as now drawn, an affiant, verifying an account so as to make the same prima facie evidence, must be a competent witness to the facts, and when it appears on the face of the account that he has no personal knowledge of these facts, or it is established that he is otherwise an incompetent witness, the ex parte account so verified should not be received in evidence. *Nall v. Kelly*, 169 N. C. 717, 86 S. E. 627. And it must appear that he is not excluded under the provision of sec. 8-51. See *Lloyd & Co. v. Poythress*, 185 N. C. 180, 116 S. E. 584.

An itemized, verified statement of an account is an ex parte statement and this section, governing its admission, must be strictly complied with, and the person who verifies the account, being treated as a witness pro tanto must be competent to testify as a witness in respect to the account if called upon at the trial, but where an itemized statement of account offered at the trial is verified by the treasurer of the plaintiff corporation who declares in his affidavit that "he is familiar with the books and business" of the plaintiff, it cannot be held as a matter of law that the affiant had no personal knowledge of the transaction, and the exclusion of the statement by the trial court will be held for reversible error. *Nall v. Kelly*, 169 N. C. 717, 86 S. E. 627, cited and distinguished. *Endicott-Johnson Corp. v. Schochet*, 198 N. C. 769, 153 S. E. 403.

Subordinate to Section 8-51.—In *Lloyd & Co. v. Poythress*, 185 N. C. 180, 184, 116 S. E. 584, the court said: "We have held that this section, appearing as a section on the law of evidence, should be construed in subordination to C. S., 1795, [§ 8-51] under the principle announced in *Cecil v. High Point*, 165 N. C. 431, 81 S. E. 616." See also, *Nall v. Kelly*, 169 N. C. 717, 86 S. E. 627.

Prima Facie Case.—In an action to recover for goods sold and delivered, where a verified statement of the account shows that it is for goods sold by the plaintiff to the defendant and sets out the number and kind of articles, the catalogue numbers, price per dozen and discounts allowed, and there are trade terms and abbreviations well understood in the trade, which show more fully the kind of articles, it is properly itemized to make out a prima facie case under this section. *Claus v. Lee*, 140 N. C. 552, 53 S. E. 433; *Lipinsky v. Revell*, 167 N. C. 508, 83 S. E. 820.

Same—Nonsuit.—Where a verified account or affidavit to a statement for goods sold and delivered is insufficient to establish a prima facie case, under the provision of this section, and this is the only evidence offered, a judgment of nonsuit upon the evidence is properly allowed. *Nall v. Kelly*, 169 N. C. 717, 86 S. E. 627.

Same—Burden of Proof.—Where a prima facie case has been made out by the plaintiff, in his action to recover the purchase price of goods sold and delivered to the defendant, and the latter contends that he, as the agent for the former, was to sell upon commission, and that he had accounted for such sales, except a small balance which

he tendered, or offered to submit to judgment for that amount, the burden is upon the defendant to show the fact of agency, and of accounting thereon, which is for the determination of the jury upon the question of indebtedness. *Carr v. Alexander*, 169 N. C. 665, 86 S. E. 613.

Account of Mercantile Corporation.—This section applied in *Wright Co. v. Green*, 196 N. C. 197, 145 S. E. 16.

Husband as Agent of Wife.—Evidence held insufficient. *Pitt v. Speight*, 222 N. C. 585, 24 S. E. (2d) 350.

Art. 5. Life Tables.

§ 8-46. Mortuary tables as evidence.—Whenever it is necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the columns headed by the words "completed age" and "expectation" respectively:

Completed Age	Expectation
10	48.7
11	48.1
12	47.4
13	46.8
14	46.2
15	45.5
16	44.9
17	44.2
18	43.5
19	42.9
20	42.2
21	41.5
22	40.9
23	40.2
24	39.5
25	38.8
26	38.1
27	37.4
28	36.7
29	36.0
30	35.3
31	34.6
32	33.9
33	33.2
34	32.5
35	31.8
36	31.1
37	30.4
38	29.6
39	28.9
40	28.2
41	27.5
42	26.7
43	26.0
44	25.3
45	24.5
46	23.8
47	23.1
48	22.4
49	21.6
50	20.9
51	20.2
52	19.5
53	18.8
54	18.1
55	17.4

Completed Age	Expectation
56	16.7
57	16.1
58	15.4
59	14.7
60	14.1
61	13.5
62	12.9
63	12.3
64	11.7
65	11.1
66	10.5
67	10.0
68	9.5
69	9.0
70	8.5
71	8.0
72	7.6
73	7.1
74	6.7
75	6.3
76	5.9
77	5.5
78	5.1
79	4.8
80	4.4
81	4.1
82	3.7
83	3.4
84	3.1
85	2.8
86	2.5
87	2.2
88	1.9
89	1.7
90	1.4
91	1.2
92	1.0
93 .....	.8
94 .....	.6
95 .....	.5

(Rev., s. 1626; Code, s. 1352; 1883, c. 225; C. S. 1790.)

Need Not Be Put in Evidence.—This section being a public act, the tables herein contained are competent as evidence without being specially put in evidence. *Coley v. Statesville*, 121 N. C. 301, 317, 28 S. E. 482.

Tables Not Conclusive.—In an action to recover damages for a personal injury, the expectation of life tables contained in this section are not conclusive but merely evidential on the issue as to damages. *Odom v. Canfield Lumber Co.*, 173 N. C. 134, 91 S. E. 716; *Sledge v. Lumber Co.*, 140 N. C. 459, 461, 53 S. E. 295; *Young v. Wood*, 196 N. C. 435, 146 S. E. 70. The tables must be considered in connection with the "other evidence as to the health, constitution and habits" of the deceased. *Russell v. Wind-sor Steamboat Co.*, 126 N. C. 961, 967, 36 S. E. 191. See *Wachovia Bank, etc., Co. v. Atlantic Greyhound Lines*, 210 N. C. 293, 186 S. E. 320; *Hancock v. Wilson*, 211 N. C. 129, 189 S. E. 631.

Value of Life Tenancy.—When a life tenant and the remainderman sell the lands, the life tenant is entitled to the present cash value of her life estate in the purchase price, computed according to her life expectancy at the date of the execution of the deed, and the remainderman is entitled to the balance of the purchase price. *Thompson v. Avery County*, 216 N. C. 405, 5 S. E. (2d) 146.

Cited in *Farris v. Hendricks*, 196 N. C. 439, 442, 146 S. E. 77; *Waddell v. United Cigar Stores*, 195 N. C. 434, 437, 142 S. E. 585; *Queen City Coach Co. v. Lee*, 218 N. C. 320, 11 S. E. (2d) 341; *McClamrock v. Colonial Ice Co.*, 217 N. C. 106, 6 S. E. (2d) 850; *White v. North Carolina R. Co.*, 216 N. C. 79, 3 S. E. (2d) 310.

§ 8-47. Present worth of annuities.—When-ever it is necessary to establish the present

worth or cash value of an annuity to a person, payable annually during his life, such present worth or cash value may be ascertained by the use of the following table in connection with the mor-tuary tables established by law, the first column representing the number of years the annuity is to run and the second column representing the present cash value of an annuity of one dollar for such number of years, respectively:

No. of Years Annuity is to Run	Cash Value of the An- nuity of \$1
1	\$0.943
2	1.833
3	2.673
4	3.465
5	4.212
6	4.917
7	5.582
8	6.209
9	6.801
10	7.360
11	7.886
12	8.383
13	8.852
14	9.295
15	9.712
16	10.106
17	10.477
18	10.827
19	11.158
20	11.469
21	11.764
22	12.042
23	12.304
24	12.550
25	12.783
26	13.003
27	13.211
28	13.406
29	13.591
30	13.765
31	13.929
32	14.084
33	14.230
34	14.368
35	14.498
36	14.621
37	14.737
38	14.846
39	14.949
40	15.046
41	15.135
42	15.219
43	15.299
44	15.374
45	15.445
46	15.514
47	15.579
48	15.641
49	15.699
50	15.754

The present cash value of the annuity for a fraction of a year may be ascertained as follows: multiply the difference between the cash value of the annuities for the preceding and succeed-ing full years by the fraction of the year in decimals and add the sum to the present cash

value for the preceding full year. When a person is entitled to the use of a sum of money for life, or for a given time, the interest thereon for one year, computed at four and one-half per cent, may be considered as an annuity and the present cash value be ascertained as herein provided: Provided, the interest rate in computing the present cash value of dower shall be six per cent. (Rev., s. 1627; 1905, c. 347; 1927, c. 215; C. S. 1791; 1943, c. 543.)

Editor's Note.—The words "computed at four and one-half per cent." after the word "year" and before the word "may" near the end of the section were placed herein by the Act of 1927, which provided that it "shall apply only to estates hereafter created." This act became effective March 9, 1927.

The 1943 amendment added the proviso at the end of the section.

Applicable Only to Annuities.—This section is intended to apply strictly to annuities, and therefore, in an action to recover damages for injuries causing death, it is error to permit the jury to consider the provisions thereof for the purpose of ascertaining the present value of the intestate's life. *Poe v. Railroad*, 141 N. C. 525, 526, 54 S. E. 406. See *Brown v. Lipe*, 210 N. C. 199, 185 S. E. 681.

Cited in *American Blower Co. v. Mackenzie*, 197 N. C. 152, 154, 147 S. E. 829.

Art. 6. Calendars.

§ 8-48. Clark's calendar; proof of dates.—In any controversy or inquiry in any court or before any fact finding board, commission, administrative agency or other body, where it becomes necessary or pertinent to determine any information which may be established by reference to a calendar for any year between the years one thousand seven hundred and fifty-three and two thousand and two, Anno Domini, inclusive, it is permissible to introduce in evidence "Clark's Calendar, A Calendar Covering 250 Years, 1753 A. D. to 2002 A. D.", as supplemented, copyrighted, 1940, by E. D. Clark, Entry: Class AA, Number three hundred and twenty-eight thousand five hundred and seventy-three, Copyright Office of the United States of America, Washington, or any reprint of said one thousand nine hundred and forty edition certified by the secretary of state to be an accurate copy thereof; and such calendar or reprint, when so introduced, shall be prima facie evidence that the information disclosed by said calendar or reprint thereof is true and correct. (1941, c. 312.)

Art. 7. Competency of Witnesses.

§ 8-49. Witness not excluded by interest or crime.—No person offered as a witness shall be excluded, by reason of incapacity from interest or crime, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit or proceeding, civil or criminal, in any court, or before any judge, justice, jury or other person having, by law, authority to hear, receive and examine evidence; and every person so offered shall be admitted to give evidence, notwithstanding such person may or shall have an interest in the matter in question, or in the event of the trial of the issue, or of the suit or other proceeding in which he is offered as a witness. This section shall not be construed to apply to attesting witnesses to wills. (Rev., ss. 1628, 1629; Code, ss. 589, 1350; C. C. P., c. 342; 1866, c. 43, ss. 1, 4; 1869-70, c. 177; 1871-2, c. 4; C. S. 1792.)

Cross References.—See also, §§ 8-50, 8-51, 8-54, 8-56, and notes thereto. As to general treatment of application of the rule herein contained, see § 8-51 and notes thereto.

Editor's Note.—This section abolishes the common law rule which prevented a party who was interested in the result of the verdict and judgment from appearing as a witness. A similar enactment will be found in the codes of practically all the states.

A great number of varying constructions have been given to this section, and the decisions of the cases falling hereunder are not altogether harmonious. However, it seems settled that its provisions must be considered in the light of those contained in sec. 8-51 which place certain restrictions on the general rule embodied in this section. In other words, the provisions of sec. 8-51 form exceptions to this section, and take them from the operation of its principle, leaving the parties falling within these exceptions to stand upon the same footing as they did prior to the enactment of this section. See *Charlotte Oil, etc., Co. v. Rippy*, 124 N. C. 643, 645, 32 S. E. 980.

The construction of this section should also be in connection with the provisions of secs. 8-50 and 8-56, since they all relate to the same subject—the competency of the witnesses. *Powell v. Strickland*, 163 N. C. 393, 397, 79 S. E. 872. This being true, a portion of the notes found under each section will necessarily have some bearing on and may prove helpful to the practitioner in construing one or more of the other sections. A few of the decided cases are placed under this section simply to show that the general rule contained in its provisions constitutes the foundation for the decisions under the following sections.

Legatee under Will as Witness.—Under this section removing the disqualification on account of interest, the widow of the testator, who was named as a legatee and devisee in a will, is a competent witness to prove the fact that the script propounded was found among the papers of the deceased. *Cornelius v. Brawley*, 109 N. C. 542, 548, 14 S. E. 78. Nor would the last provision of the section prevent the widow in this case from testifying, since this provision applies only to attesting witnesses to the execution of a will. *Id.*

Beneficiary under Holograph Will.—Under this and the following section, one who is a beneficiary under a holograph will may testify to such competent relevant and material facts as tend to establish it as a valid will without rendering void the benefits he is to receive thereunder. It is otherwise as to an attesting witness of a will that the statute requires to be attested by witness thereto. In *re Will of Westfeldt*, 188 N. C. 702, 125 S. E. 531.

Executor as Witness.—An executor, named in a will, is a competent witness to testify as to the existence, probate and registration of a will, he being rendered competent by this section, and he is not disqualified by sec. 8-51, as to transactions occurring after the death of the testator, as they can in no sense be considered as transactions between the witness and the testator. *Cox v. Beaufort County Lumber Co.*, 124 N. C. 78, 32 S. E. 381.

The widow of a deceased vendor, who was present at the sale of a mule by her husband to the plaintiff, is a competent witness under this section, and was not excluded under sec. 8-51, as she was not a party to the action and had no interest in the same. *Little v. Ratliff*, 126 N. C. 262, 35 S. E. 469.

Mortgagee.—Where he is not excluded under the provisions of sec. 8-51, the mortgagee in a chattel mortgage is competent, as a subscribing witness thereto, to prove its execution for admission to probate, inasmuch as this section removes the disqualification formerly attaching to witnesses having an interest. *Clark v. Hodge*, 116 N. C. 761, 21 S. E. 562.

Fornication and Adultery.—In a trial for fornication and adultery a former defendant as to whom a nolle prosequi has been entered is a competent witness against the other defendant. *State v. Phipps*, 76 N. C. 203.

Party Testifying in Own Behalf.—The provisions of this section make it permissible for a party to testify in his own behalf. *Autry v. Floyd*, 127 N. C. 186, 37 S. E. 208; *State v. McIntosh*, 64 N. C. 607.

Applied in *State v. Perry*, 210 N. C. 796, 188 S. E. 639, dissenting opinion.

§ 8-50. Parties competent as witnesses.—On the trial of any issue, or of any matter or question, or on any inquiry arising in any action, suit or other proceeding in court, or before any judge, justice, jury or other person having, by law, authority to hear and examine evidence, the parties themselves and the person in whose be-

half any suit or other proceeding may be brought or defended, shall, except as otherwise provided, be competent and compellable to give evidence, either viva voce or by deposition, according to the practice of the court, in behalf of either or any of the parties to said action, suit or other proceeding. Nothing in this section shall be construed to apply to any action or other proceeding in any court instituted in consequence of adultery, or to any action for criminal conversation. (Rev., s. 1630; Code, s. 1351; 1866, c. 43, ss. 2, 3; C. S. 1793.)

Cross Reference.—See also, §§ 8-49, 8-51, 8-54, 8-56 and notes thereto.

In General.—This, and secs. 8-49 and 8-51 should be construed together, and thus construed, they do not prohibit the evidence of the husband as to the conduct of his wife, where she is not a party, in his action against another for damages for criminal conversation with his wife and the alienation of her affections. *Powell v. Strickland*, 163 N. C. 393, 79 S. E. 872.

At common law, neither the husband nor the wife is allowed to prove the fact of access or non-access; and as such rule is founded "upon decency, morality and public policy," it is not changed by this section, allowing parties to testify in their own behalf. *Boykin v. Boykin*, 70 N. C. 262; *King v. Lourtoun*, 31 Eng. C. L. 312.

Testimony of an Accomplice.—An accomplice may not testify on direct examination to facts tending to incriminate defendant and at the same time refuse to answer questions on cross-examination relating to matters embraced in his examination-in-chief, and where he refuses to answer relevant questions on cross-examination on the ground that his answers might tend to incriminate him, it is error for the court to refuse defendant's motion that his testimony-in-chief be stricken from the record, the refusal to answer the questions on cross-examination rendering the testimony-in-chief incompetent. *State v. Perry*, 210 N. C. 796, 188 S. E. 639. See Const., Art. I, sec. 11.

Testifying against Co-Defendant.—A defendant in a criminal case is, under this section, competent and compellable to testify for or against a co-defendant, provided his testimony does not criminate himself. *State v. Medley*, 178 N. C. 710, 100 S. E. 591; *State v. Smith*, 86 N. C. 705. See *State v. Perry*, 210 N. C. 796, 188 S. E. 639, dissenting opinion.

Same—Practice Not Commendable.—The practice of sending co-defendants to the grand jury to testify against each other, while allowable, is not commended. *State v. Frizell*, 111 N. C. 722, 16 S. E. 409.

Instructions Not to Incriminate Himself.—In an indictment for an affray, it is not error for the presiding judge to caution the witness (a defendant) before the counsel for the other defendant cross-examines him, that he need not tell anything to incriminate himself. *State v. Weaver*, 93 N. C. 595, 600. See *State v. Perry*, 210 N. C. 796, 188 S. E. 639, dissenting opinion.

§ 8-51. A party to a transaction excluded, when the other party is dead.—Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same trans-

action or communication. (Rev., s. 1631; Code, s. 590; C. C. P., s. 343; C. S. 1795.)

I. General Consideration.

II. The Section Disqualifies Whom.

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B. Persons Interested in the Event of the Action.

1. General Consideration.

2. Applications.

C. Persons Deriving Title or Interest Through Two Preceding Classes.

III. When the Disqualification Exists.

IV. Subject Matter of the Transaction.

V. Exceptions.

VI. Pleading and Practice.

Cross Reference.

See also, §§ 8-49, 8-50, 8-54, 8-56 and notes thereto.

I. GENERAL CONSIDERATION.

Editor's Note.—Mr. Justice Clark in *Bunn v. Todd*, 107 N. C. 266, 11 S. E. 1043, gives the following analytical treatment to this section, which has been cited and approved in many of the cases coming within the principles of this section, and has proved to be a helpful guide-post for the courts in deciding as to the admissibility of the particular evidence involved in the case. It is submitted that if the practitioner, in passing upon the exclusion or non-exclusion of the evidence in the cases bearing upon this section, will carefully compare the point at issue with the clauses of the following out-line, then much time will have been saved, in addition to having the assurance that he more than likely will be correct in his conclusion since, as has been said, the substantive part of this resume has been accepted by the great majority (if not all) of the courts. See *Fidelity Bank v. Wysong, etc., Co.*, 177 N. C. 284, 98 S. E. 769; *Seals v. Seals*, 165 N. C. 409, 81 S. E. 613.

It disqualifies—

WHOM—1. Parties to the action.

2. Persons interested in the event of the action.

3. Persons through or under whom the persons in the first two classes derive their title or interest.

A witness, although belonging to one of these three classes, is incompetent only in the following cases:

WHEN—To testify in behalf of himself, or the person succeeding to his title or interest, against the representative or a deceased person, or committee of a lunatic, or any one deriving his title or interest through them.

And the disqualification of such person, and in even such cases, is restricted to the following:

SUBJECT-MATTER.—As to a personal transaction or communication between the witness and the person since deceased or a lunatic.

And even as to those persons and in those cases there are the following:

EXCEPTIONS.—When the representative of, or person claiming through or under, the deceased person or lunatic is examined in his own behalf, or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction. *Burnett v. Savage*, 92 N. C. 10; *Sumner v. Candler*, 92 N. C. 634.

The editor has deemed it expedient to use this excellent outline as the basis of his analysis of the section, and, wherever possible, has adhered to the same, making no departures but only continuing the treatment by breaking the lines into further ramifications of the same subjects in order to show the component parts thereof.

Purpose of Section.—The mischief the statute was passed to prevent was the giving of testimony by a witness interested in the event, as to a personal transaction or communication between the witness and the deceased person whose lips are sealed in death. *Abernathy v. Skidmore*, 190 N. C. 66, 128 S. E. 475, 476.

The purpose of this section is to exclude evidence of a personal transaction or communication between the witness and a person who by reason of death or lunacy cannot be heard. *White v. Mitchell*, 196 N. C. 89, 92, 144 S. E. 526.

This section applies to actions in tort as well as actions on contract. *Boyd v. Williams*, 207 N. C. 30, 175 S. E. 832.

Reasons for Exclusion.—The exclusion of such testimony rests not merely upon the ground that the dead man can not have a fair showing, but upon the broader and more practical ground that the other party to the action has no chance by the oath of the relevant witness to reply to the oath of the party to the action. In *re Will of Mann*, 192 N. C. 248, 134 S. E. 649.

Province of Court to Decide What Testimony May "Come In."—When a personal representative "opens the door" by testifying to a transaction, it is not in his province, but that of the court, to decide what testimony favorable to

the adverse party may "come in." *Mansfield v. Wade*, 208 N. C. 790, 796, 182 S. E. 475, citing *Herring v. Ipock*, 187 N. C. 459, 121 S. E. 758.

Instruction as to Use of Section Cannot Be Obtained by Declaratory Judgment.—In an action instituted under the Declaratory Judgment Act the court has no authority to instruct a litigant whether to take advantage of the provision of this section, upon the hearing of the cause upon its merits, since such instructions upon a question of procedure do not fall within the purview of the act. *Redmond v. Farthing*, 217 N. C. 678, 9 S. E. (2d) 405.

Testimony Not Within Section.—Where a widow is entitled during her widowhood to the profits on the land devised by her deceased husband, but not to his moneys commingled therewith in a deposit in a bank, and has died devising the total amount of the deposit: Held, testimony as to her receipt of the money from the crops is competent, not falling within the provisions of this section, and does not affect the title to other money owned by her husband at his death and given to her for life by his will. *White v. Mitchell*, 196 N. C. 89, 144 S. E. 526.

Same—Conversations with Living Persons.—Where the widow under the terms of the will of her husband may only dispose of the moneys in the bank to her credit, and not such as may at her death have passed to the remainderman under his will, it may be shown by disinterested witnesses as to what part passed under the widow's will, as not objectionable evidence under this section based upon conversations with other living parties interested under the husband's will. *White v. Mitchell*, 196 N. C. 89, 144 S. E. 526.

Record Evidence.—While testimony as to personal transactions with the deceased payee of a note would be incompetent to establish defenses to the note over the objection of the personal representative of the payee, record evidence tending to establish such defenses is not precluded by this section. *Flippin v. Lindsey*, 221 N. C. 30, 18 S. E. (2d) 824.

General Rule Applicable in Other States.—The decisions in other jurisdictions are equally emphatic in the rejection of such evidence, the statutes being the same as this one, relating to personal transactions or communications. See *Comstock v. Comstock*, 76 Minn. 396, where it is said: "A party to an action, or interested in the result thereof, can not give evidence as to conversations with a deceased person, even though the witness took no part in the conversation." See also, *Holland v. Holland*, 98 Appellate Div. (N. Y.) 366; *Matthews v. Hoagland*, 48 N. J. Eq. 455.—Ed. Note.

Rehearsal of Conversation Admissible.—Direct evidence of a conversation and understanding with the plaintiff's testator is, under this section, incompetent, but a rehearsal of that conversation is a part of the *res gestae*, and admissible. *Gilmer v. McNairy*, 69 N. C. 335.

Testimony of conversations with party to action wherein witness related statements of decedent is not in contravention of this section. *Allen v. Allen*, 213 N. C. 264, 195 S. E. 801.

Itemized and Verified Accounts.—Section 8-45 relating to itemized and verified accounts is subordinate to this section. See note of *Lloyd & Co. v. Poythress*, 185 N. C. 180, 184, 116 S. E. 584, placed under sec. 8-45.

The provisions of this section may be waived by the adverse party. *Andrews v. Smith*, 198 N. C. 34, 150 S. E. 670.

Where an administrator brings proceedings under the provisions of §§ 1-569 et seq., to examine a defendant to discover assets of the estate of the deceased, the administrator waives the provisions of this section and the testimony thus taken may be introduced by the defendant in his own behalf. *Andrews v. Smith*, 198 N. C. 34, 150 S. E. 670.

Applied in *State v. Perry*, 210 N. C. 796, 188 S. E. 639, dissenting opinion.

Cited in *Bynum v. Fidelity Bank*, 219 N. C. 109, 12 S. E. (2d) 898 (dissenting opinion).

II. THE SECTION DISQUALIFIES WHOM.

A. Parties to the Action.

Editor's Note.—The general rule is that a party is not competent to testify as to a transaction with persons since deceased; e converso, a person not a party nor interested in the event of the suit may testify as to such transaction or communication.

It will be noticed that this section excludes the testimony of "a party or person interested;" in regard to parties, however, interest is not a necessary prerequisite to the exclusion of the evidence and it was not the legislative purpose so to make it. It is immaterial whether a "party" is interested or not but a "person," of course because of the context of the section, must be interested. See *Cartwright v. Coppersmith*, 222 N. C. 573, 24 S. E. (2d) 246.

The following cases under this analysis line will demonstrate when persons are considered or are not considered parties within the meaning of this section.

A "next friend" is not a party to the suit. *Mason v. McCormick*, 75 N. C. 263. But his liability for costs renders him incompetent to testify to the transactions or conversations here under consideration. Id. See also *McLeary v. Norment*, 84 N. C. 235.

Testimony of Guardian.—Testimony of a guardian, suing an executor to establish a gift made by a testatrix to the guardian's ward, as to what occurred between the testatrix and executor, was admissible as against the objection that the guardian could not testify as to any communication or transaction between himself and testatrix. *Zollicoffer v. Zollicoffer*, 168 N. C. 326, 84 S. E. 349.

Testimony of Tenant.—In an action for goods sold and delivered to the intestate, a tenant of the intestate who was furnished with goods from the plaintiff's store, and who settled with the intestate, is competent to testify in the plaintiff's behalf as to the intestate's delivery to him of the merchandise because the witness is not a party to the action. *Sorrell v. McGhee*, 178 N. C. 279, 100 S. E. 434.

Probate of Will.—In a proceeding for the probate of a will, both propounders and caveators are parties within the meaning and spirit of this section. In re *Will of Brown*, 194 N. C. 583, 595, 140 S. E. 192.

Under this section the beneficiary under a will may not testify to transactions and communications with the deceased, but he may in proceedings of *devisavit vel non* give his opinion, based on his own observations, as to the mental incapacity of the deceased at the time of the execution of the writing propounded, and then testify to personal transactions he has had with him as being a part of the basis of his opinion, when evidence of this character is properly so confined upon the trial by instructions or otherwise, the weight and credibility being for the jury to determine. In re *Will of Brown*, 194 N. C. 583, 140 S. E. 192.

A defendant executor can not testify concerning a land transaction between himself and the intestate, in a suit brought by creditors of the estate to subject the land alleged to have been fraudulently conveyed to the defendant by the intestate. *Grier v. Cagle*, 87 N. C. 377; *State v. Morris*, 69 N. C. 444.

A member of the board of county commissioners is not a competent witness as to transactions with the defendant's intestate in a suit by the board. *Commissioners v. Lash*, 89 N. C. 159.

A principal debtor, who was a party to an action to foreclose a mortgage given by his sureties as security for the loan, was an incompetent witness to a contract with the deceased creditor. *Benedict v. Jones*, 129 N. C. 475, 40 S. E. 223.

Party Acting in Corporate Capacity.—One who is a party to a suit, though in his corporate capacity, is not competent to testify as to a transaction with a person deceased. *Commissioners v. Lash*, 89 N. C. 159, 164.

In an action to recover for services rendered deceased, testimony by the plaintiff that plaintiff boarded deceased is incompetent under the provisions of this section. *Price v. Pyatt*, 203 N. C. 799, 167 S. E. 69.

Time and Place of Signing Receipt.—The defendant in an action for money demanded is disqualified by this section, to testify as to the time and place of signing a receipt by the plaintiff's intestate, in support of his plea of satisfaction. *Sumner v. Candler*, 86 N. C. 71.

B. Persons Interested in the Event of the Action.

1. General Consideration.

The Rule Stated.—To be incompetent under this section a witness must be either a party to the action or interested in the event thereof. Having discussed the question of "parties" under the preceding analysis line, it next becomes pertinent to examine the subject of "interest" of witnesses and other persons not parties.

To determine when such interest exists so as to render the person incompetent, the following rule should be applied: The true test of the competency of a witness is whether he bears such a relation to the controversy that the verdict and judgment in the case may be used against him as a party in another action if not he is not disqualified. *Jones v. Emory*, 115 N. C. 158, 20 S. E. 206; *Henderson v. McLain*, 146 N. C. 329, 59 S. E. 873.

Nature of Interest Involved.—This section does not disqualify every witness who, in the broadest sense of the term, is interested in the event of the action, but only such as have a direct and substantial or a direct legal or pecuniary interest in the result. *Jones v. Emory*, 115 N.

C. 158, 163, 20 S. E. 206; *Helsabeck v. Doub*, 167 N. C. 205, 83 S. E. 241; *In re Gorham*, 177 N. C. 271, 98 S. E. 717; *Allen v. Allen*, 213 N. C. 264, 195 S. E. 801.

It follows that a mere sentimental interest will not suffice. *Sutton v. Walters*, 118 N. C. 496, 24 S. E. 357. And it has been held that relationship of the parties alone does not constitute the direct, legal, pecuniary interest required. See *Bennett v. Best*, 142 N. C. 168, 55 S. E. 84; *Sutton v. Walters*, 118 N. C. 495, 24 S. E. 357; *Porter v. White*, 128 N. C. 42, 38 S. E. 24; *Walston v. Lowry*, 212 N. C. 23, 192 S. E. 877.

Present Interest.—In *Isler v. Dewey*, 67 N. C. 93, 96, the court intimates that the interest necessary to disqualify is a present interest; that is, one retained by the party at the time of examination. In reaching this conclusion it was said: "Any other construction would make a statute, professedly for the removal of the incompetency of witnesses, the means of introducing new incompetencies unknown to the common law and opposed to its principles."

In *Bunn v. Todd*, 107 N. C. 266, 268, 11 S. E. 1043, it is said: "Originally this section disqualified a fourth class of persons, i. e. those who have had an interest in the subject matter of the suit, but whose interest has since ceased. This disqualification did not exist at common law, and was struck out of this section of the Code of 1883, except in the cases in which such persons still came under the third class of disqualified persons above [see the Editor's Note and analysis line I of this note] stated."

Witness Must Be Party in Interest.—The testimony of a witness, in an action against the administrator of his deceased brother-in-law to recover certain sums obtained by the deceased on two vouchers made to a fictitious firm and embezzled by him, that he collected the vouchers for the deceased through his bank and sent the proceeds to the deceased, is not incompetent as falling within the provisions of this section, the witness not being a party in interest and having no direct, legal or pecuniary interest in the event of the action. *Ft. Worth, etc., R. Co. v. Hegwood*, 198 N. C. 309, 151 S. E. 641.

In an action against the administrator of a deceased person to recover for breach of the deceased's contract to devise, testimony of witnesses not interested in the event as to declarations made by the deceased against his interest was properly admitted. *Hager v. Whitener*, 204 N. C. 747, 169 S. E. 645.

Not Confined to Parties to Action.—The provisions of this section are not confined to the parties to the action, but extend to testimony of a witness interested in the result of the action. *Honeycutt v. Burleson*, 198 N. C. 37, 150 S. E. 634.

2. Applications.

No Interest in Recovery—Interest in Subject Matter.—In an action against an insane person for damages for breach of warranty in a deed, a witness who is not interested in the recovery is not disqualified by this section, though he may have an interest in the land. *Lemly v. Ellis*, 143 N. C. 200, 55 S. E. 629.

Where some of the witnesses in an action in ejectment are not interested in the event, their testimony does not fall within the intent and meaning of this section and the exclusion of their testimony tending to show the tenancy of a decedent under whom one defendant claims as adverse possessor, is reversible error entitling the plaintiff to a new trial. *Pitman v. Hunt*, 197 N. C. 574, 150 S. E. 13.

Neither Husband nor Wife Is an Interested Party.—Where husband and wife instituted separate suits to recover, each respectively, for personal services rendered by them to defendant's testate, it was held that each was competent to testify for the other, since neither had a direct pecuniary interest in the action of the other, and was not therefore an interested party in the other's action within the meaning of this section, the testimony not being as to a transaction between the witness and the deceased, but between a third party and deceased. *Burton v. Styers*, 210 N. C. 230, 186 S. E. 248.

It has been consistently held by this court that the prohibition against the testimony of a "person interested in the event" extends only to those having a "direct legal or pecuniary interest," and not to the sentimental interest the husband or wife would naturally have in the lawsuit of the other. *Burton v. Styers*, 210 N. C. 230, 231, 186 S. E. 248, citing *Hall v. Holloman*, 136 N. C. 34, 48 S. E. 515; *Helsabeck v. Doub*, 167 N. C. 205, 83 S. E. 241, *L. R. A.* 1917A, 1; *Vannoy v. Stafford*, 209 N. C. 748, 184 S. E. 482. See § 8-56 and note.

Where the blind husband of a grantee, in a deed reserving a life estate in the grantor, was present and heard the grantor acknowledge its execution and delivery, he was a competent witness to prove such execution and delivery, his

wife having died prior to the grantor and the title therefore being vested in her son, in that his evidence disclosed no personal transaction or communication and he was not a party in interest within this section. *Turlington v. Neighbors*, 222 N. C. 694, 24 S. E. (2d) 648.

The Same Being True of Attorney Formerly Holding Note for Collection.—An attorney formerly holding a note for collection is not an interested party in an action on the note within the meaning of this section, prohibiting testimony by interested parties as to transactions with or declarations of a decedent. *Vannoy v. Stafford*, 209 N. C. 748, 184 S. E. 482.

And of Draftsman Who Failed to Insert Reversionary Clause in Deed.—In an action for reformation of a deed to a county board of education for mistake of the draftsman in failing to insert a reversionary clause therein in accordance with the agreement between the grantors and grantee, testimony of the draftsman relating to declarations of a deceased member of the board and of the superintendent of schools, tending to show that it was agreed that the reversionary clause should be inserted, was held not precluded by this section, the draftsman not being a party interested in the event as contemplated by the statute. *Ollis v. Board of Education*, 210 N. C. 489, 187 S. E. 772.

Interest of Wife in Compensation Due Husband.—In an action against an administrator to recover the value of services the plaintiff alleges he has rendered the deceased, the wife of the plaintiff has no interest in the event which would bar her testimony as to a transaction with the deceased, and it is competent for her to testify to the contract relied upon by her husband the plaintiff. *Helsabeck v. Doub*, 167 N. C. 205, 83 S. E. 241. See *Price v. Askins*, 212 N. C. 583, 194 S. E. 284.

In *Linebarger v. Linebarger*, 143 N. C. 229, 55 S. E. 709, the court had held that on an issue of *devisavit vel non* it was not competent to prove by a witness whose husband was one of the caveators and heirs at law of the testator, declarations of said testator offered for the purpose of showing undue influence, as such witness had an interest in the real estate, dependent upon the result of the action. This and the foregoing case are distinguishable, however, upon the ground that in the *Linebarger* case the property in controversy was land, and the wife's inchoate dower attached immediately upon the recovery by her husband.—*Ed. Note.*

The interest which a married woman has in the real property of her husband before and during coverture comes within the intent and meaning of this section, and will exclude testimony by her of a communication or transaction between her husband and a deceased person as to a contract made between them whereby a mortgage on the lands of her husband executed prior to his marriage was to be canceled by the deceased. *Honeycutt v. Burleson*, 198 N. C. 37, 150 S. E. 634.

A husband has no vested interest in the real estate of his wife, and it would seem that he is not a "person interested in the event" within the contemplation of this section in an action involving his wife's title to realty. *Allen v. Allen*, 213 N. C. 264, 195 S. E. 801.

Widower Has No Interest in Division of Wife's Lands among Children.—When a husband and wife, each owning certain lands, enter into an agreement to pool their lands for division among their children, and the wife dies intestate before her lands are deeded in accordance with the agreement the husband has a life estate in her lands as tenant by the curtesy regardless of the disposition of the lands among the children, and therefore has no direct pecuniary interest in an action by the children to whom deeds were not executed to declare the heirs of another child estopped to assert an interest in the lands of their mother, and his testimony of the agreement with his wife is not precluded by this section. *Coward v. Coward*, 216 N. C. 506, 5 S. E. (2d) 537.

The mother, in her illegitimate child's action against the estate of the deceased father on a contract made by him for the child's support, is not a party interested in the event of the action whose evidence on the trial is excluded under the provisions of this section. *Conley v. Cabe*, 198 N. C. 298, 299, 151 S. E. 645.

Husband as Interested Party in Deed Drawn by Wife.—The husband is an interested witness in the event of the action, though not a party, when a trust deed made by his deceased wife is being attacked for the want of his joining therein; and upon the question of abandonment, his evidence, to the effect that his wife said to him she would give him a horse if he would leave, was incompetent. *Whitty v. Barham*, 147 N. C. 479, 61 S. E. 372. The testimony of the daughter that she heard the conversation to that effect would be the "indirect testimony of an interested witness as to a transaction or communication with deceased," and also incompetent. *Id.*

Husband as Interested Party in Check Given Wife.—When a check made payable to one of the intestate's daughters and signed by the intestate was introduced in evidence to show an advancement, the daughter's husband was held competent under this section to testify over objection that the check was given his wife as a wedding present, he having no interest in the event of the action. Likewise another daughter was permitted to testify for her sister, the transaction testified to not being between the witness and deceased, but between the witness's sister and deceased father. *Vannoy v. Green*, 206 N. C. 80, 173 S. E. 275.

Interest of Depositor's Son in Action to Recover Moneys Deposited.—In an action by the administrator of a deceased person against a bank to recover moneys deposited by the intestate, resisted on the ground that the deceased had authorized the bank to pay the money upon his son's checks, the latter being present at the time, the son was interested in the event since he would be liable to the plaintiff if he was not authorized to draw the checks and possibly to the defendant, and his testimony was incompetent under this section, and the fact that a third person was present at the time of the transaction and testified at the trial does not affect this result. *Donoho v. Wachovia Bank & Trust Co.*, 198 N. C. 765, 153 S. E. 451.

Sheriff as Witness.—A deputy collected a sum of money on account of taxes and deposited the same with G. with instructions to pay it over to the sheriff, which was not done, and the deputy was afterwards required to pay the sheriff the sum so collected; it was held, in an action to recover the amount, brought by the deputy against the administrator of G., that the sheriff had no interest in the event of the action, and was a competent witness under this section. *Allen v. Gilkey*, 86 N. C. 65.

A partner in intestate's firm may not testify as to transactions or communications with intestate in an action by brokers against the estate on a claim for commissions and advancements. *Fenner v. Tucker*, 213 N. C. 419, 196 S. E. 357.

Testimony as to Partnership Transaction by Nonmember of Firm.—Where the defendant's liability depends upon whether he was a member of the defendant partnership at the time the firm contracted a debt, which is the subject of the action, with the plaintiff who has since died and whose administrator has been made a party to the action, a witness who was not a member of the firm is not such person interested in the result as would exclude his direct testimony, under the provisions of this section as to the payment to his own knowledge by the deceased of the partnership debts. *Herring v. Ipock*, 187 N. C. 459, 121 S. E. 758.

Stockholder's Interest in Recovery on Contract of Sale.—Where defendant's intestate made two separate contracts with the holders of stock in a corporation to purchase their respective holdings, in an action by one of the stockholders to recover on the contract of sale the other testified that he had no claim against the estate on his contract. It was held the witness was not interested in the event, and his testimony as to transaction between decedent and plaintiff as to the contract of sale of plaintiff's stock was competent under this section. *Winborne v. McMahan*, 206 N. C. 30, 31, 173 S. E. 278.

In caveat proceedings propounders and caveators are "parties interested in the event" within the meaning of this section. In *re Brown*, 203 N. C. 347, 166 S. E. 72.

The interest of one who temporarily held the title to the lands in dispute prior to the defendant is a sufficient interest in the event to disqualify his testimony as to a conversation or transaction with the plaintiff's deceased predecessor in title. *Dill-Cramer-Truitt Corp. v. Downs*, 201 N. C. 478, 160 S. E. 492.

In this case, testimony of an endorser of a note, as to conversations with the payee's agent, now dead, showing the consideration which induced the endorsement, is not excluded under this section, the agent not being a party interested in the event within the meaning of the statute for, although the agent guaranteed all notes to the payee, if there was a failure of consideration the payee could hold neither of the guarantors and had the endorser been liable he could not have recovered from the agent. *American Agr. Chemical Co. v. Griffin*, 204 N. C. 559, 169 S. E. 152.

Effect of Insolvency of Deceased.—In an action involving the validity of a deed of trust, where the trustor is dead and his estate insolvent, the son of the trustor is a competent witness as to his declarations concerning the trust; the disqualification of the son under this section is removed by the insolvency of his father's estate, for there is nothing for the children in any event of the action. *Gidney v. Logan*, 79 N. C. 214.

Holder of Insurance Policy.—A policy holder in a mutual

life insurance company is not disqualified as "interested in the event of the action" to testify for the company suing to cancel another policy. *Mutual Life Ins. Co. v. Leaks-ville Woolen Mills*, 172 N. C. 534, 90 S. E. 574. See also *Gwaltney v. Provident Sav. Life Assur. Soc.*, 132 N. C. 925, 44 S. E. 659; *Gwaltney v. Provident Sav. Life Assur. Soc.*, 134 N. C. 552, 47 S. E. 122.

Agreement to Bequeath Property in Consideration of Services.—Where the plaintiff, in her own right and as administratrix of her mother, seeks to recover upon an alleged contract made by her mother and another person now deceased, under which her mother performed services to such other person under his agreement that he would devise and bequeath to her all of his property, it is incompetent for the plaintiff to testify to communications or transactions between her mother and such other person tending to establish her demand, for she is a party interested, within the contemplation of the statute. *Brown v. Adams*, 174 N. C. 490, 93 S. E. 989.

Agreement as to Disputed Boundary.—Testimony of a party interested in the result of the action that the deceased predecessor of the common source of title of the parties had agreed as to the boundary of the lands in dispute preliminary to making the deeds, that the deceased had the lands surveyed and that the witness saw the deceased mark the boundary claimed by him as controlling the description given in the deeds later made, is that of a transaction or communication prohibited by this section. *Poole v. Russell*, 197 N. C. 246, 148 S. E. 242.

C. Persons Deriving Title or Interest Through Two Preceding Classes.

In General.—The words of this section "derives its interest or title by assignment or otherwise" mean—gets from a source—some person, through or under one or more persons, successively, directly or indirectly, immediately or mediately, "his interest or title," any valuable interest in part or share of something real or personal, of whatever nature, whether legal or equitable, acquired by assignment, or by any other means, or in any other manner. *Carey v. Carey*, 104 N. C. 171, 10 S. E. 156.

It should be noted, however, that interest must be present and not speculative. So it has been held that a husband is not disqualified by interest from testifying in his wife's behalf in her action to recover for services rendered a deceased person, the possibilities of his being benefited by her will or in case of her intestacy being too remote. *McCurry v. Purgason*, 170 N. C. 463, 87 S. E. 244.

When deceased has had no interest in lands, but was simply an assignee, evidence of his declarations is admissible as no claim of title is made under him. *Condor v. Secret*, 149 N. C. 201, 62 S. E. 921.

Attorney.—The fact that an attorney has had an interest in the event of a suit on account of the fee taxed does not disqualify him under this section. *Syme v. Broughton*, 85 N. C. 367. Nor is an attorney of one of the parties precluded from testifying for his client concerning the agreement. *Propst v. Fisher*, 104 N. C. 214, 10 S. E. 295, cited in note in 49 L. R. A. 426.

Testimony of Grantee of Deceased Debtor.—In an action in the nature of a creditor's bill, evidence of the brother of the immediate grantee of the deceased debtor was held incompetent as in favor of their sister, claiming title under the witness, the validity of which title was affected by the testimony. *Sutton v. Wells*, 175 N. C. 1, 94 S. E. 688.

Suits by Plaintiff against Surety.—See post, this note, "When the Disqualification Exists," III.

Trustee.—In an action by trustors against a trustee to compel an accounting for the proceeds of a foreclosure sale the incompetency of the trustor to testify as to transactions between himself and the deceased cestui que trust must be predicated upon the assumption that trustee under the deed of trust derived his "title or interest from, through or under" the cestui, and furthermore that it is this interest which is attacked. *Garrett v. Stadiem*, 220 N. C. 654, 659, 18 S. E. (2d) 178.

III. WHEN THE DISQUALIFICATION EXISTS.

Editor's Note.—Continuing the treatment as based upon Mr. Justice Clark's resume of this section, it is proper at this place to consider the circumstances which render incompetent the testimony of the witness who comes within one or more of the three classes of persons who are disqualified by the provision of this section. It will be seen from the outline given under the analysis line "General Consideration," that the testimony of such witness is excluded in two cases, (1) when he testifies in behalf of himself, or the person succeeding to his title or interest, and (2) when the testimony is against the representative of a deceased person, or any one deriving his title or interest

through him. The following cases will illustrate the principles upon which the exclusion of the testimony falling within one or both of these two subdivisions is founded. They appear in the order as stated in the outline.

Party Testifying against Interest.—Under this section a witness may testify against his own interest, even if thereby other parties to the suit are injuriously affected and the disqualification applies only when a witness testifies in his own behalf. In *re Worth's Will*, 129 N. C. 223, 39 S. E. 956.

In proceedings to caveat a will, an heir at law who would receive more as a beneficiary under the will if it is not set aside may testify to declarations made by the testator after its execution which are competent to show that it was obtained by fraud and undue influence; and such testimony, being against the interests of the witness, is not prohibited by this section. In *re will of Fowler*, 159 N. C. 203, 74 S. E. 117; In *re Worth's Will*, 129 N. C. 223, 39 S. E. 956.

In an action to declare a deed void on the ground that it was never delivered to the grantee, since deceased, testimony offered by the grantor tending to show that the deed had not been delivered is not incompetent under this section. *Gulley v. Smith*, 203 N. C. 274, 165 S. E. 710.

Contradicting Former Witness.—A defendant having an interest in the event of an action is not permitted under this section to testify in his own behalf, for the purpose of contradicting a former witness whose testimony tended to show that the defendant fraudulently procured an assignment from a person deceased. *Bushee v. Surles*, 77 N. C. 62.

Testifying in Favor of Representative.—Where a witness was not asked to testify against the representative or assignee of a dead person as to any transaction or communication between himself and the person deceased, but in favor of such a representative, the testimony being offered by the party to the suit who represented the dead person, it was held that such testimony does not fall within the inhibition of this section, which is intended to protect the deceased person's representative or assignee, who is suing or being sued. *Bonner v. Stotesbury*, 139 N. C. 3, 51 S. E. 781.

Representative Not a Party.—It is competent for a plaintiff, as a witness for himself, to testify where the representative of the deceased was not a party to the suit. *Thomas v. Kelly*, 74 N. C. 174.

Trustor as Witness.—Where a deed of trust was attacked for fraud, the trustee having died, and the property having been conveyed by a substituted trustee to the defendants, the trustor is not excluded by this section from being a witness for the plaintiff, who also claimed title through him. *Isler v. Dewey*, 67 N. C. 93.

Suits against Sureties.—Where the plaintiff sues the surety, and proposes to testify as to transactions between himself and the deceased principal of the surety, an interesting question arises which has been answered by the courts of North Carolina in a masterful manner. Is this testimony to be excluded and if so upon what grounds? In order to render the witness incompetent, the testimony must be against "the executor, administrator or survivor of a deceased person or a person deriving his title or interest from" such deceased person. From a cursory view of this problem it would seem that the testimony is not against the principal or his executor, administrator, etc., but when the rule of law, which gives the surety an action over against the representative of the principal, is recalled this view must be abandoned. It would seem that where the testimony affects the estate either directly or indirectly (i. e. giving rise to a right of subrogation against it) such testimony must be excluded.

In *McGowan v. Davenport*, 134 N. C. 526, 47 S. E. 27, Mr. Justice Walker in an illuminating opinion discussing this subject, says: "The rule to be deduced from these authorities is that the surety, who comes not within the letter but within the intentment of the law, stands in the same position and is entitled to the same protection under section 590 of the Code as the representative on his deceased principal when sued."

Conversation before Death of One of Contracting Parties Admissible.—A witness is not incompetent, under this section, to testify to a conversation had with two persons, one of whom is dead at the time of the trial, in reference to a contract made between them and the witness. *Peacock v. Stott*, 90 N. C. 518.

Partnership.—The death of one of the partners in a firm will not incapacitate the witness from proving a transaction with the firm while the other partner, who was present at the interview, is living. *Peacock v. Stott*, 90 N. C. 518.

Where the conversation is not strictly with the intestate, but is one held with him and two others who were associated with him in the transaction, then the provisions of this section do not incapacitate the party from testifying. *Johnson v. Townsend*, 117 N. C. 338, 340, 23 S. E. 271.

Testimony of Third Parties Present.—This section makes no exception where other parties are present but leaves these witnesses to be called by either, and their testimony to come before the jury and be considered by itself, its credit unaffected by the testimony of the interested party. *MacRae v. Molley*, 90 N. C. 521, 524.

The administrator of a deceased guardian is a competent witness to prove the execution to said guardian by a debtor of a bond for the payment of money, such testimony not being against the representatives of a deceased person. *Thompson v. Humphrey*, 83 N. C. 416.

IV. SUBJECT MATTER OF THE TRANSACTION.

Not Applicable unless Transaction Is Personal.—Under this section the parties in interest are disqualified from testifying only as to personal transactions with the deceased. For instance, such party could testify that a paper writing was in the handwriting of the deceased, as will be seen from the catchline "Proof of Handwriting" following in this note, or as to any independent fact which was neither a transaction nor communication with the testator. *McCall v. Wilson*, 101 N. C. 598, 600, 8 S. E. 225; *Cox v. Beaufort County Lumber Co.*, 124 N. C. 78, 32 S. E. 381; *Davidson v. Bardin*, 139 N. C. 1, 51 S. E. 779.

This section does not preclude a witness from testifying to independent facts and circumstances within her observation and knowledge or from giving evidence of what she saw or heard take place between the deceased and another or others, not involving personal transactions between herself and the deceased. *Collins v. Lamb*, 215 N. C. 719, 2 S. E. (2d) 863.

Testimony of an interested witness as to independent facts and circumstances, within his own knowledge, or as to what he saw or heard take place between deceased and a third party, is not rendered incompetent by this section, since in such instances the testimony does not relate to a personal transaction or communication between the witness and deceased, and appellant's exceptions to the admission of such testimony are not sustained. *Wilder v. Medlin*, 215 N. C. 542, 2 S. E. (2d) 549.

Test as to When Transaction Is "Personal."—A fair test in undertaking to ascertain what is a "personal transaction or communication" with the deceased is to inquire whether, in case the witness testifies falsely, the deceased, if living, could contradict it of his own knowledge. *Sherrill v. Wilhelm*, 182 N. C. 673, 675, 110 S. E. 95.

Driving of Car Is "Transaction" within Meaning of Statute.—Where the only evidence of negligence in an action by the wife of the driver to recover for injuries sustained in an automobile accident was her testimony that he was traveling at an excessive speed upon a curve, and that the accident occurred when the car failed to make the curve, and that she had spoken to him in regard to the speed he was driving the car, the driving of the car was a transaction within the meaning of the term as used in this section and her testimony of his manner of driving and her statement to him regarding the speed was incompetent under this section, her testimony of the transaction and communication being an essential or material link in the chain establishing liability of the estate to her. *Boyd v. Williams*, 207 N. C. 30, 175 S. E. 832.

In an action against an administrator to recover for personal injuries, plaintiff's testimony that he was unable to drive a car and that at the time of the accident he and one other person were in the car, when taken in connection with other evidence tending to show that intestate was such other person and customarily drove the car, was within the prohibition of this section, as being of a transaction with a deceased person material in establishing liability on the part of the estate. *Davis v. Pearson*, 220 N. C. 163, 16 S. E. (2d) 655.

Transaction Must Be Exclusive Source of Knowledge.—In order to exclude testimony under this provision, it must be made to appear that the knowledge of the witness was derived from a personal transaction with the deceased person. *Thompson v. Onley*, 96 N. C. 9, 1 S. E. 620. And it is proper to show whether the witness had knowledge of the fact testified to, from sources extraneous to his personal communications or relations with the deceased. *Charlotte Oil, etc., Co. v. Rippey*, 123 N. C. 626, 31 S. E. 879.

Facts Occurring Out of Presence of Deceased.—A witness who offered to prove a fact which occurred out of the presence of, and which was in no sense a transaction with, a deceased person is not incompetent under this section. It is only when the transaction is between the deceased and the living party that the statute prohibits the latter from testifying. *Lockhart v. Bell*, 86 N. C. 443.

Substantive Facts.—In an action in the nature of a creditor's bill, testimony of the deceased debtor's grantee that the deceased grantor occupied the building part of the time after she got her deed to the land in litigation was held ad-

missible as being to a substantive fact of which she had knowledge independently of any statement by the deceased. *Sutton v. Wells*, 175 N. C. 1, 94 S. E. 688.

The rule may be deduced, therefore, that a party in interest may testify to any substantive fact which is independent of any transaction or communication with the deceased or is based upon independent knowledge not derived from such source. *Sutton v. Wells*, 175 N. C. 1, 94 S. E. 688. See also *In re Will of Saunders*, 177 N. C. 156, 98 S. E. 378; *Price Real Estate, etc., Co. v. Jones, etc.*, 191 N. C. 176, 131 S. E. 587.

Conversation of Deceased with Living Defendant.—This section does not apply to the testimony of an interested witness as to a conversation between her deceased father and a living defendant. This is not testimony "concerning a personal transaction." *Abernathy v. Skidmore*, 190 N. C. 66, 128 S. E. 475.

Testimony Given in Former Trial.—It is competent for the plaintiff's witness to testify what the deceased maker of the note sued upon testified on a former trial as to its payment, such not being a personal transaction within the meaning of the provisions of this section. *Worth v. Wrenn*, 144 N. C. 656, 657, 57 S. E. 388; *Costen v. McDowell*, 107 N. C. 546, 12 S. E. 432.

Proof of Handwriting.—A party interested in the event of a suit is not an incompetent witness, under this section, to prove the handwriting of the deceased person. *Rush v. Steed*, 91 N. C. 226; *Hussey v. Kirkman*, 95 N. C. 63, 65; *Armfield v. Colvert*, 103 N. C. 147, 9 S. E. 461; *Sawyer v. Grady*, 113 N. C. 42, 18 S. E. 79; *Lister v. Lister*, 222 N. C. 555, 24 S. E. (2d) 342.

These decisions are based on the distinction which is drawn between proving the handwriting and proving the actual signing of the paper, the latter being held to be a transaction within the meaning of this section while the former is not. A similar distinction was drawn in the case of *State v. Maxwell*, 64 N. C. 313, the case having been decided prior to the insertion of the word "personal" before the word "transaction." In the *Rush Case* the court regards this amendment as the legislative recognition of the soundness of this distinction and says that it (the amendment) was "probably induced by the decision in *State v. Maxwell*."—*Ed. Note.*

Will Cases.—In *Cox v. Beaufort County Lumber Co.*, 124 N. C. 78, 82, 32 S. E. 381, it is held that this section does not apply to wills, but that they are governed by sections 31-9 and 31-10; this was placed on the ground that this section applies where there is necessarily a contract or agreement between the parties, and in the case of a will there is ordinarily no transactions between the parties.

By the same reasoning it is held that attesting a will is not a "personal transaction," the witness being of the law and not of the party. *Vester v. Collins*, 101 N. C. 114, 7 S. E. 687. Again, a beneficiary may testify as to the leaving of a holograph will with her for safe keeping. *McEvan v. Brown*, 176 N. C. 249, 97 S. E. 20. Or to the fact that when a will was opened it contained certain erasures and that they were not made by him. In *re Will of Saunders*, 177 N. C. 156, 98 S. E. 378.

Circumstances may arise, however, in which the person interested as a beneficiary may attempt to testify as to personal transactions or conversations with the deceased and this testimony would, of course, be excluded. But the rule of exclusion does not apply, as may be inferred from the preceding cases, as to facts of which the witness had knowledge by means other than by personal transactions with the deceased. So the rule does exclude the witness from testifying as to the identity of certain papers as being those which he had previously seen in the testator's presence; nor to the fact that it was the same "will," when only for the purpose and effect of the identification of the sheets in question. In *re Will of Mann*, 192 N. C. 248, 134 S. E. 649.

Under this section a party interested in the result of the action is incompetent to testify to declaration of the deceased, whose will is under attack, when the issue is as to undue influence. In *re Will of Platt*, 211 N. C. 451, 190 S. E. 717.

Mental Capacity of Deceased Formed from Conversation.—Where a witness testifies to the want of mental capacity in a grantor to take a deed, and that his opinion was formed from conversation and communication between the witness and grantor, it was held competent to prove the facts upon which such opinion was founded, the provisions of this section not applying as the subject was not a "transaction" within its meaning. *McLeary v. Norment*, 84 N. C. 235; *Rakestraw v. Pratt*, 160 N. C. 436, 76 S. E. 259.

Services of Physician.—Testimony by a physician, the plaintiff, that he attended the deceased as such, for which he had an account against him, of the number of visits, sum due therefor, etc., is incompetent as being "personal" transactions with the deceased, prohibited by this section. *Knight*

v. Everett, 152 N. C. 118, 67 S. E. 328; *Dunn v. Currie*, 141 N. C. 123, 53 S. E. 533.

Sale of Property by Guardian.—It is competent for the plaintiff to prove the sale of his property by his guardian as this is not a personal transaction within the meaning of this section. *State v. Osborne*, 67 N. C. 259.

Testimony as to Placement of Deed.—This section does not exclude testimony that the witness saw the decedent place the deed, under which the witness claims, in a trunk as it does not involve a communication or transaction with him. *Carroll v. Smith*, 163 N. C. 204, 79 S. E. 497; *Cornelius v. Brawley*, 109 N. C. 542, 548, 14 S. E. 78.

In a proceeding for dower, the decision of the question whether the plaintiff left her husband's home of her own volition or by reason of what the law will recognize as compulsion, is an inquiry that does not necessarily involve a transaction or communication with her husband which disqualifies her under this section. *Hicks v. Hicks*, 142 N. C. 231, 55 S. E. 106.

Claim That Intestate Was Holder in Due Course.—Where the administrator of the deceased claims that his intestate was a holder of a negotiable instrument in due course for value, and relies upon his intestate's possession to make out a prima facie case, it is not a personal transaction or communication with the deceased, prohibited by statute, for it may be shown in rebuttal that after maturity it was seen in the possession of another claimant of the title. *Price Real Estate, etc., Co. v. Jones*, 191 N. C. 176, 131 S. E. 587.

Evidence of the declarations of a deceased partner tending to show that the deceased partner made an agreement with plaintiff that check given for a disputed account and marked thereon "balance on account" was not to be taken as full settlement is incompetent as a transaction or communication with a deceased person prohibited by this section. *Walston v. Coppersmith*, 197 N. C. 407, 149 S. E. 381.

Sale of Interest in Partnership.—This section does not apply to a transaction between living persons by which one of them sold to the other his interest in a firm of which the decedent was the other partner. *Brantley v. Marshbourn*, 166 N. C. 527, 82 S. E. 959.

Bailment.—The burden is on plaintiff to show the contract of bailment sued on, whether express or implied, by competent evidence, and the fact that the alleged bailee is dead, rendering incompetent testimony as to any transaction or communication with him to establish the bailment, is not a circumstance to be considered in passing upon the sufficiency of the evidence actually presented. *Troxler v. Beville*, 215 N. C. 640, 3 S. E. (2d) 8.

Settlement of Estate.—Testimony relating to an agreement between administrator and distributee in regard to the settlement of an estate was incompetent in an action by distributee's administrator to recover assets. *Wilder v. Medlin*, 215 N. C. 542, 2 S. E. (2d) 549.

Possession of stock, see *Jones v. Walldroup*, 217 N. C. 178, 7 S. E. (2d) 366.

V. EXCEPTIONS.

Similar Evidence Previously Introduced.—This section does not apply where evidence, similar to that which is being introduced, has previously been introduced and the door has been opened to the objecting party. *Davidson v. West Oxford Land Co.*, 126 N. C. 704, 708, 36 S. E. 162.

Grounds for Exceptions.—The rule of exclusion, if left absolute in form, might in certain cases, it was thought, work unequally, and therefore the exception was inserted to make it fair and just in its operation. There is nothing inequitable in requiring that the opposing testimony to that given in evidence by the other side should be limited to the same transaction or communication. It could not be otherwise without opening the door much wider than the necessity of the particular case justified. *Pope v. Pope*, 176 N. C. 283, 287, 96 S. E. 1034. Where the testimony, of a deceased adverse party has been given and is available, the reason for the exclusion rule ceases. *Phillips v. Intestate Land Co.*, 174 N. C. 542, 94 S. E. 12.

In order to "open the door" for the admission of evidence of transactions or communications with a deceased person, prohibited by this section, such evidence must relate to the particular subject-matter of the evidence testified to by the adverse party, or the same transaction, and the door is not necessarily opened to all transactions or fact situations growing out of the controversy. *Walston v. Coppersmith*, 197 N. C. 407, 149 S. E. 381.

Limitation of the Exception.—Where the door is opened to the opposing party to testify for himself, he can testify only as to those particular transactions and communications to which the testimony of the deceased person or his representative was pertinent. *Summer v. Candler*, 92 N. C. 634.

Illustrations.—Where the defendant executor has testified as to certain matters relating to the identification of certain

letters the deceased had written upon the question of whether he should be held liable as a partner for the debts of a firm, it is competent for the plaintiff's witness to testify in the plaintiff's behalf, as to other matters relating thereto and tending to fix the deceased with liability as a partner, under the principle that when the defendant has himself "opened the door by his own evidence" the plaintiff may testify as to the completed transaction, and this section prohibiting testimony as to transaction, etc., with a deceased person, does not apply. *Herring v. Ipock*, 187 N. C. 459, 121 S. E. 758.

It is incompetent as a transaction with a deceased person for the plaintiff to testify as to personal services rendered to the deceased as coming within her demand for damages. *Pulliam v. Hoge*, 192 N. C. 459, 135 S. E. 288. The court said: "We do not think the defendant 'opened the door' by asking the plaintiff for an explanation as to why she had changed the amount at her demand." *Id.*

VI. PLEADING AND PRACTICE.

Effect of Failure to Object.—Objections to the competency of testimony must be taken in due time; if not, they are waived. Therefore, where a party was allowed to testify, upon examination in chief, to a conversation between himself and the defendant's testator, and during the cross-examination the defendant objected to the competency of such testimony and asked that it might be excluded, it was held that, although incompetent, the objection to its reception came too late. *Meroney v. Avery*, 64 N. C. 312. Where a general objection as to witness' competency was overruled, and afterwards no specific objection was made to his testimony as to transactions with the decedent, the objection will be deemed waived. *Norris v. Stewart*, 105 N. C. 455, 10 S. E. 912, 18 Am. St. Rep. 917.

The objection will not be considered unless so specific as to show that the evidence is objectionable. *Perkins v. Berry*, 103 N. C. 131, 9 S. E. 621. The incompetency must appear at the time of the objection to the evidence, so that the court may pass intelligently upon the objection. *Harris v. Harris*, 178 N. C. 7, 100 S. E. 125.

When Admission of Evidence Harmless.—The erroneous admission of evidence of transactions with deceased persons prohibited by this section becomes immaterial when from the answers by the jury to the issues it appears that this evidence was disregarded by them. *Ray v. Ray*, 175 N. C. 290, 95 S. E. 550.

Determination on Appeal of Relevancy of Testimony.—Where testimony of transactions or communications with a decedent is properly excluded as irrelevant to the issue, its competency or incompetency under this section will not be determined on appeal. *Pendleton v. Spencer*, 205 N. C. 179, 170 S. E. 637.

§ 8-52. Communications between attorney and client.—In cases where fraud upon the state is charged it shall not be a sufficient cause to excuse any one from imparting any evidence or information legally required of him, because he came into the possession of such evidence or information by his position as counsel or attorney before the consummation of such fraud, and any person refusing for such cause to answer any question when legally required so to do shall be guilty of contempt, and punished at the discretion of the court or other body demanding such information: Provided, that it shall not be competent to introduce any admissions thus made on the trial of any persons making the same. (Rev., s. 1620; Code, s. 1349; 1874-5, c. 213; C. S. 1797.)

Statutory Exception.—This section, providing that communications to counsel, in cases of fraud where the State is concerned, are not privileged, constitutes a statutory exception to the general rule privileging communications made to an attorney where the relation of attorney and client exists. *Hughes v. Boone*, 102 N. C. 137, 159, 9 S. E. 286.

§ 8-53. Communications between physician and patient.—No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician,

or to do any act for him as a surgeon: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice. (Rev., s. 1621; 1885, c. 159; C. S. 1798.)

Editor's Note.—See 13 N. C. Law Rev. 326; 16 N. C. Law Rev. 53.

In General.—The principle by which a physician may not be compelled to divulge communications and other matters which have come to his knowledge by observation of his patient is regulated by statute, and under the provisions of this section, the privilege is qualified, and it rests within the discretion of the trial judge, in the administration of justice, to compel the physician, called as a witness, to testify to such matters when relevant to the inquiry. *State v. Martin*, 182 N. C. 846, 109 S. E. 74.

If the statements were privileged under this section, then in the absence of a finding by the presiding judge, duly entered upon the record, that the testimony was necessary to a proper administration of justice, it was incompetent, and upon defendant's objection should have been excluded. *Sawyer v. Weskett*, 201 N. C. 500, 501, 160 S. E. 575.

What Information Included.—It is the accepted construction of this statute that it extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe. *Smith v. Roper Lumber Co.*, 147 N. C. 62, 64, 60 S. E. 717; *Gartside v. Ins. Co.*, 76 Mo. 446; *Dilleber v. Ins. Co.*, 69 N. Y. 256. See *Crech v. Sovereign Camp*, W. O. W., 211 N. C. 658, 191 S. E. 840.

Relationship of Physician and Patient Must Exist.—The admissions of one accused of crime are not rendered confidential within the meaning of the law when made to a psychiatrist examining him by order of the court in order to form an opinion as to whether the defendant had sufficient capacity to be in law guilty of crime, since, under the circumstances of this case, the relationship of physician and patient did not exist, and this section is not applicable. *State v. Newsome*, 195 N. C. 552, 143 S. E. 187.

Privilege May Be Waived.—The privilege given by this section is for the benefit of the patient alone, and it may be insisted on or waived at his discretion, subject to the exceptions included in the section. *Smith v. Roper Lumber Co.*, 147 N. C. 62, 64, 60 S. E. 717; *Fuller v. Knights of Pythias*, 129 N. C. 318, 40 S. E. 65. See *Crech v. Sovereign Camp*, W. O. W., 211 N. C. 658, 191 S. E. 840.

Judge's Finding of Record that Testimony Necessary.—Before a physician may testify to matters arising in his confidential relationship with his patient, our statute requires that the trial judge find that in his opinion such testimony is "necessary to a proper administration of justice," and in the absence of such finding appearing of record on appeal, it is reversible error for the trial judge upon defendant's exception to admit testimony of the insured's physician tending to show that the insured in his application for life insurance had made misstatements of material facts that would avoid the insurer's liability in his suit to cancel the policy issued thereon. *Metropolitan Life Ins. Co. v. Boddie*, 194 N. C. 199, 139 S. E. 228. See *Crech v. Sovereign Camp*, W. O. W., 211 N. C. 658, 191 S. E. 840.

Cited in *State v. Wade*, 197 N. C. 571, 150 S. E. 32.

§ 8-54. Defendant in criminal action competent but not compellable to testify.—In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross examination as other witnesses. Except as above provided, nothing in this section shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to criminate himself. (Rev., ss. 1634, 1635; Code, ss. 1353, 1354; 1881, c. 89, s. 3; 1881,

c. 110, ss. 2, 3; 1856-7, c. 23; 1866, c. 43, s. 3; 1868-9, c. 209, s. 4; C. S. 1799.)

Cross References.—See also, the North Carolina Const., Art. I, § 11. As to provision in preliminary examination, see § 15-89. As to exceptions, i. e., where witness is not excused from testifying on ground that testimony will tend to incriminate him, see §§ 1-357, 14-354, 14-38, 18-8, 18-27.

For article discussing the limits to self-incrimination, see 15 N. C. Law Rev. 229.

Common-law disqualification removed by this section. State v. Howard, 222 N. C. 291, 22 S. E. (2d) 917.

Privilege and Not a Duty.—A defendant in a criminal matter can only be examined as a witness by his own request. State v. Ellis, 97 N. C. 447, 2 S. E. 525.

Treated as Other Witnesses.—When the defendant exercises this privilege he is treated just as any other witness and thereby subjects himself to all the disadvantages of that position. State v. Effer, 85 N. C. 585; State v. Hawkins, 115 N. C. 712, 715, 20 S. E. 623.

Where a defendant in a criminal prosecution testifies in his own behalf he waives his constitutional privilege not to answer questions tending to incriminate him and is subject to cross-examination for the purpose of impeaching his credibility as other witnesses. State v. Griffin, 201 N. C. 541, 160 S. E. 826.

Extent of Cross Examination Permitted.—Cross examination of a defendant under this section is not confined to matters brought out on direct examination, but questions are admissible to impeach, diminish or impair the credit of the witness. State v. Dickerson, 189 N. C. 327, 127 S. E. 256.

Testimony May Be Used in Subsequent Trial.—Where a defendant, in a prosecution for another crime, testified in his own behalf, after having been informed of his privilege not to testify, admissions made by him are competent evidence against him in a subsequent trial. State v. Simpson, 133 N. C. 676, 45 S. E. 567.

Failure to Take Stand.—The failure of the prisoner charged with homicide to take the witness-stand voluntarily will not create a presumption against him. State v. Bynum, 175 N. C. 777, 95 S. E. 101.

Court need not charge that failure of defendant to testify should not be considered against him in absence of request. State v. Jordan, 216 N. C. 356, 5 S. E. (2d) 156.

Where defendant moved to set aside the verdict on ground that the jury, without defendant's consent, took into its room the complaint in a civil action relating to the subject matter of the prosecution, which had been admitted in evidence without objection, and typed notes of the argument of counsel for the prosecution containing reference to defendant's failure to testify, it was error to permit the jury to take such papers into the jury room and retain same while in its deliberations, and defendant's motion to set aside the verdict should have been allowed. State v. Stephenson, 218 N. C. 258, 10 S. E. (2d) 819.

Same—How Far Subject to Comment.—The introduction or non-introduction of a party as a witness in his own behalf should be the subject of comment only as the introduction or non-introduction of any other witness might be. Goodman v. Sapp, 102 N. C. 477, 9 S. E. 483.

"It is the privilege, but not the duty, of a party to an action to offer himself as a witness in his own behalf, and he is not the proper subject for unfriendly criticism because he declines to exercise a privilege conferred upon him for his own benefit merely. The fact is not the subject of comment at all, certainly not unless under very peculiar circumstances, which must be necessarily passed upon by the judge presiding at the trial, as a matter of sound discretion." Gragg v. Wagner, 77 N. C. 246.

General Character Can Be Shown.—When a prosecutor or defendant in a criminal action goes upon the stand as a witness he becomes just as any other witness, and his general character can be proven, not only as it was before a charge affecting it was made, but as it is at the date he goes upon the stand. State v. Spurling, 118 N. C. 1250, 24 S. E. 533.

Same—Not in Issue unless So Placed.—Where a defendant goes on the witness stand and testifies, he does not thereby put his character in issue, but only puts his testimony in issue, and the State may introduce evidence tending to show the bad character of the witness solely for the purpose of contradicting him. State v. Cloninger, 149 N. C. 567, 63 S. E. 154; State v. Foster, 130 N. C. 666, 41 S. E. 284.

When defendant does not go upon the stand, and does not offer evidence of good character, his character is not in issue and it may not be impeached by the state. State v. Proctor, 213 N. C. 221, 195 S. E. 816.

Same—Where Introduced by Defendant.—When the defendant introduces evidence himself to prove his good

character, then that evidence is substantive evidence, and may be considered by the jury as such. State v. Cloninger, 149 N. C. 567, 63 S. E. 154.

The right of the defendant to offer testimony of his good character does not depend upon his having been examined as a witness in his own behalf. State v. Hice, 117 N. C. 782, 23 S. E. 357.

"In declaring him to be 'a competent witness' we understand the statute to mean that he shall occupy the same position with any other witness, be under obligation to tell the truth, entitled to the same privileges, receive the same protection, and equally liable to be impeached or discredited *** But by availing himself of the statute he assumes the position of a witness and subjects himself to all the disadvantages of that position, and his credibility is to be weighed and tested as that of any other witness." State v. Effer, 85 N. C. 585; State v. Traylor, 121 N. C. 674, 676, 28 S. E. 493.

Same—Put in Issue by State.—Where, in the trial of a criminal action, the defendant testifies in his own behalf and introduces no evidence as to his general character, but the State introduces evidence to show that such character is bad, it was held that such evidence by the State can be considered only as affecting the credibility of the defendant as a witness and not as a circumstance in determining the question of his guilt or innocence. State v. Traylor, 121 N. C. 674, 28 S. E. 493.

Where There Are Two or More Defendants.—Even prior to the enactment of this section on a trial for an affray one defendant could not oppose the testifying of his codefendant for himself, the State's counsel not objecting. State v. Hamlet, 85 N. C. 520.

Testifying as to Confessions.—The defendant in a criminal action is competent as a witness in his own defense upon the preliminary hearing of the trial judge, as to whether confessions he had made to the officers of the law were voluntarily made or induced from him contrary to law. State v. Whitener, 191 N. C. 659, 132 S. E. 603.

Admission before Magistrate.—Where a prisoner made certain confessions which were induced by hope, and therefore inadmissible, but a day or so after, upon his examination before a committing magistrate, he asked to be examined as a witness on his own behalf, when he admitted that he had made the confessions, but said that they were not true, it was held, that his evidence given before the magistrate was admissible against him, and it was for the jury to say whether they believed the confession, or that part of his evidence declaring that the confessions were not true. State v. Ellis, 97 N. C. 447, 2 S. E. 525.

Weight Given Testimony Is for Jury.—While the interpretations of this section require defendant's testimony to be scrutinized, it is the province of the jury to determine from his demeanor and the attending circumstances the weight which they will accord his testimony, and a charge of the court that "the law presumes" that he is naturally laboring under the temptation to testify to whatever he thinks may be necessary to clear himself and that the jury should take into consideration what a conviction would mean to defendant, etc., is held to impose a burden and cast a shadow upon his testimony greater than the law requires and to constitute reversible error. State v. Wilcox, 206 N. C. 691, 175 S. E. 122.

Constitutional Provision as to Self-Incrimination.—See N. C. Const., Art. I, Sec. 11, and notes thereto.

Erroneous Instructions.—While it is proper for the court to instruct the jury to scrutinize testimony of a defendant in a criminal prosecution because of his interest in the verdict, it is error for the court to fail to follow such instruction with a charge that if after such scrutiny the jury finds him worthy of belief they should give his testimony as full credit as they would that of any other witness. State v. Dee, 214 N. C. 509, 199 S. E. 730.

An instruction that the jury should scrutinize defendant's testimony in his own behalf because of his interest in the verdict, but if after doing so they were satisfied he told the truth, they should give his testimony the same weight they would give that of any "interested witness," perforce impeaches the testimony of defendant contrary to this section, and the pertinent decisions, and constitutes prejudicial error. *Id.*

Proper Instruction.—The court's remarks to the jury in instructing them that defendant was within his rights in not testifying, and that his failure to testify should not be considered against him, were held without error upon defendant's exception. State v. Horne, 209 N. C. 725, 184 S. E. 470.

Applied in State v. Perry, 210 N. C. 796, 188 S. E. 639, dissenting opinion.

Cited in State v. Colson, 194 N. C. 206, 139 S. E. 230; State v. Spivey, 198 N. C. 655, 656, 153 S. E. 255; State

v. McLeod, 198 N. C. 649, 650, 152 S. E. 895; State v. Vernon, 208 N. C. 340, 180 S. E. 590; York v. York, 212 N. C. 695, 194 S. E. 486.

§ 8-55. Testimony enforced in certain criminal investigations; immunity.—If any justice of the peace, magistrate of police, mayor of a town, or judge of the supreme or superior courts shall have good reason to believe that any person within his jurisdiction has knowledge of the existence and establishment of any faro-bank, faro-table or other gaming table prohibited by law, or of any place where intoxicating liquors are sold contrary to law, in any town or county within his jurisdiction, such person not being minded to make voluntary information thereof on oath, then it shall be lawful for such justice of the peace, magistrate, mayor, or judge to issue to the sheriff of the county or to any constable of the town or township in which such faro-bank, faro-table, gaming table, or place where intoxicating liquors are sold contrary to law is supposed to be, a subpoena, *capias ad testificandum*, or other summons in writing, commanding such person to appear immediately before such justice of the peace, magistrate, mayor or judge and give evidence on oath as to what he may know touching the existence, establishment and whereabouts of such faro-bank, faro-table or other gaming table, or place where intoxicating liquors are sold contrary to law, and the name and personal description of the keeper thereof. Such evidence, when obtained, shall be considered and held in law as an information on oath, and the justice, magistrate, mayor or judge may thereupon proceed to seize and arrest such keeper and destroy such table, or issue process therefore as provided by law. No person shall be excused, on any prosecution, from testifying touching any unlawful gaming done by himself or others; but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offenses so done or participated in by him. (Rev., ss. 3721, 1637; Code, ss. 1215, 1050; R. C., c. 35, s. 50; 1858-9, c. 34, s. 1; 1889, c. 355; 1913, c. 141; C. S. 1800.)

Cross Reference.—See also, §§ 18-27.

Section Constitutional.—This section is not unconstitutional by reason of the Fifth Amendment to Constitution of the United States, because it does not apply to the State; nor does it violate Article I, section 11, Constitution of North Carolina, for the reason that the said statute grants a pardon to the witness. In re Briggs, 135 N. C. 118, 47 S. E. 403.

Witness Compellable to Testify.—In a prosecution for gaming a witness may be compelled to testify, although his answer tends to criminate him, since he is pardoned for the offense. State v. Morgan, 133 N. C. 743, 45 S. E. 1033.

Sufficiency of Indictment.—In an indictment for keeping a common gaming-house the use of the word "gaming" is sufficient. State v. Morgan, 133 N. C. 743, 45 S. E. 1033.

§ 8-56. Husband and wife as witnesses in civil actions.—In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. Nothing herein shall render

any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage); or in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by the husband in which the character of the wife is assailed she shall be a competent witness to testify in refutation of such charges. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. (Rev., s. 1636; Code, s. 588; C. C. P., s. 341; 1866, c. 43, ss. 3, 4; 1919, c. 18; C. S. 1801.)

Cross References.—As to competency in criminal actions, see § 8-57 and notes thereto. See also, § 8-50.

Editor's Note.—For note on privileged communications between husband and wife, see 15 N. C. Law Rev. 282.

In General.—Husbands and wives are competent and compellable to give evidence for or against each other, save only in the particular cases mentioned in the section. Barringer v. Barringer, 69 N. C. 179, 181.

The provisions of this section are quite clear and self-explanatory. The legislative intent is apparent and little room is left for a judicial construction of the clauses herein contained. A few of the leading cases are sufficient to show that the decisions of the various cases arising hereunder have been predicated upon the section as actually worded, without any judicial inferences being drawn by the courts. —Ed. Note.

Section Does Not Render Voluntary Disclosure Incompetent.—This section means that neither shall be compelled to disclose any such confidential communication, but does not perforce render a voluntary disclosure thereof incompetent. Hagedorn v. Hagedorn, 211 N. C. 175, 178, 189 S. E. 507, citing Nelson v. Nelson, 197 N. C. 465, 149 S. E. 585.

Divorce for Adultery.—In divorce for alleged adultery, neither the husband nor the wife is a competent witness. Perkins v. Perkins, 88 N. C. 41; Horne v. Horne, 75 N. C. 101, 103.

Contradiction by Wife.—Under this section, a wife, sued for divorce for adultery, is competent to deny the evidence of witnesses that she was guilty of adultery with them. Broom v. Broom, 130 N. C. 562, 41 S. E. 673.

Same—Criminal Conversation.—In an action for criminal conversation wherein the husband has testified to immoral relations between his wife and the defendant, the wife is a competent witness for the defendant for the purpose of refuting the charges made against her character. Chestnut v. Sutton, 204 N. C. 476, 168 S. E. 680.

Confidential Communications Defined.—The confidential communications made between husband and wife which neither will be compelled to disclose, are those which are communicated "during their marriage." Whitford v. North State Life Ins. Co., 163 N. C. 223, 79 S. E. 501.

Same—Protected.—The confidential communications between husband and wife cannot, on the grounds of public policy, be admitted in evidence. State v. Britain, 117 N. C. 783, 23 S. E. 433.

In a suit in equity to set aside a judgment rendered in an action at law for fraud, letters from the plaintiff in the former action to his wife respecting fraud in that action are properly excluded when the letters are obtained by a third party with the consent of the wife, the letters being privileged communications and inadmissible against either the husband or the wife. McCoy v. Justice, 199 N. C. 602, 603, 155 S. E. 452.

Where a witness for the state has written a letter to his wife, and his wife, without his knowledge or consent, has given the letter to the defendant, the witness cannot be cross-examined relative to the letter in an attempt to prove bias. State v. Banks, 204 N. C. 233, 167 S. E. 851.

Applied, in action by husband for criminal conversation, in Rouse v. Creech, 203 N. C. 378, 166 S. E. 174. See State v. Perry, 210 N. C. 796, 188 S. E. 639, dis. op.

Cited in Nelson v. Nelson, 197 N. C. 465, 466, 149 S. E. 585.

§ 8-57. Husband and wife as witnesses in criminal actions.—The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but

the failure of such witness to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to be cross-examined as are other witnesses. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. Nothing herein shall render any husband or wife competent or compellable to give evidence against each other in any criminal action or proceeding, except to prove the fact of marriage in case of bigamy, and except that in all criminal prosecutions of a husband for an assault and battery upon his wife, or for abandoning his wife, and/or his children, or for neglecting to provide for her support, and/or the support of his children, it shall be lawful to examine the wife in behalf of the state against the husband. (Rev., ss. 1634, 1635, 1636; Code, ss. 588, 1353, 1354; 1856-7, c. 23; 1866, c. 43; 1868-9, c. 209; 1881, c. 110; 1933, c. 13, s. 1; 1933, c. 361; C. S. 1802.)

Cross Reference.—As to competency in civil action, see § 8-56 and notes thereto.

Editor's Note.—Public Laws of 1933, cc. 13 and 361, added, near the end of this section, the words "and/or his children" following the word "wife" and the words "and/or the support of his children" following the word "support." For a criticism of this amendment, see 11 N. C. Law Rev., 231.

In General.—Under this section the husband or wife is a competent witness for the defendant in all criminal actions or proceedings. *State v. Harbison*, 94 N. C. 885. But neither is competent or compellable to give evidence against the other in any criminal proceeding. *Id.* See *State v. Watson*, 215 N. C. 387, 1 S. E. (2d) 886.

Under this section a wife is neither competent nor compellable to testify against her husband in a criminal proceeding, hence hearsay evidence of her declarations, not made in his presence or by his authority, which would be prejudicial to the husband, is inadmissible. *State v. Reid*, 178 N. C. 745, 101 S. E. 104.

See *State v. Cotton*, 218 N. C. 577, 12 S. E. (2d) 246.

Discretion of Trial Judge.—Where the defendant husband is alleged to have stolen certain property, it is competent for him to introduce his wife as a witness to prove from what source he got the money to pay for such property, but unless he introduces her in proper time it rests within the discretion of the trial judge whether her testimony will be received. *State v. Lemon*, 92 N. C. 791, 793.

A wife cannot be compelled to testify against her husband in a criminal action; but when she takes the stand in his behalf, she is subject to cross-examination in the same manner and to the same extent as any other witness. *State v. Tola*, 222 N. C. 406, 23 S. E. (2d) 321.

Confidential Communication.—Testimony of a witness that at the time of the arrest of the defendant, by the officers of the law, his wife was present and said to him: "I told you that you would get into it if you did not stay with me like I wanted you to," to which he replied: "hush," is not a confidential communication between husband and wife within the contemplation of this section and may be testified to by the witness who was present and heard it, and is some evidence of guilt in connection with the other evidence in the case. *State v. Freeman*, 197 N. C. 376, 148 S. E. 450.

The confidential communications between husband and wife cannot, on the grounds of public policy, be admitted in evidence. *State v. Brittain*, 117 N. C. 783, 23 S. E. 433.

Husband May Testify against Wife in Assault.—Conversely to the rule enunciated in this section, that a wife may testify against her husband in actions for assault against her, it appears that a husband may testify in assaults by the wife against him, and this was so held. *State v. Davidson*, 77 N. C. 522; *State v. Alderman*, 182 N. C. 917, 919, 110 S. E. 59.

In case of assault and battery with intent to kill by poison, with evidence tending to show the previous threats of the wife, and that the poison was put into the food prepared by the daughter in her mother's presence at their home, and that the husband was poisoned from eating thereof, the testimony of the husband as to his wife's previous threats is not inadmissible under the provisions of this section, but is admissible for the purpose of showing knowledge and identifying the perpetrators of the crime,

and is distinguishable from the rule that threats are ordinarily inadmissible on trials for assault and battery. *State v. Alderman*, 182 N. C. 917, 110 S. E. 59.

The rule that neither the husband nor wife is competent to testify against the other in criminal cases does not apply to proof of assault by the one upon the other. *State v. French*, 203 N. C. 632, 166 S. E. 747.

A wife under this section is not competent to testify against her husband in a prosecution for felonious burning and the admission of her testimony entitles him to a new trial. *State v. Kluttz*, 206 N. C. 726, 175 S. E. 81.

Failure of Wife to Appear and Testify.—The failure of the wife to be examined as a witness in behalf of a husband tried for a criminal offense, is expressly excluded as evidence to the husband's prejudice by this section, though she is competent to testify. *State v. Harris*, 181 N. C. 600, 107 S. E. 466.

Where the trial judge has properly excluded from the consideration by the jury testimony relating to the wife's failure to appear and testify in behalf of her husband on his trial for a homicide, the prisoner may not successfully complain of error on appeal in the failure of the trial judge to again instruct the jury thereon, when there has been no exception taken to the charge of the court or the refusal of any prayer for instruction on the subject. *State v. Harris*, 181 N. C. 600, 107 S. E. 466.

Where a prisoner's wife, on his trial for a homicide, has failed to appear and be examined in her husband's defense, and a witness has testified to facts relating thereto, before the trial judge has had opportunity to rule upon the prisoner's objection, the reading of this section by the trial judge to the jury, and his telling them they must not consider this failure of the wife to appear as evidence to the prisoner's prejudice, renders the error harmless, if any was committed. *State v. Harris*, 181 N. C. 600, 107 S. E. 466.

During the absence of the judge, the solicitor in his argument to the jury called the jury's attention to the fact that defendant's wife had not testified in his behalf, and persisted in the argument after objection by defendant's counsel. Upon its return, the court sustained the objection, and near the conclusion of its charge to the jury stated that the law did not permit such comment and that the jury should not let the argument influence it. Held: The solicitor's comment violates this section, and was prejudicial, and called for prompt peremptory and certain caution by the court not only that the argument should be disregarded but that the failure of defendant's wife to testify should not be considered to his prejudice, and the action of the court in merely sustaining the objection and the caution later given by the court near the conclusion of the charge is insufficient to free the case of prejudice. *State v. Helms*, 218 N. C. 592, 12 S. E. (2d) 243.

Threats.—In a homicide case, where there is a plea and evidence of self-defense, it is competent for defendant's wife to testify to a threat made by deceased against her husband, which she communicated to defendant before the killing. *State v. Rice*, 222 N. C. 634, 24 S. E. (2d) 483.

Abandonment of Wife.—Under this section the wife is a competent witness against her husband as to the fact of abandonment, or neglect to provide adequate support. *State v. Brown*, 67 N. C. 470.

Proof of Marriage.—The wife is competent to prove the fact of marriage under an indictment against her husband for abandonment. *State v. Chester*, 172 N. C. 946, 90 S. E. 697. The holding was otherwise under a former wording of the statute. *State v. Brown*, 67 N. C. 470.

Same—Bigamy.—In an indictment for bigamy the first wife of the defendant is a competent witness to prove the marriage, public cohabitation as man and wife being public acknowledgments of the relation and not coming within the nature of the confidential relations which the policy of the law forbids either to give in evidence. *State v. Melton*, 120 N. C. 591, 26 S. E. 933. See also *State v. McDuffie*, 107 N. C. 885, 890, 12 S. E. 83.

Adultery Prior to Marriage.—Where a man and woman are indicted for fornication and adultery, and a nol. pros. is entered as to the feme defendant, the husband of the woman is a competent witness to show adultery between the defendants committed before the marriage of the woman and the witness. *State v. Wiseman*, 130 N. C. 726, 41 S. E. 884.

Consolidation of Prosecutions against Husband and Wife.—Where husband and wife are separately indicted for the same homicide and the prosecutions are consolidated and tried together over their objections, and the wife's testimony, though admitted only as to her, is to the effect that her husband killed deceased and forced her, through fear, to confess and attempt to exculpate him, her testimony is necessarily inculpatory of the husband and impinges this section, and his motion for a mistrial and severance at the con-

clusion of the state's evidence should have been granted. *State v. Cotton*, 218 N. C. 577, 12 S. E. (2d) 246.

Competency of Divorced Parties.—A divorced husband is incompetent to testify against the divorced wife in the trial of an indictment against her for fornication and adultery which occurred prior to the divorce. *State v. Raby*, 121 N. C. 682, 28 S. E. 490.

Applied in *State v. Perry*, 210 N. C. 796, 188 S. E. 639, dissenting opinion.

§ 8-58. Wife may testify in applications for peace warrants.—The wife shall be competent to make affidavit and testify in applications for peace warrants against the husband. (1933, c. 13, s. 2.)

Art. 8. Attendance of Witness.

§ 8-59. Issue and service of subpoena.—In obtaining the testimony of witnesses in causes depending in the superior, criminal and inferior courts, the following rules shall be observed in practice, to wit:

In suits where witnesses are to appear at any court, the clerk at the instance of a party shall issue a subpoena, directed to the sheriff or other officer of the county where such witnesses reside, naming the time and place for their appearance, the names of the parties to the suit wherein the testimony is to be given, and the party at whose instance they are summoned. Every subpoena made returnable immediately shall be issued only in term time, and shall be personally served on the witness therein named. A copy of every subpoena issued by the clerk in vacation, in case any witness therein named is not to be found, may be left at his usual place of residence; and such copy certified by the sheriff or other officer, and left as aforesaid, shall be deemed a legal summons, and the person therein named shall be bound to appear in the same manner as if personally summoned. (Rev., s. 1639; Code, s. 1355; R. C., c. 31, s. 59; 1777, c. 115, s. 36; C. S. 1803.)

Cross Reference.—As to duty of clerk to issue subpoena, see § 2-16.

§ 8-60. Attendance before referee or commissioners.—In all cases not otherwise provided for, when witnesses are required to attend any court, commission, referee, order of survey, or jury of view, a summons shall be issued by the clerk of the court, at the request of either party, naming the day and place when and where they are to appear, the names of the parties to the suit, and in whose behalf summoned. (Rev., s. 1640; Code, s. 1366; R. C., c. 31, s. 68; 1805, c. 685, ss. 1, 2; C. S. 1804.)

§ 8-61. Subpoena duces tecum issued.—In all causes depending in any court, in which the production of an original paper, lodged in any of the public offices of the state, or in any office of any court, shall become necessary, the court may issue the process of subpoena duces tecum, requiring such persons who hold said offices to attend the court with such original paper, in like manner and under the same penalties as witnesses are required in cases of subpoena to testify. (Rev., s. 1641; Code, s. 1372; R. C., c. 31, s. 81; 1797, c. 476; C. S. 1805.)

§ 8-62. Subpoenas and depositions upon removal of cause.—When any cause shall be removed from the superior court of one county to that of another, after the order of removal,

depositions may be taken in the cause, and subpoenas for the attendance of witnesses and commissions to take depositions may issue from either of the said courts, under the same rules as if the cause had been originally commenced in the court from which the subpoenas or commissions issued. (Rev., s. 1642; Code, s. 1371; R. C., c. 31, s. 72; 1810, c. 787; 1832, c. 8; C. S. 1806.)

Cross Reference.—As to depositions generally, see § 8-71 et seq.

In General.—Until the transcript is deposited the removal is not consummated and the cause is not constituted so as to give full jurisdiction to the court to which the removal is ordered, hence to meet this situation the provision of this section gives to the clerk of either court the power to issue subpoenas for witnesses. *Commissioners v. Lemly*, 85 N. C. 342, 346.

Upon removal jurisdiction of the court from which the cause is removed ceases, unless otherwise provided in the order of removal, or by consent of the parties in writing, duly filed. *Fisher v. Cid Copper Min. Co.*, 105 N. C. 123, 10 S. E. 1055.

This section, however, makes one exception to the general rule by allowing the subpoena to be issued from either court. *Fisher v. Cid Copper Min. Co.*, 105 N. C. 123, 10 S. E. 1055.

Time for Depositing Transcript.—The party procuring the order of removal has until the term of the court to which the cause is removed to deposit his transcript. *Fisher v. Cid Copper Min. Co.*, 105 N. C. 123, 10 S. E. 1055.

§ 8-63. Witnesses attend until discharged; effect of nonattendance.—Every witness, being summoned to appear in any of the said courts, in manner before directed, shall appear accordingly, and continue to attend from term to term until discharged, when summoned in a civil action or special proceeding, by the court or the party at whose instance such witness shall be summoned, or, when summoned in a criminal prosecution, until discharged by the court, the prosecuting officer, or the party at whose instance he was summoned; and in default thereof shall forfeit and pay, in civil actions or special proceedings, to the party at whose instance the subpoena issued, the sum of forty dollars, to be recovered by motion in the cause, and shall be further liable to his action for the full damages which may be sustained for the want of such witness's testimony; or if summoned in a criminal prosecution shall forfeit and pay eighty dollars for the use of the state, or the party summoning him. If the civil action or special proceeding shall, in the vacation, be compromised and settled between the parties, and the party at whose instance such witness was summoned should omit to discharge him from further attendance, and for want of such discharge he shall attend the next term, in that case the witness, upon oath made of the facts, shall be entitled to a ticket from the clerk in the same manner as other witnesses, and shall recover from the party at whose instance he was summoned the allowance which is given to witnesses for their attendance, with costs.

No execution shall issue against any defaulting witness for the forfeiture aforesaid but after notice made known to him to show cause against the issuing thereof; and if sufficient cause be shown of his incapacity to attend, execution shall not issue, and the witness shall be discharged of the forfeiture without costs; but otherwise the court shall, on motion, award execution for the forfeiture against the defaulting witness. (Rev.,

s. 1643; Code, s. 1356; R. C., c. 31, ss. 60, 61, 62; 1777, c. 115, ss. 37, 38, 43; 1799, c. 528; 1801, c. 591; C. S. 1807.)

Cross Reference.—See also, §§ 6-51, 6-62.

Duty to Attend.—When a subpoena has been served on a witness, he is required by this section to attend from term to term until discharged. *State v. Gwynn*, 61 N. C. 445.

Non-Attendance Need Not Be Wilful.—This section does not require that the failure of the witness to attend should be "wilful." In *re Pierce*, 163 N. C. 247, 79 S. E. 507.

When Witness May Elect.—Where two subpoenas are served upon a witness, requiring his attendance on the same day at different places distant from each other, he is not bound to obey the writ which may have been first served, but may make his election between them. *Icehour v. Martin*, 44 N. C. 478.

Test of Inability to Attend.—In an early case, *Eller v. Roberts*, 25 N. C. 11, it was held that where a witness alleges that he was unable to attend court, this inability must be decided by reference to the modes of travelling which are in use in the community.

Where Service Had on Transient.—A witness, who is summoned in this State, while casually here, but who resides in another state, cannot be required to pay a forfeiture for non-attendance, if he has returned to his own state and is there at his domicile. *Kinzey v. King*, 28 N. C. 76.

Attorney Not Exempt.—A witness who fails to appear when the case is called in which he has been subpoenaed to testify is not justified in his default because he is a practicing attorney at law and has cases to try in another county at the date upon which the case was called wherein he was a witness, and the party who subpoenaed him can recover the penalty, with the costs of the motions. In *re Pierce*, 163 N. C. 247, 79 S. E. 507.

An issue in bastardy is not a "criminal prosecution" as to subject a defaulting witness to the fine of eighty dollars, prescribed by this section. *Ward v. Bell*, 52 N. C. 79.

Applied in *State v. Perry*, 210 N. C. 796, 188 S. E. 639, dissenting opinion.

§ 8-64. Witnesses exempt from civil arrest.—

Every witness shall be exempt from arrest in civil actions or special proceedings during his attendance at any court, or before a commissioner, arbitrator, referee or other person authorized to command the attendance of such witness, and during the time such witness is going to and returning from the place of such attendance, allowing one day for every thirty miles such witness has to travel to and from his place of residence. (Rev., s. 1644; Code, s. 1367; R. C., c. 31, s. 70; 1777, c. 115, s. 44; C. S. 1808.)

Common Law Rule Not Repealed.—This section does not serve to repeal the common law rule of exemption of witnesses from civil arrest. *Cooper v. Wyman*, 122 N. C. 784, 787, 29 S. E. 947.

Not Applicable to Criminal Proceeding.—The exemption of witnesses from civil arrest accorded by this section, and of nonresident parties and witnesses voluntarily attending court here, on grounds of public policy does not apply to parties arrested in criminal proceedings. *White v. Underwood*, 125 N. C. 26, 34 S. E. 104.

Procedure for Claiming Exemption.—Where a party has not been granted the exemption from service of summons (which the courts seem to have placed on the same plane as the exemption from civil arrest), his remedy is not a motion to dismiss the action, but a motion, on special appearance, to set aside the return of service. *Dell School v. Pierce*, 163 N. C. 424, 79 S. E. 687. This is because the service is not void but voidable. *Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947.

Nonresident Attorney.—This section does not prevent service of summons on a nonresident attorney in this State to represent his clients in a matter pending in the federal court. *Greenleaf v. Peoples Bank*, 133 N. C. 292, 45 S. E. 638.

Art. 9. Attendance of Witnesses from without State.

§ 8-65. Definitions.—"Witness" as used in this article shall include a person whose testimony is desired in any proceeding or investigation by a

grand jury or in a criminal action, prosecution or proceeding.

The word "state" shall include any territory of the United States and District of Columbia.

The word "summons" shall include a subpoena order or other notice requiring the appearance of a witness. (1937, c. 217, s. 1.)

See 15 N. C. Law Rev., No. 4, p. 345.

§ 8-66. Summoning witness in this state to testify in another state.—If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies, under the seal of such court, that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, and of any other state through which the witness may be required to pass by ordinary course of travel, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence, at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing, being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness

who disobeys a summons issued from a court of record in this state. (1937, c. 217, s. 2.)

Cross Reference.—As to effect of non-attendance of witness, see § 8-63.

§ 8-67. Witness from another state summoned to testify in this state.—If a person in any state which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court, stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state. (1937, c. 217, s. 3.)

Cross References.—See also, § 8-66. As to effect of non-attendance of witness, see § 8-63.

§ 8-68. Exemption from arrest and service of process.—If a person comes into this state in obedience to a summons directing him to attend and testify in this state he shall not, while in this state pursuant to such summons, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state, or while returning therefrom, he shall not while so passing through this state be subject to arrest or the services of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons. (1937, c. 217, s. 4.)

Cross Reference.—See also, § 8-64.

Res Judicata.—In an action against the driver of a car upon whom service of summons was had while he was in the state in obedience to a summons from a coroner to testify at an inquest, motion to vacate the service was allowed upon the court's finding from the evidence that defendant was a nonresident and that therefore he was exempt from service of process in connection with matters which arose before his entrance into the state in obedience to the coroner's summons. In a subsequent action arising out of the same collision, brought in another county by the administrator of a party killed in the collision, service was had upon the defendant at the same time and in the same manner. It was held that the prior adjudication that

defendant was a nonresident and was exempt from service under this section was in the nature of a judgment in rem and is res judicata as to the status and residence of the defendant, and is binding upon the administrator under the maxim res judicata pro veritate accipitur, and the holding of the court in the second action upon substantially the same evidence that defendant was a resident of this state and that the service of summons on him was valid must be reversed on appeal even though supported by evidence. *Current v. Webb*, 220 N. C. 425, 17 S. E. (2d) 614.

Applied in *Bangle v. Webb*, 220 N. C. 423, 17 S. E. (2d) 613.

§ 8-69. Uniformity of interpretation.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it. (1937, c. 217, s. 5.)

§ 8-70. Title of article.—This article may be cited as "Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings." (1937, c. 217, s. 6.)

Art. 10. Depositions.

§ 8-71. Manner of taking depositions in civil actions.—Any party in a civil action or special proceeding, upon giving notice to the adverse party or his attorney as provided by law, may take the depositions of persons whose evidence he may desire to use, without any special order therefor, unless the witness shall be beyond the limits of the United States.

Depositions shall be taken on commission, issuing from the court and under the seal thereof, by one or more commissioners, who shall be of kin to neither party, and shall be appointed by the clerk; or depositions may be taken by a notary public of this state or of any other state or foreign country, or any commissioner of oaths or commissioner of deeds of any foreign country, or by any officer of the army of the United States or marine corps having the rank of captain or higher, by any officer of the United States navy or United States coast guard having the rank of lieutenant, senior grade, or higher, or by any officer of the United States merchant marine having the rank of lieutenant, senior grade, or higher, without a commission issuing from the court. No official seal shall be required of said military or naval officials, but they shall sign their name, designate rank, name of ship or military division, and date, without a commission issuing from the court.

Depositions shall be subscribed and sealed up by the commissioners or notary public, and returned to the court, the clerk whereof or the judge holding the court, if the clerk is a party to the action, shall open and pass upon the same, after having first given the parties or their attorneys not less than one day's notice; and all such depositions, when passed upon and allowed by the clerk, without appeal, or by the judge upon appeal from the clerk's order, or by the judge holding the court, when the clerk is a party to the action, shall be deemed legal evidence, if the witness be competent. (Rev., s. 1652; Code, s. 1357; 1911, c. 158; R. C., c. 31, s. 63; 1881, c. 279; 1893, c. 360; 1943, c. 160, s. 1; C. S. 1809.)

Editor's Note.—As this section originally stood, it contained many restrictive clauses which no longer appear.

The 1943 amendment added to the second paragraph the

provisions relating to commissioners of oaths or deeds and to officers in the armed forces and in the merchant marine. Section 2 of the amendatory act provided that in all instances in which depositions had been taken by an officer of the armed forces as provided in the said paragraph, they are validated as though taken pursuant thereto.

Purpose of Section.—The purpose of this section is to save the inconvenience and cost of taking witnesses to the court, unless the party desiring the testimony of the witness sees fit to summon him to attend the court and testify in person. *Sparrow v. Blount*, 90 N. C. 514, 516.

Optional with Party Desiring the Evidence.—A party may take the deposition; he is not obliged to do so and it is optional with him whether he will or not. *Sparrow v. Blount*, 90 N. C. 514, 516.

Right of Cross Examination.—Where a cause has been referred and regularly proceeded with before a commissioner to take deposition therein, the party has a right to cross-examine the witnesses of the opposing party, which may not be denied him as a matter of law. *Sugg v. St. Mary's Oil Engine Co.*, 193 N. C. 814, 138 S. E. 169.

Presumed Regular.—The presumption is that a deposition has been properly taken when it appears thereon that it was taken by one named in the commission on the day and at the designated place. *Younce v. Broad River Lumber Co.*, 155 N. C. 239, 71 S. E. 329.

May Be Taken in Place of Business.—It is not error to take a deposition in the place of business of one of the parties if such place is named in the notice and there is no suggestion that the other party suffered any prejudice thereby. *Bank v. Carr*, 130 N. C. 479, 41 S. E. 876.

May Be Taken before Answer.—The plaintiff is not required to delay taking the deposition of a witness in a cause until after the answer is filed. *Freeman v. Brown*, 151 N. C. 111, 65 S. E. 743.

Leading Question.—It is discretionary with the trial judge whether or not answers to leading questions shall be stricken out of the deposition. *Bank v. Carr*, 130 N. C. 479, 41 S. E. 876.

Necessity of Sealing.—A deposition must be sealed up by the commissioners, so as to prevent inspection and alteration; it need not be certified under the seal of the commissioners. *Ward v. Ely*, 12 N. C. 372.

Where a deposition was found among the papers, with a commission unattached, and an envelope which appeared to have been sealed up and afterwards broken open, it was held that this was sufficient evidence to justify the clerk in finding that the deposition had been taken under such commission, and had been returned to him sealed up by the commissioner, and therefore, that the clerk had done right in passing upon and allowing such deposition to be read. *Hill v. Bell*, 61 N. C. 122.

Name of Witness in Commission Not Essential.—It is not necessary that the commission issued for taking depositions name the particular witness to whose depositions exceptions are taken, when the notice to take the deposition gave the name of the witness and the address of the commissioner, and the requirement of the statute has been met. *Jeffords v. Albemarle Waterworks*, 157 N. C. 10, 72 S. E. 624.

Signature of Witness Unnecessary.—Where a deposition is otherwise regular and identified, it should not be refused as evidence because it has not been signed by the witness whose testimony was being taken, this not being required by our statute. *Boggs v. Cullowhee Min. Co.*, 162 N. C. 393, 78 S. E. 274. And the fact that it was signed when neither party was present is not ground for refusing to admit it. *Riff v. Yarkin, etc., Co.*, 189 N. C. 585, 127 S. E. 588.

Question Need Not Be Written.—In the taking of a deposition, interrogatories are not required to be in writing, and when there is nothing to indicate that the deposition does not contain the whole of the deponent's testimony or that it was not written down at the time and in the presence of the witness, a motion to quash should be refused. *Chippewa Valley Bank v. National Bank*, 116 N. C. 815, 21 S. E. 688.

Attachment or Identification of the Papers.—While it is customary, and the better practice, to attach to a deposition a paper-writing therein referred to, or, if there are more than one deposition, to attach it to one and identify it by reference in the others, and in case the writing is a matter of record or in the custody of the court, over which the parties have no control, to attach an exemplified copy; it is not required by our statutes that the writing be so attached, and when this has not been done, the fact of identity may be proved as any other fact in evidence. In *re Will of Clodfelter*, 171 N. C. 528, 88 S. E. 625.

As to waiver of formal defects, see note of *McArter v. Rhea*, 122 N. C. 614, 30 S. E. 128, under section 8-81.

Notice to Adverse Party Required.—A party offering to read a deposition as evidence must prove that he has given

the notice of the opening of the deposition before the clerk prescribed by this section, or show facts that would amount to a waiver by the opposite party of the statutory requirement. *Berry v. Hall*, 105 N. C. 154, 10 S. E. 903. See section 8-72 and notes thereto.

Power of Clerk.—This section allowing the clerk to pass upon depositions only applies to the depositions of competent witnesses; where, therefore, he passed upon and allowed one to be read which was taken out of the county, under a commission without a seal, it was held, that such action of his might well be disregarded by the court trying the cause. *Sehorn v. Williams*, 51 N. C. 575.

An Appeal Essential for Review by Court.—The superior court has no jurisdiction to decide whether a deposition be regularly taken, except on appeal from the clerk's decision. *Hix v. Fisher*, 60 N. C. 474.

Qualification of Commissioner Presumed.—A commissioner appointed to take depositions will be presumed to be properly qualified until the contrary is shown. *Gregg v. Mallett*, 111 N. C. 74, 15 S. E. 936.

Mistake in Name.—Where the notice to take depositions correctly states the name of the commissioner appointed to take them, and is otherwise regular, it is error for the trial judge to exclude the depositions, as evidence, on account of a slight error in the spelling of the commissioner's name. *Hardy v. Phoenix Mut. Life Ins. Co.*, 167 N. C. 22, 83 S. E. 5.

Commissioner Related to Parties.—The commissioner should not be related to either of the parties, but the burden of proving this relationship rests upon the movant. *Younce v. Broad River Lumber Co.*, 155 N. C. 239, 71 S. E. 329.

Same-Objection.—An objection that a commissioner to take depositions is related to one of the parties must be taken at the time of opening such depositions before the clerk. *Kerr v. Hicks*, 131 N. C. 90, 42 S. E. 532.

Duty of Witness to Answer.—The commissioner acts for the court and it is the duty of the witness to answer proper questions propounded by him, just as though the examination is conducted before the judge or clerk. *Bradley, etc., Co. v. Taylor*, 112 N. C. 141, 146, 17 S. E. 69.

Delay of Commission Insufficient for Continuance.—Commissions to take testimony are issued at the instance, and for the benefit, of one of the parties, and he will usually make them returnable at the earliest day consistent with convenience. But if through laches or from a wish to delay the trial, he should not do so, the non-execution of the commission will be adjudged an insufficient reason for asking a continuance. *Duncan v. Hill*, 19 N. C. 291.

§ 8-72. Notice required for taking depositions.

—In taking depositions in civil actions or special proceedings, written notice of the time and place of taking a deposition, specifying the name of the witness, must be served by the party at whose instance it is taken upon the adverse party or his attorney. The time for serving such notice shall be as follows: Three entire days when the party notified resides within ten miles of the place where the deposition is to be taken; in other cases, where the party notified resides in the state, one day more for every additional twenty miles, except where the deposition is to be taken within ten miles of a railway in running operation in the state, when one day only shall be given for every hundred miles of railway to the place where the deposition is to be taken. When a deposition is to be taken beyond the state, ten days notice of the taking thereof shall be given, when the person whose deposition is to be taken resides within ten miles of a railway connecting with a line of railway within twenty miles of the place where the person notified resides. In other cases, where there are no railways running as above specified, twenty days notice shall be given. When objection is taken to the reading of any such deposition, upon the ground that there are no railways or connecting railways to and from the points specified in this section, or that the notice given had otherwise been actually insufficient, it shall devolve upon

the party objecting to satisfy the court of the truth of his allegation. (Rev., s. 1652; Code, s. 1357; 1881, c. 279; C. S. 1810.)

In General.—The object of the notice is to give the party an opportunity to attend and cross-examine; and, while on the one hand, a party will not be forced to attend on Sunday, or on a day when his presence is required at another place for the purpose of that very suit, so, on the other, it is held that the principle is complied with substantially, if the notice describes the place with reasonable certainty. *Owens v. Kinsey*, 51 N. C. 38, 40.

Variance between Notice and Certificate.—A deposition certified to have been taken at the house of J. E. was objected to because the notice was to take it at the house of J. A. E., it was held, that it would be presumed that the notice and certificate referred to the same person. *Ellmore v. Mills*, 2 N. C. 359.

Alternative Days.—A notice to take a deposition on "the 5th or 6th" of a certain month was held sufficient. *Kenedy v. Alexander*, 2 N. C. 25.

On a Particular Day for Several Successive Weeks.—Notice to take a deposition on a particular day of every week for three successive months is not good. *Bedell v. State Bank*, 12 N. C. 483.

Conflicting Dates.—Where notice is served that depositions will be taken at the same time in two different places, so that the party who is notified cannot be present at both, he may attend at either place designated and disregard the notice as to the other, and the deposition taken in his absence at the other place will, on motion, be quashed or suppressed, but where he elects to appeal by counsel and cross-examines the witnesses without making any objection at the time, this is a waiver as to any defect in the notice. *Ivey v. Bessemer City Cotton Mills*, 143 N. C. 189, 55 S. E. 613.

Certainty of Place.—A misdescription of a place, in one small particular, in a notice to take depositions will not be fatal, if there be other descriptive terms used in the notice, less liable to mistake, by which such place may be identified. *Pursell v. Long*, 52 N. C. 102.

Reasonableness as to Time.—Where the statute required three days' notice of the taking of a deposition, and only two days' notice was given and the opposite party appeared and objected to the shortness of notice, and declined to cross-examine the deponent, the deposition was rejected. In such cases the day on which notice is given is not counted, but the day on which the deposition is taken may be counted. *Beasley v. Downey*, 32 N. C. 284.

Where Parties Specially Mentioned.—Where notice was given to take the deposition of certain parties, specifically mentioned, "and others," and depositions of those particularly mentioned were not taken, it was held to be no ground for exception. *McDugald v. Smith*, 33 N. C. 576.

The notice directing the commissioner to take the depositions of persons named "and others," depositions taken of others than those named are admissible. *In re Will of Rawlings*, 170 N. C. 58, 86 S. E. 794.

Notice to One of Joint Defendants.—Upon a bill against joint administrators relative to the acts of the intestate, of which the administrators put in a joint answer, a deposition taken by the plaintiff upon notice to one of the defendants only was excluded, though it was the deposition of the plaintiff's only witness, who had since died. *Cox v. Smitherman*, 37 N. C. 66.

Served at Residence of Party.—Notice of taking a deposition is sufficient, if left at a party's residence. *Kennedy & Co. v. Fairman*, 2 N. C. 404.

Service by Constable.—A town constable cannot serve a notice to take depositions in an action pending in the superior court. *Cullen v. Absher*, 119 N. C. 441, 26 S. E. 33.

Notice by Guardian Appointed after Person Released as Sane.—Where a party to an action has become insane and placed in a State institution therefor, and is thereafter released therefrom as sane, § 122-67, the court is without authority, after his regaining his sanity, to appoint a guardian ad litem for him, § 1-65, and notice to the guardian so appointed as to the taking of depositions of witnesses does not comply with the requirements of this section, and upon objection, the depositions so taken should be excluded. *Orr v. Beachboard*, 199 N. C. 276, 154 S. E. 311.

Proof of Service.—The practice permits the person, who has served the notice that a deposition will be taken, to appear before the commissioners and swear to that fact and if it be shown by the certificate of the commissioners, the deposition may be read. *Sawrey v. Murrell*, 3 N. C. 397.

Absent Party or Attorney.—In taking depositions where a party lives out of the State, notice may be given to the

absent party, or to his attorney in court. *Savage v. Rice*, 1 N. C. 19.

§ 8-73. Publication of notice in case of non-resident.—Instead of the notice served upon the adverse party or his attorney in taking depositions in civil actions or special proceedings, when the adverse party is a nonresident and has no attorney of record, it shall be sufficient to publish notice to the adverse party in some newspaper published in the county where the action is pending, or if no newspaper is published in such county, then in some newspaper in the judicial district, for three consecutive weeks, giving the time and place of taking the deposition and specifying the name of the witness. And when the adverse party is a nonresident and service of notice cannot be had upon him or his attorney in this state, then one publication of notice to open such deposition shall be sufficient notice. (1913, c. 137; C. S. 1811.)

Cross Reference.—As to publication generally, see §§ 1-98, 1-99.

Where the defendant had left for parts unknown, and his attorney in the case had died, and none other been substituted, and plaintiff was desirous of taking a deposition in New England, an order was made directing publication for three successive weeks in a newspaper, of notice that the deposition would be taken at a certain place and day three months after publication. *Maxwell v. Holland*, 2 N. C. 302.

§ 8-74. Depositions for defendant in criminal actions.—In all criminal actions, hearings and investigations it shall be lawful for the defendant in any such action to make affidavit before the clerk of the superior court of the county in which said action is pending, that it is important for the defense that he have the testimony of any person, whose name must be given, and that such person is so infirm, or otherwise physically incapacitated, or nonresident of this state, that he cannot procure his attendance at the trial or hearing of said cause. Upon the filing of such affidavit, it shall be the duty of the clerk to appoint some responsible person to take the deposition of such witness, which deposition may be read in the trial of such criminal action under the same rules as now apply by law to depositions in civil actions: Provided, that the solicitor or prosecuting attorney of the district, county or town in which such action is pending have ten days notice of the taking of such deposition, who may appear in person or by representative to conduct the cross-examination of such witness. This section shall not apply to the taking of depositions in courts of justices of the peace. (Rev., s. 1652; Code, s. 1357; 1891, c. 522; 1893, c. 80; 1915, c. 251; C. S. 1812.)

Not Applicable to State Witnesses.—In *State v. Harris*, 181 N. C. 600, 107 S. E. 466, Stacy, J., commenting on an offer of a trial judge to allow the defense to take depositions of State's witnesses, in a dissenting opinion said: "This section provides that the defendant, in all criminal actions, may take the depositions of witnesses to be used as evidence in his behalf. But this applies to his own witnesses and not to those who testify against him. It would be strange, indeed, to say that a statute, intended to grant, as it does, a privilege to the defendant, could be used to deprive him of his constitutional guarantees. As to the witnesses offered by the State, he has the right to demand their presence in the courtroom, and to confront them with other witnesses, and to subject them to the test of a cross-examination. *State v. Mitchell*, 119 N. C. 784, 25 S. E. 783. The prisoner may not be required to examine the State's witnesses in the absence of the jury; and the con-

trary suggestion of his Honor, though unintentional, was prejudicial to the defendant."

Where there are several defendants in the same bill of indictment, it is not necessary to notify each of the others of the taking of a deposition by one for use as evidence on his behalf. *State v. Finley*, 118 N. C. 1162, 24 S. E. 495.

A deposition taken under this section is competent to be read in favor of one prisoner, although it contains testimony charging his codefendant with committing the crime. When so read, it is the duty of the presiding judge to instruct the jury that they are not to consider it as evidence against the codefendant thus charged with the crime, but only as evidence in favor of the prisoner who offers it. *State v. Finley*, 118 N. C. 1162, 24 S. E. 495.

§ 8-75. Depositions in justices' courts.—Any party in a civil action before a justice of the peace may take the depositions of all persons whose evidence he may desire to use in the action; and to do so he may apply to the clerk of the superior court for a commission to take the same, and shall proceed in all things in taking such depositions as if such action was pending in the superior court. When any such depositions are returned to the clerk, they shall be opened and passed upon by the clerk, and delivered to the justice of the peace before whom the trial is to be had; and the reading and using of said depositions shall conform to the rules of the superior court. (Rev., s. 1646; Code, s. 1359; 1872-3, c. 33; C. S. 1813.)

§ 8-76. Depositions before municipal authorities.—Any board of aldermen, board of town or county commissioners or any person interested in any proceeding, investigation, hearing or trial before such board, may take the depositions of all persons whose evidence may be desired for use in said proceeding, investigation, hearing or trial; and to do so, the chairman of such board or such person may apply in person or by attorney to the superior court clerk of that county in which such proceeding, investigation, hearing or trial is pending, for a commission to take the same, and said clerk, upon such application, shall issue such commission, or such deposition may be taken by a notary public of this state or of any other state or foreign county without a commission issuing from the court; and the notice and proceedings upon the taking of said depositions shall be the same as provided for in civil actions; and if the person upon whom the notice of the taking of such deposition is to be served is absent from or cannot after due diligence be found within this state, but can be found within the county in which the deposition is to be taken, then, and in that case, said notice shall be personally served on such person by the commissioner appointed to take such deposition or by the notary taking such deposition, as the case may be; and when any such deposition is returned to the clerk it shall be opened and passed upon by him and delivered to such board, and the reading and using of such deposition shall conform to the rules of the superior court. (Rev., s. 1653; 1889, c. 151; 1943, c. 543; C. S. 1814.)

Editor's Note.—The 1943 amendment inserted the provisions relating to notary public.

§ 8-77. Depositions in quo warranto proceedings.—In all actions for the purpose of trying the title to the office of clerk of the superior court, register of deeds, county treasurer or sheriff of any county, it shall be competent and

lawful to take the deposition of witnesses before a commissioner or commissioners to be appointed by the judge of the district wherein the case is to be tried, or the judge holding the court of said district, or the clerk of the court wherein the case is pending, or a notary public, under the same rules as to time of notice and as to the manner of taking and filing the same as is now provided by law for the taking of depositions in other cases; and such depositions, when so taken, shall be competent to be read on the trial of such action, without regard to the place of residence of such witness or distance of residence from said place of trial: Provided, that the provisions of this section shall not be construed to prevent the oral examination, by either party on the trial, of such witnesses as they may summon in their behalf. (Rev., s. 1654; 1889, c. 428; 1943, c. 543; C. S. 1815.)

§ 8-78. Commissioner may subpoena witness and punish for contempt.—Commissioners to take depositions appointed by the courts of this state, or by the courts of the states or territories of the United States, arbitrators, referees, and all persons acting under a commission issuing from any court of record in this state, are hereby empowered, they or the clerks of the courts respectively in this state, to which such commission shall be returnable, to issue subpoenas, specifying the time and place for the attendance of witnesses before them, and to administer oaths to said witnesses, to the end that they may give their testimony. And any witness appearing before any of the said persons and refusing to give his testimony on oath touching such matters as he may be lawfully examined unto shall be committed, by warrant of the person before whom he shall so refuse, to the common jail of the county, there to remain until he may be willing to give his evidence; which warrant of commitment shall recite what authority the person has to take the testimony of such witness, and the refusal of the witness to give it. (Rev., s. 1649; Code, s. 1362; R. C., c. 31, s. 64; 1777, c. 115, s. 42; 1805, c. 685, ss. 1, 2; 1848, c. 66; 1850, c. 188; C. S. 1816.)

Cross References.—As to attendance of witnesses before commissioners, etc., see § 8-60. See also, § 5-1, subsec. 6, under which refusal of witness to be sworn or answer questions amounts to contempt.

Power Not Exclusively in Commissioner.—The power to commit to jail a person refusing to testify before a commissioner, as provided for in this section, is not given exclusively, if at all, to the commissioner, but he may invoke the aid of the judge from whom he derives his appointment and whose authority is defied. *Bradley, etc., Co. v. Taylor*, 112 N. C. 141, 17 S. E. 69.

§ 8-79. Attendance before commissioner enforced.—The sheriff of the county where the witness may be shall execute all such subpoenas, and make due return thereof before the commissioner, or other person, before whom the witness is to appear, in the same manner, and under the same penalties, as in case of process of a like kind returnable to court; and when the witness shall be subpoenaed five days before the time of his required attendance, and shall fail to appear according to the subpoena and give evidence, the default shall be noted by the commissioner, arbitrator, or other person aforesaid; and in case the default be made before a commissioner act-

ing under authority from courts without the state, the defaulting witness shall forfeit and pay to the party at whose instance he may be subpoenaed fifty dollars, and on the trial for such penalty the subpoena issued by the commissioner, or other person, as aforesaid, with the indorsement thereon of due service by the officer serving the same, together with the default noted as aforesaid and indorsed on the subpoena, shall be prima facie evidence of the forfeiture, and sufficient to entitle the plaintiff to judgment for the same, unless the witness may show his incapacity to have attended. (Rev., s. 1650; Code, s. 1363; R. C., c. 31, s. 65; 1848, c. 66, s. 2; 1850, c. 188, ss. 1, 2; C. S. 1817.)

§ 8-80. Remedies against defaulting witness before commissioner.—But in case the default be made before a commissioner, arbitrator, referee or other person, acting under a commission or authority from any of the courts of this state, then the same shall be certified under his hand, and returned with the subpoena to the court by which he was commissioned or empowered to take the evidence of such witness; and thereupon the court shall adjudge the defaulting witness to pay to the party at whose instance he was summoned the sum of forty dollars; but execution shall not issue therefor until the same be ordered by the court, after such proceedings had as shall give said witness an opportunity to show cause, if he can, against the issuing thereof. (Rev., s. 1651; Code, s. 1364; R. C., c. 31, s. 66; 1850, c. 188, s. 2; C. S. 1818.)

§ 8-81. Objection to deposition before trial.—At any time before the trial, or hearing of an action or proceeding, any party may make a motion to the judge or court to reject a deposition for irregularity in the taking of it, either in whole or in part, for scandal, impertinence, the incompetency of the testimony, for insufficient notice, or for any other good cause. The objecting party shall state his exceptions in writing. (Rev., s. 1648; Code, s. 1361; 1895, c. 312; 1903, c. 132; 1869-70, c. 227, ss. 13, 17; C. S. 1819.)

Purpose of Section.—The purpose of this section is to settle the depositions as evidence before the trial or hearing and thus prevent surprise, misapprehension, confusion and delay on the trial. *Carroll v. Hodges*, 98 N. C. 418, 420, 4 S. E. 199.

Time and Manner of Objection.—As stated by the section exceptions to a deposition, especially those which relate to its regularity, should be disposed of, at the latest, before the trial is entered upon. *Ivey v. Bessemer City Cotton Mills*, 143 N. C. 189, 197, 55 S. E. 613; *Barnhardt v. Smith*, 86 N. C. 473, 480; *Carroll v. Hodges*, 98 N. C. 418, 4 S. E. 199. Such objection must be made in writing. *Brittain v. Hitchcock*, 127 N. C. 400, 37 S. E. 474.

Same—When Allowed at Trial.—Where it appeared that no notice had been given to the adverse party of the taking of a deposition, and that it had not been passed upon by the clerk, it was held that an objection to its reception might be taken on the trial of the action. *Bryan v. Jeffreys*, 104 N. C. 242, 10 S. E. 167.

Waiver of Formal Defects.—Where a party attends upon and takes part in taking depositions, he thereby waives all objections of a formal character, but a void process will not be vitalized unless there is an amendment without prejudice to third parties. *McArter v. Rhea*, 122 N. C. 614, 30 S. E. 128.

The failure to insert the name of the commissioner in the commission to take the deposition is waived by the objecting party appearing at the taking of the deposition and making no objection thereto until after the trial was begun. *Womack v. Gross*, 135 N. C. 378, 47 S. E. 464; *Tomlinson Chair Mfg. Co. v. Townsend*, 153 N. C. 244, 69 S. E. 145.

Where the provisions of this section as to making the objection before trial and in writing are not complied with, the objection to the deposition is waived. *Woodley v. Hassell*, 94 N. C. 157.

For discussion of waiver in general, see 4 N. C. Enc. Dig. 706; as to cross-examination of witnesses, see 4 N. C. Enc. Dig. 707.

Cited in Hood System Industrial Bank v. Dixie OH Co., 205 N. C. 778, 779, 172 S. E. 360.

§ 8-82. Deposition not quashed after trial begun.—No deposition shall be quashed, or rejected, on objection first made after a trial has begun, merely because of an irregularity in taking the same, provided it shall appear that the party objecting had notice that it had been taken, and it was on file long enough before the trial to enable him to present his objection. (Rev., s. 1647; Code, s. 1360; 1869-70, c. 227, s. 12; C. S. 1820.)

Opportunity to Object before Trial.—Where a deposition was open and on file before the trial, and an objection thereto was made for the first time on the trial, it was held that the objection could not be sustained. *Morgan v. Royal Fraternal Ass'n*, 170 N. C. 75, 81, 86 S. E. 975; citing *Ivey v. Bessemer City Cotton Mills*, 143 N. C. 189, 55 S. E. 613. And this is true whether the motion is to quash the deposition in whole or in part. *Carroll v. Hodges*, 98 N. C. 418, 4 S. E. 199.

Filing as Notice.—Where the deposition had been on file for two or three months before the trial, the appellant's counsel having notice and being present when it was opened by the clerk and ordered by him to be read in evidence on the trial, and they making no objections thereto, it was held that such deposition could not be quashed on oral objection made at the trial. *Carroll v. Hodges*, 98 N. C. 418, 4 S. E. 199.

As to failure to give notice to adverse party, see note of *Bryan v. Jeffreys*, 104 N. C. 242, 10 S. E. 167, under section 8-81.

Preservation of Exception.—Where a commissioner to take depositions has, over the objection and exceptions of a party litigant, denied him the right of cross-examination of a witness of his opponent, and the litigant has appealed therefrom to the trial court, and preserved his right, the exception gives notice of the grounds upon which it was based, and on his motion on the trial, the deposition relating to that part of the evidence will be stricken out. *Sugg v. St. Mary's Oil Engine Co.*, 193 N. C. 814, 138 S. E. 169.

Incompetent Questions.—Since a deposition can be quashed only for irregularities in the taking or the incompetency of witnesses, objection should be taken to the questions and answers of the deponent by way of exception and not by motion to quash the depositions. *Jeffords v. Albemarle Waterworks*, 157 N. C. 10, 72 S. E. 624.

Stated in Gulf States Steel Co. v. Ford, 173 N. C. 195, 91 S. E. 844.

§ 8-83. When deposition may be read on the trial.—Every deposition taken and returned in the manner provided by law may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:

1. If the witness is dead, or has become insane since the deposition was taken.
2. If the witness is a resident of a foreign country, or of another state, and is not present at the trial.
3. If the witness is confined in a prison outside the county in which the trial takes place.
4. If the witness is so old, sick or infirm as to be unable to attend court.
5. If the witness is the president of the United States, or the head of any department of the federal government, or a judge, district attorney, or clerk of any court of the United States, and the trial shall take place during the term of such court.
6. If the witness is the governor of the state, or the head of any department of the state government, or the president of the university, or

the head of any other incorporated college in the state, or the superintendent or any physician in the employ of any of the hospitals for the insane for the state.

7. If the witness is a justice of the supreme court, or a judge, presiding officer, clerk or solicitor of any court of record, and the trial shall take place during the term of such court.

8. If the witness is a member of the congress of the United States, or a member of the general assembly, and the trial shall take place during a session of the body of which he is a member.

9. If the witness has been duly summoned, and at the time of the trial is out of the state, or is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting, without the procurement or consent of the party offering his deposition.

10. If the action is pending in a justice's court the deposition may be read on the trial of the action, provided the witness is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting. (Rev., s. 1615; Code, s. 1358; R. C., c. 31, s. 63; 1777, c. 115, ss. 39, 40, 41; 1803, c. 633; 1828, c. 24, ss. 1, 2; 1836, c. 30; 1869-70, c. 227, s. 11; 1881, c. 279, ss. 1, 3; 1905, c. 366; 1919, c. 324; C. S. 1821.)

Cross References.—As to manner, form, and time of taking exceptions, see §§ 8-81, 8-82 and notes thereto. As to depositions in criminal actions, see § 8-74 and notes thereto.

Selected Parts.—It is not permissible to introduce selected portions of depositions without offering the whole. *Sternberg v. Crocker, etc., Co.*, 172 N. C. 731, 90 S. E. 935; *Enloe v. Charlotte Coca-Cola Bottling Co.*, 210 N. C. 262, 186 S. E. 242.

Witness Unable to Talk.—The deposition of a witness adjudged to be unable to talk or remain in court is admissible in evidence under this section. *Willeford v. Bailey*, 132 N. C. 402, 43 S. E. 928.

Where Admissible in Subsequent Action.—In the trial of an action a deposition regularly taken in another action between the same parties and involving the same subject matter is admissible as substantive evidence. *Hartis v. Charlotte Elect. R. Co.*, 162 N. C. 236, 78 S. E. 164. It may be introduced whether the deponent was examined as a witness in the case being tried or not. *Mabe v. Mabe*, 122 N. C. 552, 29 S. E. 843.

The difference between hearsay evidence and that obtained by deposition, as pointed out by the court in the *Hartis* case, lies in the fact that in the latter instance the testimony is taken before one who is empowered to administer oaths, and the adverse party is given full opportunity to cross-examine.—Ed. Note.

Same—Where Action Survives.—Where the deposition de bene esse of the plaintiff in an action has been taken in accordance with law, and the plaintiff has since died, but the cause of action survives, the deposition may properly be read in evidence in behalf of those who survive him in interest, and have properly been made parties to the original action. *Barbee v. Cannady*, 191 N. C. 529, 132 S. E. 572.

Meaning of "Duly Summoned."—By reasonable construction the ninth sub-division of this section means that where the deposition has been regularly taken, and where the witness is more than seventy-five miles from the place of trial without the consent of the party, and the presence of the witness cannot be procured, the deposition may be read if a subpoena has been duly issued—not necessarily served. *Tomlinson Chair Mfg. Co. v. Townsend*, 153 N. C. 244, 69 S. E. 145. See also *Sparrow v. Blount*, 90 N. C. 514. Stated in *Jeffords v. Albemarle Waterworks*, 157 N. C. 10, 72 S. E. 624; *Barnhardt v. Smith*, 86 N. C. 473. Section cited in *Stern & Co. v. Herren*, 101 N. C. 517, 8 S. E. 221.

§ 8-84. Depositions taken in the state to be used in another state:

1. By whom obtained. In addition to the other remedies prescribed by law, a party to an action, suit or special proceeding, civil or criminal, pending in a court without the state, either in the

United States or any of the possessions thereof, or any foreign country, may obtain, by the proceedings prescribed by this section, the testimony of a witness and in connection therewith the production of books and papers within the state to be used in the action, suit or special proceeding.

2. Application filed. Where a commission to take testimony within the state has been issued from the court in which the action, suit or special proceeding is pending, or where a notice has been given, or any other proceeding has been taken for the purpose of taking the testimony within the state pursuant to the laws of the state or country wherein the court is located, or pursuant to the laws of the United States or any of the possessions thereof, if it is a court of the United States, the person desiring such testimony, or the production of papers and documents, may present a verified petition to any justice of the supreme court or judge of the superior court, stating generally the nature of the action or proceeding in which the testimony is sought to be taken, and that the testimony of the witness is material to the issue presented in such action or proceeding, and he shall set forth the substance of or have annexed to his petition a copy of the commission, order, notice, consent or other authority under which the deposition is taken. In case of an application for a subpoena to compel the production of books or papers, the petition shall specify the particular books or papers, the production of which is sought, and show that such books or papers are in the possession of or under the control of the witness and are material upon the issues presented in the action or special proceeding in which the deposition of the witness is sought to be taken.

3. Subpoena issued. Upon the filing of such petition, if the justice of the supreme court or judge of the superior court is satisfied that the application is made in good faith to obtain testimony within the provisions of this section, he shall issue a subpoena to the witness, commanding him to appear before the commissioner named in the commission, or before a commissioner within the state, for the state, territory or foreign country in which the notice was given or the proceeding taken, or before the officer designated in the commission, notice or other paper, by his title or office, at a time and place specified in the subpoena, to testify in the action, suit or special proceeding. Where the subpoena directs the production of books or papers, it shall specify the particular books or papers to be produced, and shall specify whether the witness is required to deliver sworn copies of such books or papers to the commissioner or to produce the original thereof for inspection, but such books and original papers shall not be taken from the witness. This subpoena must be served upon the witness at least two days, or, in case of a subpoena requiring the production of books or papers, at least five days before the day on which the witness is commanded to appear. A party to an action or proceeding in which a deposition is sought to be taken, or a witness subpoenaed to attend and give his testimony, may apply to the court issuing such subpoena to vacate or modify the same.

4. Witness compelled to attend and testify. If the witness shall fail to obey the subpoena, or

refuse to have an oath administered, or to testify or to produce a book or paper pursuant to a subpoena, or to subscribe his deposition, the justice or judge issuing the subpoena shall, if it is determined that a contempt has been committed, prescribe punishment as in case of a recalcitrant witness. Upon proof by affidavit that a person to whom a subpoena was issued has failed or refused to obey such subpoena, to be duly sworn or affirmed, to testify or answer a question propounded to him, to produce a book or paper which he has been subpoenaed to produce, or to subscribe to his deposition when correctly taken down, the justice or judge shall grant an order requiring such person to show cause before him, at a time and place specified, why he should not appear, be sworn or affirmed, testify, answer a question propounded, produce a book or paper, or subscribe to the deposition, as the case may be. Such affidavit shall set forth the nature of the action or special proceeding in which the testimony is sought to be taken, and a copy of the pleadings or other papers defining the issues in such action or special proceeding, or the facts to be proved therein. Upon the return of such order to show cause, the justice or judge shall, upon such affidavit and upon the original petition and upon such other facts as shall appear, determine whether such person should be required to appear, be sworn or affirmed, testify, answer the question propounded, produce the books or papers, or subscribe to his deposition, as the case may be, and may prescribe such terms and conditions as shall seem proper. Upon proof of a failure or refusal on the part of any person to comply with any order of the court made upon such determination, the justice or judge shall make an order requiring such person to show cause before him, at a time and place therein specified, why such person should not be punished for the offense as for a contempt. Upon the return of the order to show cause, the questions which arise must be determined as upon a motion. If such failure or refusal is established to the satisfaction of the justice or judge before whom the order to show cause is made returnable, he shall enforce the order and prescribe the punishment as hereinbefore provided.

5. Deposit for costs required. The commissioner herein provided for shall not proceed to act under and by virtue of his appointment until the party seeking to obtain such deposition has deposited with him a sufficient sum of money to cover all costs and charges incident to the taking of the deposition, including such witness fees as are allowed to witnesses in this state for attendance upon the superior courts. From such deposit the commissioner shall retain whatever amount may be due him for services, pay the witness fees and other costs that may have been incurred by reason of taking such deposition, and if any balance remains in his hands, he shall pay the same to the party by whom it was advanced. (Rev., s. 1655; 1903, c. 608; C. S. 1822.)

Art. 11. Perpetuation of Testimony.

§ 8-85. Relief afforded by superior courts.—The relief afforded in courts of equity by what is known as a "bill to perpetuate testimony" shall be

afforded by the superior courts of this State. (1935, c. 254, s. 1.)

§ 8-86. How to obtain relief.—Such relief may be obtained either by a special proceeding before the clerk of the superior court, or by a civil action brought to the superior court in term. (1935, c. 254, s. 2.)

§ 8-87. Rules of procedure; admissibility of testimony taken.—Such special proceedings and civil actions shall be governed by the same rules of procedure that govern other special proceedings and civil actions; and the testimony taken therein shall be admissible in the trial of any controversy, under the same regulations and restrictions which govern depositions taken in other cases in which the taking of depositions is provided for by the laws of this State: Provided, however, the evidence so perpetuated shall not be competent against any person who was not served with notice now provided by law for the taking of depositions in civil causes to be present and cross examine said witnesses. (1935, c. 254, s. 3.)

Cross References.—As to procedure in civil actions, see § 1-88 et seq. As to procedure in special proceeding, see § 1-393 et seq. As to depositions, see § 8-71 et seq.

§ 8-88. Taxing costs.—The costs of such special proceedings and civil actions shall be taxed against the party at whose instance the proceeding is instituted. (1935, c. 254, s. 4.)

Art. 12. Inspection and Production of Writings.

§ 8-89. Inspection of writings.—The court before which an action is pending, or a judge thereof, may, in its or his discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both. (Rev., s. 1656; Code, s. 578; R. C., c. 31, s. 82; R. S., c. 31, s. 86; 1821, c. 1095; C. C. P., s. 331; 1828, c. 7; C. S. 1823.)

Cross Reference.—As to examination of adverse party, see § 1-569 and notes thereto.

Editor's Note.—This section is quite similar to the provisions of section 8-90 and must be construed therewith. In many of the cases the courts have used the term "production" when more properly the term "inspection" should be used, as the case was decided primarily under the provisions of this section. The reasoning used by the courts would indicate that this use of language has not been through inadvertence, but on the other hand would seem to furnish an additional support to the statement that the two sections are kindred in their nature and substance.

Liberal Construction.—This section is remedial, and should be liberally construed to advance the remedy intended thereby to be afforded. *Abbitt v. Gregory*, 196 N. C. 9, 11, 144 S. E. 297.

Discretion of Court.—Whether the trial court shall grant an order for the inspection of writings upon a sufficient affidavit rests in its sound discretion. *Dunlap v. London Guaranty, etc., Co.*, 202 N. C. 651, 163 S. E. 750.

The trial court's refusal to grant plaintiff's motion, for an order that defendant produce certain written statements signed by witnesses, employees of defendant, which statements these employees testified they used to refresh their recollection before becoming witnesses, was not error, the granting of such motion being in the discretion of the court, and the record failed to show that the requirements of this and the following section were met by plaintiff, or that the

written statements were in court. *Star Mfg. Co. v. Atlantic Coast Line R. Co.*, 222 N. C. 330, 23 S. E. (2d) 32.

Application for Order.—While a "roving commission for the inspection of papers" will not be ordinarily allowed, an application for an order for inspection of writings is sufficiently definite when it refers to papers under the exclusive control of the adverse party, which relate to the immediate issue in controversy, which could not be definitely described, and an order based thereon will be upheld. *Bell v. Murchison National Bank*, 196 N. C. 233, 145 S. E. 241.

Substitute for Bill of Discovery.—This section is primarily designed and intended to afford the facilities for the ascertainment of truths that were formerly supplied by a bill of discovery. *Girard Nat. Bank v. McArthur*, 165 N. C. 374, 81 S. E. 327.

Must Be Pertinent to Issue.—Upon motion to allow inspection or copy of books, papers, etc., before trial, it must be made to appear that the instrument in question relates to the merits of the action or is pertinent to the issue. *Evans v. Seaboard Air Line R. Co.*, 167 N. C. 415, 83 S. E. 617.

Where No Information Could Be Gained.—Under this section, a person will not be ordered to allow an inspection of the paper-writing if the party making the request knows the contents thereof. *Sheek v. Sain*, 127 N. C. 266, 37 S. E. 334. The court said: "The object of this section is to enable a party to get information that he did not have, or to give him more definite information, or data, than he already had." *Id.*

Inspection within Specified Time.—This section only authorizes the judge to order one party to exhibit the writing to the other and require a copy to be given him or permit him to take a copy of the same, within a specified time. *Sheek v. Sain*, 127 N. C. 266, 272, 37 S. E. 334. It was not intended that there should be an investigation of the controversies—a kind of inferior court or petty trial—with witnesses and lawyers on both sides. *Id.*

An examination of an adverse party, under § 1-569 et seq., may be joined with an order under this section for an inspection of writings, in the possession or under the control of the party to be examined. *Abbitt v. Gregory*, 196 N. C. 9, 11, 144 S. E. 297.

Due Notice Required.—The inspection as provided for in this section can only be had upon the order of the court, made after due notice. *Vann v. Lawrence*, 111 N. C. 32, 34, 15 S. E. 1031.

Same—Duration of Notice.—A notice to produce papers, etc., "on a trial to be had this day," is not confined to a trial on that day, but extends to a trial at a subsequent term. *State v. Kimbrough*, 13 N. C. 431.

As an Aid to Frame Complaint.—In an action by a stockholder of a corporation to set aside as fraudulent an assignment by the corporation of a contract, the plaintiff is entitled under this section to inspect the records and books of the corporation in order to obtain information upon which to frame his complaint. *Holt v. Southern Finishing, etc., Co.*, 116 N. C. 480, 487, 21 S. E. 919. This is true even though their evidence may result in pecuniary injury. *Id.*

Depositing the Papers Not Required.—This section does not authorize the judge or clerk to issue an order that the respondent be required to deposit the papers in the clerk's office. *Mills v. Biscoe Lumber Co.*, 139 N. C. 524, 52 S. E. 200.

Extent of Admission.—The papers, when produced by the method herein prescribed, are competent evidence for all legitimate purposes. *Austin v. Secrest*, 91 N. C. 214, 218.

Applicability of Res Judicata.—An order of the judge, reversing an order of the clerk with reference to the production of papers, is a discretionary matter, and being an administrative order in the cause, and not affecting the merits, is not res judicata and the motion can be renewed and a new order obtained. *Mills v. Biscoe Lumber Co.*, 139 N. C. 524, 52 S. E. 200.

Motion to Nonsuit.—A motion to nonsuit a plaintiff for not producing books or papers, cannot be made unless a previous order of the court has been obtained for the production of such books or papers. *Graham v. Hamilton*, 25 N. C. 381.

Where Inspection Refused.—Where the judge refuses an inspection which is of the character authorized by this section, it still rests within his discretion to compel the production of the writing later or upon trial, when its competency and pertinency as evidence bearing on the issue may be better determined. *Evans v. Seaboard Air Line R. Co.*, 167 N. C. 415, 83 S. E. 617.

The affidavit supporting an order for inspection of writings must sufficiently designate the writings sought to be inspected and show that they are material to the inquiry,

and where the affidavit is insufficient the order based thereon is invalid. *Dunlap v. London Guaranty, etc., Co.*, 202 N. C. 651, 163 S. E. 750.

An application for an order for inspection of writings is sufficiently definite when it refers to papers under the exclusive control of the adverse party which relate to the immediate issue in controversy, and which cannot be more definitely described by applicant. *Rivenbark v. Shell Union Oil Corp.*, 217 N. C. 592, 8 S. E. (2d) 919.

And Must Show Materiality and Necessity.—It is required that the affidavit set forth facts showing the materiality and necessity of the papers sought to be produced, and the mere averment that they are material and necessary is insufficient. *Patterson v. Southern Ry. Co.*, 219 N. C. 23, 12 S. E. (2d) 652.

Review.—Where the trial court, within its discretion, has ordered a party to give to the other an inspection and copy of certain books, papers or documents containing material evidence, and the order is supported by sufficient findings of fact, and there is no evidence of abuse of such discretion, the order is not reviewable on appeal, and the appeal will be dismissed. *Abbitt v. Gregory*, 196 N. C. 9, 144 S. E. 297.

Reviewal by Supreme Court.—The Supreme Court will not pass upon the propriety of discharging a rule for the production of papers under this section unless the facts are stated upon which the application is based. *Maxwell v. McDowell*, 50 N. C. 391.

Appeal Allowed.—An appeal lies from an order requiring a person to allow an inspection of paper writings. *Sheek v. Sain*, 127 N. C. 266, 37 S. E. 334.

Applied to note for purpose of taking photographic copy thereof, in *Girard Nat. Bank v. McArthur*, 165 N. C. 374, 81 S. E. 327. Applied in *Long v. Oxford*, 104 N. C. 408, 10 S. E. 525, to determine the genuineness of a new promise on an indebtedness set up by the plaintiff to defendant's plea of the statute of limitations.

Stated in *McDonald v. Carson*, 94 N. C. 497; *Whitten v. Western Union Tel. Co.*, 141 N. C. 361, 54 S. E. 289; *Harper v. Pinkston*, 112 N. C. 293, 17 S. E. 161.

Cited in *Sossamon v. Oaklawn Cemetery*, 212 N. C. 535, 193 S. E. 720.

§ 8-90. Production of writings.—The courts have full power, on motion and due notice thereof given, to require the parties to produce books or writings in their possession or control which contain evidence pertinent to the issue, and if a plaintiff shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion, may give the like judgment for the defendant, as in cases of nonsuit; and if a defendant shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion as aforesaid, may give judgment against him by default. (Rev., s. 1657; Code, s. 1373; R. C., c. 31, s. 25; 1821, c. 1095; 1828, c. 7; C. S. 1824.)

Discretion of Court.—When the requirements of the applicant, as set forth in the preceding section, are met, this section does nothing more than vest the granting of such application in the discretion of the judge. *Star Mfg. Co. v. Atlantic Coast Line R. Co.*, 222 N. C. 330, 333, 23 S. E. (2d) 32.

Complaint Essential.—A court cannot under this section order the production of papers by the defendant where no complaint has been filed, so that, in case the papers are not produced, the court can render judgment for the plaintiff, according to the provision of the section. *Branson v. Pentress*, 35 N. C. 165.

Where No Answer Filed.—Where no answer has been filed, the defendant is not entitled to an order to inspect a check in possession of the plaintiff, under this section. *Sheek v. Sain*, 127 N. C. 266, 37 S. E. 334.

Proof by Parol.—The contents of a paper writing cannot be proved by parol, unless notice has been given to the adverse party, who has it in possession to produce it on trial. *Murchison v. McLeod*, 47 N. C. 239.

As to requirement of notice, see note of *Vann v. Lawrence*, 111 N. C. 32, 15 S. E. 1031, under section 8-89. As to requirement of pertinence to issue, see note of *Evans v. Seaboard Air Line R. Co.*, 167 N. C. 415, 83 S. E. 617, under section 8-89.

Due notice is notice sufficient to enable the party to have the document when called for. *McDonald v. Carson*, 95 N. C. 377.

Generally if a party dwells in another town than that in which the trial is had, a service of notice upon him at the place where the trial is had, or after he has left home to attend court, to produce papers, is not sufficient. *Beard v. Southern R. Co.*, 143 N. C. 136, 55 S. E. 505.

As to extent of admission, see note of *Austin v. Secrest*, 91 N. C. 214, under section 8-89.

Affidavit for Non-Production.—Where the plaintiff's affidavit stated that he had not seen the letter (ordered produced) since he first sent it, that he had not knowingly destroyed it, and had made diligent search for it and could not find it, thus it was held to be sufficient cause shown for a discharge of the rule for its production. *Fuller v. McMillan*, 44 N. C. 206.

Stated in *McDonald v. Carson*, 94 N. C. 497; *Rivenbark v. Shell Union Oil Corp.*, 217 N. C. 592, 8 S. E. (2d) 919.

§ 8-91. Admission of genuineness.—Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper material

to the action, and request an admission in writing of its genuineness. If the adverse party, or his attorney, fail to give the admission within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained at the trial, shall be paid by the party refusing the admission, unless it appear to the satisfaction of the court that there were good reasons for the refusal. (Rev., s. 1658; Code, s. 578; R. C., c. 31, s. 82; R. S., c. 31, s. 86; 1821, c. 1095; 1828, c. 7; C. C. P., s. 331; C. S. 1825.)

Comments by Counsel.—Counsel may comment as to the truth of the contents of an instrument as suggested by its appearance, even after the admission in writing under this section that the instrument is genuine. *Knight v. Hough-talling*, 85 N. C. 17.

Chapter 9. Jurors.

Art. 1. Jury List and Drawing of Original Panel.

Sec.

- 9-1. Jury list from taxpayers of good character.
- 9-2. Names on list put in box.
- 9-3. Manner of drawing panel for term from box.
- 9-4. Local modifications as to drawing panel.
- 9-5. Fees of jurors.
- 9-6. Jurors having suits pending.
- 9-7. Disqualified persons drawn.
- 9-8. How drawing to continue.
- 9-9. Drawing when commissioners fail to draw.

Art. 2. Petit Jurors; Attendance, Regulation and Privileges.

- 9-10. Summons to jurors drawn; to attend until discharged.
- 9-11. Summons to talesmen; their disqualifications.
- 9-12. How talesmen summoned when sheriff interested.
- 9-13. Penalty for disobeying summons.
- 9-14. Jury sworn; judge decides competency.
- 9-15. Questioning jurors without challenge.
- 9-16. Causes of challenge to juror drawn from box.
- 9-17. Jurors impaneled to try case furnished with accommodations.

Art. 1. Jury List and Drawing of Original Panel.

§ 9-1. Jury list from taxpayers of good character.—The board of county commissioners for the several counties at their regular meeting on the first Monday in June, in the year nineteen hundred and five, and every two years thereafter, shall cause their clerks to lay before them the tax returns of the preceding year for their county, from which they shall proceed to select the names of all such persons as have paid all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence. A list of the names thus selected shall be made out by the clerk of the board of commissioners and shall constitute the jury list, and shall be preserved as such. (Rev., s. 1957; Code, ss. 1722, 1723; 1806, c. 694; 1889, c. 569; 1899, c. 729; 1897, cc. 117, 539; 1899, c. 729; 1937, cc. 19, 200; 1941, c. 92; C. S. 2312.)

Sec.

- 9-18. Exemption from civil arrest.
- 9-19. Exemptions from jury duty.
- 9-20. Clerk to keep record of jurors.
- 9-21. Extra or alternate juror; challenges; compensation and duties.

Art. 3. Peremptory Challenges in Civil Cases.

- 9-22. Six peremptory challenges on each side.
- 9-23. Where several defendants; challenges apportioned; discretion of judge.

Art. 4. Grand Jurors.

- 9-24. How grand jury drawn.
- 9-25. Grand juries in certain counties.
- 9-26. Exceptions for disqualifications.
- 9-27. Foreman may administer oaths to witnesses.
- 9-28. Grand jury to visit jail and county home.

Art. 5. Special Venire.

- 9-29. Special venire to sheriff in capital cases.
- 9-30. Drawn from jury box in court by judge's order.
- 9-31. Penalty on sheriff not executing writ or jurors not attending.

Local Modification.—Macon: 1933, c. 62; Yancey: 1929, cc. 57, 65.

Editor's Note.—Public Laws 1937, c. 19, applicable only to Ashe county, changed the date for selecting the jury list to the first Monday in March.

Public Laws 1937, c. 200, amended this section by adding the following: "In Ashe county, non-payment of taxes shall not be a bar to jury service nor prevent the placing of the names of persons otherwise qualified upon the jury list for said county."

Public Laws, 1941, c. 92 repealed Public Laws, 1937, cc. 19, 200.

Section Directory.—The regulations contained in this section, relative to the revision of the jury lists, are directory only and, while they should be observed, the failure to do so does not vitiate the venire in the absence of bad faith or corruption on the part of the county commissioners. *State v. Smarr*, 121 N. C. 669, 28 S. E. 549; *State v. Perry*, 122 N. C. 1018, 29 S. E. 384; *State v. Bonner*, 149 N. C. 519, 63 S. E. 84.

Special Statute Allowing Other Method.—Where a statute creating a special criminal court for certain counties allows every facility to the accused for getting a fair and impartial jury, it is not unconstitutional because it does

not follow the same methods of drawing the jury which are provided for by the superior courts. *State v. Jones*, 97 N. C. 469, 1 S. E. 680.

Alienage.—Alienage is disqualification of a juror. *Hinton v. Hinton*, 196 N. C. 341, 145 S. E. 615.

Omission of Negroes.—The omission of negroes from the jury list, when not excluded on account of their race, is not of itself grounds for quashing an indictment. *State v. Daniels*, 134 N. C. 641, 46 S. E. 743.

Names of Qualified Persons Not on Jury List.—Where the county commissioners, while drawing the jurors, laid aside the names of several persons, otherwise qualified, for the reason that they did not know whether they were residents of the county, and the jury list was completed by the names of other duly qualified persons, if there was any irregularity it did not affect the action of the jurors so drawn and summoned. *State v. Wilcox*, 104 N. C. 847, 10 S. E. 453.

Merely Purging Jury List.—Merely purging the jury list of the names of those who had not paid their taxes, without adding any new names thereto, does not vitiate the venire in the absence of bad faith or corruption on the part of the county commissioners. *State v. Dixon*, 131 N. C. 808, 42 S. E. 944.

Section Does Not Abolish Challenge.—This section providing that good and lawful men, required by the Constitution to serve on juries, shall be men found by the county commissioners to have paid taxes for the preceding year, and of good moral character and of sufficient intelligence, did not abolish challenges to jurors, in particular actions, for bias, interest, kinship, etc. *State v. Vick*, 132 N. C. 995, 43 S. E. 626.

Juror Having Served within Two Years.—A juror of the original panel is not subject to be challenged upon the ground that he had served upon a jury in the same court within two years; only tales-jurors who have thus served are disqualified by the statute. *State v. Brittain*, 89 N. C. 481.

Payment of Taxes—Motion to Quash Indictments.—Under this section only such persons as have paid all of their taxes for the preceding year are competent to serve as jurors or grand jurors. *Breese v. United States*, 143 Fed. 250. But there are many defenses to the failure to pay. For example nonpayment of taxes due to failure to put name on list of taxpayers does not of itself disqualify the juror. *Breese v. United States*, 203 Fed. 824. Nor does this section disqualify where the juror owned no taxable property above the exemption. *U. S. v. Breese*, 172 Fed. 761. To disqualify the failure to pay must be for the fiscal year preceding the annual revision at which the juror's name was drawn. *State v. Davis*, 109 N. C. 780, 14 S. E. 780; *State v. Hargrove*, 100 N. C. 484, 6 S. E. 185; *Sellers v. Sellers*, 98 N. C. 13, 3 S. E. 917; *State v. Carland*, 90 N. C. 668. And a juror is not disqualified when the sheriff has been enjoined from collecting his taxes. *State v. Heaton*, 77 N. C. 505.

The findings of the judge in the trial court as to whether a juror has paid his taxes is not reviewable on appeal. *State v. Carland*, 90 N. C. 668.

Formerly it was held that an indictment could be quashed if one of the members of the grand jury had not paid his taxes but this was changed by legislative enactment. See sec. 9-26 and note thereto.

Cited in *Haney v. Lincolnton*, 207 N. C. 282, 292, 176 S. E. 573; *Ryals v. Carolina Contracting Co.*, 219 N. C. 479, 14 S. E. (2d) 531 (dis. op.).

§ 9-2. Names on list put in box.—The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board. (Rev., s. 1958; Code, s. 1726; 1868-9, c. 9, s. 5; 1937, c. 19; 1941, c. 92; C. S. 2313.)

Editor's Note.—Public Laws 1937, c. 19, applicable only to Ashe county changed date for putting names in box to "first Monday in March or a date selected and approved on the first Monday in March." Public Laws 1941, c. 92, repealed Public Laws 1937, c. 19.

Boxes Improperly Marked.—Where the partitions of the jury box, instead of being marked "No. 1" and "No. 2," were marked "Jurors Drawn" and "Jurors Not Drawn"; there was a lock on each partition, but one key unlocked both; there was but one key and that was placed in the custody of the register and ex officio clerk to the board of county commissioners by the chairman of the board, it was held that a special venire drawn under the directions of the presiding judge from such boxes was legal. *State v. Potts*, 100 N. C. 457, 6 S. E. 657.

Middle Letter Entered Erroneously.—The entering on the scroll of the name J. L. B. summoned as a juror, as J. S. B. is immaterial, since the use of a middle letter forms no part of the name. *State v. Mills*, 91 N. C. 581.

Applied in *State v. Walls*, 211 N. C. 487, 191 S. E. 232.

§ 9-3. Manner of drawing panel for term from box.—At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trial of civil cases exclusively, when they need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined. (Rev., s. 1959; Code, ss. 1727, 1731; 1889, c. 559; 1897, c. 117; 1868-9, c. 175; 1868-9, c. 9, s. 6; 1806, c. 694; 1901, c. 636; 1901, c. 28, s. 3; 1903, c. 11; 1905, cc. 38, 76, s. 4; 1905, c. 285; 1933, c. 89; C. S. 2314.)

Local Modification.—*Buncombe, Cabarrus, Catawba, Forsyth, Guilford, Haywood, Iredell, Wake*: 1933, c. 89.

Cross References.—As to manner of drawing panel when commissioners fail to act, see § 9-9. As to drawing of grand jury from those returned as jurors, see § 9-24. As to drawing special veniremen, see § 9-30. As to drawing additional jurors from other counties instead of removal, see § 1-86. As to drawing jurors in recorders' courts, see § 7-250. As to drawing jurors in civil county courts, see § 7-310. As to general county courts, see § 7-288.

Section Partly Mandatory.—The portion of this section, requiring persons named on the scrolls drawn from the jury box to constitute the jury, is mandatory. *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293.

But the section is directory merely so far as it relates to the action of the commissioners as to the time and place of drawing the jury. *State v. Banner*, 149 N. C. 519, 521, 63 S. E. 84; *State v. Perry*, 122 N. C. 1018, 29 S. E. 384.

While the provisions of the statutes fixing the number of jurors to be drawn by the county commissioners is directory, yet they are very essential to the impartial administration of justice, and their non-observance is the subject of censure, if not punishment. *State v. Watson*, 104 N. C. 735, 10 S. E. 705.

Child Draws Jurors to Prevent Fraud.—The reason for having a child not more than ten years of age to draw the jurors is to prevent fraud in the selection of the jury, so that the law can be administered impartially and without discrimination. The child draws from the jury box the

names of all sorts and conditions of men, white and negro persons, Jew and Gentile, who are qualified to serve under the law. A more perfect system could hardly be devised to insure impartiality. *State v. Walls*, 211 N. C. 487, 494, 191 S. E. 232.

Effect of Excluding Negroes from Grand Jury.—The exclusion of all persons of the negro race from a grand jury, which finds an indictment against a negro, where they are excluded solely because of their race or color, denies him the equal protection of the laws in violation of the Constitutions of North Carolina and of the United States. *State v. Walls*, 211 N. C. 487, 494, 191 S. E. 232.

Findings That Section Complied with Conclusive.—The findings of the trial court, after hearing evidence, that the jurors were drawn, sworn and empanelled in accordance with this section, and that there was no discrimination against persons of the negro race in making up the jury lists, are conclusive on appeal when supported by sufficient evidence, in the absence of gross abuse. *State v. Cooper*, 205 N. C. 657, 172 S. E. 199. See *State v. Walls*, 211 N. C. 487, 191 S. E. 232.

Cited in *State v. Barkley*, 198 N. C. 349, 151 S. E. 733; *State v. Dalton*, 206 N. C. 507, 174 S. E. 422.

§ 9-4. Local modifications as to drawing panel.

—In Buncombe county forty-eight jurors shall be drawn to serve the first week and twenty-four to serve the second week.

In Cabarrus county the board of county commissioners shall annually draw forty-two jurors for the first week of the January term of superior court of each year and twenty-four jurors for each and every other week of superior court during the year.

In Cumberland county the commissioners may, in their discretion, cause an additional twelve scrolls to be drawn, to serve as the jury for the first week.

In Forsyth county the board of county commissioners is authorized and empowered to draw as jurors from the box, as provided in the preceding section, an additional number of jurors to those now provided by law. At all civil terms, regular and special, for the first week thirty jurors shall be drawn and summoned, and likewise for the second week. At all criminal terms, regular and special, for the first week forty-two jurors shall be drawn and summoned.

For the second week thirty jurors shall be drawn and summoned.

In Hertford county fifteen extra jurors shall be drawn and summoned for the second week.

In Iredell county twenty-four jurors shall be drawn and summoned for the second week.

In McDowell county the board of county commissioners is authorized and empowered to draw as jurors from the box an additional number of jurors to those now provided by law. At each term when grand jury is to be selected, for the first week, forty-eight jurors shall be drawn and summoned, and for each subsequent week of such terms and at all other terms, both civil and criminal, or mixed, regular or special, for each week, thirty jurors shall be drawn and summoned.

In Randolph county forty-two scrolls shall be drawn for the first week and twenty-four for the second week. The commissioners may at the same time and in the same manner draw the names of twenty-four other persons who shall serve as petit jurors for the week for which they are drawn and summoned.

In Rockingham county the board of county commissioners is authorized and empowered to draw as jurors from the box, as provided in the preceding section, an additional number of jurors

to those now provided by law. At all civil terms, regular and special, for the first week thirty jurors shall be drawn and summoned; for the second week twenty-four jurors shall be drawn and summoned. At all criminal terms, regular and special, for the first week forty-two jurors shall be drawn and summoned; for the second week twenty-four jurors shall be drawn and summoned.

In Rowan county twenty-four jurors shall be drawn and summoned for the second week.

In Stokes county the commissioners shall draw for each term of the superior court, in accordance with law, twenty-four jurors, to be summoned by the sheriff of Stokes county.

In Wayne, Robeson and Granville counties the board of commissioners for the first week of each term of the superior court of said counties for the trial of civil and criminal causes shall cause to be drawn from the jury box forty-two scrolls, and for each additional week or for any court for the trial of civil causes only, said board of commissioners shall draw twenty-four scrolls; provided, that in Wayne county the forty-two scrolls required by this section shall be drawn only at the January and July criminal terms of court; at all other times, thirty-six scrolls shall be drawn from the jury box for each week. (Rev., s. 1959; 1907, c. 239; Ex. Sess. 1913, c. 4; Pub. Loc., 1915, cc. 233, 744, 764; 1921, c. 142; 1923, c. 107, s. 2; 1923, c. 117; 1937, c. 19, s. 4; 1939, c. 140; 1941, cc. 87, 92, 175; C. S. 2315.)

Editor's Note.—By Public Laws 1921, ch. 142, the paragraph relating to Stokes County was added. In 1923 the paragraphs relating to Wayne, Robeson, Granville and McDowell Counties were added.

Public Laws 1941, c. 92, s. 1, repealed Public Laws 1937, c. 19 which added a paragraph relating to Ashe County. The 1939 amendment added the proviso relating to Wayne County which was amended by Public Laws 1941, c. 87. Public Laws 1941, c. 175, added the proviso relating to Cabarrus County.

§ 9-5. Fees of jurors.—All jurors in the superior court other than special veniremen and tales jurors shall receive such an amount per day as the boards of commissioners of their respective counties may fix, not less than two dollars per day and not more than four dollars per day, and mileage at the rate of five cents per mile while coming to the county-seat and returning home. The said distance to be computed by the usual route of public travel. In the counties of Union, Nash, Brunswick, Randolph, Haywood, Polk, Surry, Swain, Alleghany, Anson, Graham, Ashe, Dare, Alexander, Cleveland, Clay, Transylvania, Harnett, Stanly, Mitchell, Burke, Franklin, Greene, Johnston, and Henderson, jurors other than special veniremen and tales jurors shall not receive more than three dollars per day.

Special veniremen and tales jurors shall receive such an amount per day for their attendance upon court as may be fixed by the boards of commissioners of their respective counties, not exceeding three dollars per day. Special veniremen who have been accepted on the panel in the trial of any cause shall receive the pay and mileage of regular jurors. (Rev., s. 2798; 1919, c. 85, ss. 1, 2; Ex. Sess. 1920, c. 61, ss. 1, 3; 1921, c. 62, s. 1; C. S. 3892.)

Local Modification.—Durham: 1943, c. 323; Harnett: 1933, c. 75; Martin: 1943, c. 173.

Cross References.—As to payment of members of the

grand jury in Scotland county, see § 9-25. As to payment of an alternate juror, see § 9-21. As to payment of additional jurors from another county, see § 1-86. As to compensation of jurors at coroner's inquest, see § 152-9. As to unclaimed fees of jurors, see § 2-250. As to compensation of jurors to value division fence under the fence and stock law, see § 68-10.

§ 9-6. Jurors having suits pending.—If any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jury box. (Rev., s. 1960; Code, s. 1728; 1868-9, c. 9, s. 7; 1806, c. 694; C. S. 2316.)

Cross Reference.—As to grand juror who has suit pending, see § 9-26.

Fundamental Objection.—The circumstance described by this section is a fundamental objection to the juror, whenever it is made to appear, and is a cause of challenge, although the county commissioners may have allowed his name to go upon the venire. *Hodges Bros. v. Lassiter*, 96 N. C. 351, 2 S. E. 923.

Such juror is incompetent, and the defendant in a criminal action is not required to show affirmatively that the juror was present and participated in the deliberations of the grand jury when the bill was found. *State v. Smith*, 80 N. C. 410.

When Suit Not Triable at Same Term.—This section disqualifies only one who has a suit to be tried at the same term at which he is drawn to serve as a juror, and does not disqualify a party to a suit in which the summons is issued and made returnable to the term at which he is drawn to serve, but no pleadings are filed, so that it, even if thereafter brought to issue at that term, is not triable till the next term. *State v. Spivey*, 132 N. C. 989, 43 S. E. 475.

Suit Pending but Not at Issue.—A juror who has a suit "pending" but not "at issue" at the term of the court at which he has been drawn to serve, is not disqualified under this section. *State v. Smarr*, 121 N. C. 669, 28 S. E. 549.

Indictment Quashed When Section Violated.—An indictment was properly quashed where one of the grand jurors who found the bill was a party to an action pending and at issue in the superior court. *State v. Liles*, 77 N. C. 496; *State v. Smith*, 80 N. C. 410.

Applied in *State v. Parish*, 104 N. C. 679, 10 S. E. 457.

§ 9-7. Disqualified persons drawn.—If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead. (Rev., s. 1961; Code, s. 1729; 1889, c. 559; 1897, c. 117, s. 5; 1806, c. 694; C. S. 2317.)

§ 9-8. How drawing to continue.—The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out again as herein directed. (Rev., s. 1962; Code, s. 1730; 1868-9, c. 9, s. 9; 1806, c. 6, s. 94; C. S. 2318.)

Cross Reference.—See § 9-3 and notes thereto.

§ 9-9. Drawing when commissioners fail to draw.—If the commissioners for any cause fail to draw a jury for any term of the superior court, regular or special, the sheriff of the county and the clerk of the commissioners, in the presence of and assisted by two justices of the peace of the county, shall draw such jury in the manner above prescribed; and if a special term continues for more than two weeks, then for the weeks exceeding two a jury or juries may be drawn as in this section provided. (Rev., s. 1963; Code, s. 1732; 1868-9, c. 9, s. 11; C. S. 2319.)

Time When Names Must Be Drawn.—This section does not require a jury to be drawn twenty days or more before the term but when considered with the preceding sec-

tions it is evident that the drawing must be done within the twenty days. Even if the twenty days were required as a time limited it would be regarded as directory only. *Lanier v. Greenville*, 174 N. C. 311, 93 S. E. 850.

Deputy Sheriff Included.—The provision of this section refers to sheriffs in the generic sense, including deputies within its meaning to perform a duty of a ministerial nature in the sheriff's name; and where the deputy thus acts at the request of the sheriff, a challenge to the panel on that account alone will not be sustained. *Lanier v. Greenville*, 174 N. C. 311, 93 S. E. 850.

Court May Order Jury Drawn.—Where, upon failure of the commissioners to draw a jury for a third week of court, the court orders the same to be drawn as prescribed by this section, such jury is legal. *Leach v. Linde*, 108 N. C. 547, 13 S. E. 212.

Art. 2. Petit Jurors; Attendance, Regulation and Privileges.

§ 9-10. Summons to jurors drawn; to attend until discharged.—The clerk of the board of county commissioners shall, within five days from the drawing, deliver the list of jurors drawn for the superior court to the sheriff of the county, who shall summon the persons therein named to attend as jurors at such court. The summons shall be served, personally, or by leaving a copy thereof at the house of the juror, at least five days before the sitting of the court to which he may be summoned. Jurors shall appear and give their attendance until duly discharged. (Rev., s. 1976; Code, s. 1733; 1868-9, c. 9, s. 12; R. C., c. 31, s. 29; 1779, c. 157, ss. 4, 6; C. S. 2320.)

Cross Reference.—As to penalty for disobeying summons, see § 9-13.

§ 9-11. Summons to talesmen; their disqualifications.—That there may not be a defect of jurors, the sheriff shall by order of the court summon, from day to day, of the bystanders, other jurors, being freeholders, within the county where the court is held, or the judge may, in his discretion, at the beginning of the term direct the tales jurors to be drawn from the jury box used in drawing the petit jury for the term, in the presence of the court; such tales jurors so drawn to be summoned by the sheriff and to serve on the petit jury, and on any day the court may discharge those who have served the preceding day. The judge may, upon his own motion, or upon the request of counsel for either plaintiff or defendant, instruct the sheriff to summon such jurors outside of the courthouse. It is a disqualification and ground of challenge to any tales juror that such juror has acted in the same court as grand, petit or tales juror within two years next preceding such term of court. (Rev., s. 1967; Code, s. 1733; R. C., c. 31, s. 29; 1779, c. 156, s. 69; 1911, c. 15; 1915, c. 210; C. S. 2321.)

See 11 N. C. Law Rev., 218.

Tales Jurors Defined.—A tales is a supply of such men as are summoned on the first panel in order to make up the deficiency. *Boyer v. Teague*, 106 N. C. 576, 621, 11 S. E. 665.

Qualifications of Tales Juror.—A tales juror must have the same qualification as a regular juror, with the additional one of being a freeholder. *State v. Sherman*, 115 N. C. 773, 20 S. E. 711. This includes the requirement as to being a taxpayer. *State v. Hargrove*, 100 N. C. 484, 6 S. E. 185; *State v. Sherman*, 115 N. C. 773, 20 S. E. 711. But it is not a disqualification of such a juror that his name does not appear on the list of the county commissioners. *Lee v. Lee*, 71 N. C. 139.

Selection.—Although this section seems to imply that tales jurors are to be selected from bystanders, it is the practice and within the powers of the court and of the executive officers, acting under the court's orders, to go outside for the purpose of selecting talesmen, or to notify

them in advance when such a course best promotes the ends of justice. *Lupton v. Spencer*, 173 N. C. 126, 91 S. E. 718.

None of Original Panel Necessary.—The trial judge, in his discretion, may discharge any jurors or jury, and is not required to reserve one juror of the original panel to "build to," before directing the sheriff to summons tales jurors as authorized by this section. *State v. Manship*, 174 N. C. 798, 94 S. E. 2.

"Freeholders."—A freeholder is one who owns land in fee, or for life, or for some indeterminate period. As there are legal and equitable estates, so there are legal and equitable freeholds. *State v. Ragland*, 75 N. C. 12. The realty must be situated in the county where the court is held. *State v. Cooper*, 83 N. C. 671. A mortgagor in possession is a freeholder within the meaning of this section. *State v. Ragland*, 75 N. C. 12. But not so with the holder of a license to lay off an oyster bed. *State v. Young*, 138 N. C. 571, 50 S. E. 213.

A finding by the trial judge that persons drawn were not freeholders is conclusive on appeal. *State v. Register*, 133 N. C. 746, 46 S. E. 21.

Regular Jurors Discharged.—Where the regular jurors have been discharged by the trial judge for the term, evidently under the impression that the business of the court was over, and on the following day there remains a criminal case regularly coming up for trial on a defect of jurors, the judge, within his discretion, is authorized to direct the sheriff to summons "other jurors, being freeholders within the county," whether within or without the courthouse. *State v. Manship*, 174 N. C. 798, 94 S. E. 2.

Instruction of Court Held Not to Be an Order under This Section.—Where upon adjournment the court instructed the sheriff to summon a number of men to act as talesmen in a case proposed to be called for the next day and upon the trial defendants moved that none of the men so summoned and none of the jurors already in the box should serve, but that the jury be selected from bystanders, it was held that the instruction of the court was not an order under this section for talesmen or a special venire, and that the jurors summoned being subject to all the qualifications of talesmen, and defendants having failed to exhaust their respective challenges to the poll, defendants' exceptions to the refusal of their motions could not be sustained. *State v. Anderson*, 208 N. C. 771, 182 S. E. 643.

§ 9-12. How talesmen summoned when sheriff interested.—When, in the trial of any action before a jury, the sheriff of the county in which the case is to be tried is a party to or has any interest in the action, or when the presiding judge finds upon investigation that the sheriff of the county is not a suitable person, on account of indirect interest in or relative to the cause of action, to be entrusted with the summoning of the tales jurors in any particular case pending, such judge shall appoint some suitable person to summon the jurors in place of the sheriff. (Rev., s. 1968; 1889, c. 441; C. S. 2322.)

Stated and applied in *Boyer v. Teague*, 106 N. C. 577, 11 S. E. 665; *Lupton v. Spencer*, 173 N. C. 126, 91 S. E. 718.

§ 9-13. Penalty for disobeying summons.—Every person on the original venire summoned to appear as a juror who fails to give his attendance until duly discharged shall forfeit and pay for the use of the county the sum of twenty dollars, to be imposed by the court; but each delinquent juror shall have until the next succeeding term to make his excuse for his nonattendance, and, if he renders an excuse deemed sufficient by the court, he shall be discharged without costs. Every person summoned of the bystanders who shall not appear and serve during the day as a juror shall be fined in the sum of two dollars, unless he can show sufficient cause to the court; and the clerk shall forthwith issue an execution against the estate of the delinquent tales juror for such amercement and costs. (Rev., s. 1977; Code, ss.

1734, 405; R. C., c. 31, s. 30; 1779, c. 157, s. 4; 1783, c. 189; 1806, c. 694; C. S. 2323.)

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

—The clerk shall, at the beginning of the court, swear such of the petit jury as are of the original panel, to try all civil cases; and if there should not be enough of the original panel, the talesmen shall be sworn. The petit jurors of the original panel, as well as talesmen, shall be sworn as prescribed in the chapter entitled Oaths. Nothing herein shall be construed to disallow the usual challenges in law to the whole jury so sworn or to any of them; and if by reason of such challenge, any juror is withdrawn, his place on the jury shall be supplied by any of the original venire, or from the bystanders qualified to serve as jurors. The judge or other presiding officer of the court shall decide all questions as to the competency of jurors in both civil and criminal actions. (Rev., s. 1966; Code, s. 405; R. C., c. 31, s. 34; 1790, c. 321; 1822, c. 1133, s. 1; C. S. 2324.)

Cross References.—As to oaths, see Chapter 11. As to peremptory challenges in civil cases, see §§ 9-22 and 9-23. As to peremptory challenges in criminal cases, see §§ 15-163, 15-164.

Challenges for Cause.—The causes of challenge to the juror are so numerous as to be described by Lord Coke as "infinite." It has been held in many cases that the right is given to afford a litigant fair opportunity to remove objectionable jurors, and was not intended to enable them to select a jury of his own choosing. See *Blevins v. Mills*, 150 N. C. 493, 64 S. E. 428. A few of the most common grounds for challenge will be set out. Chief of these, perhaps, is expression of opinion. This is sometimes ground for challenge, but is not if the juror states that the opinion could be eliminated and a fair and impartial verdict rendered. *State v. Bailey*, 179 N. C. 724, 102 S. E. 406; *State v. Winder*, 183 N. C. 776, 111 S. E. 530. The challenge for this cause can be made only by that party against whom the opinion was formed and expressed. *State v. Benton*, 19 N. C. 196.

A juror may be examined as to opinions honestly formed, and honestly expressed, manifesting a bias of judgment, not referable to personal partiality, or malevolence; but if the opinion has been made up and expressed under circumstances which involve dishonor and guilt, and where such expression may be visited with punishment, he ought not to be required to testify so as to criminate himself. *State v. Benton*, 19 N. C. 196; *State v. Mills*, 91 N. C. 581.

Other grounds for challenge, briefly enumerated, are relation within the ninth degree of affinity (*State v. Potts*, 100 N. C. 457, 6 S. E. 657); opposition to capital punishment (*State v. Vick*, 132 N. C. 995, 43 S. E. 626); nonresidence (*State v. Bullock*, 63 N. C. 570; *State v. Upton*, 170 N. C. 769, 87 S. E. 328); employment by party (*Oliphant v. Ry. Co.*, 171 N. C. 303, 88 S. E. 425.) But in an indictment for illegal sale of liquor, challenges for cause, in that the jurors belonged to the Anti-Saloon League, were properly disallowed, where the jurors had taken no part in prosecuting or aiding in the prosecution of the defendant. *State v. Sultan*, 142 N. C. 569, 54 S. E. 84.

Time of Challenge.—The court may, in its discretion, permit a juror to be challenged by the State for cause, after he has been tendered to the defendant and before the jury is impaneled. *State v. Green*, 95 N. C. 611.

Excusing Unchallenged Juror.—The trial judge may excuse a juror, before the jury is impaneled, although the solicitor has passed him to the prisoner and has not challenged him for cause. *State v. Vick*, 132 N. C. 995, 43 S. E. 626.

Method of Taking Advantage of Error.—The action of a trial judge in determining the qualifications of a juror, if erroneous, is ground for a challenge to the array by a motion to quash and set aside the entire panel, and in the absence of such challenge a defendant cannot be allowed to take advantage of the alleged error after trial and judgment. *State v. Moore*, 120 N. C. 570, 26 S. E. 697.

§ 9-15. Questioning jurors without challenge.—

The court, or any party to an action, civil or criminal, shall be allowed, in selecting the jury to make inquiry as to the fitness and competency

of any person to serve as a juror, without having such inquiry treated as a challenge of such person, and it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged. (1913, c. 31, s. 6; C. S. 2325.)

§ 9-16. Causes of challenge to juror drawn from box.—It shall not be a valid cause of challenge that a juror called from those whose names are drawn from the box is not a freeholder or has served upon the jury within two years prior to the court at which the case is tried or has not paid the taxes assessed against him during the preceding two years. In other respects the cause of challenge shall be the same as now provided by law, and nothing herein shall modify any law authorizing jurors to be summoned from counties other than the county of trial. (1913, c. 31, ss. 5, 7; 1933, c. 130; C. S. 2326.)

See 11 N. C. Law Rev., 218, for discussion as to effect of the 1933 amendment to this section.

Editor's Note.—Public Laws 1933, c. 130, inserted, at the end of the first sentence of this section, the clause "or has not paid the taxes assessed against him during the preceding two years."

§ 9-17. Jurors impaneled to try case furnished with accommodations.—When a jury, impaneled to try any cause, is put in charge of an officer of the court, the said officer shall furnish said jury with such accommodation as the court may order, and the same shall be paid for by the party cast or by the county, under the order and in the discretion of the judge of the court. (Rev., s. 1978; Code, s. 1736; 1876-7, c. 173; 1889, c. 44; C. S. 2327.)

Effect on Verdict of Refusal to Furnish Refreshments.—Where a jury retired at 11 a. m., to consider their verdict, which was returned at 3 p. m. such verdict cannot be impeached because the sheriff declined to give them refreshments, except water, until they agreed on a verdict, or until the judge should tell him to take them to dinner. *Gaither v. Generator Co.*, 121 N. C. 384, 28 S. E. 546.

§ 9-18. Exemption from civil arrest.—No sheriff or other officer shall arrest under civil process any juror during his attendance on or going to and returning from any court of record. All such service shall be void, and the defendant on motion shall be discharged. (Rev., s. 1979; Code, s. 1735; R. C., c. 31, s. 31; 1779, c. 157, s. 10; C. S. 2328.)

Section Does Not Repeal Common-Law Exemption.—This section does not by implication repeal the common-law exemption of nonresidents from service of process while in the State in attendance in court either as witnesses or as suitors. *Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947. See, also, *Greenlief v. Peoples Bank*, 133 N. C. 292, 45 S. E. 638.

§ 9-19. Exemptions from jury duty.—All practicing physicians, licensed druggists, telegraph operators who are in the regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral directors and embalmers, printers and linotype operators, all millers of grist mills, all United States railway postal clerks and rural free delivery mail carriers, locomotive engineers, brakemen and railroad conductors in active service, radio broadcast technicians, announcers, and optometrists, and all members of the national guard,

naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, who comply with and perform all duties required of them as members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, shall be exempt from service as jurors. On the first day of January and July of each year, the commanding officer of each company, troop, battery, detachment, or division of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, of North Carolina, shall file with the clerk of the superior court of the county in which such company, troop, battery, detachment, or division is located a statement giving the name and rank of each member of his organization who has performed all military duties during the preceding six months; and any member of such military organization whose name does not appear upon such statement shall not receive the benefit of the exemption provided for herein during the six months immediately following the filing of the statement.

The board of county commissioners of any county in North Carolina may, in their discretion, exempt any ex-confederate soldier in their county from jury duty who shall apply to them for exemption.

The clerk of the superior court of each county is hereby empowered to excuse from jury duty any person or persons exempt under the first sentence of this section prior to the convening of the term of court for which such person or persons are required to serve as jurors. (Rev., s. 1980; Code, ss. 1723, 2269; 1885, c. 289; 1889, c. 255; 1897, c. 32; 1901, c. 118; 1909, cc. 333, 868; 1913, c. 38, s. 1; 1913, c. 103; 1915, cc. 217, 228, 260; 1917, c. 200, s. 89; 1931, c. 410; 1937, c. 151; 1937, c. 224, s. 2; 1943, c. 343; C. S. 2329, 6870.)

Editor's Note.—The Act of 1931 added "brakemen" to the first paragraph of this section.

The first 1937 amendment added the last paragraph. And the second 1937 amendment made the section applicable to the officers reserve corps, the enlisted reserve corps and the naval reserves.

The 1943 amendment made the section applicable to radio broadcast technicians, announcers and optometrists.

Exemption Not a Contract.—Exemption from jury duty is not a contract, but a mere privilege, and may be revoked by the Legislature at any time. *State v. Cantwell*, 142 N. C. 604, 55 S. E. 820.

§ 9-20. Clerk to keep record of jurors.—The clerk of the superior court shall record alphabetically in a book kept for the purpose the names of all grand and petit jurors and talesmen who serve in his court, with the term at which they serve. (Rev., s. 1981; 1893, c. 52, s. 3; C. S. 2330.)

§ 9-21. Extra or alternate juror; challenges; compensation and duties.—In the trial in the Superior Court of any case, civil or criminal, when it appears to the judge presiding that the trial is likely to be protracted, upon direction of the judge after the jury has been duly impaneled and sworn, an additional or alternate juror shall be selected in the same manner as the regular jurors in said case were selected, but each party shall be entitled to two peremptory challenges as to such alternate juror; such additional or alternate juror shall likewise be sworn and seated near the jury, with equal opportunity for seeing and hearing the proceedings and shall attend at

all times upon the trial with the jury and shall obey all orders and admonitions of the court to the jury and, when the jurors are ordered kept together in any case, said alternate juror shall be kept with them. Such additional or alternate juror shall be liable as a regular juror for failure to attend the trial or to obey any order or admonition of the court to the jury, shall receive the same compensation as other jurors, and except as hereinafter provided shall be discharged upon the final submission of the case to the jury. If before the final submission of the case to the jury a juror becomes incapacitated or disqualified, or by reason of illness or death in his family, or other sufficient reason in the opinion of the court, he may be discharged by the judge, in which case, or if a juror dies, upon the order of the judge said additional or alternate juror shall become one of the jury and serve in all respects as though selected as an original juror. (1931, c. 103; 1939, c. 35.)

Editor's Note.—In 9 N. C. L. Rev. 378, this statute and its background are discussed.

The 1939 amendment inserted in the last sentence the words "or by reason of illness or death in his family, or other sufficient reason in the opinion of the court."

Constitutional.—The essential attributes of trial by jury guaranteed by Art. I, sec. 13, are the number of jurors, their impartiality and a unanimous verdict, and this section does not infringe upon same, the alternate not being technically a juror until a member of the jury has died or been discharged and the alternate is made a juror by order of the court, and the verdict being finally returned by the unanimous verdict of twelve good and lawful men. *State v. Dalton*, 206 N. C. 507, 174 S. E. 422.

Applied in *State v. Broom*, 222 N. C. 324, 22 S. E. (2d) 926.

Art. 3. Peremptory Challenges in Civil Cases.

§ 9-22. Six peremptory challenges on each side.

—The clerk, before a jury is impaneled to try the issues in any civil suit, shall read over the names of the jury upon the panel in the presence and hearing of the parties or their counsel; and the parties, or their counsel for them, may challenge peremptorily six jurors upon the said panel, without showing any cause therefor, which shall be allowed by the court. (Rev., s. 1964; Code, s. 406; R. C., c. 31, s. 35; 1796, c. 452, s. 2; 1812, c. 833; 1935, c. 475, s. 1; C. S. 2331.)

Cross References.—As to challenge of alternate juror, see § 9-21. As to peremptory challenges in a criminal case, see §§ 15-163 and 15-164.

Editor's Note.—By the amendment of 1935 the number of peremptory challenges was increased from four to six.

In General.—As in the case of challenges for cause, the right is given to challenge but such right does not constitute the right to select jurors. *Ives v. Railroad*, 142 N. C. 131, 137, 55 S. E. 74; *Medlin v. Simpson*, 144 N. C. 397, 57 S. E. 24.

Reasons for Challenge Need Not Be Given.—A party's reason for peremptorily challenging can not be inquired into. *Dupree v. Ins. Co.*, 92 N. C. 418.

More Parties than One.—Whether there are one or more plaintiffs or defendants, only four (now six) peremptory challenges to the jury on either side are allowable. *Bryan v. Harrison*, 76 N. C. 360.

After Acceptance.—Where a juror has been accepted it is error to permit a peremptory challenge. *Dunn v. Railroad*, 141 N. C. 446, 42 S. E. 862.

Cited in *Ramsey v. Carolina-Tennessee Power Co.*, 195 N. C. 788, 143 S. E. 861.

§ 9-23. Where several defendants; challenges apporportioned; discretion of judge.—When there are two or more defendants in a civil action the judge presiding at the trial, if it appears to the court that there are divers and antagonistic interests

between the defendants, may in his discretion apportion among the defendants the challenges now allowed by law to defendants, or he may increase the number of challenges to not exceeding four to each defendant or class of defendants representing the same interest. In either event, the same number of challenges shall be allowed each defendant or class of defendants representing the same interest. The decision of the judge as to the nature of the interests and number of challenges shall be final. (Rev., s. 1965; 1905, c. 357; C. S. 2332.)

Cited in *Ramsey v. Carolina-Tennessee Power Co.*, 195 N. C. 788, 143 S. E. 861.

Art. 4. Grand Jurors.

§ 9-24. How grand jury drawn.—The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court. (Rev., s. 1969; Code, s. 404; R. C., c. 31, s. 33; 1779, c. 157, s. 11; C. S. 2333.)

Twelve Jurors Sufficient.—Eighteen jurors are not necessary to the finding of an indictment, but twelve are sufficient in North Carolina as at common law. *State v. Stewart*, 189 N. C. 340, 127 S. E. 260.

Wilson County.—Chapter 189, Public-Local Laws 1937, providing that the board of county commissioners of Wilson county shall select grand juries in the county "in the manner prescribed by law," merely empowers the board to draw grand juries in the manner prescribed by this section, and the act is a valid exercise of legislative power. *State v. Peacock*, 220 N. C. 63, 16 S. E. (2d) 452.

Cited in *State v. Barkley*, 198 N. C. 349, 351, 151 S. E. 733.

§ 9-25. Grand juries in certain counties.—At the first fall and spring terms of the criminal courts held for the counties of Craven, Gaston, Guilford, Mecklenburg, Moore, Pitt, Richmond, New Hanover, McDowell, Durham, Cumberland, Lenoir, Columbus, Nash, Johnston, Vance, Wayne, Iredell, and Wake, grand juries shall be drawn, the presiding judge shall charge them as provided by law, and they shall serve during the remaining fall and spring terms, respectively. In the event of vacancies occurring in the grand jury of Pitt county, the judge holding the court of said county may, in his discretion, order a new juror drawn to take the oaths prescribed and to fill any vacancy occurring thereon.

At any time the judge of the superior court presiding over either the criminal or civil court of New Hanover, McDowell, Durham, Cumberland and Lenoir counties may call said grand jury to assemble and may deliver unto said grand jury an additional charge. The said judge presiding over either the criminal or civil court of New Hanover, McDowell, Durham, Cumberland, or Lenoir counties may at any time discharge said grand jury from further service, in which event he shall cause a new grand jury to be drawn which shall serve during the remainder of the said fall or spring term. The first nine members of the grand jury chosen at the first term of the superior court of Cumberland and Lenoir counties for the trial of

criminal causes in the year of one thousand nine hundred twenty-two shall serve during the spring and fall terms, and at the first of such courts of the fall and spring terms thereafter, nine additional jurors shall be chosen to serve for one year.

The first nine members of the grand jury chosen at the first term of the superior court of McDowell County for the trial of criminal cases after January first, one thousand nine hundred and forty-three, shall serve for one year and until their successors are chosen and qualified, and at the first of such courts of the fall and spring terms thereafter nine additional jurors shall be chosen to serve for one year and until their successors are chosen and qualified.

At any time the judge of the superior court presiding over the criminal court of Columbus county may call said grand jury to assemble and may deliver unto said jury an additional charge. The said judge presiding over the criminal court of Columbus county may at any time discharge said grand jury from further service, and may cause a new grand jury to be drawn, which shall serve during the remainder of the said fall and spring term.

Every grand juror drawn and summoned in Robeson county shall serve for a period of twelve months.

At the spring term of the criminal court held for the county of Gates, and for the county of Henderson, grand jury shall be drawn, the presiding judge shall charge them as provided by law, and they shall serve for twelve (12) months: Provided, that at any time the judge of the superior court presiding over the criminal courts of Gates county or Henderson county may call said jury to assemble and may deliver unto said grand jury an additional charge: Provided further, that the judge of the superior court presiding over the criminal courts of Gates county and of Henderson county may at any time discharge said grand jury from further service, and may cause a new grand jury to be drawn, which shall serve during the remainder of the said twelve (12) months: Provided, further, that the first nine members of the grand jury chosen at the fall term of the superior court of Gates County for the trial of criminal cases in the year one thousand nine hundred and forty-three shall serve during the fall and spring terms, and at the spring and fall terms thereafter, nine additional jurors shall be chosen to serve for one year.

At the April term of superior court held for the county of Hoke a grand jury shall be drawn, the presiding judge shall charge it as provided by law, and it shall serve until the following April term, Hoke superior court: Provided, that at any time the judge of the superior court presiding over either criminal or civil court in said county may call said grand jury to assemble and may deliver unto said grand jury an additional charge: Provided further, that the judge of the superior court presiding over either criminal or civil court in said county may at any time discharge said grand jury from further service, in which event he shall cause a new grand jury to be drawn, which shall serve out the unfinished year.

If it should appear to the board of commissioners of Union county, thirty days before the beginning of the term of superior court that be-

gins on the third Monday after the first Monday in March, that the condition of the criminal docket, and the number of prisoners in jail, make it necessary that said March term should be used as a criminal term, the said board of commissioners are authorized and empowered within their discretion to draw a grand jury for said term, and to give thirty days' notice in some local paper that criminal cases would be tried at said term, and all criminal process and undertakings returnable to a subsequent term shall be returnable to said March term. A grand jury for Union county shall be selected at each January term of the superior court in the usual manner by the presiding judge, which said grand jury shall serve for a period of one year from the time of their selection.

In the selection of a grand jury for Bertie County for the fall term of one thousand nine hundred and twenty-seven and annually thereafter, there shall be drawn and summoned forty men, in the same manner as now provided by law, from which a grand jury of eighteen shall be selected by the presiding judge of the superior court, which said grand jury shall serve for a period of one year from the time of their selection.

The persons drawn for service in the grand jury at the term at which said grand jury is selected, and who are not selected to serve on the grand jury, shall serve on the petit jury for the week of the term at which the grand jury is selected: Provided, that at other terms of the Superior Court of Bertie County, both civil and criminal, there shall be drawn and summoned, in the manner now provided by law, twenty persons from which the jury for the term of court for which they are drawn shall be selected.

At the first term of court for the trial of criminal cases in Durham county after the first day of July, one thousand nine hundred and twenty-nine, there shall be chosen a grand jury as now provided by law, and the first nine members of said grand jury chosen at said term shall serve for a term of one year, and the second nine members of said grand jury so chosen shall serve for a term of six months, and thereafter at the first regular and not special term of criminal court after the first days of January and July of each year there shall be chosen nine members of said grand jury to serve for a term of one year.

The grand jurors for Davidson County shall be drawn at the first fall and spring terms of the criminal courts held in the County of Davidson, and the judge shall charge them as provided by law, and the jurors so drawn shall serve during the remaining fall and spring terms respectively.

In the event of any vacancy occurring in the grand jury of Johnston, Wayne or Iredell County by death, removal from the county, sickness, or otherwise, the presiding judge may, in his discretion, order such vacancy, or vacancies, filled by drawing sufficient jurors to fill said vacancy or vacancies from the jury box, and said juror or jurors so drawn shall take the oath prescribed by law and shall fill out the unexpired term of the juror or jurors whose places they were drawn to fill. The presiding judge shall have the power, in his discretion, to appoint an assistant-foreman of the grand jury in the counties of Johnston, Wayne and Iredell and said assistant-foreman so ap-

pointed shall, in the absence or disqualification of the foreman, discharge the duties of the foreman of said grand jury.

At the first term of court for the trial of criminal cases in New Hanover County after the first day of July, one thousand nine hundred and thirty-seven, there shall be chosen a grand jury as now provided by law, and the first nine members of said jury chosen at said term shall serve for a term of one year, and the second nine members of said jury so chosen shall serve for a term of six months, and thereafter at the first term of criminal court after the first days of January and July of each year there shall be chosen nine members of said grand jury to serve for a term of one year.

At each August term of the superior court hereafter held for the county of Scotland the grand jury drawn as now provided by law shall be charged by the presiding judge as provided by law, and said grand jury shall serve until the next succeeding March term of the superior court for Scotland County and until its successor has been drawn and has qualified; at each March term of the superior court hereafter held for the county of Scotland the grand jury drawn as now provided by law shall be charged by the presiding judge as provided by law, and said grand jury shall serve until the next succeeding August term of the superior court for Scotland County and until its successor has been drawn and has qualified; said grand jury shall attend every term of the superior court held in said county in which criminal cases may under the law be tried during the term of service of said grand jury and until it has been discharged; at any time the judge of the superior court presiding over either criminal, civil, or mixed terms of court in said county may call said grand jury to assemble and may deliver unto said grand jury an additional charge; the judge of the superior court presiding over either criminal, civil, or mixed terms of court in said county may at any time discharge said grand jury from further service, in which event he shall cause a new grand jury to be drawn and qualified, which shall serve out the unexpired term of said grand jury so discharged; said grand jury shall be subject to call for session and service at any time by the presiding judge, the solicitor of the district, or the foreman of said grand jury.

While in session or otherwise actually engaged in the performance of their duties as members of said grand jury, the members thereof shall be paid and compensated as follows: Three dollars per day shall be paid the foreman and two dollars per day shall be paid to other members of said grand jury.

A grand jury for Cabarrus County shall be selected at each January term of the superior court in the usual manner by the presiding judge, which said grand jury shall serve for a period of one year from the time of their selection.

A grand jury for Montgomery County shall be selected at each July term of the superior court in the usual manner, which said grand jury shall serve for a period of one year from the time of their selection.

A grand jury for Rowan County shall be selected at the one thousand nine hundred thirty-seven May term of criminal court to serve until the February term of said court in one thousand

nine hundred thirty-eight, and at each February term of criminal court a grand jury for Rowan County shall be selected in the usual manner by the presiding judge, which said grand jury shall serve for a period of one year from the time of its selection: Provided, in case of removal from the county, sickness, death or other cause a juror or jurors become disqualified, the presiding judge may in his discretion select in the usual manner a juror or jurors to fill such vacancy or vacancies, which said juror or jurors selected shall fill out the unexpired term of such juror or jurors disqualified; and, Provided further, the presiding judge may in his discretion at any term discharge said grand jury in whole or in part and cause another to be selected.

The first nine members of the grand jury chosen at the first term of the superior court of Caldwell County for the trial of criminal cases after May first, one thousand nine hundred and forty-three, shall serve for one year and until their successors are chosen and qualified, and at the first of such courts of the fall and spring terms thereafter nine additional jurors shall be chosen to serve for one year and until their successors are chosen and qualified.

A grand jury for Lincoln County shall be selected at each January term of the superior court in the usual manner by the presiding judge, which said grand jury shall serve for a period of one year from the time of its selection: Provided, that at any time the judge of the superior court presiding over either criminal or civil court in said county may call said grand jury to assemble and may deliver unto said grand jury an additional charge. (1913, c. 196; 1917, cc. 116, 118; 1919, cc. 113, 187; Ex. Sess. 1920, c. 39; 1921, cc. 18, 55, 69, 72; Ex. Sess. 1921, c. 15; 1923, cc. 11, 15, 104, 115; Ex. Sess. 1924, c. 28; 1925, c. 24; 1927, c. 78; Pub. Loc. 1927, cc. 80, 162; 1929, c. 52, ss. 1, 2; 1929, cc. 122, 133; 1931, cc. 43, 97, 130, 131, 237; 1933, cc. 29, 92, 138; 1935, cc. 5, 41; 1937, cc. 21, 77, 78, 372; 1939, c. 26; 1943, cc. 50, 51, 613; C. S. 2334.)

§ 9-26. Exceptions for disqualifications. — All exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived. But no indictment shall be quashed, nor shall judgment thereon be arrested, by reason of the fact that any member of the grand jury finding such bills of indictment had not paid his taxes for the preceding year, or was a party to any suit pending and at issue. (Rev., s. 1970; Code, s. 1741; 1907, c. 36, s. 1; C. S. 2335.)

Grand Jury of Twelve Men.—An indictment found by a grand jury of twelve men is good, provided all of the twelve concur in finding the bill. *State v. Perry*, 122 N. C. 1018, 29 S. E. 384.

Duty of Grand Jurors.—It is not only the right but it is the duty of grand jurors, of their own motion, to originate prosecutions by making presentments of all violations of law which have come under the personal observation or knowledge of each juror, or of which they have credible information. *State v. Wilcox*, 104 N. C. 847, 10 S. E. 453.

A party litigant does not have the right to select jurors, but only to challenge or reject them. *State v. Peacock*, 220 N. C. 63, 16 S. E. (2d) 452.

Grand Juror also Member of Petit Jury.—The fact that a member of the grand jury which returned a true bill for perjury was one of the petit jury that tried the issues in an action wherein it was charged the perjury was com-

mitted, is not good ground for abating or quashing the indictment. He was bound by his oath as a grand juror to communicate to his fellows the information he had acquired as a petit juror. *State v. Wilcox*, 104 N. C. 847, 19 S. E. 433.

Grand Juror Having Suit Pending.—The fact that one of the grand jurors who found a true bill had at that time a suit pending and at issue in the same court is sufficient ground to support a motion to quash the indictment, if the motion is made in apt time. *State v. Gardner*, 104 N. C. 739, 10 S. E. 146.

Son of Prosecutor Member of Grand Jury.—The fact that the son of the prosecutor, in an indictment for larceny, was a member of the grand jury, and actively participated in finding the bill, did not vitiate the indictment, and it was error to quash it on that ground. *State v. Sharp*, 110 N. C. 604, 14 S. E. 504.

Absence of Negroes from Grand Jury.—It is no ground to quash an indictment because it was found by a grand jury drawn from a venire in which there were no colored freeholders. The jury list, as constituted by the county court in accordance with the law in force at the time of its constitution, did not contain the names of such colored freeholders. *State v. Taylor*, 61 N. C. 508. See also *State v. Daniels*, 134 N. C. 641, 46 S. E. 743.

The exclusion of all persons of the negro race from a grand jury, which finds an indictment against a negro, where they are excluded solely because of their race or color, denies him the equal protection of the laws in violation of the Constitution of the United States. *State v. Peoples*, 131 N. C. 784, 42 S. E. 814.

Indictment Not Quashed for Failure to Pay Taxes.—Formerly, it was discretionary with the trial judge to allow or refuse a motion to quash because a grand juror had not paid his taxes after entry of plea until the petit jury was sworn and impaneled, and a motion to quash after entry of plea was made too late as a matter of right. This is changed by the amendment of 1907 adding the last sentence of this section. *State v. Banner*, 149 N. C. 519, 63 S. E. 84.

The passage of this section, immediately following the decision of this court in *Breese v. United States*, 143 F. 250, was evidently for the purpose of removing the disqualification of grand jurors, based upon failure to pay taxes for the preceding year, in case where they actually serve upon the grand jury and pass upon bills of indictment; and there is no reason why it should not be given this interpretation. *Davis v. United States*, 49 F. (2d) 269, 270.

Members of Grand Jury Summoned by Mistake.—While, generally, the provisions of the statute for drawing and summoning jurors are directory, the grand jury is illegally constituted when one whose name was not drawn from the boxes was summoned by mistake, and served by mistake. *State v. Paramore*, 146 N. C. 604, 60 S. E. 502.

When Competency of Grand Jury Excepted to.—Matters which go to the incompetency of a grand jury may be excepted to after the bill is found, if it is done at the earliest opportunity afterwards, which clearly is upon the arraignment, when the defendant is first called upon to answer. *State v. Griffee*, 74 N. C. 316.

A motion to quash an indictment, made upon arraignment and before pleading, for that the grand jury was improperly constituted, is in apt time. *State v. Paramore*, 146 N. C. 604, 60 S. E. 502.

Qualifications Judged at Time of Service.—The fact that a grand juror was a minor when his name was put on the jury list is immaterial if he was of age at the time he served. *State v. Perry*, 122 N. C. 1018, 29 S. E. 384.

Cited in *State v. Barkley*, 198 N. C. 349, 151 S. E. 733.

§ 9-27. Foreman may administer oaths to witnesses.—The foreman of every grand jury duly sworn and impaneled in any of the courts has power to administer oaths and affirmations to persons to be examined before it as witnesses: Provided, that the said foreman shall not administer such oath or affirmation to any person except those whose names are endorsed on the bill of indictment by the officer prosecuting in behalf of the state, or by direction of the court. The foreman of the grand jury shall mark on the bill the names of the witnesses sworn and examined before the jury. In case of the absence of the foreman, or in case of his inability to serve, the presiding Judge shall appoint an acting foreman, who shall have all powers vested by law in

the foreman. (Rev., s. 1971; Code, s. 1742; 1879, c. 12; 1929, c. 228; C. S. 2336.)

Editor's Note.—The Act of 1929 added the last sentence to this section.

Section Not Exclusive.—This section, authorizing the foreman of the grand jury to swear witnesses to be examined before the jury, is directory merely. The fact that witnesses are sworn by the clerk of court rather than by the foreman is not grounds for arresting judgment or quashing an indictment. *State v. Allen*, 83 N. C. 680; *State v. White*, 88 N. C. 698.

Section Directory Merely.—The provision of the section, providing that the foreman of the grand jury shall mark on the indictment the names of the witnesses sworn and examined before the jury, is directory merely, and the omission of the foreman to comply therewith is no ground for quashing the bill, where the proof is that the witnesses were sworn. *State v. Hines*, 84 N. C. 810. See *State v. Avant*, 202 N. C. 680, 163 S. E. 806; *State v. Lancaster*, 210 N. C. 584, 187 S. E. 802.

This section requiring the foreman of the grand jury, when the oath is administered by him, to mark on the bill the names of the witnesses sworn and examined before the jury is directory, and the fact that it does not appear by indorsement on a bill that the witness had been sworn and examined is no ground for quashing the indictment or arresting the judgment. *State v. Hollingsworth*, 100 N. C. 535, 6 S. E. 417.

No Indorsement Necessary.—No indorsement on a bill of indictment by the grand jury is necessary. The record that it was presented by the grand jury is sufficient in the absence of evidence to impeach it. *State v. Sultan*, 142 N. C. 569, 54 S. E. 841, overruling *State v. McBroom*, 127 N. C. 528, 37 S. E. 193.

Witnesses Not Re-Examined.—Where an indictment upon which witnesses had been examined was returned by the grand jury "a true bill," and quashed because it did not sufficiently charge the offense intended, and thereupon a new bill for the offense was sent and returned into court, "a true bill," without a re-examination of the witnesses, this bill should be quashed. *State v. Ivey*, 100 N. C. 539, 5 S. E. 407.

§ 9-28. Grand jury to visit jail and county home.—Every grand jury, while the court is in session, shall visit the county home for the aged and infirm, the workhouse, if there is one, and the jail, examine the same, and especially the apartments in which inmates and prisoners shall be confined; and they shall report to the court the condition thereof and of the inmates and prisoners confined therein, and also the manner in which the jailer or superintendent has discharged his duties. (Rev., s. 1972; Code, s. 785; R. C., c. 30, s. 3; 1816, c. 911, s. 3; C. S. 2337.)

Art. 5. Special Venire.

§ 9-29. Special venire to sheriff in capital cases.

—When a judge of the superior court deems it necessary to a fair and impartial trial of any person charged with a capital offense, he may issue to the sheriff of the county in which the trial may be a special writ of venire facias, commanding him to summon such number of persons qualified to act as jurors in said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specified day of the term as jurors of said court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when it is returnable, with the names of the jurors summoned. (Rev., s. 1973; Code, s. 1738; R. C., c. 35, s. 30; 1830, c. 27; 1913, c. 31, s. 1; C. S. 2338.)

Cross Reference.—As to penalty on sheriff who fails to execute writ, see § 9-31.

Discretion of Judge.—It is in the discretion of the trial judge to order a special venire in capital cases and determine its number, which he may likewise change by another order. *State v. Brodgen*, 111 N. C. 656, 16 S. E. 170.

The trial judge has the discretionary power to issue a writ of venire facias, instead of directing the jurors to be drawn from the jury box, and the court's action in issuing the writ is not reviewable in the absence of abuse of discretion. *State v. Casey*, 212 N. C. 352, 193 S. E. 411.

An objection by a prisoner charged with capital offense, that the special venire was summoned by the sheriff as prescribed by this section instead of being drawn from the jury box as prescribed by section 9-30, is untenable since the latter method is purely discretionary. *State v. Smarr*, 121 N. C. 669, 28 S. E. 549.

The ordering of a special venire where the prisoner is charged with a capital offense, and the manner in which it shall be summoned or drawn, when so ordered, whether selected by the sheriff under this section, or drawn from the box under section 9-30, are both discretionary with the judge of the superior court, and unless an objection goes to the whole panel of jurors, it may not be taken advantage of by a challenge to the array, unless there is partiality or misconduct of the sheriff shown, or some irregularity in making out the list. *State v. Levy*, 187 N. C. 581, 122 S. E. 386.

Juror May Have Served Within Two Years.—A juror summoned on a special venire is not rendered incompetent because he has served on the jury in the same court within two years. Only tales jurors come within the proviso of sec. 9-11 and, in order that they may be disqualified, it must appear that they have not only been summoned, but have acted as jurors within that time. *State v. Whitfield*, 92 N. C. 831.

Special Venire Selected without Partiality.—A challenge to the array on the ground that the sheriff and his deputies, under instructions by the sheriff, selected for the special venire freeholders of good character, who had not served on the jury within the past two years and who lived in townships in the county other than the township in which the crime was committed and townships contiguous thereto, is properly refused, the instructions of the sheriff being in compliance with this section, and the action of the sheriff and the deputies showing no partiality, misconduct and irregularity in making out the list. *State v. Dixon*, 215 N. C. 438, 2 S. E. (2d) 371.

Special Venire Selected without Regard to Color.—It is no ground of exception that a special venire was selected from the freeholders of the county without regard to color, no reference having been had to the jury list constituted by the county court. *State v. Taylor*, 61 N. C. 508.

Accessory May Be Tried by Special Venire.—Where two persons are indicted for murder, one as principal and the other as accessory before the fact, the latter may be tried by a jury selected from a special venire ordered in the case. *State v. Register*, 133 N. C. 746, 46 S. E. 21.

Challenge for Cause.—Under this section where a special venire has been ordered by the court for the trial of a capital felony, the veniremen, being selected by the sheriff in his discretion, not from the jury box, are subject to the same challenges for cause as tales jurors. *State v. Avant*, 202 N. C. 680, 163 S. E. 806.

§ 9-30. Drawn from jury box in court by judge's order.—When a judge deems a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he shall cause the number of scrolls as designated by him to be drawn from box number one by a child under ten years of age. The names so drawn shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the sheriff. If the special venire is exhausted before the jury is chosen, the judge shall order another special venire until the jury has been chosen. The scrolls containing the names of the persons drawn as jurors from box number one shall, after the jury is chosen, be placed in box number two,

and if box number one is exhausted before the jury is chosen, the drawing shall be completed from box number two after the same has been well shaken. (Rev., s. 1974; Code, s. 1739; 1897, c. 364; 1913, c. 31, s. 2; C. S. 2339.)

Cross Reference.—As to qualification of jurors, see § 9-1 and annotations thereto.

See 11 N. C. Law Rev., 219.

Editor's Note.—Formerly special veniremen were required to be freeholders, but in 1913 this requirement was omitted.

For cases decided under the former rule, see *State v. Moore*, 120 N. C. 565, 26 S. E. 629; *State v. Kilgore*, 93 N. C. 533. See, also, *State v. Freeman*, 100 N. C. 429, 5 S. E. 921.

Method of Drawing Directory.—The regulations as to drawing a special venire may be directory, but they should be strictly observed. However, failure to follow the directions of the statute will not invalidate the panel in the absence of bad faith or other adequate cause. *State v. Parker*, 132 N. C. 1014, 43 S. E. 830.

The practice of drawing the venire from the box is commended. *State v. Brogden*, 111 N. C. 656, 16 S. E. 170.

The drawing of the jury from the box is authorized by this section, and is favored by the courts, though the requirement is not mandatory. *State v. Whitson*, 111 N. C. 695, 697, 16 S. E. 332.

Discretion of Judge.—See notes to § 9-29.

How Jurors Drawn.—On the trial of a capital case, the names of the jurors of the original panel should be first put into the box and drawn, before those of the tales jurors are put in and drawn; and the jurors summoned under a special venire facias are in this respect to be regarded as talesmen. *State v. Benton*, 19 N. C. 196.

Special Venire Exhausted.—When a special venire is exhausted without completing the jury, the court may order a further venire to be summoned at once from the bystanders. *State v. Stanton*, 118 N. C. 1182, 24 S. E. 536.

Matters Affecting Entire Panel.—In the absence of any allegation that the sheriff acted corruptly or with partiality in summoning the venire, or that anything had been done affecting "the integrity and fairness of the entire panel," it is not a ground of challenge to the array that the sheriff failed to summon several of the special venire, drawn from the jury box or that the jury box was not revised by the county commissioners. *State v. Stanton*, 118 N. C. 1182, 24 S. E. 536.

The integrity and fairness of the entire panel of jurors summoned in obedience to a writ of special venire are not affected by the fact that one man named in the writ had removed from the county and that another named therein was dead when the jury list was revised by the commissioners. Neither are they affected by the fact that one of these named on the venire was not summoned, nor by the fact that the Sheriff in copying the list of the venire furnished him omitted, by mistake, the name of one who in consequence was not summoned. *State v. Whitt*, 113 N. C. 716, 18 S. E. 715.

§ 9-31. Penalty on sheriff not executing writ or jurors not attending.—If any sheriff fails duly to execute and return such writ of venire facias, he shall be fined by the court not exceeding one hundred dollars. All jurors so summoned shall attend until discharged by the court, under the same rules and penalties as are prescribed for other jurors. (Rev., ss. 1975, 3602; Code, s. 1740; R. C., c. 35, s. 31; 1830, c. 27, s. 2; C. S. 2340.)

Cross Reference.—As to rules and penalties prescribed for other jurors, see § 9-10 et seq.

Amendment of Return on Writ.—Where a sheriff, in making his return on a writ and list of special venire, endorsed thereon, "Received October 15, 1893, executed October 30, 1893, by summoning one hundred and fifty men," it was within the discretion of the court, at the term to which the writ was returnable, to permit an amendment of the return so as to show those of the list furnished him by the clerk who were actually summoned, and those not summoned, with the reasons why they were not. *State v. Whitt*, 113 N. C. 716, 18 S. E. 715.

Chapter 10. Notaries.

Sec.

- 10-1. Appointment and commission; term of offices; revocation of commission.
- 10-2. To qualify before clerk; record of qualification.
- 10-3. Clerks notaries ex officio; may certify own seals.
- 10-4. Powers of notaries.
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Sec

- permitted to take acknowledgments, administer oaths, etc.
- 10-6. May exercise powers in any county.
- 10-7. Expiration of commission to be stated after signature.
- 10-8. Fees of notaries.
- 10-9. Notarial seal.
- 10-10. Acts of minor notaries validated.

§ 10-1. Appointment and commission; term of office; revocation of commission.—The governor may, from time to time, at his discretion, appoint one or more fit persons in every county to act as notaries public, and shall issue to each a commission. They shall hold their office for two years from and after the date of their appointment.

Any commission so issued by the Governor or his predecessor, shall be revokable by him in his discretion upon complaint being made against such notary public and when he shall be satisfied that the interest of the public will be best served by the revocation of said commission.

Whenever the Governor shall have revoked the commission of any notary public appointed by him, or his predecessor in office, it shall be his duty to file with the clerk of the court in the county of such notary public a copy of said order and mail a copy of same to said notary public.

Any person holding himself out to the public as a notary public, or any person attempting to act in such capacity after his commission shall have been revoked by the Governor, shall be guilty of a misdemeanor and upon conviction be punishable in the discretion of the court, as provided for in other misdemeanors. (Rev., ss. 2347, 2348; Code, ss. 3304, 3305; 1927, c. 117; C. S. 3172.)

Cross References.—As to validating acknowledgments before notaries under age, see § 10-10. As to validation of defective acknowledgments before notaries public in certain conveyances, see §§ 47-52, 47-53, 47-102.

Editor's Note.—The Supreme Court, by a three to two decision, with the great Chief Justice Clark dissenting, held in *State v. Knight*, 169 N. C. 333, 85 S. E. 418, that women could not hold the position of notary public in North Carolina. The Legislature had, at its previous session, enacted chapter 12, Laws 1915, as follows: "The Governor is hereby authorized to appoint women as well as men to be notaries public, and this position shall be deemed to be a place of trust and profit, and not an office." The Governor, acting upon this authority, issued his commission to Mrs. Noland Knight as a notary public. Thereafter a quo warranto proceeding was brought, averring that a notary public was not a place of trust and profit, as the Legislature has enacted, but was in truth an office, and therefore that the commission issued to her by the Chief Executive was a nullity because she was a woman. The action was brought before his Honor Judge Webb of the superior court, who declined to hold the commission void. The Supreme Court reversed the decision and held the act unconstitutional on the grounds that a notary public was a public office; that a woman was ineligible for public office under the Constitution; and that being a public office, that the Legislature could not change its character by simply making a change in its name. This was so held in spite of the fact that, as pointed out by Mr. Chief Justice Clark, there was no constitutional provision as to notaries public, and that the place was wholly a creature of legislative enactment. In *Opinion of Justices*, 165 Mass. 599, 601, 43 N. E. 927, 32 L. R. A. 350, the court said: "Where an office is created by statute . . . the qualifications required . . . are wholly within the control of the Legislature, unless there is some limitation put upon the Legislature by the Constitution." And in *Bank v. Smith* (Tenn.), 37 S. W. 1102, it was said: "All that is needed to

enable one to be a de jure female notary public is an enabling act of the Legislature."

However correct or incorrect may have been the conclusion of the court in *State v. Knight*, supra, by the very reasoning in that case, women are now eligible as notaries public. Federal and State constitutional amendments now insure to women the right to the ballot on equal terms with men. Article VI, sec. 7, of the Constitution of North Carolina is as follows: "Every voter in North Carolina, except as in this article disqualified, shall be eligible to office," etc. Women are not included within the exceptions numbered. See *Lee v. Dunn*, 73 N. C. 595; *Spruill v. Batemen*, 162 N. C. 588, 77 S. E. 768. Therefore, since women can vote, and voters may hold office, and the position of notary public is a public office, it follows that women are eligible to the office of notary public.

Origin.—The office of notary public has long been known both to the civil and to the common law. *State v. Knight*, 169 N. C. 333, 337, 85 S. E. 418; 29 Cyc. 1068.

In *Loan Co. v. Turrell*, 19 Ind. 469, it was said: "The office originated in the early Roman jurisprudence, and was known in England before the Conquest." *State v. Knight*, 169 N. C. 333, 338, 85 S. E. 418.

Same—Recognized as an Officer.—That the position was recognized as an office at common law is shown by the following, taken from 5 Comyn's Dig., 140, when speaking of protests of bills of exchange: "The protest must be made by a public notary upon all foreign bills of exchange, because he is a public officer to whom credit is given"; and by the opinion of Buller, J., in *Lefty v. Mills*, 4 T. R., 175 (1791), that "The demand of a foreign bill must be made by a notary public, to whom credit is given, because he is a public officer." *State v. Knight*, 169 N. C. 333, 337, 85 S. E. 418.

Present Status.—In *Ashcraft v. Chapman*, 38 Conn. 232, Chief Justice Butler says: "Notaries were originally mere commercial scribes. Becoming important to the commercial world, their appointment was provided for and their duties regulated by public law, and they became sworn public officers." *State v. Knight*, 169 N. C. 333, 338, 85 S. E. 418. See also, 21 A. and E. Enc. Law, 555.

It is in most of the states a state office, although in few states it has been regarded as a county office, and its functions, once simple, have now a wider scope. *State v. Knight*, 169 N. C. 333, 337, 85 S. E. 418.

Who Eligible.—In *U. S. v. Bixby*, 10 Bizzell, 520, it was held by Gresham, J., that "at common law a minor is eligible to the position of notary public." *State v. Knight*, 169 N. C. 333, 358, 85 S. E. 418.

After the passage of Chapter 12, Laws 1915 an official inquiry was instituted as to the status of notary public in the other states. The replies from their judicial departments show that out of the fifty-three jurisdictions in the United States (i. e., forty-eight States, the District of Columbia, and the territories of Alaska, Porto Rico, Hawaii, and the Philippines) women are competent to be notaries public in all except ten, and in those ten they were held incompetent either because, as in Massachusetts, the Constitution had made the position an office or a statute had made it an office, or, as in a few of them, "it had not been the custom to admit women to hold the place, and there was no statute as yet authorizing them to fill the position." In no case was there found, or reported, a decision holding women incompetent to fill the place when there was a statute authorizing them to do so, or providing that the position was not an office. Outside of these ten States (of our fifty-three jurisdictions) there is no country which disqualifies a woman to hold the position of notary public. From dissenting opinion of Clark, C. J., in *State v. Knight*, 169 N. C. 333, 359, 85 S. E. 418.

Same—In Virginia.—In Virginia, which naturally more nearly follows the English law than any other State in the Union, its Attorney-General says: "In this State any man

or woman over 18 years of age can be a notary public." State v. Knight, 169 N. C. 333, 358, 85 S. E. 418.

Same—English Rule as to Women.—Sir John Simon, when Attorney-General of England, said: "No act of Parliament has ever disqualified women from holding the position of notary public in this country, and it is very certain that none such could be passed." State v. Knight, 169 N. C. 333, 358, 85 S. E. 418.

§ 10-2. To qualify before clerk; record of qualification.—Upon exhibiting their commissions to the clerk of the superior court of the county in which they are to act, the notaries shall be duly qualified by taking before said clerk an oath of office, and the oaths prescribed for officers. A certificate of the commission shall be deposited with the clerk and filed among the records, and he shall note on his minutes the qualification of the notary public. (Rev., ss. 2347, 2348; Code, ss. 3304, 3305; C. S. 3173.)

Cross References.—As to the oath prescribed for officers, see § 11-11. As to when an attorney is disqualified, see § 47-8.

§ 10-3. Clerks notaries ex officio; may certify own seals.—The clerks of the superior court may act as notaries public, in their several counties, by virtue of their office as clerks, and may certify their notarial acts under the seals of their respective courts. (Rev., s. 2349; Code, s. 3306; R. C., c. 75, s. 3; 1833, c. 7, ss. 1, 2; C. S. 3174.)

A clerk of the superior court is, by virtue of his office, a notary public, and the taking of acknowledgments must be referred to the exercise of his notarial authority. Lawrence v. Hodges, 92 N. C. 672, 681.

§ 10-4. Powers of notaries.—Notaries public, in and out of the state, have power to take and certify the acknowledgment or proof of powers of attorney, mortgages, deeds and other instruments of writing, to take depositions and to administer oaths and affirmations in matters incident or belonging to the duties of their office, and to take affidavits to be used before a court, judge or other officer, within the state, and have power to take the privy examination of femes covert. (Rev., s. 2350; Code, s. 3307; 1866, c. 30; 1879, c. 128; C. S. 3175.)

Cross Reference.—As to the taking of affidavits to be used before a court, see § 3-8.

Scope of Powers.—A notary public is recognized by the universal law of civilized and commercial nations; but his powers are confined to the authentication of commercial papers and to the protesting of bills of exchange and the like. Benedict, Hall & Co. v. Hall, 76 N. C. 113, 114.

By statute in this State the powers of notaries public have been extended beyond those which were incident to the office by the universal law-merchant, and pertained to the presentment of bills of exchange for acceptance or payment and the protest thereof for nonpayment or refusal to accept; they may now take and certify the acknowledgment or proof of powers of attorney, mortgages, deeds and other instruments of writing, etc. Pipe and Foundry Co. v. Keith & Co., 114 N. C. 178, 184, 19 S. E. 109.

Duty in Taking Acknowledgments.—The notary is required "to take and certify the acknowledgment or proof" and this imposes upon him the duty of ascertaining (1) that the persons who present themselves are the grantors in the deed; (2) that they acknowledge the execution of it; (3) that the wife signed the deed freely and voluntarily, and that she voluntarily assents thereto. Young v. Jackson, 92 N. C. 144, 147; Darden v. Steamboat Co., 107 N. C. 434, 446, 12 S. E. 46; State v. Knight, 169 N. C. 333, 343, 85 S. E. 418.

Acknowledgment Quasi Judicial Act.—An acknowledgment of a deed, taken before a notary public, is a judicial, or at least a quasi judicial, act. Long v. Crews, 113 N. C. 256, 18 S. E. 499.

Protest as Evidence.—The protest of a notary establishes the facts stated in it in respect to each and all of these points to the full extent the notary could do it if he were examined as a witness and were believed. Pipe and Foundry Co. v. Keith & Co., 114 N. C. 178, 184, 19 S. E. 109.

This was for convenience of commerce and to dispense with the necessity of bringing witnesses from a distance or of taking depositions to prove the facts certified to in the protest, the certificate being prima facie true. Elliott v. White, 51 N. C. 98; Pipe and Foundry Co. v. Keith & Co., 114 N. C. 178, 184, 19 S. E. 109.

Certificates of Probate Prima Facie Evidence.—With the extension of the powers of notaries to take probate of deeds, the same quality attaches to their certificates of probate or acknowledgment; it is prima facie evidence of the truth of its pertinent recitals. Pipe and Foundry Co. v. Keith & Co., 114 N. C. 178, 184, 19 S. E. 109.

Not Disqualified to Act Because Employee of Grantee.—A notary public is not disqualified to take acknowledgment of grantors and privy examination of married women to conveyances of land when he is an employee of the grantee, without any interest in the land conveyed. Smith v. Ayden Lumber Co., 144 N. C. 47, 56 S. E. 555.

Incurable Incompetency.—Where a notary public was interested in a deed of trust, he was disqualified to take the acknowledgment, his attempted action was a nullity, and such defect could not be cured by probate upon such acknowledgment before the clerk and registration. Long v. Crews, 113 N. C. 256, 18 S. E. 499.

§ 10-5. Notaries public, who are stockholders, etc., permitted to take acknowledgments, administer oaths, etc.—It shall be lawful for any notary public who is a stockholder, director, officer or employee of a bank or other corporation to take the acknowledgment of any party to any written instrument executed to or by such corporation, or to administer an oath to any other stockholder, director, officer, employee or agent of such corporation, or to protest for non-acceptance or non-payment bills of exchange, drafts, checks, notes and other negotiable instruments which may be owned or held for collection by such corporation: Provided, it shall be unlawful for any notary public to take the acknowledgment of an instrument executed by or to a bank or other corporation of which he is a stockholder, director, officer, or employee, where such notary is individually a party to such instrument, or to protest any negotiable instrument owned or held for collection by such corporation, where such notary is individually a party to such instrument. (1937, c. 183.)

§ 10-6. May exercise powers in any county.—Notaries public have full power and authority to perform the functions of their office in any and all counties of the state, and full faith and credit shall be given to any of their official acts where-soever the same shall be made and done. (Rev., s. 2351; 1891, c. 248; C. S. 3176.)

A notary public resident out of the State has no authority to take affidavits to be used in the courts of this State. Hall & Co. v. Hall, 76 N. C. 113, 114.

§ 10-7. Expiration of commission to be stated after signature.—Notaries public shall state after each official signature by them the date of the expiration of their commissions; but the failure to do so shall not thereby invalidate their official acts. (Rev., s. 2351a; C. S. 3177.)

§ 10-8. Fees of notaries.—Notaries public and other persons acting as such shall be allowed the sum of fifty cents for protesting for nonacceptance or for nonpayment, or for both when done at the same time, any order, draft, note, bond or bill or any other thing necessary to be protested, and the sum of ten cents for each notice sent in connection therewith. For other necessary services, where no fee is fixed, they shall be allowed twenty cents for every ninety words.

Cases of protest concerning vessels or other cargoes shall not be affected by this section. (Rev., s. 2800; Code, s. 3749; 1889, c. 446; 1895, c. 296; 1903, c. 734; C. S. 3178.)

The fees of notaries public are created and regulated by statute. *Cider & Vinegar Co. v. Carroll*, 124 N. C. 555, 559, 32 S. E. 959.

§ 10-9. Notarial seal.—Official acts by notaries public shall be attested by their notarial seals. (Rev., s. 2352; C. S. 3179.)

Cross Reference.—As to validation of deeds and probate and registration thereof where notarial seals have been omitted, see §§ 47-102 and 47-103.

Courts Take Judicial Notice.—It was said in *Pierce v. Indseth*, 106 U. S. 546, 1 S. Ct. 418, 27 L. Ed. 254: "The court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world." *State v. Knight*, 169 N. C. 333, 338, 85 S. E. 418.

Name in Seal.—The statute authorizing a notary public to take acknowledgment of deeds does not require that his name or any name shall be used in the notarial seal, and the seal appended to the certificate is presumably his in the absence of evidence to the contrary; hence, where the fact of the execution of deed by a notary public is adjudged to have been proved by such seal and certificate, it is not rebutted by the mere fact that the notary signs his

name, "Geo. Theo. Somner" and the seal has on it the name of "Theo. Somner." *Deans v. Pate*, 114 N. C. 194, 19 S. E. 146.

Failure to Attest by Seal.—A motion for judgment for want of an answer was properly allowed when the complaint was duly verified and what purported to be the verification of the answer was attested only by a person signing his name with the letters "N. P." added thereto, but without an official seal. *Tucker v. Inter-States Life Association*, 112 N. C. 796, 17 S. E. 532.

The acknowledgment of a deed before a notary public in due form is not defective because not attested by his notarial seal. *Peel v. Corey*, 196 N. C. 79, 144 S. E. 559.

§ 10-10. Acts of minor notaries validated.—All acts of notaries public for the state of North Carolina who were not yet twenty-one years of age at the time of the performance of such acts are hereby validated; and in every case where deeds or other instruments have been acknowledged before such notary public who was not yet twenty-one years of age at the time of taking of said acknowledgment, such acknowledgment taken before such notary public is hereby declared to be sufficient and valid. (1941, c. 233.)

Cross References.—As to validation of defective acknowledgments before notaries public in certain conveyances, see §§ 47-52, 47-53, 47-102.

Chapter 11. Oaths.

Art. 1. General Provisions.

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- 11-1. Oaths to be administered with solemnity.
 - 11-2. Administration of oath upon the Gospels.
 - 11-3. Administration of oath with uplifted hand.
 - 11-4. Affirmation of Quakers and others.
 - 11-5. Oaths of corporations.
 - 11-6. Oath to support constitution of United States; all officers take.
 - 11-7. Oath or affirmation to support state constitution; all officers to take.

Art. 1. General Provisions.

§ 11-1. Oaths to be administered with solemnity.—Whereas, lawful oaths for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God, as the omniscient witness of truth and the just and omnipotent avenger of falsehood, such oaths, therefore, ought to be taken and administered with the utmost solemnity. (Rev., s. 2353; R. C., c. 76, s. 1; 1777, c. 108, s. 2; C. S. 3188.)

This "solemnity" applies not only to the substance of the oath, but to the form and manner of taking it and of administering it. *State v. Davis*, 69 N. C. 383, 385.

Object of Statutes.—It is manifest, by a perusal of the statutes, that they were not intended to alter any rule of law, but the sole object was to prescribe forms for the sake of convenience and uniformity. *State v. Pitt*, 166 N. C. 268, 271, 80 S. E. 1060.

Double Sanction to Oath of Witness.—The law requires two guarantees of the truth of what a witness is about to state; he must be in the fear of punishment by the laws of man, and he must also be in the fear of punishment by the laws of God, if he states what is false; in other words, there must be a temporal and also a religious sanction to his oath. *Shaw v. Moore*, 49 N. C. 25, 26.

Sufficiency of Belief.—A person who believes in the obligation of an oath on the Bible; who believes in God and Jesus Christ, and that God will punish in this world, all violators of his law, and that the sinner will inevitably be

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- 11-8. When deputies may administer.
- 11-9. Administration by certain officers.
- 11-10. When county surveyors may administer oaths.

Art. 2. Forms of Official and Other Oaths.

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

punished in this world for each and every sin committed; but there will be no punishment after death, and that in another world all will be happy and equal to the angels is competent to be sworn. *Shaw v. Moore*, 49 N. C. 25, 26.

In the case of *Omychund v. Barker*, 1 Atk. 19, and *Wiles*, 538, it was decided by the Lord Chancellor, with the assistance of Chief Baron Parker, Chief Justice Willes and Chief Justice Lee, that a Gentoo, who was an infidel, who did not believe in either the Old or New Testament, but who believed in a God, as the Creator of the Universe, and that he is a rewarder of those who do well, and an avenger of those who do ill, according to the common law, may be sworn in that form which is the most sacred and obligatory upon his religious sense. *Shaw v. Moore*, 49 N. C. 25, 27.

The great case of *Omychund v. Barker*, establishes the rule to be, that an infidel is competent to be sworn, provided he believes in the existence of a Supreme Being, who punishes the wicked, without reference to the time of punishment. *Shaw v. Moore*, 49 N. C. 25, 29.

It is laid down by Lord Hale to be the common law, that a Jew is competent to be sworn, and may be sworn on the Old Testament, and such has ever since been taken to be the law. *Shaw v. Moore*, 49 N. C. 25, 27.

Finding of the Judge Conclusive.—The finding of the judge as to the competency of a witness to take oath is conclusive, and not reviewable. *State v. Pitt*, 166 N. C. 268, 270, 80 S. E. 1060.

At Common Law.—In *Shaw v. Moore*, 49 N. C. 25, *Pearson, J.*, said that "in the old cases it was held to be common law that no infidel (in which class Jews were included) could be sworn as a witness in the courts of England." He then proceeds to say that the reason for this as given by Lord Coke, "to say the least of it, is narrow-minded, illiberal, bigoted, and unsound." *State v. Pitt*, 166 N. C. 268, 270, 80 S. E. 1060.

Objection to Oath of Incompetent after Verdict.—Where a juror is incompetent to be sworn because an atheist (*State v. Davis*, 80 N. C. 412) and the objection is not discovered till after verdict, setting aside the verdict rests in the discretion of the trial judge. *State v. Lambert*, 93 N. C. 618; *State v. Council*, 129 N. C. 511, 39 S. E. 814, 816.

Objection to Manner of Administering after Verdict.—Where a juror was sworn in the presence of the prisoner, and his counsel let him acquiesce in the manner in which the oath was taken, to object after the verdict would simply make a trial not a decision upon the merits but a series of pitfalls for the State. Not having spoken when he was called upon to speak, the prisoner should not be heard after the verdict has gone against him. *State v. Boon*, 82 N. C. 638; *State v. Patrick*, 48 N. C. 443; *Briggs v. Byrd*, 34 N. C. 377; *State v. Ward*, 9 N. C. 443; *State v. Council*, 129 N. C. 511, 39 S. E. 814, 816.

Failure to Administer.—In *State v. Gee*, 92 N. C. 756, where a witness was not sworn at all, the court held that this was not ground of objection after verdict. *State v. Council*, 129 N. C. 511, 39 S. E. 814, 817.

§ 11-2. Administration of oath upon the Gospels.—Judges and justices of the peace, and other persons who may be empowered to administer oaths, shall (except in the cases in this chapter excepted) require the party sworn to lay his hand upon the Holy Evangelists of Almighty God, in token of his engagement to speak the truth, as he hopes to be saved in the way and method of salvation pointed out in that blessed volume; and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of the Gospel, and made liable to that vengeance which he has imprecated on his own head. (Rev., s. 2354; Code, s. 3309; R. C., c. 76, s. 1; 1777, c. 108, s. 2; 1941, c. 11; C. S. 3189.)

Cross Reference.—As to validation of defective acknowledgment for oath with uplifted hand, and § 11-4 for Quakers and others. As to forms of oaths, see § 11-11. As to perjury, see § 14-209.

Editor's Note.—The 1941 amendment dispensed with the former requirement that the Holy Gospel be kissed as a part of the administration of an oath. For case relating to the requirement, see *State v. Owen*, 72 N. C. 605, 612.

Application to Witnesses.—After this manner, every witness, except as otherwise provided, must be sworn. *State v. Davis*, 69 N. C. 383, 385.

Sufficiency of Juror's Oath.—An oath administered to a juror in the manner prescribed by statute is sufficient; the juror need not repeat the words "so help me God." *State v. Paylor*, 89 N. C. 539.

Ministerial Act.—The administration of an oath is a ministerial act and may be done by any one in the presence and by the direction of the court, but is the act of the court. *State v. Knight*, 84 N. C. 790.

Partially Directory.—"As to the form of the oath, when it is prescribed by statute," remarks Mr. Bishop, "the statute is to be construed in some sense directory only, so far at least that a departure from the words, in matter not of substance but of form merely, does not exempt the person taking it from the pains of perjury." 2 Bish. Cr. Law, secs. 862, 982; *State v. Mazon*, 90 N. C. 676, 678.

Same—Validity of Irregular Oath.—To hold invalid an oath that did not follow the very words of the statute might prove disastrous to the public interests. "Perjury and slander," in the language of the Supreme Court of Tennessee, "could often find, in slight variances from the prescribed forms of oath, the means of escape from condign punishment which justice invokes. Undoubtedly an oath, administered substantially according to the prescribed form, will be valid, and if taken falsely the party will be guilty of perjury." Sharp v. Wilhite, 21 Tenn. 434. And in the language of Green, C. J., in *State v. Daylor*, 3 Zab. (N. Y.), 49: "The Legislature did not design to prescribe the precise form of the oath, the slightest deviation from the phraseology of which would prove fatal." *State v. Mazon*, 90 N. C. 676, 678.

Same—Same—Juror's Oath in Capital Cases.—Although the omission of the words "you swear" at the commencement of the oath of jurors in a capital case looks awkward and mars the comeliness of judicial proceedings, we do not think that it vitiates the oath. *State v. Owen*, 72 N. C. 605, 612.

The manner of swearing is, as Judge Pearson says, merely a form "adapted to the religious belief of the general mass of citizens for the sake of convenience and uniformity." *State v. Pitt*, 166 N. C. 268, 271, 80 S. E. 1060.

Presumption.—The administration of an oath to a witness is an official act of the court; and it being shown affirmatively that an oath was administered to the defendant in open court on the Bible, a presumption arises that it was rightly done. *State v. Mace*, 86 N. C. 668, 670.

The maxim *omnia presumuntur rite esse acta* applies in no case with greater effect than to official acts of this nature, the minute and particular details of which, while important, are not likely to attract such attention as to insure their being accurately remembered. *State v. Mace*, 86 N. C. 668, 670.

Willful Violation.—A willful violation of such an oath in a material matter is perjury, and no other is. This is the general rule. *State v. Davis*, 69 N. C. 383, 385.

When Deputy Clerk May Administer.—The deputy of the clerk of the superior court is authorized to take the affidavit of the plaintiff in an action of claim and delivery. *Jack v. Buchanan*, 89 N. C. 74.

A deputy sheriff is not authorized to administer oath to homestead appraisers. *Oates v. Munday*, 127 N. C. 439, 444, 37 S. E. 457.

Cited in *State v. Beal*, 199 N. C. 278, 280, 154 S. E. 604.

§ 11-3. Administration of oath with uplifted hand.—When the person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from laying hands upon, or touching the Holy Gospel; and the oath required shall be administered in the following manner, namely: He shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also in token that if he should swerve from the truth he would draw down the vengeance of heaven upon his head, and shall introduce the intended oath with these words, namely:

I, A. B., do appeal to God, as a witness of the truth and the avenger of falsehood, as I shall answer the same at the great day of judgment, when the secrets of all hearts shall be known (etc., as the words of the oath may be). (Rev., s. 2355; Code, s. 3310; R. C., c. 76, s. 2; 1777, c. 108, s. 3; C. S. 3190.)

Cross References.—As to forms of oaths, see § 11-11. As to oath required of voter, see § 163-29.

Conscientious Scruples.—If the usual form of oaths upon the Holy Evangelists is dispensed with, and an "appeal" or "affirmation" is substituted, it must appear that the person sworn had conscientious scruples, else the "appeal" or "affirmation" is invalid. *State v. Davis*, 69 N. C. 383, 386; *Pearre v. Folb*, 123 N. C. 239, 31 S. E. 475.

Presumption as to Manner.—Where it appears that the registrar administered the prescribed oath to electors, but that he did not swear them on the Bible, it will be inferred, in the absence of direct proof to the contrary, that the oath was taken with uplifted hand, as specified by the section, and was accepted as a valid mode of administering it, by both the registrar and the elector. Administering the oath in such manner is sufficient to meet the requirements of the election law. *State v. Nicholson*, 102 N. C. 465, 9 S. E. 545.

Presumption as to Witness.—When a witness comes before a tribunal to be sworn it is to be presumed that he has settled the point with himself in what manner he will be sworn, and he should make it known to the officer of the court; and should he be sworn with uplifted hand, though not conscientiously scrupulous of swearing on the Gospels, and depose falsely, he subjects himself to the pains and penalties of perjury. *State v. Whisenhurst*, 9 N. C. 458.

Cited in *State v. Beal*, 199 N. C. 278, 280, 154 S. E. 604.

§ 11-4. Affirmation of Quakers and others.—The solemn affirmation of Quakers, Moravians, Dunkers and Mennonites, made in the manner heretofore used and accustomed, shall be admitted as evidence in all civil and criminal actions; and in all cases where they are required to take an oath to support the constitution of the state, or of the United States, or an oath of

office, they shall make their solemn affirmation in the words of the oath beginning after the word "swear"; which affirmation shall be effectual to all intents and purposes. (Rev., s. 2356; Code, s. 3311; R. C., c. 76, s. 3; 1777, c. 108, s. 4; 1777, c. 115, s. 42; 1819, c. 1019; 1821, c. 1112; C. S. 3191.)

Quakers and some others who have conscientious scruples about swearing at all, are permitted to "affirm." *State v. Davis*, 69 N. C. 383, 385.

Cited in *State v. Beal*, 199 N. C. 278, 280, 154 S. E. 604.

§ 11-5. Oaths of corporations.—In all cases where a corporation is appointed administrator, executor, collector, or to any other fiduciary position, of which fiduciary an oath is required by law, such oath may be taken by such corporation by and through any officer or agent of said corporation who is authorized by law to verify pleadings in behalf of such corporation; and any oath so taken shall be valid as the oath of such corporation. Any oath heretofore taken in the manner aforesaid in behalf of a corporation as such fiduciary is hereby validated as the oath of such corporation. (1919, c. 89, ss. 1, 2; C. S. 3192.)

Cross Reference.—As to verification of pleadings by corporations, see § 1-147.

§ 11-6. Oath to support constitution of United States; all officers take.—All members of the general assembly, and all officers who shall be elected or appointed to any office of trust or profit within the state, shall, agreeably to act of congress, take the following oath or affirmation:

I, A. B., do solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States; so help me, God.

Which oath shall be taken before they enter upon the execution of the duties of the office. (Rev., s. 2357; Code, s. 3313; R. C., c. 76, s. 5; 1791, c. 342, s. 2; C. S. 3193.)

Cross References.—As to what constitutes an office or place of trust or profit within the meaning of this section, see §§ 128-1, 128-13. See also, Const. Art. VI, s. 7, for oaths required of public officers.

Officers and Placemen.—Officers are required to take an oath to support the Constitutions of the State and of the United States, while placemen are not. *Worthy v. Barrett*, 63 N. C. 199.

Oath Incidental.—The oath required of public officers is merely incidental to and constitutes no part of the office. *State v. Stanley*, 66 N. C. 60, 63.

Failure to Take Oath.—Public officers who have not taken the required oaths of office are not entitled to the salaries attached to such offices. *Wiley v. Worth*, 61 N. C. 171.

§ 11-7. Oath or affirmation to support state constitution; all officers to take.—Every member of the general assembly, and every person who shall be chosen or appointed to hold any office of trust or profit in the state, shall, before taking his seat or entering upon the execution of the office, take and subscribe the following oath or affirmation:

I, A. B., do solemnly and sincerely swear (or affirm) that I will be faithful and bear true allegiance to the state of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the constitution of said state, not inconsistent with the constitution of the United States, to the best of my knowledge and ability; so help me, God.

Where such person shall be of the people

called Quakers, Moravians, Mennonites or Dunkers, he shall take and subscribe the following affirmation:

I, A. B., do solemnly and sincerely declare and affirm that I will truly and faithfully demean myself as a peaceful citizen of North Carolina; that I will be subject to the powers and authorities that are or may be established for the good government thereof, not inconsistent with the constitution of the state and constitution of the United States, either by yielding an active or passive obedience thereto, and that I will not abet or join the enemies of the state, by any means, in any conspiracy whatever, against the state; that I will disclose and make known to the legislative, executive or judicial powers of the state all treasonable conspiracies which I shall know to be made or intended against the state. (Rev., s. 2358; Code, s. 3312; R. C., c. 76, s. 4; 1781, c. 342, s. 1; C. S. 3194.)

Cross References.—As to oath with uplifted hand, see § 11-3. As to affirmation by Quakers and others, see § 11-4. As to public officers, see § 11-6 and Const., Art. VI, s. 7.

§ 11-8. When deputies may administer.—In all cases where any civil officer, in the discharge of his duties, is permitted by the law to administer an oath, the deputy of such officer, when discharging such duties, shall have authority to administer it, provided he is a sworn officer; and the oath thus administered by the deputy shall be as obligatory as if administered by the principal officer, and shall be attended with the same penalties in case of false swearing. (Rev., s. 2359; Code, s. 3316; R. C., c. 76, s. 7; 1836, c. 27, s. 2; C. S. 3195.)

Cross References.—As to administration of homestead appraiser's oath, see § 1-371 and annotations. See also, annotations to § 11-2.

§ 11-9. Administration by certain officers.—The chairman of the board of county commissioners and the chairman of the board of education of the several counties may administer oaths in any matter or hearing before their respective boards. (Rev., s. 2362; 1899, c. 89; 1889, c. 529; C. S. 3196.)

Cross Reference.—As to power of sheriff to administer oath to homestead appraisers, see § 1-371.

§ 11-10. When county surveyors may administer oaths.—The county surveyors of the several counties are empowered to administer oaths to all such persons as are required by law to be sworn in making partition of real estate, in laying off widows' dower, in establishing boundaries and in surveying vacant lands under warrants. (Rev., s. 2361; Code, s. 3314; 1881, c. 144; C. S. 3197.)

Art. 2. Forms of Official and Other Oaths.

§ 11-11. Oaths of sundry persons; forms.—The oaths of office to be taken by the several persons hereafter named shall be in the words following the names of said persons respectively:

Administrator

You swear (or affirm) that you believe A. B. died without leaving any last will and testament; that you will well and truly administer all and singular the goods and chattels, rights and credits of the said A. B., and a true and perfect inventory thereof return according to law; and that

all other duties appertaining to the charge reposed in you, you will well and truly perform, according to law, and with your best skill and ability; so help you, God.

Attorney at Law

I, A. B., do swear (or affirm) that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability; so help me, God.

Attorney-General, State Solicitors and County Attorneys

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the state of North Carolina in the office of attorney-general (solicitor for the state or attorney for the state in the county of); I will, in the execution of my office, endeavor to have the criminal laws fairly and impartially administered, so far as in me lies, according to the best of my knowledge and ability; so help me, God.

Auditor

I, A. B., do solemnly swear (or affirm) that I will well and truly execute the trust reposed in me as auditor, without favor or partiality, according to law, to the best of my knowledge and ability; so help me, God.

Book Debt Oath

You swear (or affirm) that the matter in dispute is a book account; that you have no means to prove the delivery of such articles, as you propose to prove by your own oath, or any of them, but by yourself; and you further swear that the account rendered by you is just and true; and that you have given all just credits; so help you, God.

Book Debt Oath for Administrator

You, as executor or administrator of A. B., swear (or affirm) that you verily believe this account to be just and true, and that there are no witnesses, to your knowledge, capable of proving the delivery of the articles therein charged; and that you found the book or account so stated, and do not know of any other or further credit to be given than what is therein given; so help you, God.

Clerk of the Supreme Court

I, A. B., do swear (or affirm) that, by myself or any other person, I neither have given, nor will give, to any person whatsoever, any gratuity, gift, fee or reward, in consideration of my appointment to the office of clerk of the supreme court of North Carolina; nor have I sold or offered to sell, nor will I sell or offer to sell, my interest in the said office; I also solemnly swear that I do not, directly or indirectly, hold any other lucrative office in this state; I do further swear that I will execute the office of clerk of the supreme court without prejudice, favor, affection or partiality, to the best of my skill and ability; so help me, God.

Clerk of the Superior Court

I, A. B., do swear (or affirm) that, by myself or any other person, I neither have given, nor will I give, to any person whatsoever, any gratuity, fee, gift or reward, in consideration of my

election or appointment to the office of clerk of the superior court for the county of.....; nor have I sold, or offered to sell, nor will I sell or offer to sell, my interest in the said office; I also solemnly swear that I do not, directly or indirectly, hold any other lucrative office in the state; and I do further swear that I will execute the office of clerk of the superior court for the county of without prejudice, favor, affection or partiality, to the best of my skill and ability; so help me, God.

Commissioners Allotting a Year's Provisions

You and each of you swear (or affirm) that you will lay off and allot to the petitioner a year's provisions for herself and family, according to law, and with your best skill and ability; so help you, God.

Commissioners Dividing and Allotting Real Estate

You and each of you swear (or affirm) that, in the partition of the real estate now about to be made by you, you will do equal and impartial justice among the several claimants, according to their several rights, and agreeably to law; so help you, God.

Commissioner of Wrecks

I, A. B., do solemnly swear (or affirm) that I will truly and faithfully discharge the duties of a commissioner of wrecks, for the district of, in the county of....., according to law; so help me, God.

Constable

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the state of North Carolina in the office of constable; I will see and cause the peace of the state to be well and truly preserved and kept, according to my power; I will arrest all such persons as, in my sight, shall ride or go armed offensively, or shall commit or make any riot, affray or other breach of the peace; I will do my best endeavor, upon complaint to me made, to apprehend all felons and rioters or persons riotously assembled, and if any such offenders shall make resistance with force, I will make hue and cry, and will pursue them according to law, and will faithfully and without delay execute and return all lawful precepts to me directed; I will well and truly, according to my knowledge, power and ability, do and execute all other things belonging to the office of constable, so long as I shall continue in office; so help me, God.

Cotton Weigher for Public

I,, public weigher for the city of (or as the case may be), do solemnly swear that I will justly, impartially and without any deduction, except as may be allowed by law, weigh all cotton that may be brought to me for that purpose, and tender a true account thereof to the parties concerned, if required so to do; so help me, God.

Entry-Taker

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of entry-taker for the county of.....according to law; so help me, God.

Executor

You swear (or affirm) that you believe this writing to be and contain the last will and testament of A. B., deceased; and that you will well and truly execute the same by first paying his debts and then his legacies, as far as the said estate shall extend or the law shall charge you; and that you will well and faithfully execute the office of an executor, agreeably to the trust and confidence reposed in you, and according to law; so help you, God.

Grand Jury—Foreman of

You, as foreman of this grand inquest for the body of this county, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the state's counsel, your fellows' and your own you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave any one unrepresented for fear, favor or affection, reward or the hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding; so help you, God.

Grand Jurors

The same oath which your foreman hath taken on his part, you and each of you shall well and truly observe and keep on your part; so help you, God.

Grand Jury—Officer of

You swear (or affirm) that you will faithfully carry all papers sent from the court to the grand jury, or from the grand jury to the court, without alteration or erasure, and without disclosing the contents thereof; so help you, God.

Jury—Officer of

You swear (or affirm) that you will keep every person, sworn on this jury, together in some private or convenient place, without meat or drink (water excepted). You shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask them whether they are agreed in their verdict, but with leave of the court; so help you, God.

Jury, in a Capital Case

You swear (or affirm) that you will well and truly try, and true deliverance make, between the state and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence; so help you, God.

Jury, in Criminal Actions Not Capital

You and each of you swear (or affirm) that you will well and truly try all issues in criminal actions which shall come before you during this term, and true verdicts give according to the evidence thereon; so help you, God.

(The same oath to talesmen, by using the word "day" instead of "term.")

Jury, in Civil Actions

You and each of you swear (or affirm) that you will well and truly try all civil actions which shall come before you during this term, and true verdicts give according to the evidence; so help you, God.

(The same oath to talesmen, by using the word "day" instead of "term.")

Jury, Laying off Dower

You and each of you swear (or affirm) that you will, without partiality and according to your best judgment, lay off and allot to A. B., widow of C. D., such dower in the lands of said C. D. as by law she is entitled to; so help you, God.

Judge of the Supreme Court

I, A. B., do solemnly swear (or affirm) that in my office of justice of the supreme court of North Carolina I will administer justice without respect to persons, and do equal right to the poor and the rich, to the state and to individuals; and that I will honestly, faithfully, and impartially perform all the duties of the said officer according to the best of my abilities, and agreeably to the constitution and laws of the state; so help me, God.

Judge of the Superior Court

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the state of North Carolina in the office of judge of the superior court of the said state; I will do equal law and right to all persons, rich and poor, without having regard to any person. I will not wittingly or willingly take, by myself or by any other person, any fee, gift, gratuity or reward whatsoever, for any matter or thing by me to be done by virtue of my office, except the fees and salary by law appointed; I will not maintain, by myself or by any other person, privately or openly, any plea or quarrel depending in any of the said courts; I will not delay any person of common right by reason of any letter or command from any person or persons in authority to me directed, or for any other cause whatsoever; and in case any letter or orders come to me contrary to law, I will proceed to enforce the law, such letters or order notwithstanding; I will not appoint any person to be clerk of any of the said courts but such of the candidates as appear to me sufficiently qualified for that office; and in all such appointments I will nominate without reward, hope of reward, prejudice, favor or partiality or any other sinister motive whatsoever; and finally, in all things belonging to my office, during my continuance therein, I will faithfully, truly and justly, according to the best of my skill and judgment, do equal and impartial justice to the public and to individuals; so help me, God.

Justice of the Peace

I, A. B., do solemnly swear (or affirm) that as justice of the peace of the county of, in all articles in the commission to me directed, I will do equal right to the poor and the rich, to the best of my judgment and according to the laws of the state; I will not, privately or openly, by myself or any other person, be of counsel in any quarrel or suit depending before me; the fines and amercements that shall happen to be made, and the forfeitures that shall be incurred, I will cause to be duly entered without concealment; I will not wittingly or willingly take, by myself or by any other person for me, any fee, gift, gratuity or reward whatsoever for any matter or thing by me to be done by virtue of my office, except such fees as are or may be directed and limited by statute; but well and truly I will perform my office of justice of the peace; I will not

delay any person of common right, by reason of any letter or order from any person in authority to me directed, or for any other cause whatever; and if any letter or order come to me contrary to law I will proceed to enforce the law, such letter or order notwithstanding. I will not direct or cause to be directed to the parties any warrant by me made, but will direct all such warrants to the sheriffs or constables of the county, or the other officers or ministers of the state, or other indifferent persons, to do execution thereof; and finally, in all things belonging to my office, during my continuance therein, I will faithfully, truly and justly, and according to the best of my skill and judgment, do equal and impartial justice to the public and to individuals; so help me, God.

Register of Deeds

I, A. B., do solemnly swear (or affirm) that I will faithfully and truly, according to the best of my skill and ability, execute the duties of the office of register of deeds for the county of....., in all things according to law; so help me, God.

Secretary of State

I, A. B., do swear (or affirm) that I will, in all respects, faithfully and honestly execute the office of secretary of state of the state of North Carolina, during my continuance in office, according to law; so help me, God.

Sheriff

I, A. B., do solemnly swear (or affirm) that I will execute the office of sheriff of county to the best of my knowledge and ability, agreeably to law; and that I will not take, accept or receive, directly or indirectly, any fee, gift, bribe, gratuity or reward whatsoever, for returning any man to serve as a juror or for making any false return on any process to me directed; so help me, God.

Standard Keeper

I, A. B., do swear (or affirm) that I will not stamp, seal or give any certificate for any steel-yards, weights or measures, but such as shall, as near as possible, agree with the standard in my keeping; and that I will, in all respects, truly and faithfully discharge and execute the power and trust by law reposed in me, to the best of my ability and capacity; so help me, God.

State Treasurer

I, A. B., do swear (or affirm) that, according to the best of my abilities and judgment, I will execute impartially the office of state treasurer, in all things according to law, and account for the public taxes; and I will not, directly or indirectly, apply the public money to any other use than by law directed; so help me, God.

Stray Valuers

You swear (or affirm) that you will well and truly view and appraise the stray, now to be valued by you, without favor or partiality, according to your skill and ability; so help you, God.

Surveyor for a County

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of surveyor for the county of....., according to law; so help me, God.

Treasurer for a County

I, A. B., do solemnly swear (or affirm) that, according to the best of my skill and ability, I will execute impartially the office of treasurer for the county of....., in all things according to law; that I will duly and faithfully account for all public moneys that may come into my hands, and will not, directly or indirectly, apply the same, or any part thereof, to any other use than by law directed; so help me, God.

Witness to Depose before the Grand Jury

You swear (or affirm) that the evidence you shall give to the grand jury, upon this bill of indictment against A. B., shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in a Capital Trial

You swear (or affirm) that the evidence you shall give to the court and jury in this trial, between the state and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in a Criminal Action

You swear (or affirm) that the evidence you shall give to the court and jury in this action between the state and A. B. shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in Civil Cases

You swear (or affirm) that the evidence you shall give to the court and jury in this cause now on trial, wherein A. B. is plaintiff and C. D. defendant, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness to Prove a Will

You swear (or affirm) that you saw C. D. execute (or heard him acknowledge the execution of) this writing as his last will and testament; that you attested it in his presence and at his request; and that at the time of its execution (or at the time the execution was acknowledged) he was, in your opinion, of sound mind and disposing memory; so help you, God.

General Oath

Any officer of the state or of any county or township, the term of whose oath is not given above, shall take an oath in the following form:

I, A. B., do swear (or affirm) that I will well and truly execute the duties of the office of according to the best of my skill and ability, according to law; so help me, God. (Rev., s. 2360; Code, ss. 3057, 3315; 1903, c. 604; 1874-5, c. 58, s. 2; R. C., c. 76, s. 6; C. S. 3199.)

Cross Reference.—As to oath of members of finance committee of county, see § 153-45.

Chapter 12. Statutory Construction.

Sec.

12-1. No public-local or private act may amend or repeal public law unless latter is referred to in caption.

§ 12-1. No public-local or private act may amend or repeal public law unless latter is referred to in caption.—No act, which by its caption purports to be a public-local or private act, shall have the force and effect to repeal, alter or change the provisions of any Public Law, unless the caption of said public-local or private act shall make specific reference to the Public Law it attempts to repeal, alter or change. (1929, c. 250, s. 1.)

Cited in *State v. Dixon*, 215 N. C. 161, 1 S. E. (2d) 521.

§ 12-2. Repeal of statute not to affect actions.

—The repeal of a statute shall not affect any action brought before the repeal, for any forfeitures incurred, or for the recovery of any rights accruing under such statute. (Rev., s. 2830; Code, s. 3764; R. C., c. 108, s. 1; 1830, c. 4; 1879, c. 163; 1881, c. 48; C. S. 3948.)

Section Not Obligatory.—As the laws of our Legislature do not bind another, except in so far as they may be absolute contracts, this section must be taken as merely a rule of construction having no application where the intention of the Legislature clearly and explicitly appears to the contrary. *Dyer v. Ellington*, 126 N. C. 941, 945, 36 S. E. 177.

Repeal after Services Rendered.—Where a statute was in force when certain services were rendered, it was held that the plaintiff's right had become absolute, and no subsequent repeal could invalidate it. *Copple v. Commissioners*, 138 N. C. 127, 134, 50 S. E. 574.

Action Commenced before Repeal.—By express terms of the section, the repeal of a statute does not affect an action theretofore commenced under it. *Smith v. Morganton Ice Company*, 159 N. C. 151, 74 S. E. 961.

Same—For Penalty or Forfeiture.—Under the provisions of the section a suit for a forfeiture or penalty is not discontinued by a repeal of the statute giving the penalty. *State v. Williams*, 97 N. C. 455, 2 S. E. 55; *Grocery Co. v. Southern R. Co.*, 136 N. C. 396, 48 S. E. 801; *Epps v. Smith*, 121 N. C. 157, 28 S. E. 359.

Subject Matter Destroyed by Statute Pending Appeal.—Where, pending an appeal, the subject matter of the action is destroyed or a statute giving the cause of action is repealed, the Supreme Court will not go into consideration of the abstract question as to which party ought to have prevailed, in order to adjudicate the costs but the judgment below as to costs will be allowed to stand. *Wikel v. Board*, 120 N. C. 451, 27 S. E. 117; *Brinson v. Duplin County*, 173 N. C. 137, 91 S. E. 708.

A vested right of action is property in the same sense in which tangible things are property, and is equally protected against interferences. Where it springs from contract, or from the principles of the common law, it is not competent for the Legislature to take it away. *Cooley's Constitutional Limitations*, p. 517; *Black's Const. Law*, p. 432; *Williams v. Atlantic Coast Line R. Co.*, 153 N. C. 360, 363, 69 S. E. 402. This case contains an excellent discussion which will be of aid in determining when a right is vested.

Right of Informer.—An informer has, in a certain sense, an inchoate right when he brings his suit, but he has no vested right to the penalty until judgment. Hence, until his right becomes vested, it can be destroyed by the Legislature. *Dyer v. Ellington*, 126 N. C. 941, 36 S. E. 177.

Action to Recover Arrearages of Taxes.—An action pending to recover arrearages of taxes, brought under an act authorizing the collection of unpaid taxes for past years, is not affected by the repeal of such statute. *Wilmington v. Cronly*, 122 N. C. 388, 30 S. E. 9.

Changing Rules of Evidence.—An act of the Legislature changing the rules of evidence can not be construed as operating retrospectively so as to affect existing rights. *Lowe v. Harris*, 112 N. C. 472, 17 S. E. 539.

Modes of Procedure.—Statutes which change modes of procedure may govern suits pending at the time of their enactment. *Sumner v. Miller*, 64 N. C. 688.

Sec.

12-2. Repeal of statute not to affect actions.

12-3. Rules for construction of statutes.

12-4. Construction of amended statute.

A retrospective law is one that in some way affects the rights and liabilities of parties incident to and growing out of a transaction that has passed. *Waddill v. Masten*, 172 N. C. 582, 584, 90 S. E. 694.

Maxim "Leges Posteriores Priores Contrarias Abrogant."

—To give operation to the maxim, *leges posteriores priores contrarias abrogant*, the latter law must be in conflict with the former; therefore, when a later statute is almost in *ipsisimis verbis* with a former one: Held, that there was no repeal of the former. *Kesler v. Smith*, 66 N. C. 154.

General Rule—Prospective Effect.—The general rule is that a statute will be given prospective effect only unless the law in question clearly forbids such a construction. *Mann v. Allen*, 171 N. C. 219, 88 S. E. 235; *Elizabeth City v. Commissioners*, 146 N. C. 539, 60 S. E. 416; *Waddill v. Masten*, 172 N. C. 582, 584, 90 S. E. 694.

Remedial Legislation.—In case of a remedial legislation, the general rule is not so insistent, and such statutes are not infrequently given retrospective effect where the language permits and such a construction will best promote the meaning and purpose of the Legislature. *Connecticut and E. Ins. Co. v. Talbot*, 113 Ind. 373; *Ex Parte Brickley*, 53 Ala. 42; *People ex re Collins v. Spicer*, 99 N. Y. 225; cited and approved in *Waddill v. Masten*, 172 N. C. 582, 584, 90 S. E. 694.

Mere Court Procedure.—The rule that statutes may be construed to have retrospective effect does not prevail when they concern mere matters of court procedure before action instituted, or the substitution or designation of new parties deemed necessary to a proper determination of a controversy or authorized to maintain and enforce a recognized or existent right. *Waddill v. Masten*, 172 N. C. 582, 90 S. E. 694.

Limitation of Actions.—While the Legislature has the power to extend or reduce the time in which an action may be brought, this is subject to the restriction that when the limitation is shortened a reasonable time must be given for the commencement of an action before the statute works a bar. *Strickland v. Draughan*, 91 N. C. 103, and cases there cited; *Cooley Const. Lim.* 450 (8 Ed.), and cases there cited. The action in the instant case having been instituted before the passage of the act, is not affected by it. *Nichols v. Norfolk, etc., R. Co.*, 120 N. C. 495, 498, 26 S. E. 643.

General Rule in Criminal Actions.—The repeal of a statute pending a prosecution for an offense which it creates arrests the prosecution and withdraws all authority to pronounce judgment, even after conviction. *State v. Williams*, 97 N. C. 455, 2 S. E. 55; *State v. Massey*, 103 N. C. 356, 9 S. E. 632.

Same—Legislative Authority to Increase Punishment.—The Legislature has no more authority to give a retroactive effect to a statute making the punishment for an offense already created more severe, than to subject persons to punishment under a criminal statute passed after the commission of the act for which they may be indicted. The provision of the Federal Constitution, which forbids the enactment by a State of any *ex post facto* law, could, in either event, be invoked for the protection of the person charged. *Ordonaux Cons. Leg.*, p. 223; *State v. Ramsour*, 113 N. C. 642, 644, 18 S. E. 707; *State v. Williams*, 97 N. C. 455, 2 S. E. 55.

§ 12-3. Rules for construction of statutes.—In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the same statute, that is to say:

1. Singular and plural number, masculine gender, etc. Every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing; and every word importing the plural number only shall extend and be applied to one person or thing, as well as to several persons or things; and every word importing the masculine

gender only shall extend and be applied to females as well as to males, unless the context clearly shows to the contrary.

2. Authority, to three or more exercised by majority. All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority.

3. "Month" and "year." The word "month" shall be construed to mean a calendar month, unless otherwise expressed; and the word "year," a calendar year, unless otherwise expressed; and the word "year" alone shall be equivalent to the expression "year of our Lord."

4. Leap-year, how counted. In every leap-year the increasing day and the day before, in all legal proceedings, shall be counted as one day.

5. "Oath" and "sworn." The word "oath" shall be construed to include "affirmation," in all cases where by law an affirmation may be substituted for an oath, and in like cases the word "sworn" shall be construed to include the word "affirmed."

6. "Person" and "property." The word "person" shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary. The words "real property" shall be coextensive with lands, tenements and hereditaments. The words "personal property" shall include moneys, goods, chattels, choses in action and evidences of debt, including all things capable of ownership, not descendible to the heirs at law. The word "property" shall include all property, both real and personal.

7. "Preceding" and "following."—The words "preceding" and "following," when used by way of reference to any section of a statute, shall be construed to mean the section next preceding or next following that in which such reference is made; unless when some other section is expressly designated in such reference.

8. "Seal."—In all cases in which the seal of any court or public office shall be required by law to be affixed to any paper issuing from such court or office, the word "seal" shall be construed to include an impression of such official seal, made upon the paper alone, as well as an impression made by means of a wafer or of wax affixed thereto.

9. "Will."—The term "will" shall be construed to include codicils as well as wills.

10. "Written" and "in writing."—The words "written" and "in writing" may be construed to include printing, engraving, lithographing, and any other mode of representing words and letters: Provided, that in all cases where a written signature is required by law, the same shall be in a proper handwriting, or in a proper mark.

11. "State" and "United States."—The word "state," when applied to the different parts of the United States, shall be construed to extend to and include the District of Columbia and the several territories, so called; and the words "United States" shall be construed to include the said district and territories and all dependencies.

12. "Imprisonment for one month," how construed. The words "imprisonment for one month,"

wherever used in any of the statutes, shall be construed to mean "imprisonment for thirty days."

13. "Governor," "senator," "solicitor," "elector," "executor," "administrator," "collector," "juror," and "auditor."—The words "governor," "senator," "solicitor," "elector," "executor," "administrator," "collector," "juror," "auditor," and any other words of like character shall when applied to the holder of such office, or occupant of such position, be words of common gender, and they shall be a sufficient designation of the person holding such office or position, whether the holder be a man or woman. (Rev., s. 2831; Code, s. 3765; R. C., c. 31, s. 108; R. C., c. 108; R. S., c. 31, s. 113; 21 Hen. III; 1921, c. 30; C. S. 3949.)

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VI. Definitions.

I. GENERAL CONSIDERATIONS.

Specific Words Followed by General Words.—Where particular and specific words or acts, the subject of a statute, are followed by general words, the latter must, as a rule, and by a proper interpretation, be confined to acts and things of the same kind. *State v. Craig*, 176 N. C. 740, 97 S. E. 400.

Words Given Ordinary Meaning.—When construing a statute the words used therein will be given their ordinary meaning, unless it appears from the context that they should be taken in a different sense. *Abernethy v. Board*, 169 N. C. 631, 86 S. E. 577.

When Court May Interpolate Necessary Words.—When it is necessary to carry out the clear meaning of a statute, and to make it sensible and effective, the court may interpolate the words necessary thereto, which were evidently omitted, as appears from the context, or silently understand them to be incorporated in it. *Fortune v. Commissioners*, 140 N. C. 322, 52 S. E. 950; *Abernethy v. Board*, 169 N. C. 631, 86 S. E. 577.

In *Palms v. Shawano*, 61 Wisc., 217, the words "south" used in the legislative act defining the boundaries of a county was read "north"; in *Stoneman v. Whaley*, 9 Iowa, 390, a subsequent act purported to repeal the sixteenth section of another act, and it was held that the repealing act referred to the sixth section; and in a case from 3 Utah, 334, a subsequent act referred to section 162 of a prior act, and it was construed to mean section 151. *Tooney v. Goldsboro Lumber Co.*, 171 N. C. 178, 181, 88 S. E. 215.

Proviso.—As a general rule in the construction of statutes, a proviso will be considered as a limitation upon the general words preceding, and as excepting something therefrom, but this rule is not absolute, and the meaning of the proviso will be ascertained by the language used in it. *Traders Nat. Bank v. Lawrence Mfg. Co.*, 96 N. C. 298, 3 S. E. 363.

Words Cannot Be Construed Away.—The court has no power or right to strike out words or to construe them away. *Nance v. Southern Railway*, 149 N. C. 366, 370, 63 S. E. 116.

When laws have been codified, it is permissible to examine the original legislation as an aid to correct interpretation. *Rodgers & Co. v. Bell*, 156 N. C. 378, 386, 72 S. E. 817; *Morganton Mfg., etc., Co. v. Andrews*, 165 N. C. 285, 292, 81 S. E. 418.

The maxim cessante ratione legis, cessat et ipsa lex has no application in the construction of statutes. *State v. Eaves*, 106 N. C. 752, 11 S. E. 370.

Void for Vagueness.—If a statute be so vague in its terms as to convey no definite meaning to the court or a ministerial officer, it is void. *State v. Partlow*, 91 N. C. 550.

II. DETERMINATION OF INTENT AND MEANING.

A. In General.

When Statute Is Clear.—It is not allowable to interpret

what has no need of interpretation, or, where the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes should be read and understood according to the natural and most obvious import of the language without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. *McCluskey v. Cornwell*, 11 N. Y. 593; *Nance v. Southern Railway*, 149 N. C. 366, 372, 63 S. E. 116; *Hamilton v. Rathbone*, 175 U. S. 414, 421, 44 L. Ed. 219, 20 S. Ct. 155; *State v. Carpenter*, 173 N. C. 767, 769, 92 S. E. 373.

Where Language Is of Doubtful Meaning.—In interpreting the statute where the language is of doubtful meaning, the Court will reject an interpretation which would make the statute harsh, oppressive, inequitable and unduly restrictive of primary private rights. *Nance v. Southern Railway*, 149 N. C. 366, 63 S. E. 116.

Meaning First Sought in Language Used.—In *Caminetti v. United States*, 242 U. S. 470, 37 S. Ct. 192, 193, 61 L. Ed. 442, the court said: "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms." *State v. Carpenter*, 173 N. C. 767, 768, 91 S. E. 373.

Law Existing at Time of Enactment.—To discover the true meaning of a statute, consideration should be given the law as it existed at the time of its enactment, the public policy as declared in judicial opinions and legislative acts, the public interest, and the purpose of the act in question. *Kendall v. Stafford*, 178 N. C. 461, 101 S. E. 15.

But the meaning must be ascertained from the statute itself, and the means and signs of which, as appears upon its face, it has reference. *State v. Parlow*, 91 N. C. 550, 552.

Objects Embraced.—The meaning of a statute in respect to what it has reference and the objects it embraces, as well as in other respects, is to be ascertained by appropriate means and indicia, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in *pari materia*, the preamble, the title, and other like means. *State v. Parlow*, 91 N. C. 550, 552.

Misdescription or Misnomer.—The question was fully considered by the Supreme Court in *Fortune v. Commissioners*, 140 N. C. 322, 328, 52 S. E. 950, and the court there says: "A misdescription or misnomer in a statute will not vitiate the enactment or render it inoperative, provided the means of identifying the person or thing intended, apart from the erroneous description, are clear, certain, and convincing." *Black Interp. of Laws*, sec. 558. Under this rule we may call to our aid anything in the act itself, or even in the alleged erroneous description, which sufficiently points to something else as furnishing certain evidence of what was meant, though the reference to the extraneous matter may not in itself be full and accurate. The rule, even when literally or strictly construed, does not require that the erroneous description shall be altogether rejected in making the search for the true meaning; but it may be used in connection with anything outside of the statute to which it refers and which itself, when examined, makes the meaning clear. The erroneous description may in this way be helped out by extraneous evidence. *Black Interp. Laws*, sec. 38; *Toomey v. Goldsboro Lumber Co.*, 171 N. C. 178, 181, 88 S. E. 215.

The title of a statute is no part thereof. *State v. Welsh*, 10 N. C. 404. But it may be construed when the meaning is doubtful. *State v. Woolard*, 119 N. C. 779, 25 S. E. 719.

It cannot control the text when it is clear. *Blue v. McDuffie*, 44 N. C. 131; *Hines v. Wilmington, etc., Railroad*, 95 N. C. 434; *Jones v. Hartford Ins. Co.*, 88 N. C. 499, 500; *State v. Woolard*, 119 N. C. 779, 25 S. E. 719. Especially is this true as to the headings of a section in the Code. *Cram v. Cram*, 116 N. C. 288, 21 S. E. 197; *In re Chisholm's Will*, 176 N. C. 211, 213, 96 S. E. 1034.

B. Legislative Intent.

Motive and Purpose of Legislature.—If the language of a statute is doubtful, and the intention of the Legislature is clear, the former will be construed in the latter; but where the language is plain, the Courts can not look into the motive or purpose of the Legislature in the enactment of the law. *State v. Eaves*, 106 N. C. 752, 11 S. E. 370.

Same—Understanding of Individual.—Whatever may be the views and purposes of those who procure the enactment of a statute, the legislature contemplates that its intention shall be ascertained from its words as embodied in it. And courts are not at liberty to accept the understanding of any individual as to the legislative intent. *State v. Boon*, 1 N. C.

191; *Drake v. Drake*, 15 N. C. 110; *Adams v. Turrentine*, 30 N. C. 147; *State v. Melton*, 44 N. C. 49; *Blue v. McDuffie*, 44 N. C. 131; *State v. Parlow*, 91 N. C. 550, 552.

Same—Same—Affidavit of Legislators.—In interpreting a statute it is not permissible to show its intent and meaning by affidavit of legislators, for such must be gathered from the act itself. *Goins v. Trustees Indian Training School*, 169 N. C. 736, 86 S. E. 629.

Harmonizing Context.—It is the duty of the Court to adopt that sense which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislature. *U. S. v. Winn*, 3 Summer, 209; *Nance v. Southern Railway*, 149 N. C. 366, 372, 63 S. E. 116.

Effectuation of Purpose.—Where the language used is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and effectuate its objects. *Fortune v. Commissioners*, 140 N. C. 322, 52 S. E. 950; *State v. Parlow*, 91 N. C. 550, 552.

The use of inapt, inaccurate or improper terms or phrases will not invalidate the statute, provided the real meaning of the Legislature can be gathered from the context or from the general purpose and tenor of the enactment. *Fortune v. Commissioners*, 140 N. C. 322, 52 S. E. 950.

Mistakes or Omissions.—Legislative enactments are not to be defeated on account of mistakes or omissions, any more than other writings, provided the intention of the Legislature can be collected from the whole statute. If the mistake renders the intention doubtful, the courts will look to the title and preamble as well as the body or purview of the act for assistance in arriving at it, and not until all these fail can the act be held inoperative. *Toomey v. Goldsboro Lumber Co.*, 171 N. C. 178, 181, 88 S. E. 215, quoting *Nazro v. Ins. Co.*, 14 Wisc. 298.

Impossible Requirements.—In the construction of a statute the court will avoid attributing to the legislature the intention to punish the failure to do an impossible thing. *Garrison v. Southern R. Company*, 150 N. C. 575, 64 S. E. 578.

Proviso Prevails over Purview.—When a proviso in a statute is directly contrary to the purview of the statute, the proviso is good and not the purview, because the proviso speaks the later intention of the Legislature. *Orinoco Supply Co. v. Masonic, etc., Star Home*, 163 N. C. 513, 79 S. E. 964.

As to Whether Statute Mandatory or Directory.—There is no absolutely formal test for determining whether a statutory provision is to be considered mandatory or directory. The meaning and intention of the Legislature must govern; and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it in the one way or the other. *Black's Interpretation of Laws*, p. 338 (124); *Spruill v. Davenport*, 178 N. C. 364, 368, 100 S. E. 527.

III. SIMILAR AND RELATED ACTS.

A. In General.

Words and Phrases in One Statute Read in a Subsequent Act.—*Dwarris on Statutes*, 274, says: "That words and phrases, the meaning of which, in a Statute, has been ascertained, are, when read in a subsequent Statute, to be understood in the same sense," and in the note of Judge Potter on the same page, it is said that "where the terms of a Statute which has received judicial construction are used in a later Statute, whether passed by the Legislature of the same State or county, or by that of another, that construction is to be given to the later Statute. *Conn. v. Hartwell*, 3 Gray, 450; *Ruchmabay v. Mottichmed*, Eng. L. & Eng. 84; *Bogards v. Trinity Church*, 4 Sand. Chan. 633; *Riggs v. Wilton*, 13 Ill. 15; *Adams v. Field*, 21 Vt. 256. It is presumed that the Legislature which passed the latter Statute knew the judicial construction which had been placed on the former one, and such a construction becomes a part of the law." *Bridgers v. Taylor*, 102 N. C. 86, 89, 8 S. E. 893.

Permissible to Look at Other Statutes.—To ascertain the mischief which an act of the Legislature was intended to remove, it is permissible, in the interpretation thereof, to consider other statutes, related to the particular subject, or to one under construction. *Abernethy v. Board*, 169 N. C. 631, 86 S. E. 577.

It is not permissible, if it can be reasonably avoided, to put such a construction upon a law as will raise a conflict between different parts of it, but effect should be given to each and every clause and provision. But when there is no way of reconciling conflicting clauses of a statute and nothing to indicate which the Legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with the other legislation on the same subject, and which would tend most

completely to secure the rights of all persons affected by such legislation. *Black's Interpretation of Laws* (1896), p. 60, sec. 32; *State Board v. White Oak Buckle Drainage District*, 177 N. C. 222, 226, 98 S. E. 597.

B. Statutes in Pari Materia.

Statutes relating to the same subject-matter should be construed in connection with each other as together constituting one law, giving effect to all parts of the statute when possible; and the history of the legislation may be considered in the effort to ascertain the uniform and consistent purpose of the Legislature. *Allen v. Reidsville*, 178 N. C. 513, 101 S. E. 267.

Where a former act has been repealed, or has expired by its limitation when it is in pari materia, it must be considered in connection with the last act and if necessary, a part of it. *Walser v. Jordan*, 124 N. C. 683, 33 S. E. 139.

Where there are different statutes in pari materia, though made at different times, or even where they have expired, and not referring to each other, they shall be taken and considered together as one system, and as explanatory of each other. *Walser v. Jordan*, 124 N. C. 683, 33 S. E. 139.

Same—Apparent Conflict.—"Where two statutes on the same subject, or on related subjects, are apparently in conflict with each other they are to be reconciled, by construction, so far as may be, on any fair hypothesis, and validity and effect given to both, if this can be done without destroying the evident intent and meaning of the later act." *Black's Interpretation of Laws* (1896), p. 60, sec. 32; *Peoples Bank v. Loven*, 172 N. C. 666, 90 S. E. 948; *State Board v. White Oak Buckle Drainage District*, 177 N. C. 222, 226, 98 S. E. 597.

Acts of Same Session of Legislature.—All acts of the same session of the Legislature upon the same subject matter are considered as one act, and must be construed together, under the doctrine of "in pari materia." They should be considered in pari materia, whether passed at the same session or not. *Walser v. Jordan*, 124 N. C. 683, 33 S. E. 139.

Act Declaratory of Intent of Previous Act.—An act of the Legislature declaratory of the intent of a previous act will not control the judiciary in the construction of the first act in actions prior to the declaratory act. *Rodwell v. Harrison*, 132 N. C. 45, 43 S. E. 540.

Private and Local Acts.—Private as well as local acts are, as a whole, and in every clause, unaffected by any repugnant provision of the general law. *State v. Womble*, 112 N. C. 862, 864, 17 S. E. 491.

C. Amendatory and Repealing Acts.

When Act Purports to Be Amendatory.—Where a statute refers to a prior legislative enactment, and in the caption and body of the act purports to be amendatory, substituting and amending different sections, the legislative intent cannot be construed to repeal the former act. *Toomy v. Goldsboro Lumber Co.*, 171 N. C. 178, 88 S. E. 215.

Amended and Amending Acts Construed Together.—Where an amendment to an existing statute is enacted the proper method of arriving at their true intent and meaning is by construing together. *Keith v. Lockhart*, 171 N. C. 451, 88 S. E. 640; *Township Road Comm. v. Board of Com'rs*, 178 N. C. 61, 100 S. E. 122.

When Amendatory Act Refers to Wrong Section.—If a section in an amendatory act refers to a section of the act amended by number, and the section referred to does not express the legislative intent, but another section is found which does express that intent, the reference will be treated as being made to the latter section. *Toomey v. Goldsboro Lumber Co.*, 171 N. C. 178, 181, 88 S. E. 215, quoting *People v. King*, 28 Cal. 266.

Erroneous Statement of Date.—An act of the Legislature subsequent to and in amendment of a former Act of the same session and correcting an ambiguity therein, is not invalidated by the fact that the date of ratification of the amended Act is erroneously stated, provided it sufficiently appears beyond cavil, what prior Act is referred to. *State v. Woolard*, 119 N. C. 779, 25 S. E. 719.

Summary of Rules of Construing Repealing Acts.—In *Winslow v. Morton*, 118 N. C. 486, 492, 24 S. E. 417, it was said: "Upon a perusal of the authorities it appears that the courts have universally given their sanction to the following rules of construction: (1) That the law does not favor a repeal of an older statute by a later one by mere implication. *State v. Woodside*, 30 N. C. 104; *Simonton v. Lanier*, 71 N. C. 498. (2) The implication, in order to be operative, must be necessary, and if it arises out of repugnancy between the two acts the later abrogates the older only to the extent that it is inconsistent and irreconcilable with it. *Wood v. United States*, 16 Peters, 341, 363, 10 L. Ed. 987; *Chew Heong v. United*

States, 112 U. S. 536, 549, 28 L. Ed. 770, 5 S. Ct. 255; *St. Louis v. Independent*, 17 Mo. 146. A later and older statute will, if it is possible and reasonable to do so, be always construed together, so as to give effect not only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, where such seems to have been the legislative purpose. *Southerland on Stat. Construct.*, sec. 158. A law will not be deemed repealed because some of its provisions are repeated in a subsequent statute, except in so far as the latter plainly appears to have been intended by the Legislature as a substitute, *Chicago, etc., R. Co. v. United States*, 127 U. S. 406, 32 L. Ed. 180, 8 S. Ct. 1194; *State v. Stolt*, 17 Wallace, 425; *Longlois v. Longlois*, 48 Mo. 60; *Casey v. Harned*, 5 Clarke (Iowa) 1; *State v. Custer*, 65 N. C. 339; *The Code*, sec. 3706; *Brietung v. Lindoner*, 37 Mich. 217. * * *

(3) Where a later or revising statute clearly covers the whole subject-matter of antecedent acts, and it plainly appears to have been the purpose of the Legislature to give expression in it to the whole law on the subject, the latter is held to be repealed by a necessary implication. *Matter of N. Y. Institution*, 121 N. Y. 234; *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153; *Jernigan v. Holden*, 34 Fla. 530."

Repeal of Act Giving Forfeiture.—The repeal of an act of Assembly giving a forfeiture for an offense is a repeal of all forfeitures incurred under the act repealed, unless there be a special exception to the contrary. *Governor v. Howard*, 5 N. C. 465.

Repeal of Repealing Act.—The repeal of a statute repealing a former statute leaves the latter in force. *Brinkley v. Swicegood*, 65 N. C. 626.

Implied Repeal by Lessening Degree of Crime.—It is perfectly settled as a rule of construction that if, by the common or statute law, an offense, for example, be a felony, and subsequent statute by an enactment merely affirmatively lessen its grade or mitigate the punishment, the latter is to that extent an implied repeal of the former. *State v. Upchurch*, 31 N. C. 454, 457.

When Acts Irreconcilably Inconsistent.—A later statute repeals, by implication, an older statute, with which it is irreconcilably inconsistent, to the extent of such repugnancy. But the two statutes must be reconciled if that can be done by any fair construction. *State v. Massey*, 103 N. C. 356, 9 S. E. 632.

IV. STATUTES STRICTLY CONSTRUED.

A. In General.

In Derogation of Common Law.—A statute in derogation of the common law must be strictly construed. *Swift & Co. v. Tempelos*, 178 N. C. 487, 101 S. E. 8.

Acts Limiting Rights to Contract.—Statutes restricting or disabling persons capable of contracting in the making of contracts, being in derogation of common right, and especially those penal in their nature, must be strictly construed. *Marriner & Bro. v. Roper Co.*, 112 N. C. 164, 16 S. E. 906.

Mandatory Act.—No provision, it would seem, could be more mandatory, in form or substance, than one which declares that non-compliance with it shall make void the act of the body required to observe its requirements. *Spruill v. Davenport*, 178 N. C. 364, 368, 100 S. E. 527.

Statutes depriving courts of jurisdiction once attached are strictly construed, and every requirement of such statute must be met before the court will yield its jurisdiction. *State v. Sullivan*, 110 N. C. 513, 14 S. E. 796.

Statutes providing for forfeitures should be strictly construed and not extended beyond the meaning of the words employed. *Skinner v. Thomas*, 171 N. C. 98, 87 S. E. 976.

Acts Restricting Private Acts.—Statutes which restrict the private rights of persons or the use of property in which the public have no concern should be strictly construed. *Nance v. Southern Railway*, 149 N. C. 366, 63 S. E. 116.

Local Lien Law.—In *Orinoco Supply Co. v. Masonic, etc., Star Home*, 163 N. C. 513, 79 S. E. 964, it was held that a lien law applicable to certain counties only, was local in its nature, and being contrary to the general lien laws of the State, must be strictly construed.

A remedial statute should be liberally construed, according to its intent, so as to advance the remedy and repress the evil. *Cape Lookout Co. v. Gold*, 167 N. C. 63, 67, 83 S. E. 3.

B. Criminal Statutes.

Rule for Construction of Penal Statutes.—It is familiar learning that penal statutes must be strictly construed, and the plaintiff, before he is entitled to recover the penalty, must bring his case strictly within the language and meaning of the statute. They must be construed sensibly, as all

other instruments, but not liberally, so as to stretch their meaning beyond what the words will warrant. 36 Cyc., 1185, 1186, 1187; *Sears v. Whitaker*, 136 N. C. 37, 48 S. E. 517; *Alexander v. Atlantic Coast Line R. Co.*, 144 N. C. 93, 99, 56 S. E. 697; *Coble v. Schoffner*, 75 N. C. 42; *Hamlet Grocery Co. v. Southern R. Co.*, 170 N. C. 241, 244, 87 S. E. 57; *State v. Godfrey*, 97 N. C. 507, 1 S. E. 779.

Rule Explained.—The rule that a penal Statute must be strictly construed, means no more than that the court, in ascertaining the meaning of such a Statute, cannot go beyond the plain meaning of the words and phraseology employed in search of an intention not certainly implied by them, and when there is a reasonable doubt as to the meaning of the words used in the Statute, the Court will not give them such an interpretation as to impose the penalty, nor will the purpose of the Statute be extended by implication, so as to embrace cases not clearly within its meaning. *Hines v. Wilmington, etc., Railroad*, 95 N. C. 434.

This rule is, however, never to be applied so strictly as to defeat the clear intention of the Legislature, and if the intention to impose the penalty clearly appears, that is sufficient, and it must prevail. *Hines v. Wilmington, etc., Railroad*, 95 N. C. 434.

Supplying Omission and Strained Constructions.—In *State v. Massey*, 103 N. C. 356, 9 S. E. 632, it was announced that as a policy it is more dangerous for the Supreme Court to usurp the powers of the legislative department by supplying omissions in, or putting strained constructions upon, criminal statutes, than that some criminals should go unpunished.

V. CONSTRUCTION IN ACCORD WITH CONSTITUTION.

A. Construction.

General Rule.—Whenever an act of the Legislature can be so construed and applied as to avoid conflict with the Constitution, and give it the force of law, such construction will be adopted by the Court. *State v. Pool*, 74 N. C. 402.

Valid and Invalid Portions of Same Act.—Where there are distinct and valid provisions of a statute, with unconstitutional provisions, the two portions of the law being separate and it appearing from a perusal of the statute that the Legislature intended the valid portion to be effective independently of the invalid part, the valid provisions may be enforced. *Archer v. Joyner*, 173 N. C. 75, 91 S. E. 699.

In Black on Constitutional Law the rule is said to be: "That if the invalid portions can be separated from the rest, and if, after their excision, there remains a complete, intelligible, and valid statute capable of being executed, and conforming to the general purpose and intent of the Legislature as shown in the act, the same will not be adjudged unconstitutional in toto, but sustained to that extent." Quoted in *Keith v. Lockhart*, 171 N. C. 451, 458, 88 S. E. 640.

The position, however, is not allowed to prevail when the parts of the statute are so connected and dependent the one upon the other that to eliminate one will work substantial change to the portion which remains. Thus, in Black's work, the author says, page 63: "And if the unconstitutional clause cannot be rejected without causing the statute to enact what the Legislature did not intend, the whole statute must fall." *Employers' Liability Cases*, 207 U. S. pp. 463-501, 28 S. Ct. 141, 52 L. Ed. 297; *Illinois Cen. R. Co. v. McKendree*, 203 U. S. 514, 27 S. Ct. 153, 51 L. Ed. 298; *Greene v. Owen*, 125 N. C. 212, 34 S. E. 424; *Riggsbee v. Durham*, 94 N. C. 800; *Keith v. Lockhart*, 171 N. C. 451, 458, 88 S. E. 640; *Lewis Sutherland Statutory Construction* (2 Ed.), sec. 306. Or if constitutional and unconstitutional parts are all interdependent. *State v. Godwin*, 123 N. C. 697, 700, 31 S. E. 221.

Resort to Implication.—Courts may resort to an implication to sustain an act, but not to destroy it. *Lowery v. School Trustees*, 140 N. C. 33, 52 S. E. 267.

Presumption in Favor of Validity.—Every presumption is in favor of the validity of an act of the Legislature and all doubts are resolved in support of the act. *Lowery v. School Trustees*, 140 N. C. 33, 52 S. E. 267.

It is never to be presumed that the Legislature intends an infringement of the Constitution, even when the infringement is palpable; but it is to be set down to inadvertence or mistake, or unconscious bias from pressing circumstances. *Jacobs v. Smallwood*, 63 N. C. 112, 113.

When Object Is Valid and Effect Invalid.—A statute, while its object may be legitimate and altogether praiseworthy, is, nevertheless, invalid if its effect is unconstitutional. *Jacobs v. Smallwood*, 63 N. C. 112, 117.

B. Effect.

Liability of Public Officer under Unconstitutional Act.—An individual officeholder is not required to be wiser than the whole people represented in their General Assembly;

therefore, he is not indictable for obeying an unconstitutional legislative act (unless it required the commission of a crime, which is not for a moment to be supposed); nor is he indictable for refusing to perform certain duties under a former law repealed by a subsequent unconstitutional statute, until at least after a decision by competent authority. *State v. Godwin*, 123 N. C. 697, 31 S. E. 221.

When Court Reverses Its Decision Not Retroactive.—Where property rights are acquired in accordance with a decision of the Supreme Court, in the interpretation of a statute, which is subsequently overruled, the effect of the later decision will not be retroactive in effect. *Fowle & Son v. Ham*, 176 N. C. 12, 96 S. E. 639.

VI. DEFINITIONS.

Purpose.—Paragraph one of this section was intended to avoid the very awkward expressions, "such person or persons," "he, she, or they," "himself or themselves," to be met with in some badly drawn statutes. *Von Glahn v. Harris*, 73 N. C. 323, 333.

"Person" Extends to "Persons."—The word "person" is construed to extend to "persons" under the authority of paragraph one of this section. *State v. Dunn*, 134 N. C. 663, 670, 46 S. E. 949; *State v. Wilkerson*, 98 N. C. 696, 701, 3 S. E. 683.

The words "twelve months," in the absence of any legislative definition of the word month and the word "year," will be interpreted to mean twelve calendar, not lunar, months. *Muse v. London Assur. Corp.*, 108 N. C. 240, 13 S. E. 94.

Month.—The lunar month, when spoken of in statutes, consists of twenty-eight days; a calendar month contains the number of days ascribed to it in the calendar, varying from twenty-eight to thirty-one. *State v. Upchurch*, 72 N. C. 146. In this respect our statute has adopted the computation of the civil instead of the common law. *Satterwhite v. Burwell*, 51 N. C. 92; *Adcock v. Fuquay Springs*, 194 N. C. 423, 425, 140 S. E. 24.

"Thirty days," as used in Art. IV of the Constitution, is not synonymous with "one month"; it may be more or less. *State v. Upchurch*, 72 N. C. 146.

Does Not Affect Constitution.—The provisions of paragraph six of this section could not affect the meaning of the terms employed in the Constitution; indeed, it purports to apply only to statutes, and to them, when the meaning is manifestly otherwise than as therein provided and defined. *Redmond v. Commissioners*, 106 N. C. 122, 144, 10 S. E. 845.

"Property" Used in Limited Sense.—While the term "property," in its broadest and most general signification, embraces all kinds of property, including choses in action, rights and credits, and the like things, it is very often and conveniently used in its limited sense, and this is so notwithstanding the statutory provision. *Redmond v. Commissioners*, 106 N. C. 122, 144, 10 S. E. 845.

A chose in action is property, and embraced in the terms of paragraph six of this section. *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198.

A promissory note or due bill being an "evidence of debt" is embraced in the term "personal property." *State v. Sneed*, 121 N. C. 614, 28 S. E. 365.

Money.—While the word "property" in its legal sense ordinarily includes money, yet where it can be seen from other parts of a will in which it is used that it was not intended, that interpretation will be given it by the courts with which the testator had evidently employed it. *Patterson v. Wilson*, 101 N. C. 584, 8 S. E. 229.

The word "estate" has a broader meaning than the word "property." The latter word could not include choses in action, unless there be something in the context which would require it to receive this interpretation, except by force of the definition contained in this section. *Vaughan v. Murfreesboro*, 96 N. C. 317, 2 S. E. 676.

§ 12-4. Construction of amended statute.—

Where a part of a statute is amended it is not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment. (Rev., s. 2832; Code, s. 3766; 1868-9, c. 270, s. 22; 1870-1, c. 111; C. S. 3950.)

Editor's Note.—See 12 N. C. Law Rev. 262.

Amending Act Presumed Not to Repeal.—Where a statute only undertakes to amend one already on the statute-books, it will be presumed that it did not intend to repeal it, unless

there is an express repealing clause. *State v. Massey*, 97 N. C. 465, 2 S. E. 445. *State v. Broadway*, 157 N. C. 598, 601, 72 S. E. 987.

Time of Enactment of New Proviso.—By this section when a part of the statute is amended, the new proviso is considered as having been enacted at the time of the amendment, and the act of 1885, amendatory of the Code of 1883 is subject to this rule of construction. *Leak v. Gay*, 107 N. C. 468, 12 S. E. 312.

Amendment of a statute operates from its enactment, leaving in force the portions which are not altered. *Nichols v. Board*, 125 N. C. 13, 34 S. E. 71.

Re-enacted Contemporaneous with Repeal.—It was held in *State v. Williams*, 117 N. C. 753, 23 S. E. 250, that: "The re-enactment by the Legislature of a law in the terms of a former law at the same time it repeals the former law, is not, in contemplation of law, a repeal, but it is a re-affirmance of the former law, whose provisions are thus continued without any intermission." *Bishop, Stat. Crimes*, sec. 181; *State v. Sutton*, 100 N. C. 474, 6 S. E. 687; *State v. Gumber*, 37 Wis. 298; *State v. Southern R. Co.*, 125 N.

C. 666, 673, 34 S. E. 527; *State v. Bellamy*, 120 N. C. 212, 27 S. E. 113.

Bill of Indictment.—If a statute creating an offense is amended in any important particular, a bill of indictment for an offense committed before the act was amended, but which was found after the passage of the amending act, should charge the offense under the old act, and contain an averment that the offense was committed before the amendment was passed. *State v. Massey*, 97 N. C. 465, 2 S. E. 445.

Misdemeanor Made Punishable by Fine or Imprisonment.—A public-local law making an act a misdemeanor is not repealed by a statute, making the same offense for the first time punishable by "a fine or imprisonment in the discretion of the court," and a felony for the second offense; the later statute expressly stating in the heading of the chapter that it was amendatory, and for the better enforcement, of the former statute, and that it was to take effect from and after its ratification; and where the prohibited offense has been committed prior to the enactment of the latter act, it is punishable under the prior law. *State v. Mull*, 178 N. C. 748, 101 S. E. 89.

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Chapter 13. Citizenship Restored.

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- 13-6. Procedure in case of pardon or suspension of judgment.
- 13-7. Restoration of rights of citizenship to per-

§ 13-1. **Petition filed.**—Any person convicted of an infamous crime, whereby the rights of citizenship are forfeited, desiring to be restored to the same, shall file his petition in the superior court, setting forth his conviction and the punishment inflicted, his place or places of residence, his occupation since his conviction, the meritorious causes which, in his opinion, entitle him to be restored to his forfeited rights, and that he has not before been restored to the lost rights of citizenship. (Rev., s. 2675; Code, ss. 2938, 2940; R. C. c. 58, ss. 1, 3; 1840, c. 36, s. 4; C. S. 385.)

Cross References.—As to infamous crimes generally, see §§ 14-1, 14-2, 14-3. See also, the North Carolina Const., Art. II, § 11; Art. VI, § 8.

Loss of citizenship.—Loss of citizenship does not form a part of the judgment of the court, but follows as a consequence of such judgment. *State v. Jones*, 82 N. C. 685.

§ 13-2. **When and where petition filed.**—At any time after the expiration of two years from the date of discharge of the petitioner, the petition may be filed in the superior court of the county in which the applicant is at the time of filing and has been for five years next preceding a bona fide resident, or in the superior court of the county, at term, where the indictment was found upon which the conviction took place; and in case the petitioner may have been convicted of an infamous crime more than once, and indictments for the same may have been found in different counties, the petition shall be filed in the superior court of that county where the last indictment was found. (Rev., s. 2676; Code, ss. 2940, 2941; 1897, c. 110; R. C., c. 58, ss. 3, 4; 1840, c. 36, s. 3; 1933, c. 243; C. S. 386.)

Editor's Note.—Prior to the amendment by Public Laws 1933, c. 243, the petition was permitted to be filed after "four years from the date of conviction," instead of "two years from the date of discharge" as is now permitted.

§ 13-3. **Notice given.**—Upon filing the petition the clerk of the court shall advertise the substance thereof, at the courthouse door of his county, for the space of three months next before the term when the petitioner proposes that the same shall be heard. (Rev., s. 2677; Code, s. 2938; R. C., c. 58, s. 1; 1840, c. 36; C. S. 387.)

§ 13-4. **Hearing and evidence.**—The petition shall be heard by the judge at term, at which hearing the court shall examine all proper testimony which may be offered, either by the petitioner as to the facts set forth in his petition or by any one who may oppose the grant of his prayer. The petitioner shall also prove by five respectable witnesses, who have been acquainted with the petitioner's character for three years next preceding the filing of his petition, that his character for truth and honesty during that time

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- sons committed to certain training schools.
- 13-8. Contents of petition; affidavits of reputable citizens; hearing; decree of restoration.
- 13-9. Restoration of citizenship to persons convicted, etc., of involuntary manslaughter.
- 13-10. Contents of petition; supporting affidavits; hearing and decree.

has been good; but no deposition shall be admissible for this purpose unless the petitioner has resided out of this state for three years next preceding the filing of the petition. (Rev., s. 2678; Code, ss. 2938, 2939; 1897, c. 110; 1901, c. 533; R. C., c. 58, ss. 1, 2; 1840, c. 36; C. S. 388.)

§ 13-5. **Decree.**—At the hearing the court, on being satisfied of the truth of the facts set forth in the petition, and on its being proved that the character of the applicant for truth and honesty is good, shall decree his restoration to the lost rights of citizenship, and the petitioner shall accordingly be restored thereto. (Rev., s. 2679; Code, s. 2938; R. C., c. 58, s. 1; 1840, c. 36; C. S. 389.)

§ 13-6. **Procedure in case of pardon or suspension of judgment.**—Any person convicted of any crime, whereby the rights of citizenship are forfeited, and the judgment of the court pronounced does not include imprisonment anywhere, and pardon has been granted by the governor, or the court suspended judgment on payment of the costs, and the costs have been paid, such person may be restored to such forfeited rights of citizenship upon application, by petition, to the judge presiding at any term of the superior court held for the county in which the conviction was had, one year after such conviction. The petition shall set out the nature of the crime committed, the time of conviction, the judgment of the court, and that pardon has been granted by the governor, and also that said crime was committed without felonious intent, and shall be verified by the oath of the applicant and accompanied by the affidavits of ten reputable citizens of the county, who shall state that they are well acquainted with the applicant and that in their opinion the crime was committed without felonious intent. No notice of the petition in such case shall be necessary, and no advertisement thereof be made, but the same shall be heard by the judge, upon its presentation, during a term of court; and if he is satisfied as to the truth of the matters set out in the petition and affidavits, he shall decree the applicant's restoration to the lost rights of citizenship, and the clerk shall spread the decree upon his minute docket: Provided, that in all cases where the court suspended judgment it shall not be necessary to allege or prove that pardon has been granted by the governor, and in such cases the petition may be made and the forfeited rights of citizenship restored at any time after conviction. (Rev., s. 2680; 1899, cc. 44, 249; 1905, c. 547; C. S. 390.)

Application.—This section is not applicable where one has been convicted of an infamous crime, imprisoned, and

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pardoned by the governor. In re Petition of Jones, 160 N. C. 15, 75 S. E. 1007.

§ 13-7. Restoration of rights of citizenship to persons committed to certain training schools.—Any person convicted of any crime whereby any rights of citizenship are forfeited, and the judgment of the court pronounced provides a sentence, and such sentence is suspended upon the condition that such person be admitted to and remain at one of the following schools: Eastern Carolina Industrial Training School for Boys, the Stonewall Jackson Manual Training and Industrial School, the Morrison Training School for Negro Boys, or the State Home and Industrial School for Girls, until lawfully discharged, and upon payment of costs, such person may be restored to such forfeited rights of citizenship upon application and petition to the judge presiding at any term of the superior court held in the county in which the conviction was had, at any time after one year from the date of the lawful discharge from any such school. (1937, c. 384, s. 1.)

§ 13-8. Contents of petition; affidavits of reputable citizens; hearing; decree of restoration.—The petition provided for in § 13-7 shall set out the nature of the crime committed, the time of conviction, the judgment of the court, and shall recite that the costs of suit have been paid, the lawful discharge of the applicant from the school to which he or she was admitted, and that applicant has never before had restored to him lost rights of citizenship, which petition shall be verified by the oath of the applicant, and accompanied by the affidavits of ten reputable citizens of the county in which said conviction took place, who shall state that they are well acquainted with the applicant, and that they are of the opinion that the applicant should have restored to him the lost rights of citizenship. The petition shall be heard by the judge during a term of court, and

if he is satisfied as to the truth of the matters set out in the petition and the affidavits, he shall decree the applicant's restoration to the lost rights of citizenship and the clerk shall spread the decree upon his minute dockets. (1937, c. 384, s. 2.)

§ 13-9. Restoration of citizenship to persons convicted, etc., of involuntary manslaughter.—Any person who has been convicted of, or confessed guilty to, the crime of involuntary manslaughter and is not actually serving a term in the state prison or on the roads of the state may, at any subsequent term of the superior court of the county in which the conviction was had, or the confession of guilt made, make application and petition the court for a restoration of all forfeited rights of citizenship. (1941, c. 184, s. 1.)

Cross Reference.—As to punishment for involuntary manslaughter, see § 14-18.

§ 13-10. Contents of petition; supporting affidavits; hearing and decree.—The petition provided for in section 13-9 shall set out the nature of the crime committed, the time of conviction or confession of guilt, the judgment of the court, and shall recite that the costs of suit have been paid, and that applicant has never before had restored to him lost rights of citizenship, which petition shall be verified by the oath of the applicant, and accompanied by the affidavits of ten reputable citizens of the county in which said conviction or confession of guilt took place, who shall state that they are well acquainted with the applicant, and that they are of the opinion that the applicant should have restored to him the lost rights of citizenship. The petition shall be heard by the judge during a term of court, and if he is satisfied as to the truth of the matters set out in the petition and the affidavits, he shall have the authority to decree the applicant's restoration to the lost rights of citizenship and the clerk shall spread the decree upon his minute dockets. (1941, c. 184, s. 2.)

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SUBCHAPTER I. GENERAL PROVISIONS.**Art. 1. Felonies and Misdemeanors.****§ 14-1. Felonies and misdemeanors defined.—**

A felony is a crime which is or may be punishable by either death or imprisonment in the state's prison. Any other crime is a misdemeanor. (Rev., s. 3291; 1891, c. 205, s. 1; C. S. 4171.)

Cross Reference.—As to statute of limitations for misdemeanors, see section 15-1.

Common Law Provisions.—Up to the time this section was passed the somewhat arbitrary common-law rule was followed as to what crimes were felonies, and what were misdemeanors and under that, conspiracy, and even such grave crimes as perjury and forgery, were misdemeanors. *State v. Mallett*, 125 N. C. 718, 723, 34 S. E. 651; *State v. Holder*, 153 N. C. 606, 608, 69 S. E. 66. See *State v. Hill*, 91 N. C. 561.

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

Section Constitutional.—This section is held to be constitutional in *State v. Lytle*, 138 N. C. 738, 744, 51 S. E. 66.

Punishment Determines Classification of Offenses.—By this section, North Carolina adopted the rule, now almost universally prevalent, by which the nature of the punish-

ment determines the classification of offenses; those which may be punished capitally or by imprisonment in the penitentiary are felonies (as to which there is no statute of limitations), and all others are misdemeanors, as to which prosecutions in this State are barred by two years. *State v. Mallett*, 125 N. C. 718, 723, 34 S. E. 651.

The measure of punishment is the test of the nature of a crime, whether felony or misdemeanor. *State v. Hyman*, 164 N. C. 411, 414, 79 S. E. 284; *Jones v. Brinkley*, 174 N. C. 23, 24, 93 S. E. 372.

It should be noted that there are exceptions to this general rule. The legislature has the power to style any offence a misdemeanor, notwithstanding it is punishable in the state's prison. Examples of this appear in sections 14-278, 14-280 and 44-25 where the offenses are specifically declared to be misdemeanors although they are punishable in the State's Prison. See *State v. Holder*, 153 N. C. 606, 608, 609, 69 S. E. 66. See also Editor's Note under section 14-3.

Offence Need Not Be Specified.—It is not necessary to prescribe that an act is a misdemeanor or felony, as the punishment affixed determines that. *State v. Lewis*, 142 N. C. 626, 630, 55 S. E. 600.

Indictment Must Use Word "Feloniously."—Since all criminal offenses punishable with death or imprisonment in a State prison were by this section declared felonies, indictments wherein there has been a failure to use the word "feloniously," as characterizing the charge in the latter class

of cases, have been declared fatally defective. *State v. Wilson*, 116 N. C. 979, 21 S. E. 692; *State v. Skidmore*, 109 N. C. 795, 14 S. E. 63; *State v. Shaw*, 117 N. C. 764, 23 S. E. 246; *State v. Bryan*, 112 N. C. 848, 16 S. E. 909; *State v. Caldwell*, 112 N. C. 854, 16 S. E. 1010; *State v. Holder*, 153 N. C. 606, 608, 69 S. E. 66. See *State v. Callett*, 211 N. C. 563, 191 S. E. 27. But this principle does not hold good where the Legislature otherwise expressly provides.

In section 15-145 the legislature has prescribed a form of indictment for perjury (which is by section 14-209 a felony) and left out the word "feloniously." And in *State v. Harris*, 145 N. C. 456, 59 S. E. 115 the court held that in the case of perjury it was unnecessary that the word appear. See *State v. Holder*, supra, at page 609.

Same—New Bill Obtained.—But the bill should not be quashed; the defendant should be held until a new bill is obtained. *State v. Skidmore*, 109 N. C. 795, 14 S. E. 63.

Penitentiary Unknown to Common Law.—The penitentiary, being a modern device, unknown to the common law, punishment in the penitentiary could not be imposed by the common law. *State v. McNeill*, 75 N. C. 15, 16.

The use of the word "penitentiary," in prescribing the punishment for one convicted under a criminal statute, has the same legal significance as the words "State's Prison," both meaning the place of punishment in which convicts sentenced to imprisonment and hard labor are confined by the authority of law. *State v. Burnett*, 184 N. C. 783, 115 S. E. 57.

Concurrence of General and Local Laws.—Our general prohibition statutes, prohibiting the manufacture or sale of intoxicating liquors, expressly provide that they shall not have the effect of repealing local or special statutes upon the subject, but they shall continue in full force and in concurrence with the general law except where otherwise provided by law; and where the local law applicable makes the offense a misdemeanor, punishable by imprisonment, in the county jail or penitentiary not exceeding two years, etc., the person convicted thereunder is guilty of a felony, by this section, and the two-year statute of limitations is not a bar to the prosecution. *State v. Burnett*, 184 N. C. 783, 115 S. E. 57.

Thus in the case of a public-local law the fact that the offense is declared a misdemeanor does not govern where the punishment prescribed is confinement in the state prison. In such cases, by this section, the offense is a felony. See above catchline "Punishment Determines Classification of Offense."—Ed. Note.

Conspiracy.—A conspiracy to commit a felony is a felony and a conspiracy to commit a misdemeanor is a misdemeanor. *State v. Abernethy*, 220 N. C. 226, 17 S. E. (2d) 25, holding that a conspiracy to interfere with election of officials in the discharge of their duties is a misdemeanor.

§ 14-2. Punishment of felonies.—Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be imprisoned in the county jail or state prison not exceeding two years, or be fined, in the discretion of the court, or if the offense be infamous, the person offending shall be imprisoned in the county jail or state prison not less than four months nor more than ten years, or be fined. (Rev., s. 3292; Code, s. 1096; R. C., c. 34, s. 27; C. S. 4172.)

In General.—It is only felonies where no specific punishment is prescribed, and offenses that are infamous, or done in secrecy and malice, or with deceit and intent to defraud, that may be punished with imprisonment in the penitentiary. *State v. Powell*, 94 N. C. 920, 921, 924. See Editor's Note under § 14-3.

Where Section Applies.—This section applies only where an act is made a felony without the nature of punishment being specified. *State v. Rippey*, 127 N. C. 516, 37 S. E. 148.

Specific Punishment.—A provision in a criminal statute "that the punishment shall be in the discretion of the court and the defendant may be fined or imprisoned or both," is the prescribing of a "specific punishment" within this section. *State v. Richardson*, 221 N. C. 209, 19 S. E. (2d) 863.

The felony defined in section 14-26 is not one "for which no specific punishment is prescribed," within this section. The punishment is expressly left to the discretion of the court, which takes the case out of this section. *State v. Swindell*, 189 N. C. 151, 126 S. E. 417. See further under § 14-3, catchline "Meaning of Specific Punishment."

Cited in *State v. Ritter*, 199 N. C. 116, 119, 154 S. E. 62.

§ 14-3. Punishment of misdemeanors, infamous

offenses, offenses committed in secrecy and malice, etc.—All misdemeanors, where a specific punishment is not prescribed shall be punished as misdemeanors at common law; but if the offense be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a felony and punished by imprisonment in the county jail or state prison for not less than four months nor more than ten years, or shall be fined. (Rev., s. 3293; Code, s. 1097; R. C., c. 34, s. 120; 1927, c. 1; C. S. 4173.)

Cross References.—As to uttering worthless check, see §§ 14-106 and 14-107. As to statute of limitations for misdemeanors, see § 15-1.

Editor's Note.—The Act of 1927 amended this section by inserting the words "or state prison." The effect of this amendment is to make misdemeanors, where no specific punishment is prescribed and which are "infamous or done in secrecy and malice or with deceit and intent to defraud," punishable in the state prison.

Interpreting, then, this addition to § 14-3, in connection with § 14-1, it makes the particular offense in the instant case, having been done in secrecy and malice, distinctly a felony. That section is not defining offences, but providing punishment for them and it, therefore, sets aside, as the necessary effect of the amendment, the offenses in the latter clause as felonies, to be punished by imprisonment in the State's prison. Consequently, properly interpreted, this amendment of 1927 creates a conspiracy formed in secrecy and in malice, a felony, which, using the words in § 14-1, may be punishable by imprisonment in State's prison. *State v. Ritter*, 199 N. C. 116, 120, 164 S. E. 62.

The grade or class of a crime is determined by the punishment prescribed therefor and not the nomenclature of the statute, a felony being a crime punishable by death or imprisonment in the State prison, and while all misdemeanors for which no punishment is prescribed are punishable as misdemeanors at common law, where the offense is infamous, or done in secrecy or malice, or with deceit and intent to defraud, it is punishable by imprisonment in the county jail or State prison, under this section, and is a felony. *State v. Harwood*, 206 N. C. 87, 173 S. E. 24.

When Section Applies.—This section applies only where an act is prohibited or is made unlawful, without the nature of the punishment being specified. *State v. Rippey*, 127 N. C. 516, 517, 37 S. E. 148.

If a statute prohibits a matter of public grievance, or commands a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute are misdemeanors at common law, notwithstanding the fact that no punishment is prescribed in the statute. *State v. Bloodworth*, 94 N. C. 918, 920.

Meaning of Specific Punishment.—It can not be said that all the crimes in the Code fall within the scope of this and the preceding sections, because "no specific punishment" is prescribed. The punishment is specific (i. e., specified as fine, or imprisonment in jail or in State's Prison), though the extent of the specified punishment is left in the discretion of the court, or in its discretion not exceeding a limit stated. *State v. Rippey*, 127 N. C. 516, 517, 37 S. E. 148.

Same—Assault Not Punishable under Section.—Under the ruling in *State v. Rippey*, 127 N. C. 516, 37 S. E. 148, section 14-33, bearing directly on the case of assaults, with or without intent to kill, making provision for punishment of such offenses, is to be regarded as specific, within the meaning of this section, and entirely withdraws the case of assault from the operation of this section. *State v. Smith*, 174 N. C. 804, 806, 93 S. E. 910.

Common Law Punishment.—Misdemeanors made punishable as at common law, or punishable by fine or imprisonment, or both, can be punished by fine, or imprisonment in the county jail, or both. *State v. McNeill*, 75 N. C. 15; *State v. Powell*, 94 N. C. 920, 923.

Fornication and Adultery.—Persons convicted of fornication and adultery may be imprisoned in the common jail for a period to be fixed in the discretion of the court. *State v. Manly*, 95 N. C. 661.

Conspiracy to Charge with Infanticide.—A conspiracy to charge one with infanticide, being only a common-law misdemeanor, is not punishable by imprisonment in the penitentiary. *State v. Jackson*, 82 N. C. 565.

Receiving Stolen Goods.—Although the offense of receiving stolen goods is declared to be a misdemeanor by section 14-71, the same section authorizes the court to punish the

offense in the same manner as larceny is punished; that is, confinement in the State's prison or county jail for not less than four months, nor more than ten years. *State v. Britte*, 73 N. C. 26.

Attempt to Commit Crime against Nature.—While an attempt to commit a felony is a misdemeanor, when such misdemeanor is infamous, or done in secrecy and malice, or with deceit and intent to defraud, it is punishable by imprisonment in the state's prison, and is made a felony by this section, and an attempt to commit the crime against nature is infamous and is punishable by imprisonment in the state's prison as a felony within the definition of this section. *State v. Spivey*, 213 N. C. 45, 195 S. E. 1.

What Amounts to Confession of Felony.—A plea of guilty to an indictment charging defendant with wilfully, feloniously, secretly, and maliciously giving aid and assistance to his codefendant by manufacturing evidence, altering and destroying original records in the office of the Commissioner of Revenue, is a confession of a felony under this section, although § 14-76 designates such offense as a misdemeanor. *State v. Harwood*, 206 N. C. 87, 173 S. E. 24.

Discretion of Trial Judge.—Where the extent of the punishment is referred to the discretion of the trial judge, his sentence may not be interfered with by the appellate court, except in case of manifest and gross abuse. *State v. Smith*, 174 N. C. 804, 807, 93 S. E. 910; *State v. Willer*, 94 N. C. 904.

Excessive Punishment.—The word "or," in criminal statutes, cannot be interpreted to mean "and," when the effect is to aggravate the offense or increase the punishment. And so where a statute provides that a party guilty of the offense created by it shall be fined or imprisoned, the court has no power to both fine and imprison. *State v. Walters*, 97 N. C. 489, 2 S. E. 539.

Same—Example.—A sentence of imprisonment for five years in the county jail and a recognizance of \$500 to keep the peace for five years after the expiration thereof upon a defendant convicted of assault and battery, is excessive and therefore unconstitutional. *State v. Driver*, 78 N. C. 423.

Same—Two Years Not Cruel or Unusual.—It is well settled that when no time is fixed by the statute, an imprisonment for two years will not be held cruel and unusual. *State v. Driver*, 78 N. C. 423; *State v. Miller*, 94 N. C. 904. *State v. Farrington*, 141 N. C. 844, 845, 53 S. E. 954.

Effect of Consent of Defendant.—No consent of the defendant can confer a jurisdiction which is denied to the court by the law, and any punishment imposed, other than that prescribed for the offense, is illegal. *In re Schenck*, 74 N. C. 607, 608.

Where Common Law Offense Altered by Statute.—Where the grade of a common law offense has been made higher by statute, the indictment must conclude against the statute, but when the punishment has been mitigated, it may conclude at common law. *State v. Lawrence*, 81 N. C. 522, 523.

Where Statute Repealed before Judgment.—Where a statute prescribing the punishment for a crime is expressly and unqualifiedly repealed after such crime has been committed, but before final judgment, though after conviction, no punishment can be imposed. *State v. Perkins*, 141 N. C. 797, 53 S. E. 735; *State v. Cress*, 49 N. C. 421; *State v. Nutt*, 61 N. C. 20; *State v. Long*, 78 N. C. 571; *State v. Massey*, 103 N. C. 356, 9 S. E. 632; *State v. Biggers*, 108 N. C. 760, 12 S. E. 1024.

Cited in *State v. Wilson*, 216 N. C. 130, 4 S. E. (2d) 440; *State v. Parker*, 220 N. C. 416, 17 S. E. (2d) 475.

§ 14-4. Violation of town ordinance misdemeanor; punishment.—If any person shall violate an ordinance of a city or town, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days. (Rev., s. 3702; Code, s. 3820; 1871-2, c. 195, s. 2; C. S. 4174.)

Cross Reference.—As to ordinances, see §§ 160-52 et seq. **In General.**—While the town or city government has no right to make criminal law, the Legislature has made the violation of ordinances a criminal offense. *State v. Higgs*, 126 N. C. 1014, 35 S. E. 473; *Board v. Henderson*, 126 N. C. 689, 691, 36 S. E. 158.

Prior to Section Violation Not Punishable.—Prior to the passage of this section there was no way provided for the enforcement of obedience to town ordinances; a violation of such ordinances was not a misdemeanor. *State v. Parker*, 75 N. C. 249; *School Directors v. Asheville*, 137 N. C. 503, 509, 50 S. E. 279.

Jurisdiction.—The mayor, or other chief officer of towns or cities, has jurisdiction of offenses under this section. *State*

v. Cainan, 94 N. C. 880; *State v. Wood*, 94 N. C. 855; *State v. Smith*, 103 N. C. 403, 405, 9 S. E. 435.

Same—Concurrent with Justice.—A justice of the peace has concurrent jurisdiction with the mayor of a city or town, of violation of ordinances, which are made misdemeanors. *State v. Cainan*, 94 N. C. 880.

Same—Superior Court Excluded.—The superior court has no original jurisdiction to try indictments for violation of town ordinances. *State v. White*, 76 N. C. 15; *State v. Threadgill*, 76 N. C. 17.

Ordinance Must Conform to State Law.—It is uniformly held that a town ordinance in violation of a valid state statute appertaining to the question is void. *State v. Beacham*, 125 N. C. 652, 34 S. E. 447; *Shaw v. Kennedy*, 4 N. C. 591; *State v. Austin*, 114 N. C. 855, 858, 19 S. E. 919; *State v. Prevost*, 178 N. C. 740, 743, 101 S. E. 370.

Violation of Invalid Ordinance No Offense.—The violation of a valid ordinance is, under the provision of this section, a misdemeanor, but it is not a criminal offense to disregard one enacted without authority. *State v. Hunter*, 106 N. C. 796, 11 S. E. 366; *State v. Webber*, 107 N. C. 962, 967, 12 S. E. 598.

Failure to Prescribe Penalty.—The violation of a valid town ordinance is made a misdemeanor by this section, and the defense that the ordinance did not prescribe a penalty therefor is untenable. *State v. Razook*, 179 N. C. 708, 103 S. E. 67.

Where Fine Provided It Must Be Certain.—An ordinance which imposes a fine is invalid if it is not certain as to the amount of the fine. *State v. Irvin*, 126 N. C. 989, 996, 35 S. E. 430.

Provision in Ordinance for Arrest Void.—When a municipal ordinance imposed a penalty for its violation, and provided that the offender should be "arrested and fined twenty-five dollars upon conviction thereof." It was held, that so much of the ordinance as provided for the arrest was void, but the other provisions were valid. *State v. Earhardt*, 107 N. C. 789, 12 S. E. 426.

Personal Notice to Offender Sufficient.—The requirement of the charter of a city or town that its ordinances shall be printed and published, is to bring such ordinances to the attention of the public, and where personal notice has been given to an offender thereunder who afterwards commits the offense prohibited, the requirement of publication, etc., is not necessary for a conviction. *State v. Razook*, 179 N. C. 708, 103 S. E. 67.

State Must Show Violation of Valid Ordinance.—Upon the prosecution of a criminal action for the violation of a city ordinance, under this section the State must show that the ordinance in question was a valid one, as well as the violation as charged in the warrant. *State v. Prevost*, 178 N. C. 740, 101 S. E. 370; *State v. Snipes*, 161 N. C. 242, 76 S. E. 243; *State v. Hunter*, 106 N. C. 796, 11 S. E. 366.

And where the state fails to show that the original act of incorporation authorized the enactment of an ordinance, it fails to make out the case, for the legislature never intended to make the violation of a void ordinance an indictable misdemeanor. *State v. Threadgill*, 76 N. C. 17, 19.

Defects in Warrant May Be Waived.—Ordinarily defects in the form of a warrant for violating a city ordinance may be waived, and usually it is so considered when a plea of not guilty is entered by the defendants. *State v. Prevost*, 178 N. C. 740, 101 S. E. 370.

Form of Indictment.—It is not necessary, in indictments for violations of city ordinances, to set out the ordinance in the warrant. It is sufficient to refer to it by such indicia, as point it out with sufficient certainty. *State v. Cainan*, 94 N. C. 880; *State v. Merritt*, 83 N. C. 677, 679.

In an indictment under an ordinance for loud and boisterous swearing, it is not necessary to set out the words used by the defendant. *State v. Cainan*, 94 N. C. 880.

No Removal under Section 7-147.—In a prosecution for violation of a town ordinance before a mayor, the defendant is not entitled to a removal, under section 7-147. *State v. Joyner*, 127 N. C. 541, 37 S. E. 201.

Costs of Prosecutions under Section.—Whether the criminal offenses created by the violation of town ordinances under this section are tried before the mayor, or before a Justice of the Peace, they are State prosecutions, in the name of the State, or for violation of the criminal law of the State, and at the expense of the State (*State v. Higgs*, 126 N. C. 1014, 35 S. E. 473), and the city can not be charged with the costs of such prosecutions. *Board v. Henderson*, 126 N. C. 689, 692, 36 S. E. 158.

Conviction for Fighting No Bar to Prosecution for Assault.—A conviction of violating a city ordinance punishing the disturbance of the good order and quiet of the town by fighting is not a bar to a prosecution by the State for an assault. *State v. Taylor*, 133 N. C. 755, 46 S. E. 5.

Art. 2. Principals and Accessories.

§ 14-5. Accessories before the fact; trial and punishment.—If any person shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any statute, the person so counseling, procuring or commanding shall be guilty of a felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished. The offense of the person so counseling, procuring or commanding, howsoever indicted, may be inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offense had been committed at the same place as the principal felony or where the principal felony is triable, although such offense may have been committed at any place within or without the limits of the state. In case the principal felony shall have been committed within the body of any county, and the offense of counseling, procuring or commanding shall have been committed within the body of any other county, the last mentioned offense may be inquired of, tried, determined, and punished in either of such counties: Provided, that no person who shall be once duly tried for any such offense, whether as an accessory before the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offense. (Rev., s. 3287; Code, s. 977; R. C., c. 34, s. 53; 1797, c. 485, s. 1; 1852, c. 58; C. S. 4175.)

In General.—It is a well established principle, that where two agree to do an unlawful act, each is responsible for the act of the other, provided it be done in pursuance of the original understanding, or in furtherance of the common purpose. *State v. Simmons*, 51 N. C. 21, 24.

Common Law Provision.—At common law an accessory before the fact could only be convicted when tried at the same time with the principal, and after conviction of the principal, or after the principal had been tried, convicted and sentenced. *State v. Duncan*, 28 N. C. 98; *State v. Jones*, 101 N. C. 719, 721, 8 S. E. 147.

But the rule that an accessory could not be tried and convicted before the principal had no application as between two principals in first and second degrees. *State v. Jarrell*, 141 N. C. 722, 53 S. E. 137.

"Accessory before Fact" Is a Substantive Felony.—This section made the facts which formerly had been called "accessory before the fact" a substantive felony (whether in murder or any other felony). *State v. Bryson*, 173 N. C. 803, 807, 92 S. E. 698.

Prior Conviction of Principals Unnecessary.—Under the provisions of this section it is not required that the principals be first convicted of the charge of murder to convict the accessories thereto, either before or after the fact, upon sufficient evidence. *State v. Walton*, 186 N. C. 485, 119 S. E. 886; *State v. Jones*, 101 N. C. 719, 722, 8 S. E. 147.

One indicted as accessory before the fact can not complain that his cause was tried before that of the alleged principal, and before the alleged principal had even been called on to plead. *State v. Reid*, 178 N. C. 745, 101 S. E. 104.

Same—What Indictment Must Aver.—Where the principal felon is not amenable to the process of the law, it is necessary to aver that in the indictment. *State v. Ives*, 35 N. C. 338, 339; *State v. Groff*, 5 N. C. 270.

Who Are Principals.—All who are present, either actually or constructively, at the place of a crime, and are either aiding, abetting, assisting, or advising its commission, or are present for such purpose, are principals in the crime.

State v. Gaston, 73 N. C. 93; *State v. Jarrell*, 141 N. C. 722, 53 S. E. 127.

Same—Second Degree.—Persons present assisting in doing a criminal act are principals in the second degree, not accessories. *State v. Rowland Lumber Co.*, 153 N. C. 610, 69 S. E. 58; *State v. Skeen*, 182 N. C. 844, 109 S. E. 71.

In Misdemeanors All Are Principals.—In a misdemeanor all aiders, abettors, and accessories, whether before or after the fact, are principals. *State v. Rowland Lumber Co.*, 153 N. C. 610, 69 S. E. 58; *State v. Barden*, 12 N. C. 518; *State v. Cheek*, 35 N. C. 114; *State v. De Boy*, 117 N. C. 702, 23 S. E. 167; *State v. Grier*, 184 N. C. 723, 114 S. E. 622. For an example of "first degree" and "second degree" in misdemeanors, see section 14-207.

Accessory Tried as Principal.—An accessory before the fact can be tried and convicted as principal, under this section. *State v. Bryson*, 173 N. C. 803, 806, 92 S. E. 698.

One Charged with Murder May Be Convicted as Accessory.—Under section 15-170 the charge of the principal crime includes the crime of accessory before the fact and hence one charged with murder may be convicted as accessory before the fact. *State v. Bryson*, 173 N. C. 803, 92 S. E. 698, overruling on this point *State v. Dewey*, 65 N. C. 572. See also *State v. Simons*, 179 N. C. 700, 103 S. E. 5.

Principal in Assault Cannot Be Convicted as Accessory.—A defendant charged as principal in an indictment for an assault with intent to kill can not be convicted as accessory. *State v. Green*, 119 N. C. 899, 26 S. E. 112.

No Conviction of Accessory Where Principal Acquitted.—This section does not change the common law rule that an acquittal of the principal is an acquittal of the accessory. *State v. Jones*, 101 N. C. 719, 8 S. E. 147.

Effect of Acquittal of One of Several Principals.—Where there are three charged as principals with murder, the acquittal of one of them, the others having fled the jurisdiction of the court, does not of itself acquit the prisoners on trial as accessories before or after the fact, when the evidence of their guilt of the offense charged is sufficient both as to them as accessories and the principals directly charged with the murder. *State v. Walton*, 186 N. C. 485, 119 S. E. 886.

Accessory Tried by Special Veniremen.—Where two persons are indicted for murder, one as principal and the other as accessory before the fact, the latter may be tried by a jury selected from a special venire ordered in the case. *State v. Register*, 133 N. C. 746, 46 S. E. 21.

What Constitutes Counseling, Procuring and Commanding.—At a meeting of a board of commissioners of a town, at which the mayor presided, a report of the cemetery committee was adopted, recommending that, unless parties, who had taken lots in the town cemetery and had not paid for them, should pay the amount due within sixty days on notice, the bodies buried in such lots should be removed to the free part of such cemetery. And, in reply to a question of one of the commissioners as to the legal right to remove the bodies, the mayor said: "The way is open, go ahead and remove them." It was held, that the mayor was individually guilty of counseling, procuring and commanding an act within the meaning of this section, the committing of which afterwards was a felony. *State v. McLean*, 121 N. C. 589, 28 S. E. 140.

The meaning of the word "command," as applied to the case of principal and accessory, is, where a person, having a control over another, as a master over his servant, orders a thing to be done. *State v. Mann*, 2 N. C. 4.

One Present Not Bound to Interfere.—One who is present, and sees that a felony is about to be committed, and does in no manner interfere, does not thereby participate in the felony committed. *State v. Hildreth*, 31 N. C. 440.

Evidence Admissible.—The record of the conviction of a principal felon is admissible on the trial of the accessory, and is conclusive evidence of the conviction of the principal, and prima facie evidence of his guilt. *State v. Chittum*, 13 N. C. 49.

But the conviction of the principal is not admissible evidence until judgment has been rendered on the verdict. *State v. Duncan*, 28 N. C. 98.

Same—Sufficient for Conviction.—Testimony that the accused had asked the one convicted of the murder of her husband to kill him, and that he accomplished the act the morning afterwards, at the place she designated, is sufficient for a conviction of murder, as an accessory before the fact. *State v. Jones*, 176 N. C. 702, 97 S. E. 32.

Sufficient Evidence to Submit Question to Jury.—Evidence tending to show that defendant knew of and participated in the plans or preparations made for the killing of deceased, that defendant procured a coat for the killer and furnished an automobile as a means of flight after the murder had been committed is held sufficient to be

submitted to the jury on an indictment drawn under this section. *State v. Williams*, 208 N. C. 707, 182 S. E. 131.

Applied in *State v. Holland*, 211 N. C. 284, 189 S. E. 761.
Cited in *State v. Hampton*, 210 N. C. 283, 186 S. E. 251;
In re Malicord, 211 N. C. 684, 191 S. E. 730; *State v. Exum*,
 213 N. C. 16, 195 S. E. 7; *State v. Ferrell*, 205 N. C. 640, 172
 S. E. 186; *State v. Kluttz*, 206 N. C. 726, 175 S. E. 81.

§ 14-6. Punishment of accessories before the fact.—Any person who shall be convicted as an accessory before the fact in either of the crimes of murder, arson, burglary or rape shall be imprisoned for life in the state's prison. An accessory before the fact to the stealing of any horse, mare, gelding or mule, on being duly convicted thereof, shall be imprisoned in the state's prison for not less than five nor more than twenty years, in the discretion of the court. Every accessory before the fact in any other felony shall be punished by imprisonment in the state prison or county jail for not more than ten years, or may be fined in the discretion of the court. (Rev., s. 3290; Code, s. 980; 1868-9, c. 31, s. 2; 1874-5, c. 212; C. S. 4176.)

Life Sentence for Accessory to Murder Valid.—Upon conviction of murder in the second degree, and sentence to twenty years in the State's Prison, upon an indictment for murder, when it appears from the evidence that the accused was only an accessory, the case will not be remanded to the Superior Court for resentencing, as the statute provides a sentence for life. *State v. Bryson*, 173 N. C. 803, 92 S. E. 698.

Sufficiency of Evidence to Go to Jury.—Evidence that defendant, for the purpose of freeing himself of competition in the illegal sale of intoxicating liquors, procured another to kill deceased by shooting him from ambush while lying in wait, is sufficient to be submitted to the jury in a prosecution as an accessory before the fact to the crime of murder under this section. *State v. Mazingo*, 207 N. C. 247, 176 S. E. 582.

Cited in *State v. Exum*, 213 N. C. 16, 195 S. E. 7.

§ 14-7. Accessories after the fact; trial and punishment.—If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute made, or to be made, such person shall be guilty of a felony, and may be indicted and convicted together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted for such felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years, and may also be fined in the discretion of the court. The offense of such person may be inquired of, tried, determined and punished by any court which shall have jurisdiction of the principal felon, in the same manner as if the act, by reason whereof such person shall have become an accessory, had been committed at the same place as the principal felony, although such act may have been committed without the limits of the state; and in case the principal felony shall have been committed within the body of any county, and the act by reason whereof any person shall have become accessory shall have been committed within the body of any other county, the offense of such person guilty of a felony as aforesaid may be inquired of, tried, determined, and punished in either of said counties: Provided, that no person who shall be once duly tried for such felony shall be again indicted or tried for the same offense. (Rev., s. 3289; Code, s. 978; R.

C., c. 34, s. 54; 1797, c. 485, s. 1; 1852, c. 58; C. S. 4177.)

In General.—See in connection with this section the annotations under section 14-5, many of which apply equally to this section.

An accessory after the fact is one who, after a felony has been committed, with knowledge that the felony has been committed, renders personal assistance to the felon in any manner to aid him to escape arrest or punishment knowing, at the time, the person so aided has committed a felony. *State v. Potter*, 221 N. C. 153, 19 S. E. (2d) 257.

Receiver of Stolen Goods Not Accessory.—All felonious stealing being now reduced by section 14-70 to the grade of petit larceny, a receiver of stolen goods is not an accessory after the fact. *State v. Tyler*, 85 N. C. 569.

Husband of Accessory Not Competent Witness.—The husband of one charged as an accessory is not a competent witness in favor of the one charged as the principal felon. *State v. Ludwick*, 61 N. C. 401.

SUBCHAPTER II. OFFENSES AGAINST THE STATE.

Art. 3. Rebellion.

§ 14-8. Rebellion against the state.—If any person shall incite, set on foot, assist or engage in a rebellion or insurrection against the authority of the state of North Carolina or the laws thereof, or shall give aid or comfort thereto, every person so offending in any of the ways aforesaid shall be guilty of a felony, and, shall be punished by imprisonment in the state's prison for not more than fifteen years and by a fine of not more than ten thousand dollars. (Rev., s. 3437; Code, s. 1106; 1868, c. 60, s. 2; 1861, c. 18; 1866, c. 64; Const., Art. IV, s. 5; C. S. 4178.)

§ 14-9. Conspiring to rebel against the state.—If two or more persons shall conspire together to overthrow or put down, or to destroy by force, the government of North Carolina, or to levy war against the government of the state, or to oppose by force the authority of such government, or by force or threats to intimidate, or to prevent, hinder or delay the execution of any law of the state, or by force or fraud to seize or take possession of any firearms or other property of the state, against the will or contrary to the authority of such state, every person so offending in any of the ways aforesaid shall be guilty of a felony and shall be imprisoned not more than ten years in the state's prison and be fined not exceeding five thousand dollars. (Rev., s. 3438; Code, s. 1107; 1868, c. 60, s. 1; C. S. 4179.)

In General.—It is a rule well established that all who engage in a conspiracy, as well as those who participate after it is formed, are equally liable, and the acts and declarations of each in furtherance of the common illegal design are admissible against all. *State v. Jackson*, 82 N. C. 565, 567.

§ 14-10. Secret political and military organizations forbidden.—If any person, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or resisting the laws, shall join or in any way connect or unite himself with any oath-bound secret political or military organization, society or association of whatsoever name or character; or shall form or organize or combine and agree with any other person or persons to form or organize any such organization; or as a member of any secret political or military party or organization shall use, or agree to use, any certain signs or grips or passwords, or any disguise of the person or voice, or any disguise whatsoever for the advancement of its object, and shall take or ad-

minister any extra-judicial oath or other secret, solemn pledge, or any like secret means; or if any two or more persons, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or circumventing the laws, shall secretly assemble, combine or agree together, and the more effectually to accomplish such purposes, or any of them, shall use any certain signs, or grips, or passwords, or any disguise of the person or voice, or other disguise whatsoever, or shall take or administer any extra-judicial oath or other secret, solemn pledge; or if any persons shall band together and assemble to muster, drill or practice any military evolutions except by virtue of the authority of an officer recognized by law, or of an instructor in institutions or schools in which such evolutions form a part of the course of instruction; or if any person shall knowingly permit any of the acts and things herein forbidden to be had, done or performed on his premises, or on any premises under his control; or if any person being a member of any such secret political or military organization shall not at once abandon the same and separate himself entirely therefrom, every person so offending shall be guilty of a misdemeanor, and shall be fined not less than ten nor more than two hundred dollars, or be imprisoned, or both, at the discretion of the court. (Rev., s. 3439; Code, s. 1095; 1870-1, c. 133; 1868-9, c. 267; 1871-2, c. 143; C. S. 4180.)

Cited in *State v. Pelley*, 221 N. C. 487, 20 S. E. (2d) 850.

Art. 4. Subversive Activities.

§ 14-11. Activities aimed at overthrow of government; use of public buildings.—It shall be unlawful for any person, by word of mouth or writing, willfully and deliberately to advocate, advise or teach a doctrine that the government of the United States, the state of North Carolina or any political subdivision thereof shall be overthrown or overturned by force or violence or by any other unlawful means. It shall be unlawful for any public building in the state, owned by the state of North Carolina, any political subdivision thereof, or by any department or agency of the state or any institution supported in whole or in part by state funds, to be used by any person for the purpose of advocating, advising or teaching a doctrine that the government of the United States, the state of North Carolina or any political subdivision thereof should be overthrown by force, violence or any other unlawful means. (1941, c. 37, s. 1.)

For comment on the enactment of this section, see 19 N. C. Law Rev. 466.

§ 14-12. Punishment for violations.—Any person or persons violating any of the provisions of this article shall, for the first offense, be guilty of a misdemeanor and be punished accordingly, and for the second offense shall be guilty of a felony and punished accordingly. (1941, c. 37, s. 2.)

Art. 5. Counterfeiting and Issuing Monetary Substitutes.

§ 14-13. Counterfeiting coin and uttering coin that is counterfeit.—If any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging or

counterfeiting the resemblance or similitude or likeness of a Spanish milled dollar, or any coin of gold or silver which is in common use and received in the discharge of contracts by the citizens of the state; or shall pass, utter, publish or sell, or attempt to pass, utter, publish or sell, or bring into the state from any other place with intent to pass, utter, publish or sell as true, any such false, forged or counterfeited coin, knowing the same to be false, forged or counterfeited, with intent to defraud any person whatsoever, every person so offending shall be guilty of a felony, and shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years. (Rev., s. 3422; Code, s. 1035; R. C., c. 34, s. 64; 1811, c. 814, s. 3; C. S. 4181.)

Cross References.—As to forgery, see § 14-119 et seq. As to counterfeiting trademarks, see § 80-8.

§ 14-14. Possessing tools for counterfeiting.—If any person shall have in his possession any instrument for the purpose of making any counterfeit similitude or likeness of a Spanish milled dollar, or other coin made of gold or silver which is in common use and received in discharge of contracts by the citizens of the state, and shall be duly convicted thereof, the person so offending shall be imprisoned in the state's prison or county jail not less than four months nor more than ten years, or be fined not more than five hundred dollars. (Rev., s. 3423; Code, s. 1036; R. C., c. 34, s. 65; 1811, c. 814, s. 4; C. S. 4182.)

Indictment Sufficient.—An indictment charging defendant with having in his possession "one pair of dies, upon which were made the likeness, similitude, figure and resemblance of the sides of a lawful Spanish milled silver dollar, etc., for the purpose of making and counterfeiting money in the likeness and similitude of Spanish milled silver dollars," was held to charge, with sufficient certainty, the offence designated in this section. *State v. Collins*, 10 N. C. 191.

§ 14-15. Issuing substitutes for money without authority.—If any person or corporation, unless the same be expressly allowed by law, shall issue any bill, due bill, order, ticket, certificate of deposit, promissory note or obligation, or any other kind of security, whatever may be its form or name, with the intent that the same shall circulate or pass as the representative of, or as a substitute for, money, he shall forfeit and pay for each offense the sum of fifty dollars; and if the offender be a corporation, it shall in addition forfeit its charter. Every person or corporation offending against this section, or aiding or assisting therein, shall be guilty of a misdemeanor. (Rev., s. 3711; Code, s. 2493; 1895, c. 127; R. C., c. 36, s. 5; C. S. 4183.)

Local Modification.—Cumberland: 1933, c. 33; Currituck: 1933, c. 328.

Editor's Note.—In *State v. Humphreys*, 19 N. C. 555, the act of 1816, ch. 900, which was very similar to this section, is discussed. It is there held that the act is constitutional and that the intent in so issuing the notes, etc., is an essential ingredient of the offense.

§ 14-16. Receiving or passing unauthorized substitutes for money.—If any person or corporation shall pass or receive, as the representative of, or as the substitute for, money, any bill, check, certificate, promissory note, or other security of the kind mentioned in § 14-15, whether the same be issued within or without the state, such person or corporation, and the officers and agents of such corporation aiding therein, who shall offend

against this section shall for every such offense forfeit and pay five dollars, and shall be guilty of a misdemeanor. (Rev., s. 3712; Code, s. 2494; 1895, c. 127; R. C., c. 36, s. 6; C. S. 4184.)

Editor's Note.—In *State v. Bank*, 48 N. C. 450, it was held that this section making it an offense to "pass and receive" banknotes, did not apply to a bank but that the bank should be penalized under another section which made it unlawful to make and issue notes of a less denomination than three dollars.

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

Art. 6. Homicide.

§ 14-17. Murder in the first and second degree defined; punishment.—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the state prison. (Rev., s. 3631; 1893, cc. 85, 281; C. S. 4200.)

- I. Editor's Note.
- II. Murder in General.
- III. Murder in the First Degree.
- IV. Murder in the Second Degree.
- V. Pleading and Practice.

Cross References.

As to accomplices, see § 14-5 et seq. As to assault in this state, but death in another, see § 15-131.

I. EDITOR'S NOTE.

"Homicide," in its largest sense is generic, embracing every mode by which the life of one person is taken by another. Generally speaking, therefore, homicide is the taking of human life, which may or may not be criminal. It is only those homicides which are committed in the manner described by the laws prescribing punishment therefor that are criminal.

Criminal homicide is the unlawful killing of a human being, and is classified as murder and manslaughter, and by statute, in most of the states as in North Carolina, murder is divided into two or more degrees.

The statutes where murder is divided into two degrees, have not, as a general thing, added to or taken away any ingredients of murder at common law, and every murder at common law is murder under the statutes. I Michie on Homicide 68.

II. MURDER IN GENERAL.

Effect of Section Dividing Murder into Degrees.—This section, dividing murder into two degrees, does not give any new definition of murder, but the same remains as it was at common law before the enactment. *State v. Delton*, 178 N. C. 779, 101 S. E. 548.

Purpose.—This section intended to select out of all murders denounced those that were more heinous because committed with premeditation and deliberation, or in the perpetration or attempted perpetration of a felony, etc., as murder in the first degree, punishable with death, and leave other murders deemed less heinous as murder in the second degree, punished by imprisonment. *State v. Smith*, 221 N. C. 278, 289, 20 S. E. (2d) 313.

Principal May Be Prosecuted under This Section and Accessory under § 14-6.—Section 14-6 prescribing imprisonment for life upon a conviction as an accessory before the fact to the crime of murder was in force at the time this section was enacted and the principal may therefore be convicted and punished under this section for murder in the second degree, while the accessory before the fact receives life under § 14-6. *State v. Mazingo*, 207 N. C. 247, 250, 176 S. E. 582.

Malice—Definition.—Malice is that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse or justification. *State v. Benson*, 183 N. C. 795, 111 S. E. 869.

Same—Necessity.—Malice is always a necessary ingredient of murder. *State v. Baldwin*, 152 N. C. 822, 68 S. E. 148.

Same—Express.—But it is not necessary to a conviction for murder that the state prove express malice. *State v. McDowell*, 145 N. C. 563, 59 S. E. 690.

Same—Implied.—For this intentional killing of a human being with a deadly weapon implies malice. *State v. Pasour*, 183 N. C. 793, 111 S. E. 779; *State v. Brinkley*, 183 N. C. 720, 110 S. E. 783; *State v. McDowell*, 145 N. C. 563, 59 S. E. 690.

Same—Presumption.—At common law, the intentional killing of a human being with a deadly weapon, nothing more appearing, was murder, malice being presumed from the facts. *State v. Rhyne*, 124 N. C. 847, 33 S. E. 128. The common law rule has been followed and it is now also presumed that a killing with a deadly weapon is unlawful and malicious. *State v. Benson*, 183 N. C. 795, 111 S. E. 869; *State v. Walker*, 193 N. C. 489, 137 S. E. 429.

If the accused previously procured a weapon for the purpose of using it, and does use it, the offense is ordinarily murder. *State v. Johnson*, 172 N. C. 920, 90 S. E. 426.

Provocation never disproves malice; it only removes the presumption of malice, which the law raises without proof. A malicious killing is murder, however gross the provocation. *State v. Johnson*, 23 N. C. 354.

Motive—Necessity.—It is not necessary to a conviction of murder that the state prove motive. *State v. Adams*, 136 N. C. 617, 48 S. E. 589; *State v. McDowell*, 145 N. C. 563, 59 S. E. 690.

Same—To Strengthen State's Case.—But the case of the state may be strengthened by the showing of a motive when the evidence is circumstantial. *State v. Stratford*, 149 N. C. 483, 62 S. E. 882; *State v. Turner*, 143 N. C. 641, 57 S. E. 158.

Same—To Identify Prisoner or Establish Malice.—And it may be shown to identify the prisoner as the perpetrator of the crime, and to establish malice, deliberation, and premeditation. *State v. Wilkins*, 158 N. C. 603, 73 S. E. 992; *State v. Adams*, 138 N. C. 688, 50 S. E. 765.

Intent—Necessity.—Before a conviction for murder can be had, an unlawful and intentional taking of another's life must be shown. Sometimes the intent may be imputed by reason of the killing with a deadly weapon, or by circumstances which indicate a reckless indifference to human life, but it must always exist before a charge of murder can be sustained. *State v. Stitt*, 146 N. C. 643, 61 S. E. 566.

Same—Must Co-exist with Killing.—"The act of killing, and the guilty intent, must concur to constitute the offense." *State v. Scates*, 50 N. C. 420, 423.

Attempt to Kill.—"An attempt only, to, kill, with the most diabolical intent, may be moral, but can not be legal, murder." *State v. Scates*, 50 N. C. 420, 423.

Applied in State v. Hodgins, 210 N. C. 371, 186 S. E. 495. **Quoted in State v. Hudson**, 218 N. C. 219, 10 S. E. (2d) 730.

Cited in State v. Evans, 198 N. C. 82, 150 S. E. 678; *State v. Macon*, 198 N. C. 483, 152 S. E. 407; *State v. Beard*, 207 N. C. 673, 678, 178 S. E. 242; *State v. Cooper*, 205 N. C. 657, 658, 172 S. E. 199; *State v. Horne*, 209 N. C. 725, 184 S. E. 470; *State v. Linney*, 212 N. C. 739, 194 S. E. 470; *State v. Blue*, 219 N. C. 612, 14 S. E. (2d) 635.

III. MURDER IN THE FIRST DEGREE.

Effect of Statute Dividing Murder into Degrees.—By the act of 1893, chapter 85 (this section), the crime of murder has been divided into two degrees, first and second. The common law definition and description are still applicable to the crime in the second degree; but it takes more than this to constitute murder in the first degree—the killing must be wilful, deliberate and premeditated, and this must be shown by the State beyond a reasonable doubt before it is justified in asking a verdict of guilty of murder in the first degree. *State v. Rhyne*, 124 N. C. 847, 33 S. E. 128.

Definition.—Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Starnes*, 220 N. C. 384, 17 S. E. (2d) 346.

Deliberation and Premeditation—Premeditation.—Premeditation means thought beforehand, for some length of time, however short. *State v. Benson*, 183 N. C. 795, 111 S. E. 869. It is a prior determination to do the act. *State v. Cameron*, 166 N. C. 379, 81 S. E. 748; *State v. Bowser*, 214 N. C. 249, 199 S. E. 31.

Same—Deliberation.—Deliberation means a preconceived intent to kill, executed in cold blood, in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose, and not under the influence of a violent passion suddenly aroused by some lawful or just cause or legal provocation. *State v. Benson*, 183 N. C. 795, 111 S. E. 869; *State v. Bowser*, 214 N. C. 249, 199 S. E. 31.

Deliberation means that the act is done in cool state of

blood. It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation. *State v. Hawkins*, 214 N. C. 326, 334, 199 S. E. 284; *State v. Benson*, 183 N. C. 795, 111 S. E. 869.

Same—Necessity.—And before a conviction for murder in the first degree can be had, the state must show that the prisoner had formed, prior to the killing, with deliberation and premeditation, a purpose to kill deceased. *State v. Terry*, 173 N. C. 761, 92 S. E. 154; *State v. Benson*, 183 N. C. 795, 111 S. E. 869. See also 5 N. C. Law Rev. 364.

Same—Length of Time Immaterial.—The killing of a human being after the fixed purpose to do so has been formed, for however short a time, is sufficient for the conviction of murder in the first degree. *State v. Walker*, 173 N. C. 780, 92 S. E. 327. No particular period of time is necessary to constitute premeditation and deliberation for a conviction of murder in the first degree under this section. If the purpose to kill at all events has been deliberately formed, the interval which elapses before its execution is immaterial. *State v. Holdscaw*, 180 N. C. 731, 105 S. E. 181; *State v. Cogey*, 174 N. C. 814, 94 S. E. 416. And deliberation and premeditation need not be of any perceptible time. *State v. Bynum*, 175 N. C. 777, 95 S. E. 101; *State v. Hammonds*, 216 N. C. 67, 4 S. E. (2d) 439; *State v. Burney*, 215 N. C. 598, 3 S. E. (2d) 24.

Same—Sufficiency.—Weighing the purpose to kill long enough to form a fixed design, and the putting of such design into execution at a future period, no matter how long deferred, constitutes premeditation and deliberation sufficient to sustain a conviction of murder in the first degree. *State v. Dowden*, 118 N. C. 1145, 24 S. E. 722.

Same—Willful.—For a conviction of murder in the first degree the killing must be done with willful premeditation and determination. *State v. McKay*, 150 N. C. 813, 63 S. E. 1059; *State v. Baldwin*, 152 N. C. 822, 68 S. E. 148.

Malice.—For a conviction of murder in the first degree the killing must be done with malice aforethought, express or implied. *State v. McKay*, 150 N. C. 813, 68 S. E. 1059.

But a charge that murder in the first degree is the unlawful killing of a human being with malice aforethought cannot be held correct, since "aforethought" as so used does not connote premeditation and deliberation but the pre-existence of malice. *State v. Smith*, 221 N. C. 278, 20 S. E. (2d) 313.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Payne*, 213 N. C. 719, 197 S. E. 573.

Formed Design to Take Life.—If the circumstances of the killing show a formed design to take life of deceased, the crime is murder in the first degree. *State v. Walker*, 173 N. C. 780, 92 S. E. 327; *State v. Cain*, 178 N. C. 724, 100 S. E. 884.

Lying in Wait.—Defendants who lay in wait and killed deceased from ambush are guilty of murder in first degree. *State v. Wiggins*, 171 N. C. 813, 89 S. E. 58. See also *State v. Satterfield*, 207 N. C. 118, 176 S. E. 466; *State v. Mazingo*, 207 N. C. 247, 176 S. E. 582.

Killing Wrong Person by Mistake.—Where defendant, intending to kill a certain person, by mistake inflicts fatal injuries on another, he is guilty in the same degree as though he had killed the person intended, and therefore an instruction that if the jury should be satisfied beyond a reasonable doubt that defendant intended to kill a certain person with malice and with premeditation and deliberation and that by mistake he shot and killed deceased, defendant would be guilty of murder in the first degree, is without error. *State v. Burney*, 215 N. C. 598, 3 S. E. (2d) 24.

Killing in Perpetration of Robbery.—A homicide committed in the perpetration of, or in attempt to perpetrate, a robbery will be deemed murder in the first degree. *State v. Lane*, 166 N. C. 333, 81 S. E. 620. See also *State v. Glover*, 208 N. C. 68, 179 S. E. 6; *State v. Exum*, 213 N. C. 16, 195 S. E. 7.

Where all the evidence for the State tends to show that the defendants killed the deceased while attempting to rob him, the crime is murder in the first degree, under this section, and the failure of the trial court to submit the issue of guilty of murder in the second degree is not error. *State v. Donnell*, 202 N. C. 782, 164 S. E. 352.

Where upon a trial for murder all the evidence and inferences therefrom unquestionably tend to show that the deceased was killed by one lying in wait and for the purpose of robbery, with evidence tending to establish that the defendant had perpetrated the crime, and there is no evi-

dence in mitigation of the offense, the evidence establishes the crime of murder in the first degree under this section, and an instruction to the jury either to convict the defendant of murder in the first degree, or to acquit him is not error. *State v. Myers*, 202 N. C. 351, 162 S. E. 764.

Evidence tending to show that defendant killed the deceased with a deadly weapon while attempting to perpetrate a robbery is sufficient to be submitted to the jury on the issue of first degree murder, the credibility and probative force of the evidence being for the jury. *State v. Langley*, 204 N. C. 687, 169 S. E. 705.

Evidence tending to show that the prisoner with another entered a store with intent to rob its cash drawer, and shot and killed the deceased is of an attempt to commit a felony and sufficient to sustain a verdict of murder in the first degree, as defined by this section, under proper instructions from the court thereon upon conflicting evidence. *State v. Sterling*, 200 N. C. 18, 19, 156 S. E. 96.

Where murder is committed in the perpetration of a robbery from the person, it is murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. *State v. Alston*, 215 N. C. 713, 3 S. E. (2d) 11.

A homicide committed in the perpetration or an attempt to perpetrate a robbery is murder in the first degree, notwithstanding the absence of any fixed intent to kill or any previous purpose, design or plan. *State v. Kelly*, 216 N. C. 627, 6 S. E. (2d) 533.

All Conspirators Are Guilty Regardless of Who Actually Committed Crime.—Where a conspiracy is formed to rob a bank, and murder is committed by one of the conspirators in the attempt to perpetrate the crime, each conspirator is guilty of murder in the first degree, under this section, and it is immaterial which one of them fired the fatal shot. *State v. Green*, 207 N. C. 369, 177 S. E. 120; *State v. Kelly*, 216 N. C. 627, 6 S. E. (2d) 533.

Thus, where defendants conspire to rob a certain place, and a murder is committed by one or more of them in the attempt to perpetrate the robbery, each of them is guilty of murder in the first degree. *State v. Stefanoff*, 206 N. C. 443, 174 S. E. 411; *State v. Miller*, 219 N. C. 514, 14 S. E. (2d) 522.

Each party to a conspiracy to burglarize or rob a home is guilty of murder in the first degree if any one of the conspirators commits murder in an attempt to perpetrate the burglary or robbery. *State v. Bell*, 205 N. C. 225, 171 S. E. 50.

IV. MURDER IN THE SECOND DEGREE.

Definition.—Murder in the second degree is the unlawful killing of a human being with malice, but without elements of premeditation and deliberation. *State v. Benson*, 183 N. C. 795, 111 S. E. 869; *State v. Starnes*, 220 N. C. 384, 17 S. E. (2d) 346.

By this section the crime of murder in the second degree is as at common law. *State v. Smith*, 221 N. C. 278, 20 S. E. (2d) 313.

Effect of Statute Dividing Murder into Degrees.—At common law, when the intentional killing by a deadly weapon was shown, the law presumed malice aforethought, and the burden of reducing the offense to a lower grade by proof of matters of mitigation or excuse devolved upon the prisoner. The statute dividing murder into two degrees (under this section) contains no reference to this rule, but the Supreme Court of N. C. in *State v. Fuller*, 114 N. C. 885, 19 S. E. 797, held that one result of the division of murder into two degrees was that proof of intentional killing with a deadly instrument raised a presumption only of murder in the second degree, and the burden was on the State to aggravate the offense to murder in the first degree, as it was on the prisoner, to reduce it. But this applies only to cases of homicide in which premeditation must be shown and not when the homicide is shown or admitted to have been committed by lying in wait, poisoning, starvation, imprisonment or torture. As to these, when intentionally done the law still raised the presumption of murder in the first degree. But none the less if the jury convict of a less offense, it is within their power so to do under the statute. Nor is intentional homicide by poisoning necessarily always murder in the first degree. The presumption may be rebutted. *State v. Matthews*, 142 N. C. 621, 625, 55 S. E. 342.

Same—Presumption.—Since the Act of 1893, the killing being proved, and nothing else appearing, the law presumes malice, but not premeditation and deliberation, and the killing is murder in the second degree. *State v. Hicks*, 125 N. C. 636, 34 S. E. 247.

The presumptions from the use of a deadly weapon in committing a homicide are that the killing was unlawful and that it was done with malice, which constitutes murder in the second degree, and in order for such homicide to constitute murder in the first degree the State must show be-

yond a reasonable doubt that it was done with premeditation and deliberation. *State v. Miller*, 197 N. C. 445, 446, 149 S. E. 590.

The intentional killing of a human being with a deadly weapon implies malice and, if nothing else appears, constitutes murder in the second degree. *State v. Hawkins*, 214 N. C. 326, 334, 199 S. E. 284; *State v. Payne*, 213 N. C. 719, 197 S. E. 573; *State v. Bright*, 215 N. C. 537, 2 S. E. (2d) 541.

A killing with a deadly weapon raises the presumption that the homicide was murder in the second degree, and if the State seeks a conviction of murder in the first degree it has the burden of proving beyond a reasonable doubt that the homicide was committed with deliberation and premeditation. *State v. Perry*, 209 N. C. 604, 184 S. E. 545.

Intent Formed Simultaneous with Act of Killing.—Where this intent to kill is formed simultaneously with the act of killing, the homicide is not murder in the first degree. *State v. Dowden*, 118 N. C. 1145, 24 S. E. 722; *State v. Barrett*, 142 N. C. 565, 54 S. E. 856.

V. PLEADING AND PRACTICE.

Form of Indictment.—Nothing contained in the act of 1893 requires any alteration or modification of the existing form of indictment for murder. Therefore, it is not necessary that an indictment for murder committed in the attempt to perpetrate larceny should contain a specific allegation of the attempted larceny, such allegation not having been necessary in indictments prior to the said act of 1893. *State v. Covington*, 117 N. C. 834, 23 S. E. 337.

Remedy for Alternative Indictment Held to Be by Motion for Bill of Particulars.—After the return of a verdict of guilty of murder in the first degree, defendant moved in arrest of judgment for that the indictment was alternative, indefinite, and uncertain. It was held that although the indictment was alternative, either charge constituted murder in the first degree under this section, informing defendant of the crime charged, and defendant's remedy, if he desired greater certainty, was by motion for a bill of particulars under § 15-143. *State v. Puckett*, 211 N. C. 66, 189 S. E. 183.

Evidence of Killing in Perpetration of Robbery.—Evidence tending to show that the prisoner killed the deceased in the perpetration or attempt to perpetrate a robbery, is expressly made competent by this section, and may be considered by the jury in determining the degree of crime, and whether the accused committed the highest felony or one of lower degree. *State v. Westmoreland*, 181 N. C. 590, 107 S. E. 438.

Evidence of Facts Succeeding Homicide.—Testimony of facts and circumstances which occurred after the commission of a homicide which tends to show a preconceived plan formed and carried out by the prisoner in detail, resulting in his actual killing of the deceased by two pistol shots, without excuse, with evidence that he had thereafter stated he had done as he had intended, is competent upon the question of deliberation and premeditation, under the evidence in this case, to sustain a verdict of murder in the first degree. *State v. Westmoreland*, 181 N. C. 590, 107 S. E. 438.

Beyond Reasonable Doubt.—The additional elements of premeditation and deliberation, necessary to constitute murder in the first degree, are not presumed from a killing with a deadly weapon. They must be established beyond a reasonable doubt, and found by the jury, before a verdict of murder in the first degree can be rendered against the prisoner. *State v. Hawkins*, 214 N. C. 326, 334, 199 S. E. 284.

Determination of Degree of Murder.—Under this section, distinguishing murder into two degrees, the jury, on conviction, must determine in their verdict whether the crime is murder in the first or second degree. *State v. Truesdale*, 123 N. C. 696, 34 S. E. 646; *State v. Gadberry*, 117 N. C. 811, 23 S. E. 477.

Charge—Willful Premeditation and Deliberation.—The law is fixed by the statute, that the killing must be willful, upon premeditation and with deliberation, and where there is no evidence tending to prove this, the jury should be so instructed, and the question of guilt on the charge of murder in the first degree ought not to be submitted to them. *State v. Rhyne*, 124 N. C. 847, 33 S. E. 128.

Same—Burden of Proof of Unlawful Killing.—Where the prisoner is on trial for murder in the first degree, burglary and rape, and there is evidence to support a verdict for each of these offenses, an instruction is proper, and in keeping with the language of this section, when construed as a whole, that the burden of proof was on the State to show beyond a reasonable doubt an unlawful killing with malice and with premeditation and deliberation, or murder committed in the perpetration, or attempt to perpetrate, other

felonies named. *State v. Walker*, 193 N. C. 489, 137 S. E. 429.

Same—Sufficiency of Charge.—The court charged fully as to what was reasonable doubt, circumstantial evidence, presumption of innocence, etc. In absence of a request to do so, it was not error for the court to fail to define robbery in detail. *State v. Godwin*, 216 N. C. 49, 3 S. E. (2d) 347.

Sufficient Showing of Provocation So as to Reduce the Crime.—A defendant who has intentionally killed another with a deadly weapon, in order to rebut the presumption arising from such showing or admission, must establish to the satisfaction of the jury the legal provocation which will take from the crime the element of malice and thus reduce it to manslaughter, or excuse it altogether, but if there is no evidence of mitigation or provocation sufficient to reduce the offense to manslaughter it is proper to withhold this issue from the jury's consideration. *State v. Keaton*, 206 N. C. 682, 686, 175 S. E. 296.

Instruction.—See annotations under § 15-172.

Evidence Sufficient to Support Instruction as to Murder in First Degree.—Evidence that defendant, while in the custody of officers of the law who had arrested him when they apprehended him in the commission of a robbery, drew his pistol in an attempt to escape, and with premeditation and deliberation shot one of the officers in his attempt to escape, is sufficient to support an instruction to the jury on the question of murder in the first degree. *State v. Brooks*, 206 N. C. 113, 172 S. E. 879.

Where Jury May Be Instructed to Return First Degree Verdict or Not Guilty.—It is only in cases where all of the evidence tends to show that the homicide was committed by means of poison, lying in wait, imprisonment, starving, torture, or in the perpetration or attempt to perpetrate a felony, that the trial judge can instruct the jury that they must return a verdict of murder in the first degree or not guilty. *State v. Perry*, 209 N. C. 604, 605, 184 S. E. 545.

Where all the evidence is to the effect that a murder was committed in the perpetration of a robbery, it is not error for the court to limit the jury to a verdict of guilty of murder in the first degree or not guilty under this section. *State v. Gosnell*, 208 N. C. 401, 181 S. E. 323.

Sufficiency of Evidence for Submission to Jury.—Evidence tending to show that the defendant on trial for a homicide drove to a filling station at night with two others for the purpose of robbery, that defendant waited outside in the car while his companions went into the filling station and that deceased was killed by a shot from a gun fired from the outside, is sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree as stated in this section. *State v. Ferrell*, 205 N. C. 640, 172 S. E. 186.

Verdict.—For a conviction of murder in the first degree under this section and section 15-172, the jury must find specifically under the evidence that this degree of crime has been committed by the defendant, and the verdict must be received in open court in the presence of the presiding judge under Constitutional Mandate, Const., Art. I, secs. 13, 17, which right may not be waived. *State v. Bazemore*, 193 N. C. 336, 137 S. E. 172.

§ 14-18. Punishment for manslaughter.—If any person shall commit the crime of manslaughter he shall be punished by imprisonment in the county jail or state prison for not less than four months nor more than twenty years: Provided, however, that in cases of involuntary manslaughter, the punishment shall be in the discretion of the court, and the defendant may be fined or imprisoned, or both. (Rev., s. 3632; Code, s. 1055; 1879, c. 255; R. C., c. 34, s. 24; 4 Hen. VII, c. 13; 1816, c. 918; 1933, c. 249; C. S. 4201.)

Editor's Note.—Public Laws of 1933, c. 249, added the proviso at the end of this section, relating to involuntary manslaughter.

As to Less Degrees of Same Crime.—While under the provisions of section 15-170, the trial judge is required to charge upon evidence on the less degrees of the same crime concerning which the prisoner was being tried, it is not required that he charge upon the principles of an assault with a deadly weapon, where the prisoner is charged with murder, and the killing of the deceased by him has been admitted, and the judge has correctly charged upon the crime of manslaughter, the lowest degree of an unlawful killing of a human being. *State v. Lutterloh*, 188 N. C. 412, 124 S. E. 752.

Punishment Not Reviewable on Appeal.—The question of the imposition of a sentence on the prisoner convicted of

manslaughter within the maximum and minimum allowed by this section, is within the discretion of the trial court and is not reviewable on appeal. *State v. Fleming*, 202 N. C. 512, 163 S. E. 453.

Section Does Not Constitute Involuntary Manslaughter a Misdemeanor.—The amendment to this section by ch. 249, Public Laws of 1933, which added a proviso that in cases of involuntary manslaughter the defendant shall be punishable by fine or imprisonment, or both, in the discretion of the court, does not constitute involuntary manslaughter a misdemeanor instead of a felony, the effect of the proviso being to mitigate punishment in cases of involuntary manslaughter, and not to set up involuntary manslaughter as a separate offense. *State v. Dunn*, 208 N. C. 333, 180 S. E. 708. See also, *State v. Richardson*, 221 N. C. 209, 19 S. E. (2d) 863; *Orinoco Supply Co. v. Masonic, etc.*, Home, 163 N. C. 513, 79 S. E. 964.

Thus the Superior Court has jurisdiction of a prosecution under the statute although the fatal accident occurred within the territorial jurisdiction of a city court having exclusive original jurisdiction of misdemeanors. *State v. Leonard*, 208 N. C. 346, 180 S. E. 710.

The proviso prescribes a "specific punishment," and a sentence of imprisonment in the state prison for a term of seven years upon defendant's plea of guilty of involuntary manslaughter will be upheld, the punishment being in the sound discretion of the trial court, limited only by the prohibition against cruel and unusual punishment. *State v. Richardson*, 221 N. C. 209, 19 S. E. (2d) 863.

§ 14-19. Punishment for second offense of manslaughter.—If any person, having been convicted of the crime of manslaughter and sentenced thereon, shall be convicted of a second crime of the like nature, he shall be imprisoned in the state prison not less than five nor more than sixty years; and in every such case of conviction for such second offense, the prior conviction of the same person and sentence thereon may be shown to the court. (Rev., s. 3633; Code, s. 1056; R. C., c. 34, s. 25; C. S. 4202.)

§ 14-20. Killing adversary in duel; aiders and abettors declared accessories.—If any persons fight a duel in consequence of a challenge sent or received, and either of the parties shall be killed, then the survivor, on conviction thereof, shall suffer death; and all their aiders or abettors shall be considered accessories before the fact. (Rev., s. 3629; Code, s. 1013; R. C., c. 34, s. 3; 1802, c. 608, s. 2; C. S. 4203.)

Cross References.—As to sending, accepting or bearing a challenge to fight a duel, or aiding and abetting a duel, see § 14-270. As to penalty for fighting a duel, see Art. XIV, § 2 of the N. C. Constitution.

Definition.—Webster's International Dictionary defines "duel" to be a combat between two persons, fought with deadly weapons by agreement. *State v. Fritz*, 133 N. C. 725, 727, 45 S. E. 957.

Offense at Common Law.—Dueling was an offence at common law, 4 Bl. Com., 145; *State v. Fritz*, 133 N. C. 725, 727, 45 S. E. 957.

Deadly Weapons.—In 2 Bishop New Criminal Law, § 313(2), it is doubted whether the use of deadly weapons is essential to a duel, but the fighting must at least be upon such mutual agreement as permits one combatant to take the life of the other. *State v. Fritz*, 133 N. C. 725, 727, 45 S. E. 957.

When Offense Complete.—Both at common law and under our statute the offense is complete, although no casualty results. *State v. Fritz*, 133 N. C. 725, 727, 45 S. E. 957.

Challenge to Fight with Fists and Hands.—Challenge to fight a fair fight with fist and hands, without the use of any deadly weapons, is not dueling within the statute. *State v. Fritz*, 133 N. C. 725, 45 S. E. 957.

Challenge to Fight Out of State.—Challenge to fight duel out of state is indictable under this section. *State v. Farrier*, 8 N. C. 487.

Indictments.—An indictment for sending a challenge, in the form of a letter, to fight a duel, need not set out the contents of the letter, nor the substance thereof. *State v. Farrier*, 8 N. C. 487.

Punishment.—Where a person is tried in the Superior Court for violation of the provisions of this section, but is convicted of a lesser offense, of which a justice of the

peace has jurisdiction, the punishment cannot exceed that which a justice of the peace could impose. *State v. Fritz*, 133 N. C. 725, 45 S. E. 957.

Art. 7. Rape and Kindred Offenses.

§ 14-21. Punishment for rape.—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death. (Rev., s. 3637; Code, s. 1101; R. C., c. 34, s. 5; 18 Eliz., c. 7; 1868-9, c. 167, s. 2; 1917, c. 29; C. S. 4204.)

Cross References.—As to conviction for assault when defendant not guilty of rape, see § 14-214. As to exclusion of bystanders during trial for rape, see § 15-166.

Editor's Note.—At common law rape was a felony, but the offense was afterwards changed to a misdemeanor before the statute of Westminster 1. By that statute the punishment, which then was castration and loss of eyes, was mitigated. *State v. Dick*, 6 N. C. 388. But by the statute of Westminster 2, the offense was again changed to a felony, and hence its present existence as a felony is in virtue of that statute. *State v. Dick*, 6 N. C. 388; *State v. Jesse*, 20 N. C. 95, 102.

Rape, under these and later statutes, was the "carnal knowledge of a female forcibly and against her will." *State v. Johnston*, 76 N. C. 209, 210. This definition left out the elements of age altogether. But as the instances of children below the age of discretion being enticed to yield without knowledge of the act and its consequences multiplied, it became necessary to fix an age under which it should be presumed, not that the act could not be consummated, but that consent could not be given. And so it came to be provided that the consummation of the act upon a female under ten years of age, with or without her consent, should be the same as if consummated upon a female over ten years of age without her consent or against her will. And the object of 18 Eliz., conclusively presuming lack of consent of a female under ten years of age, was not to create a new offense distinct from rape, but it was to make such carnal knowledge and abuse rape. The reason why the act does not call it rape in so many words is because of the seeming incongruity of calling an act rape when it is by consent, whereas the established meaning of rape is "against her will." *State v. Johnston*, 76 N. C. 209, 210. So that now the definition of rape of a female over ten years of age is as it always has been, "carnal knowledge against her will." But since 18 Eliz. and under our statute rape of a female under ten years of age is simply carnal knowledge; or in other words, carnal knowledge of a female under ten years of age is rape. *State v. Johnston*, 76 N. C. 209, 211.

By Public Laws 1917, chap. 29, the age of consent, below which it is conclusively presumed that a female child could not consent to sexual intercourse, was raised from ten to twelve years.

"The 'abusing' construed with the 'carnally knowing' means the imposing upon, deflowering, degrading, ill-treating, debauching and ruining socially, as well as morally, perhaps, of the virgin of such tender years, who, when yielding willingly, does so in ignorance of the consequences and of her right and power to resist. If the act be committed forcibly and against her will, it would be rape without reference to the statute." *State v. Monds*, 130 N. C. 697, 700, 41 S. E. 789.

"Injury" of her genital organs might have occurred from the effort to penetrate, or in some other way; but the statute does not declare it to be an element of the crime to injure or abuse the organs." *State v. Monds*, 130 N. C. 697, 700, 41 S. E. 789.

Same—Not Endeavoring to Penetrate.—"To have injured the organs in some way other than by endeavoring to penetrate with his person, if done with her consent, though it would be abusing her, would not be a crime, because there was no act of carnal knowledge." *State v. Monds*, 130 N. C. 697, 700, 41 S. E. 789.

Same—Against Her Will.—"But if the injury occurred against her will and intentionally, then it, the injury, would be embraced in the assault charged, for which he could be convicted." *State v. Monds*, 130 N. C. 697, 700, 41 S. E. 789.

Presumption of Force.—Under this section, force is conclusively presumed in the case of carnal knowledge of a female under the age of ten (now twelve). *State v. Dancy*, 83 N. C. 608, 609.

Age of Consent.—It is a settled construction of the latter clause of this section that to carnally know and abuse any

child under ten (now twelve) years of age, whether she consents to such carnal knowledge or not, is rape. *State v. Goldston*, 103 N. C. 323, 324, 9 S. E. 580; *State v. Storkey*, 63 N. C. 7, 8.

But it in no way affects the guilt of one who carnally knows a female above that age against her will. *State v. Storkey*, 63 N. C. 7, 8.

Penetration without Emission of Seed Sufficient.—In rape the least penetration of the person is sufficient, and the emission of seed is unnecessary. *State v. Monds*, 130 N. C. 697, 41 S. E. 789.

Before the passage of the Act of 1860-'61, Chp. 30 (now section 14-23), it was decided in *State v. Gray*, 53 N. C. 170, that in an indictment under this section, for carnally knowing and abusing an infant female under the age of ten (now twelve) years, there must be proof of the emission of seed, as well as of penetration, in order to convict the offender. Immediately after that decision, and probably in consequence of it, the act of 1860-'61, Chp. 30 was passed, providing that it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon the proof of penetration only. *State v. Hodges*, 61 N. C. 231, 232.

Offense Complete on Proof of Penetration.—"It shall not be necessary upon the trial of any indictment for the offense of rape, carnally knowing and abusing any female child under 10 (now 12) years of age, to prove the actual emission of seed in order to constitute the offense, but the offense shall be completed upon proof of penetration only." *State v. Monds*, 130 N. C. 697, 699, 41 S. E. 789.

Upon Whom Rape May Be Committed.—For a conviction of rape under this section it is not always essential that this offense be committed upon a virtuous woman or actual physical force be used. The circumstances of this case may do away with the necessity of all the elements of the crime and yet constitute rape, as in the following cases.—Ed. Note.

Same—Common Strumpet.—One may be guilty of rape on a common strumpet or a woman shown to have been his mistress previously. *State v. Long*, 93 N. C. 542, 544.

Capacity of Infant to Commit Rape.—An infant under the age of 14 can not commit the crime of rape or assault with intent to commit rape. *State v. Pugh*, 52 N. C. 61, 63; *State v. Gray*, 53 N. C. 170, 173; *State v. Sam*, 60 N. C. 293, 295.

Who May Be Guilty of Rape.—The word, "person", in this section, includes slaves, free negroes and free persons of color, as well as white men. *State v. Peter*, 53 N. C. 19.

Same—Two or More Persons.—Two or more persons may be guilty of the single crime of rape by being present, aiding and abetting in its commission. *State v. Jordan*, 110 N. C. 491, 14 S. E. 752.

Same—Aiding and Abetting.—One holding the husband of prosecutrix while another is perpetrating the crime of rape is guilty as principal in the offense. *State v. Jordan*, 110 N. C. 491, 14 S. E. 752.

Same—Female Aiding Man to Commit Crime.—A man and a woman are both guilty of abusing and carnally knowing a female child where both caused the child to become drunk and the man had intercourse with the child while being held by the woman. *State v. Hairston*, 121 N. C. 579, 28 S. E. 492.

Necessary Allegations—Intent.—By this section, rape is the ravishing and carnally knowing any female of the age of twelve or older by force and against her will, and for conviction of a burglarious entry into a dwelling, presently occupied by a female as a sleeping apartment, with intent to commit rape upon her person, it is necessary to charge in the indictment, and support it with evidence, that at the time of the entry into the dwelling the prisoner had this specific intent, whether he accomplished his purpose, notwithstanding any resistance on her part, or not. *State v. Allen*, 186 N. C. 302, 119 S. E. 504.

Intent is not an element of the offense of carnally knowing or abusing a female child under the age of twelve years, and a motion to quash an indictment therefor on the ground that it failed to allege "intent" is properly denied. *State v. Gibson*, 221 N. C. 252, 20 S. E. (2d) 51.

Instruction.—Where the indictment charges that defendant did ravish and carnally know prosecutrix by force and against her will, she being a child under twelve years of age, it is not error for the court to present to the jury, as applicable to the evidence in the case, both the question of carnal knowledge of prosecutrix when she was under twelve years of age, and carnal knowledge of prosecutrix when she was over twelve years of age by force and against her will. *State v. Johnson*, 213 N. C. 389, 196 S. E. 327.

Applied in *State v. Jackson*, 211 N. C. 202, 189 S. E. 510; *State v. Wagstaff*, 219 N. C. 15, 12 S. E. (2d) 657.

Cited in *State v. Jones*, 222 N. C. 37, 21 S. E. (2d) 812.

§ 14-22. Punishment for assault with intent to commit rape.—Every person convicted of an assault with intent to commit a rape upon the body of any female shall be imprisoned in the state's prison not less than one nor more than fifteen years. (Rev., s. 3638; Code, s. 1102; 1868-9, c. 167, s. 3; R. C., c. 107, s. 44; 1823, c. 1229; 1917, c. 162, s. 1; C. S. 4205.)

Editor's Note.—The offense of "assault with intent to commit rape" is a separate and distinct crime in and by itself and is not an "attempt to commit rape," as it is, sometimes, falsely designated. There is no such criminal offense as an "attempt to commit rape." It is embraced and covered by the offense of "an assault with intent to commit rape." See *State v. Hewett*, 158 N. C. 627, 629, 74 S. E. 356.

In General.—This section should be construed as if it read as follows: if any person shall attempt to commit rape specified in the preceding section, that is to say, to carnally know a female over ten (now twelve) years of age against her will, or to carnally know and abuse a female under ten (now twelve) years of age, with or against her will, he shall be punished, etc. *State v. Johnston*, 76 N. C. 209, 211.

The offense defined by this section is an assault on a female with intent to commit rape, the "intent" to commit this offense being inclusive of an "attempt" to commit it. *State v. Adams*, 214 N. C. 501, 199 S. E. 716.

"In order to convict a defendant on the charge of assault with intent to commit rape, the evidence should show not only an assault, but that the defendant intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part." *State v. Jones*, 222 N. C. 37, 38, 21 S. E. (2d) 812, quoting *State v. Massey*, 86 N. C. 658, 41 Am. Rep. 478.

Age of Female.—This section in the act of 1868 followed immediately after the second section (14-21) of that act, and had direct reference to it, and was intended to include assaults upon females, whether of the age of ten years or more. It uses the words "any female," which embrace females of all ages. *State v. Dancy*, 83 N. C. 608, 610.

Who May Be Guilty of Offense.—At common law, rape was a felony, and all persons who were present, aiding and abetting a man to commit the offense, whether men or women, were principal offenders and might be indicted as such. In this regard the law is not different to-day, so that a woman as well as a man can be found guilty as a principal in the offense. See *State v. Jones*, 83 N. C. 605, 606.

Same—Husband upon Wife.—A husband who, by threats to kill in event of refusal, compels his wife to submit to, and a man to attempt, sexual connection, is guilty of an assault with intent to commit a rape upon his wife. *State v. Dowell*, 106 N. C. 722, 11 S. E. 525.

Same—Females.—A female who aids and abets a male assailant in an attempt to commit a rape becomes thereby a principal in the offense. *State v. Jones*, 83 N. C. 605.

Same—Infant under 14.—An infant under the age of 14 years cannot be guilty of an assault with intent to commit rape. *State v. Sam*, 60 N. C. 293.

Withdrawal of Consent before Perpetration of Offense.—If the prosecutrix consented to have connection with the prisoner upon certain terms, which the defendant refused, and attempted by force to carnally know her without her consent, he is guilty of rape if he succeeds, and of an assault with intent to commit rape, if he does not succeed. *State v. Long*, 93 N. C. 542.

Effect of Subsequent Consent.—It seems that this offense is complete, if the defendant attempts to force the prosecutrix against her will, although she afterwards consents. *State v. Long*, 93 N. C. 542.

Punishment.—Unlawfully to carnally know and abuse a female under the age of ten years (now twelve) constitutes a crime of rape. Therefore, one convicted of an assault with intent to commit such offense is liable to the punishment prescribed in this section. *State v. Dancy*, 83 N. C. 608.

§ 14-23. Emission not necessary to constitute

rape and buggery.—It shall not be necessary upon the trial of any indictment for the offenses of rape, carnally knowing and abusing any female child under twelve years old, and buggery, to prove the actual emission of seed in order to constitute the offense, but the offense shall be completed upon proof of penetration only. (Rev., s. 3639; Code, s. 1105; 1860-1, c. 30; 1917, c. 29; C. S. 4206.)

Editor's Note.—The Editor has deemed it expedient to treat the substance of the provisions of this section in connection with those of section 14-21. For a treatment of the origin and effect of this section, reference is therefore made to section 14-21.

§ 14-24. Obtaining carnal knowledge of married woman by personating husband.—If any person shall have carnal knowledge of any married woman by fraud in personating her husband, he shall be guilty of a felony, and shall be punished by imprisonment in the state's prison at hard labor for not less than ten nor more than twenty years. (Rev., s. 3624; Code, s. 1103; 1881, c. 89, s. 1; C. S. 4207.)

Misrepresentation by Words or Conduct Sufficient.—A person who, either by his acts or by his conduct, induces a woman to believe he is her husband and has intercourse with her, is guilty of a felony under this section. *State v. Williams*, 128 N. C. 573, 37 S. E. 952.

Offense Does Not Constitute Rape.—An intercourse, obtained with such fraud, is not rape, for lack of force, except in those cases where the prisoner has been instrumental in disabling the prosecutrix to make resistance. *State v. Brooks*, 76 N. C. 1, 3.

§ 14-25. Attempted carnal knowledge of married woman by personating husband.—Every person convicted of an assault upon any married woman, with intent to have knowledge of her by fraud in personating her husband, shall be punished by imprisonment in the state's prison at hard labor for not less than five nor more than fifteen years. (Rev., s. 3625; Code, s. 1104; 1881, c. 89, s. 2; C. S. 4208.)

Violation of this section is not tantamount to assault with intent to commit rape. *State v. Brooks*, 76 N. C. 1.

§ 14-26. Obtaining carnal knowledge of virtuous girls between twelve and sixteen years old.—If any male person shall carnally know or abuse any female child, over twelve and under sixteen years of age, who has never before had sexual intercourse with any person, he shall be guilty of a felony and shall be fined or imprisoned in the discretion of the court; and any female person who shall carnally know any male child under the age of sixteen years shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court: Provided, that if the offenders shall be married or shall thereafter marry, such marriage shall be a bar to further prosecution. (Rev., s. 3348; 1895, c. 295; 1917, c. 29; 1923, c. 140, s. 1; C. S. 4209.)

Editor's Note.—Prior to 1917 the protection of this section extended only to a female child over ten and under fourteen years of age. The same act (1917) that raised the age of consent for the criminal offense of rape to twelve, limited this section by making it applicable to females over twelve and under fourteen years of age only. The radical change in the provisions of the section as it now stands was, however, effected by the Acts of 1923, ch. 140. As a result of this plausible amendment, the crime under this section is committed if the female child is over twelve and under sixteen, thus raising the age of consent for this particular offense to sixteen years.

The section was further amended by making it a misdemeanor for any female to carnally know any male child under the age of sixteen, a new criminal offense, hitherto unguarded against, and one that seems only fair and reasonable in an age that recognizes the equal rights of men and women.

Lastly, the new section makes the marriage of the offenders a bar to further prosecution. See 1 N. C. Law Rev. 286.

Essentials of Crime.—The essentials of the crime in this case are (1) carnally know or abuse a female child; (2) over twelve and under sixteen years of age; (3) the female child never before having had sexual intercourse with any person. *State v. Swindell*, 189 N. C. 151, 126 S. E. 417.

Injuring Genital Organs Not Sufficient.—In an indictment

under this section, for carnally knowing a girl between the ages of 10 and 14 (now 12 and 16), it is error to charge that the crime would be complete "if the jury should find that the defendant injured and abused her genital organs." *State v. Monds*, 130 N. C. 697, 41 S. E. 789.

Aiding and Abetting.—One who accompanies in an automobile another who accomplishes his purpose of having carnal knowledge of a female child over twelve and under sixteen years of age, in violation of this section, and with knowledge of this purpose leaves them together in the automobile at night until the purpose has been accomplished, though the female consents, is guilty as an aider or abettor in the commission of the offense, and punishable as a principal therein. *State v. Hart*, 186 N. C. 582, 120 S. E. 345.

Joinder of Offenses.—A charge of rape and that of carnally knowing a female person between the ages of twelve and sixteen years, under this section, can be properly joined in separate counts in one indictment, under § 15-152, since they are related in character and grow out of the same transaction, and are properly left to the jury under the general plea of not guilty, without any requirement on the part of the state to make an election. *State v. Hall*, 214 N. C. 639, 642, 200 S. E. 375.

Responsiveness of Verdict.—Defendant was charged in the first count with rape and in the second count with having carnal knowledge of a female child over twelve and under sixteen years of age. The solicitor announced he would not ask for a conviction of the capital offense of rape and the court correctly charged the jury as to the verdicts permissible upon the first count, and charged that upon the second count they might find defendant guilty or not guilty. The jury returned a verdict of not guilty upon the first count and guilty of assault upon a female upon the second count. The court thereupon instructed the jury again as to the verdicts it might render upon the respective counts, and upon the coming in of the jury the second time, it returned a verdict of guilty of an assault upon a female upon the first count and guilty upon the second count. Held: Even conceding that the first verdict of not guilty upon the first count precluded the jury from again considering that charge and rendered ineffective the second verdict of guilty of an assault upon a female, its first verdict upon the second count was not responsive to the indictment and was not a verdict permitted by law, and therefore the court properly instructed it to reconsider its verdict upon the second count, and the verdict finally rendered thereon is consistent with law and was properly accepted by the court. *State v. Wilson*, 218 N. C. 556, 11 S. E. (2d) 567.

Evidence of Conversation.—Where the prosecutrix has testified upon the trial for the unlawfully carnally knowing or abusing an innocent female child over twelve and under fourteen years of age, her testimony in answer to the questions of the solicitor, to the effect that she had told her mother on the day of the occurrence, who was the only near relative present, is admissible for the purpose of corroborating her other testimony. *State v. Winder*, 183 N. C. 776, 111 S. E. 530.

Evidence of Age.—Prosecuting witness may give competent testimony as to her age. *State v. Trippe*, 222 N. C. 600, 24 S. E. (2d) 340.

Family Bible Entries Evidence of Child's Age.—Authenticated entries in family Bible constitute competent evidence to prove age of child. *State v. Hairston*, 121 N. C. 579, 28 S. E. 492.

Expression of Opinion by Court.—In prosecution under this section, the court, in summarizing the contentions of defendant, charged that defendant insisted that the jury should not find beyond a reasonable doubt that the prosecutrix was under sixteen years of age, "whereas the Biblical records and the testimony of her father and mother should satisfy you beyond a reasonable doubt that she is under sixteen years of age." Held: The instruction constitutes an expression of opinion on an essential element of the crime charged, prohibited by section 1-180, and the error is not mitigated by construing the charge as a whole, nor may it be upheld as charging that the jury should find that the prosecutrix was under sixteen years of age if they believed the uncontradicted testimony. *State v. Wyont*, 218 N. C. 505, 11 S. E. (2d) 473.

Evidence of Relations with Other Men.—In a prosecution under this section, it is not error to exclude evidence of improper relations between the prosecuting witness and another several months after the alleged crime of the defendant. *State v. Houpe*, 207 N. C. 377, 177 S. E. 20.

Evidence Sufficient for Jury.—Evidence that prosecutrix at the time alleged was an innocent, virtuous woman, under sixteen years of age, and that defendant is the father of her illegitimate child, which was born shortly after she arrived at the age of sixteen, is sufficient to be submitted

to the jury in a prosecution under this section. *State v. Wyont*, 218 N. C. 505, 11 S. E. (2d) 573.

Plea of Guilty May Not Be Withdrawn.—Upon the trial under this section of carnally knowing a female child over twelve and under sixteen years of age, the defendant may not enter a plea of guilty and thereafter withdraw the plea and enter a defense as a matter of right, and the sentence will be sustained in the absence of abuse of the court's discretion. *State v. Porter*, 188 N. C. 804, 125 S. E. 615.

Variance as to Time.—It is to the girl's first act of intercourse with a man, when she is under sixteen years of age, that the law attaches criminality on the part of the man, and a variance between allegation and proof as to time is not material. *State v. Trippe*, 222 N. C. 600, 24 S. E. (2d) 340.

Punishment.—The felony defined in this section is not one "for which no specific punishment is prescribed" within section 14-2, and the discretion of the court in fixing the punishment is limited only by Const. Art. I, § 14. A sentence of 30 years and hard labor is not a "cruel and unusual punishment" for an offense under this section. *State v. Swindell*, 189 N. C. 151, 126 S. E. 417.

Cited in *State v. Cain*, 209 N. C. 275, 183 S. E. 300.

§ 14-27. Jurisdiction of court; offenders classed as delinquents.—All persons charged with a violation of § 14-26 under the age of sixteen years shall be subject to the jurisdiction of the juvenile court and such other courts as may hereafter exercise such jurisdiction, and shall be classed as delinquents and not as felons: Provided, that where the offenders agree to marry, the consent of the parent shall not be necessary: Provided further, that any male person convicted of the violation of § 14-26 who is under eighteen (18) years of age, shall be guilty of a misdemeanor only. (1923, c. 140, s. 2; C. S. 4209(a).)

Editor's Note.—This section is summarized and a brief history of the law given in 1 N. C. Law Rev. 286.

Art. 8. Assaults.

§ 14-28. Malicious castration.—If any person, of malice aforethought, shall unlawfully castrate any other person, or cut off, maim or disfigure any of the privy members of any person, with intent to murder, maim, disfigure, disable or render impotent such person, the person so offending shall suffer imprisonment in the state's prison for not less than five nor more than sixty years. (Rev., s. 3627; Code, s. 999; R. C., c. 34, s. 4; 1831, c. 40, s. 1; 1868-9, c. 167, s. 6; C. S. 4210.)

Cross Reference.—See annotations under §§ 14-29 and 14-30.

Appeal from Sentence for Punishment.—Upon conviction of the criminal offense inhibited by this section, sentence of the court for a period within that allowed by statute will not be considered on appeal as a cruel or unusual punishment against the provision of our Constitution, Art. I, sec. 14, or discriminatory against the principal actor in committing the crime, when the others participating therein to a less extent have been sentenced for shorter terms, the sentences imposed being left largely in the discretion of the trial court, and in the absence of an abuse of this discretion not reviewable on appeal. *State v. Griffin*, 190 N. C. 133, 129 S. E. 410.

§ 14-29. Castration or other maiming without malice aforethought.—If any person shall, on purpose and unlawfully, but without malice aforethought, cut or slit the nose, bite or cut off the nose, or a lip or an ear, or disable any limb or member of any other person, or castrate any other person, or cut off, maim or disfigure any of the privy members of any other person, with intent to kill, maim, disfigure, disable or render impotent such person, the person so offending shall be imprisoned in the county jail or state's prison not less than six months nor more than ten years, and fined, in the discretion of the court. (Rev., s.

3626; Code, s. 1000; R. C., c. 34, s. 47; 1754, c. 56; 1791, c. 339, ss. 2, 3; 1831, c. 40, s. 2; C. S. 4211.)

Cross Reference.—See annotations under § 14-30.

Proof of Malice Aforethought Not Necessary.—Proof, of malice aforethought, or of a preconceived intention to commit the maim, is not necessary. *State v. Girkin*, 23 N. C. 121.

§ 14-30. Malicious maiming.—If any person shall, of malice aforethought, unlawfully cut out or disable the tongue or put out an eye of any other person, with intent to murder, maim or disfigure, the person so offending, his counselors, abettors and aiders, knowing of and privy to the offense, shall, for the first offense, be punished by imprisonment in the state's prison or county jail not less than four months nor more than ten years, and be fined, in the discretion of the court; and for the second offense shall be imprisoned in the state's prison not less than five nor more than sixty years. (Rev., s. 3636; Code, s. 1080; R. C., c. 34, s. 14; 1754, c. 56; 1791, c. 339, s. 1; 1831, c. 12; 22 and 23 Car. II, c. 1 (Coventry Act); C. S. 4212.)

When Corpus Delicti Complete.—Under this section the corpus delicti is complete, if the maim be committed on purpose, and with intent to disfigure, although without malice prepense. *State v. Crawford*, 13 N. C. 425.

"Malice Aforethought" Construed.—For the words "malice aforethought" do not mean an actual, express or preconceived disposition; but import an intent, at the moment, to do, without lawful authority, and without the pressure of necessity, that which the law forbids. *State v. Crawford*, 13 N. C. 425.

Malicious Intent Express or Implied.—The malicious intent to maim or disfigure may either be expressed or implied from circumstances. *State v. Irwin*, 2 N. C. 112.

Proof of Grudges or Threatenings Not Necessary.—And proof of antecedent grudges, threatenings or an express design is not necessary. *State v. Irwin*, 2 N. C. 112.

Presumptions.—An intent to disfigure is prima facie to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or at least of the absence of the intent mentioned in the statute. *State v. Girkin*, 23 N. C. 121.

What Constitutes Maiming.—To constitute a maim, under this statute, by biting off an ear, it is not necessary that the whole ear shall be bitten off—it is sufficient if a part only is taken off, provided enough is taken off to alter and impair the natural personal appearance, and, to ordinary observation, to render the person less comely. *State v. Girkin*, 23 N. C. 121.

Conviction for Loss of Eye.—Construing this section in connection with the history of legislation on the subject, it is held that thereunder the loss of an eye is not included in the offense of mayhem, and though the infliction thereof without malice may neither be sustained as provided by section 14-29, nor under the common law, requiring that the offense should have been committed with malice, yet upon proper evidence a conviction may be had of an assault with a deadly weapon and an assault with serious damages, as a less degree of the crime charged under the provisions of section 14-29. *State v. Wilson*, 188 N. C. 781, 125 S. E. 612.

First Blow or Sudden Affray.—The first blow, or a sudden affray, does not palliate the offense of maiming under the act of 1791; for if it did, the statute would be of little avail. *State v. Crawford*, 13 N. C. 425, 426.

Same—Accident or Self-Defense.—When the act is proved, the law presumes that it was done on purpose. The burden is therefore upon defendant to show that it was done accidentally or in self-defense. *State v. Evans*, 2 N. C. 281, 282; *State v. Skidmore*, 87 N. C. 509.

Indictment—Necessary Allegations.—An indictment, for biting off ear, must state the offense to be done on purpose, as well as unlawfully. *State v. Ormond*, 18 N. C. 119.

Same—Unnecessary Allegations.—But it need not be alleged whether it was the right or left ear. *State v. Green*, 29 N. C. 39.

§ 14-31. Maliciously assaulting in a secret manner.—If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or

otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be guilty of a felony and shall be punished by imprisonment in jail or in the penitentiary for not less than twelve months nor more than twenty years, or by a fine not exceeding two thousand dollars, or both, in the discretion of the court. (Rev., s. 3621; 1887, c. 32; 1919, c. 25; C. S. 4213.)

Cross Reference.—As to an assault in this state injuring person in another state, see § 15-132.

Editor's Note.—The 1919 amendment added the clause relative to consciousness of the presence of the assailant.

Effect of Words, "or Otherwise."—The Legislature, after denouncing as criminal secret assaults with intent to kill, and after giving one explicit illustration, added the words "or otherwise," in order to prevent the application of the maxim *expressio unius exclusio alterius*, thus including every other manner of making secret attempts, regardless of the attendant circumstances. *State v. Shade*, 115 N. C. 757, 758, 20 S. E. 537.

Assault with Intent to Commit Murder.—"Attempts to commit any of the four capital offences were formerly felonies, but during the prosecution for 'Ku Klux' troubles the offence of assault with intent to commit murder was reduced to a simple misdemeanor. The Act of 1887, Ch. 32, restored the grade of the offence to a felony, except in those cases in which it is committed openly, giving the assailed an opportunity to know his assailant. *State v. Telfair*, 109 N. C. 878, 13 S. E. 726." *State v. Harris*, 120 N. C. 577, 579, 26 S. E. 774.

What Constitutes Secret Assault.—While it is not required for the conviction of a secret assault, under the provisions of this section, that the assailed should not have been aware of the presence of his assailant, it is necessary that the purpose of the assailant be not previously made known to him; and where the evidence does not tend to show that it was a secret assault, within the intent and meaning of the statute, an instruction to the contrary is reversible error. *State v. Oxendine*, 187 N. C. 658, 122 S. E. 568.

Same—Assault from Behind.—An assault made from behind and in such a manner as to prevent the person assaulted from knowing who his assailant is, or that the blow is about to be struck, is a secret assault. *State v. Harris*, 120 N. C. 577, 26 S. E. 774.

Same—Assault by Means of Poison.—An assault by means of poison comes within the intent of our statutes making an assault with a deadly weapon with intent to kill punishable as a felony. *State v. Alderman*, 182 N. C. 917, 110 S. E. 59.

Same—Assault Facing Victim.—Where one, facing another or walking up in front of him, draws a pistol from a hip-pocket and shoots him without warning, it is not a secret assault, within the meaning of this section. *State v. Patton*, 115 N. C. 753, 20 S. E. 538.

Same—Sufficiency.—For sufficiency of evidence to prove a secret assault, see *State v. Bridges*, 178 N. C. 733, 101 S. E. 29.

Indictment—Necessary Allegations.—Indictment omitting the words "by waylaying or otherwise," is sufficient. *State v. Shade*, 115 N. C. 757, 20 S. E. 537.

Elements of Offense, Burden of Proof.—On a trial under a criminal indictment the burden is on the State to show beyond a reasonable doubt the ingredients or elements necessary to constitute the statutory offense, or the lower degree of the same crime for which a verdict is permissible and where assault and battery, prohibited by this section, are charged, the State must accordingly show that it was maliciously done with a deadly weapon, secretly by waylaying or otherwise, etc., with intent to kill, and when the evidence is conflicting, it is an expression of opinion inhibited by sec. 1-180, for the judge to charge the jury that if they believe the evidence, a cold-blooded and cruel assault had been committed. *State v. Kline*, 190 N. C. 177, 129 S. E. 417.

Evidence Permissible to Show Malice, etc.—As bearing on the question of malice and felonious intent, the state was allowed to show that, a week or two before the happening of the offenses charged in the bill of indictment, the defendant had been seen about the home of the prosecuting witness; that he had shot at his house and threatened to shoot him. *State v. Miller*, 189 N. C. 695, 128 S. E. 1.

Instruction.—For charge not sufficiently explaining the offense, see *State v. Vanderburg*, 200 N. C. 713, 158 S. E. 248.

Verdict for Simple Assault.—Upon the trial of an indictment charging a secret felonious assault, verdict may be rendered for simple assault. *State v. Jennings*, 104 N. C. 774, 10 S. E. 249.

An indictment charging a felonious assault with intent

to kill as defined in this section, embraces as a lesser degree of the crime charged the offense of assault with a deadly weapon, and where the evidence is sufficient to sustain a verdict of the offense charged, defendant may not complain of a verdict of guilty of the lesser offense. *State v. High*, 215 N. C. 244, 1 S. E. (2d) 563.

Cited in *State v. Strickland*, 192 N. C. 253, 134 S. E. 850; *State v. Potter*, 221 N. C. 153, 19 S. E. (2d) 257.

§ 14-32. Assault with deadly weapon with intent to kill resulting in injury.—Any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punished by imprisonment in the state prison or be worked under the supervision of the state highway and public works commission for a period not less than four months nor more than ten years. (1919, c. 101; 1931, c. 145, s. 30; C. S. 4214.)

Cross Reference.—As to assault in this state resulting in injury in another state, see § 15-132.

Elements of Offense.—In order for a conviction of crime under the provisions of this section there must be a charge and evidence thereon of five essential elements: an assault, the use of a deadly weapon, the intent to kill, infliction of serious injury, death not resulting, and while an assault does not necessarily include a battery, where serious injury is inflicted a battery is necessarily implied. *State v. Heiner*, 199 N. C. 778, 155 S. E. 879.

Indictment Necessary.—A charge of assault with a deadly weapon with intent to kill, resulting in serious injury, is a charge of a felony, under this section, and defendant may not be put to answer thereon but by indictment. *State v. Clegg*, 214 N. C. 675, 200 S. E. 371.

Evidence of Infliction of Serious Injury.—Evidence that several defendants indicted under the provisions of this section were discovered selling liquor in violation of our prohibition law, and that they were armed with pistols and blackjacks and acted in concert, and that one of them threatened the life of the officer attempting to arrest them, and that the others participated by carrying the officer to a room of a garage where they beat him with a blackjack into unconsciousness, and carried him out into a field and left him there where later and alone he recovered consciousness, is sufficient for the conviction of them all of an assault with a deadly weapon with intent to kill, resulting in serious injury, in violation of the statute. *State v. Heiner*, 199 N. C. 778, 155 S. E. 879.

Evidence of Use of Deadly Weapon.—Where the evidence against the defendants, tried under an indictment for violating this section tends to show an assault with a blackjack and other like instruments whereby they beat the one assaulted into unconsciousness and carried him into a field where alone he eventually recovered consciousness, it is sufficient as to the use of a deadly weapon in making the assault. *State v. Heiner*, 199 N. C. 778, 155 S. E. 879.

Evidence of communicated threats was received with apparent approval in *State v. Scott*, 4 Ired. 409, and with explicit approval in *State v. Turpin*, 77 N. C. 473, 24 Am. Rep. 455. It was denied in *State v. Byrd*, 121 N. C. 684, 28 S. E. 353, in an obscure opinion and in *State v. Skidmore*, 87 N. C. 509, in an opinion which overlooked the two cases first cited. 11 N. C. Law Rev. 230.

Instruction as to Serious Injury.—Where the evidence is sufficient of an assault with a deadly weapon with intent to kill, not resulting in death, a charge by the judge to the jury that "serious injury" included "anything that would cause a breach of the peace," is held not to be reversible error to the defendant's prejudice where all the evidence tends to show that serious injury was inflicted in violation of the statute. *State v. Heiner*, 199 N. C. 778, 155 S. E. 879.

Erroneous Instruction Not Cured by Verdict.—An instruction that defendant's admission of assault with a deadly weapon, which resulted in serious injury, raised the presumption of defendant's guilt of assault with a deadly weapon with intent to kill, resulting in serious injury, as charged, and placed the burden on defendant to satisfy the jury of matters in mitigation or excuse, is not cured by a verdict of guilty of the misdemeanor of an assault with a deadly weapon, since the instruction required defendant to show to the satisfaction of the jury matters in mitigation or excuse before he could successfully ask for a verdict of not guilty. *State v. Carver*, 213 N. C. 150, 195 S. E. 349.

Burden of Proof.—This section under which the appealing defendant was indicted and convicted provides that any person who assaults another (1) with a deadly weapon, (2) with intent to kill, and (3) inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punishable by

imprisonment in the state's prison or be worked on the county roads for a period of not less than four months nor more than ten years. These three essential elements must be proved in order to warrant a conviction under the statute (*State v. Crisp*, 188 N. C. 799, 800, 125 S. E. 543); and the burden is on the state to establish them all beyond a reasonable doubt, where the defendant enters a plea of "not guilty" to the charge contained in the bill of indictment. *State v. Redditt*, 189 N. C. 176, 126 S. E. 506, 507.

State Must Prove Murderous Intent.—Upon a trial of one charged with using a deadly weapon in inflicting a serious injury not resulting in death, under this section, an instruction that the use of such weapon raises a presumption of felonious intent is reversible error, the fact of murderous intent being for the State to prove. *State v. Gibson*, 196 N. C. 393, 145 S. E. 772.

Guilt of Lesser Degree of Offense.—Where the defendants are tried for violating this section in making an assault with a deadly weapon with intent to kill, etc., the action will not be dismissed when the undisputed evidence tends to show the assault was made with a deadly weapon. *State v. Heiner*, 199 N. C. 778, 155 S. E. 879.

Conviction of Simple Assault.—An instruction directing verdict of guilty of at least simple assault is not erroneous when the prosecuting witness had been injured by being struck by some hard metallic substance in the defendant's hand, which he did not see, causing his nose to be broken and other serious injuries. *State v. Strickland*, 192 N. C. 253, 134 S. E. 850.

Stated in State v. Goff, 205 N. C. 545, 551, 172 S. E. 407.

Cited in State v. Colson, 194 N. C. 206, 139 S. E. 230; *State v. Potter*, 221 N. C. 153, 19 S. E. (2d) 257.

§ 14-33. Punishment for assault.—In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: Provided, that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill or with intent to commit rape, or to cases of assault or assault and battery by any man or boy over eighteen years old on any female person: Provided, that in all cases of assault, assault and battery, and affrays, wherein deadly weapons are used and serious injury is inflicted, and the plea of the defendant is self-defense, evidence of former threats against the defendant by the person alleged to have been assaulted by him, if such threats shall have been communicated to the defendant before the altercation, shall be competent as bearing upon the reasonableness of the claim of apprehension by the defendant of death or serious bodily harm, and also as bearing upon the amount of force which reasonably appeared necessary to the defendant, under the circumstances, to repel his assailant. (Rev., s. 3620; Code, s. 987; 1870-1, c. 43, s. 2; 1872-4, c. 176, s. 6; 1879, c. 92, ss. 2, 6; 1911, c. 193; 1933, c. 189; C. S. 4215.)

Cross Reference.—As to punishment for assault with intent to commit rape, see § 14-22.

Editor's Note.—Public Laws of 1933, c. 189, added the proviso, at the end of this section, relative to the admission of any evidence of threats of assailant.

As to excessive punishment, see *State v. Driver*, 78 N. C. 423; as to punishment under acts of 1870-1, ch. 43, see *State v. Miller*, 75 N. C. 73, 77; *State v. McNeill*, 75 N. C. 15.

Constitutionality.—This section is not unconstitutional on the grounds that severe sentences for criminal offenses can only be upheld under a statute affirmative in terms, this statute, by correct interpretation affirmatively providing that in all cases of assault with or without the intention to kill, the person convicted shall be punished by fine or imprisonment in the discretion of the court, and not so limiting the court's discretion as to an assault upon a female, etc. *State v. Stokes*, 181 N. C. 539, 106 S. E. 763.

The constitutional inhibition as to the imposition of cruel and unusual punishments may only be invoked in cases of manifest and gross abuse by the trial judge acting within a legislative discretion given him; and, in this case, a sentence

of three months on the road, upon conviction for an assault upon a female, cannot be held as a matter of law, on appeal, to be unconstitutional as cruel or unusual. *State v. Stokes*, 181 N. C. 539, 106 S. E. 763.

Same—Question of Discrimination.—This section, is not an unwarranted discrimination against one assaulting a female under the terms of the statute, or a denial to him of the equal protection of the laws guaranteed him by the Constitution. *State v. Stokes*, 181 N. C. 539, 106 S. E. 763.

Punishment—Extent.—While the language of this section authorizes a punishment for assault with or without intent to kill, by fine or imprisonment, or both, in the discretion of the court, it does not at all mean that the judge may change the character of punishment recognized and established by the law for such an offense, but that, within such limits, the extent of the punishment is referred to the discretion of the trial judge, and his sentence may not be interfered with by the appellate court, except in case of manifest and gross abuse. *State v. Smith*, 174 N. C. 804, 807, 93 S. E. 910.

Same—Limitation.—In conviction for simple assaults, where there is no intent to commit rape, and no deadly weapon used, and no serious bodily harm done, the punishment is limited to a fine of \$50, or imprisonment for thirty days. *State v. Johnson*, 94 N. C. 863; *State v. Battle*, 130 N. C. 655, 41 S. E. 66.

In prosecution for assault with a deadly weapon, appealing defendant relied upon and introduced evidence of self-defense and of matters in justification. The trial court instructed the jury that under the indictment and evidence the appealing defendant might be convicted of assault with a deadly weapon or of a simple assault. The jury convicted defendant of simple assault, but in imposing judgment the court found as a fact that said simple assault inflicted serious injury, and imposed a sentence of four months on the roads. It was held that the verdict of simple assault was permissible under the indictment and evidence, and the court was without power to sentence the appealing defendant to more than thirty days imprisonment. *State v. Palmer*, 212 N. C. 10, 192 S. E. 896.

Evidence Sufficient under Section.—Evidence that the prisoner awakened the prosecutrix while she was asleep in her own room at night by placing his hand upon her forehead, is sufficient to convict of an assault upon a female, etc., and a motion as of nonsuit thereon may not be granted, though such evidence is insufficient for a conviction of the intent to ravish her. *State v. Hill*, 181 N. C. 558, 107 S. E. 140.

Evidence that a negro man twenty-three years of age several times accosted a white girl fifteen years of age, on the streets of a town, with improper solicitation, resulting in her fleeing from him in a direction she had not intended to go, and, in her great fear of him, causing her to become nervous and to lose sleep at night, is held to be such evidence of violence, begun to be executed with ability to effectuate it, as will come within the intent and meaning of this section making it a crime for a man or boy over eighteen years of age to assault any female person. *State v. Williams*, 186 N. C. 627, 120 S. E. 224.

Burden to Prove Age Below Eighteen.—The burden is upon the defendant, charged with an assault upon a woman, to show that he was under the age specified in order to except his case from the proviso, and it is not necessary to the validity of the bill that it state that he was over the age, as an assault upon a woman is a crime without regard to the age of the person who commits it, and the age merely relates to the degree of punishment and is not an element or ingredient of the offense charged. *State v. Smith*, 157 N. C. 578, 72 S. E. 853.

Cited in State v. Stansberry, 197 N. C. 350, 148 S. E. 546; *State v. Griggs*, 197 N. C. 352, 148 S. E. 547.

§ 14-34. Assaulting by pointing gun.—If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of an assault, and upon conviction of the same shall be fined, imprisoned, or both, at the discretion of the court. (Rev., s. 3622; 1889, c. 527; C. S. 4216.)

Accidental Discharge of Gun—Manslaughter.—Where one points a loaded gun at another, though without intention of discharging it, if the gun goes off accidentally and kills, it is manslaughter. *State v. Coble*, 177 N. C. 588, 99 S. E. 339.

When one causes the death of another by an unlawful act which amounts to an assault on the person, as pointing a gun under circumstances which would not excuse

its discharge, he is guilty at least of manslaughter. *State v. Stitt*, 146 N. C. 643, 61 S. E. 566.

Same—Question of Guilt for Jury.—Where one pointed a gun at another and death ensued by its discharge evidence was sufficient to submit to the jury the question of the prisoner's guilt or innocence of the crime of manslaughter. *State v. Limerick*, 146 N. C. 649, 61 S. E. 568; *State v. Turnage*, 138 N. C. 566, 49 S. E. 913.

Gun Need Not Be Loaded.—In an indictment for assault with a deadly weapon an instruction that if the State "had satisfied the jury beyond a reasonable doubt that the defendant pointed a pistol at the prosecutor, whether loaded or not, this would be an assault," and to find the defendant guilty, was correct under the provisions of this section. *State v. Atkinson*, 141 N. C. 734, 53 S. E. 228.

Pointing Pistol in Pocket.—An instruction that if the jury were satisfied beyond a reasonable doubt that the defendant had a pistol in his coat pocket and "with pistol and hand on the inside of his pocket, he pointed the pistol at the prosecutor, this would be an assault," is not error. *State v. Atkinson*, 141 N. C. 734, 53 S. E. 228.

Evidence of Guilt.—Defendant, pointing gun at the prosecutor, was, under the circumstances, guilty of an assault at common law, if not under this section. *State v. Scott*, 142 N. C. 582, 55 S. E. 69.

Applied in *State v. Head*, 214 N. C. 700, 200 S. E. 415.

Cited in *Whitlow v. Southern Ry. Co.*, 217 N. C. 538, 8 S. E. (2d) 809.

Art. 9. Hazing.

§ 14-35. Hazing; definition and punishment.—It shall be unlawful for any student in any college or school in this state to engage in what is known as hazing, or to aid or abet any other student in the commission of this offense. For the purposes of this section hazing is defined as follows: "to annoy any student by playing abusive or ridiculous tricks upon him, to frighten, scold, beat or harass him, or to subject him to personal indignity." Any violation of this section shall constitute a misdemeanor. (1913, c. 169, ss. 1, 2, 3, 4; C. S. 4217.)

§ 14-36. Expulsion from school; duty of faculty to expel.—Upon conviction of any student of the offense of hazing, or of aiding or abetting in the commission of this offense, he shall, in addition to any punishment imposed by the court, be expelled from the college or school he is attending. The faculty or governing board of any college or school charged with the duty of expulsion of students for proper cause shall, upon such conviction at once expel the offender, and a failure to do so shall be a misdemeanor. (1913, c. 169, ss. 5, 6; C. S. 4218.)

§ 14-37. Certain persons and schools excepted; copy of article to be posted.—This article shall not apply to females, nor to schools or colleges not keeping boarders, nor to schools keeping less than ten student boarders. A copy of this article shall be framed and hung on display in every college or school to which it applies. (1913, c. 169, s. 3; C. S. 4219.)

§ 14-38. Witnesses in hazing trials; no indictment to be founded on self-criminating testimony.—In all trials for the offense of hazing any student or other person subpoenaed as a witness in behalf of the state shall be required to testify if called upon to do so: Provided, however, that no student or other person so testifying shall be amenable or subject to indictment on account of, or by reason of, such testimony. (1913, c. 169, s. 8; C. S. 4220.)

Art. 10. Kidnapping and Abduction.

§ 14-39. Kidnapping.—It shall be unlawful for

any person, firm or corporation, or any individual, male or female, or its or their agents, to kidnap or cause to be kidnapped any human being, or to demand a ransom of any person, firm or corporation, male or female, to be paid on account of kidnapping, or to hold any human being for ransom: Provided, however, that this section shall not apply to a father or mother for taking into their custody their own child.

Any person, or their agent, violating or causing to be violated any provisions of this section shall be guilty of a felony, and upon conviction therefor, shall be punishable by imprisonment for life.

Any firm or corporation violating, or causing to be violated through their agent or agents, any of the provisions of this section, and upon being found guilty, shall be liable to the injured party suing therefor, the sum of twenty-five thousand dollars (\$25,000), and shall forfeit its or their charter and right to do business in the state of North Carolina. (1933, c. 542.)

Section Increases Maximum Punishment.—The effect of this section, repealing § 4221 of the Consolidated Statutes of North Carolina, relating to the crime of kidnapping, is to increase, within the discretion of the court, the maximum punishment for the crime from twenty years to life, and not to make a life term mandatory upon conviction, the intent of the statute to this effect being shown by the use of the word "punishable" in prescribing the sentence. *State v. Kelly*, 206 N. C. 660, 175 S. E. 294.

§ 14-40. Enticing minors out of the state for the purpose of employment.—If any person shall employ and carry beyond the limits of this state any minor, or shall induce any minor to go beyond the limits of this state, for the purpose of employment without the consent in writing, duly authenticated, of the parent, guardian or other person having authority over such minor, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five hundred and not more than one thousand dollars for each offense. The fact of the employment and going out of the state of the minor, or of the going out of the state by the minor, at the solicitation of the person for the purpose of employment, shall be prima facie evidence of knowledge that the person employed or solicited to go beyond the limits of the state is a minor. (Rev., s. 3630; 1891, c. 45; C. S. 4222.)

Count Joined with One under Section 14-41.—An indictment for abduction, containing two counts, one under this section and the second under section 14-41, cannot be quashed for misjoinder of two different offenses, as the two counts are merely statements of the same transaction to meet the different phases of proof. *State v. Burnett*, 142 N. C. 577, 578, 55 S. E. 72.

§ 14-41. Abduction of children.—If any one shall abduct or by any means induce any child under the age of fourteen years, who shall reside with its father, mother, uncle, aunt, brother or elder sister, or shall reside at a school, or be an orphan and reside with a guardian, to leave such person or school, he shall be guilty of a felony, and on conviction shall be fined or imprisoned in the state's prison for a period not exceeding fifteen years. (Rev., s. 3358; Code, s. 973; 1879, c. 81; C. S. 4223.)

Definition.—Abduction under this section, is the taking and carrying away of a child, ward, etc., either by fraud, persuasion, or open violence. The consent of the child is no defense. If there is no force or inducement and the depart-

ure of the child is entirely voluntary, there is no abduction. *State v. Burnett*, 142 N. C. 577, 578, 55 S. E. 72.

Father's Consent a Good Defense.—If the carrying away was with the father's consent, that fact is a defense the burden of which is upon the defendant. *State v. Burnett*, 142 N. C. 577, 578, 55 S. E. 72.

The indictment need not state the means by which the abduction was accomplished, nor that it was done without the consent and against the will of her father, *State v. Burnett*, 142 N. C. 578, 55 S. E. 72, nor that the defendant was not a nearer relation to the child than the person from whose custody it was abducted. *State v. George*, 93 N. C. 567.

§ 14-42. Conspiring to abduct children.—If any one shall conspire to abduct, or by any means to induce any child under the age of fourteen years, who shall reside with any of the persons designated in § 14-41, or shall reside at school, to leave such persons or the school, he shall be guilty of a felony, and on conviction shall be punished as prescribed in that section: Provided, that no one who may be a nearer blood relation to the child than the persons named in § 14-41 shall be indicted for either of said offenses. (Rev., s. 3359; Code, s. 974; 1879, c. 81, s. 2; C. S. 4224.)

Cross References.—As to application of this section, see annotations to § 14-41. As to persuading children to leave any state institution to which they have been legally committed, see § 14-266.

§ 14-43. Abduction of married women.—If any male person shall abduct or elope with the wife of another, he shall be guilty of a felony, and upon conviction shall be imprisoned not less than one year nor more than ten years: Provided, that the woman, since her marriage, has been an innocent and virtuous woman: Provided further, that no conviction shall be had upon the unsupported testimony of any such married woman. (Rev., s. 3360; 1903, c. 362; C. S. 4225.)

Elopement Defined.—Elopement of wife is her voluntary act in deserting her husband to go away with and cohabit with another man. *State v. O'Higgins*, 178 N. C. 708, 100 S. E. 438.

Effect of Prior Adultery.—In order to constitute the offense of abducting or eloping with a married woman, under this section, the seduction by the male may be accomplished by insistent persuasion under which the woman yields her consent to be carried away from the house of her husband by the defendant charged therewith and living with him in adultery; and the defense that the woman in the course of his scheme had yielded herself before the abduction is untenable when it was shown that the wife had not thus yielded herself to any other man than the defendant. *State v. Hooper*, 186 N. C. 405, 119 S. E. 769.

Adultery after the elopement is an essential element of the offense under this section. *State v. Ashe*, 196 N. C. 387, 145 S. E. 784.

Voluntary Leaving of Husband.—The fact that the wife had voluntarily left her husband falls within the definition of this section when this results from the unlawful scheming of the man to achieve that end. *State v. Hopper*, 186 N. C. 405, 119 S. E. 769.

Evidence.—Evidence tending to show that the defendant knew of the whereabouts of the wife of another after she had left her husband, and that they had dined together at a house of ill fame, and that they had shut themselves in a room thereof is competent upon the question of the abduction and of their immoral relations and a circumstance to be submitted to the jury. *State v. Ashe*, 196 N. C. 387, 145 S. E. 784.

In a prosecution under this section the necessary element of adultery may be shown by circumstantial evidence which satisfies the jury of the defendant's guilt beyond a reasonable doubt. *State v. Ashe*, 196 N. C. 387, 145 S. E. 784.

Testimony of Wife Supported by Others.—The provision of this section that no conviction of abduction or eloping with the wife of another may be had on the unsupported testimony of the wife as to her virtue, is complied with when the testimony of the wife is supported by evidence of others as to her previous good character. *State v. Hopper*, 186 N. C. 405, 119 S. E. 769.

Evidence of Influence of Defendant.—Upon the question of influence of the defendant over the wife of another whom he is being tried for abducting and eloping with, it is competent to show the strength of the influence he had acquired, and the admission of testimony that the defendant had deserted his wife and dependent children, and also that the abducted woman had used her own money for expenses, is not subject to just exception. *State v. Hopper*, 186 N. C. 405, 119 S. E. 769.

Testimony of Husband as to Chastity.—On a criminal trial for abducting and eloping with a married woman, it is competent for her husband to testify as to the chastity of his wife up to the time the defendant had invaded his home; such testimony may be sufficient to sustain a conviction. *State v. Hopper*, 186 N. C. 405, 119 S. E. 769; *State v. O'Higgins*, 178 N. C. 708, 100 S. E. 438.

Woman's General Character for Virtue Admissible.—In an indictment under this section, where the character of the woman is by express terms of the statute directly in question, evidence as to her general character for virtue is admissible. *State v. Connor*, 142 N. C. 70, 55 S. E. 787.

Burden of Proof of First Proviso.—The state has the burden of proving the facts required under the first proviso of the section. *State v. Connor*, 142 N. C. 700, 55 S. E. 787.

Instruction—"Bad" House.—Where the evidence is that the defendant and the married woman met in a bad house, it is not prejudicial or reversible error for the judge in the statement of facts in his instructions to call it a "bad" house or "house of ill fame," where this was not brought to his attention at the time. *State v. Ashe*, 196 N. C. 387, 145 S. E. 784.

Art. 11. Abortion and Kindred Offenses.

§ 14-44. Using drugs or instruments to destroy unborn child.—If any person shall willfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or other substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of the mother, he shall be guilty of a felony, and shall be imprisoned in the state's prison for not less than one year nor more than ten years, and be fined at the discretion of the court. (Rev., s. 3618; Code, s. 975; 1881, c. 351, s. 1; C. S. 4226.)

Section relates to destruction of child. *State v. Forte*, 222 N. C. 537, 23 S. E. (2d) 842.

Elements of Offense—Intent.—The essential ingredient of the offense is the intent and not the noxious nature of the drug used. *State v. Crews*, 128 N. C. 581, 582, 38 S. E. 293; *State v. Shaft*, 166 N. C. 407, 81 S. E. 932.

Same—Abortion or Procuring Abortion.—It is just as much a crime to produce an abortion under the advice of and with means furnished by another, as it is to have an abortion performed by another. The gravamen of the offense is the abortion, or the procuring of the abortion, and not the manner by which it is accomplished. *Parker v. Edwards*, 222 N. C. 75, 78, 21 S. E. (2d) 876.

Same—Prescribing or Advising.—For a conviction under this section it is not essential to show that defendant procured the drug or that the woman used it. If defendant prescribed or advised its use with the illegal intent, that alone is sufficient. *State v. Powell*, 181 N. C. 515, 106 S. E. 133.

Same—Procuring Drug.—Under this section it is not necessary to charge or prove that the accused procured the drug. *State v. Crews*, 128 N. C. 581, 38 S. E. 293.

Same—Nature of Drug.—It is no defense even if defendant could show that the drug would not in fact cause a miscarriage. *State v. Crews*, 128 N. C. 581, 582, 38 S. E. 293. For the offense is committed by administering any substance with intent to procure an abortion. *State v. Shaft*, 166 N. C. 407, 81 S. E. 932.

Same—Stage of Pregnancy.—The offense can be perpetrated upon a woman at any stage of her pregnancy. *State v. Seagle*, 83 N. C. 630, 632.

Woman Not an Accomplice.—The woman is not, in a legal sense, an accomplice, whether or not she consents to the abortion. *State v. Shaft*, 166 N. C. 407, 81 S. E. 932, 933.

Statement of Woman as to Payment of Doctor's Fee.—The testimony as to the statement of a woman on whom the defendant was charged with bringing on a miscarriage or abortion, in violation of the provisions of this section and

section 14-45, that the defendant had paid the physician one-half of the \$200 fee he had charged for such services, uttered in the defendant's presence, is held competent with the other evidence in this case; and whether the defendant, under the circumstances, was so intoxicated that he did not understand, presented a question for the jury to determine as to whether the woman's statement was made in the hearing as well as in the defendant's presence, whether they were understood by him, whether he denied them or remained silent. *State v. Martin*, 182 N. C. 846, 109 S. E. 74.

Admissibility of Statement Made Four Months Prior to Abortion.—Upon the trial of a physician for procuring an abortion, testimony of a conversation between the physician and the woman as to an abortion about four months prior to the time in controversy is irrelevant and incompetent and its admission in evidence is prejudicial to the defendant and constitutes reversible error. *State v. Brown*, 202 N. C. 221, 162 S. E. 216.

Evidence of Disease Facilitating Abortion Properly Excluded.—Evidence offered by the defendant tending to show that the deceased was suffering from a disease which facilitated the abortion was not relevant to the issue involving the defendant's guilt as charged in the indictment. There was no error in the exclusion of such evidence. *State v. Evans*, 211 N. C. 458, 459, 190 S. E. 724.

Admission of evidence that woman took an anaesthetic was not prejudicial. *State v. Evans*, 211 N. C. 458, 459, 190 S. E. 724.

Sufficiency of Evidence.—Indictment and evidence that the defendant advised the prosecutrix, who was then "pregnant or quick with child," to take a certain drug, medicine, or substance with intent to destroy the child is sufficient for a conviction under this section. *State v. Powell*, 181 N. C. 515, 106 S. E. 133.

Testimony of the relation between the defendant and the woman, his paying half of the doctor's fees, and his concern as to the result, is held sufficient to sustain the verdict of guilty, taken in connection with the other evidence in the case. *State v. Martin*, 182 N. C. 846, 109 S. E. 74.

Variance.—On the trial of an indictment charging the performance of an operation upon a woman "quick with child," with intent thereby to destroy the child, where the proof tends to show the performance of an operation upon a pregnant woman, with no evidence that she was "quick with child," there is a fatal variance and defendant's motion for nonsuit should be allowed. *State v. Forte*, 222 N. C. 537, 23 S. E. (2d) 842.

Joinder of Offenses.—Where the defendant is tried under this section and section 14-45, for producing a miscarriage or abortion of a pregnant woman, the action will not be dismissed upon the evidence if it is sufficient for a conviction upon either count. *State v. Martin*, 182 N. C. 846, 109 S. E. 74.

Cited in *State v. Geurukus*, 195 N. C. 642, 643, 143 S. E. 208.

§ 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.—If any person shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, he shall be guilty of a felony, and shall be imprisoned in the jail or state's prison for not less than one year nor more than five years and shall be fined, at the discretion of the court. (Rev., s. 3619, Code, s. 976; 1881, c. 351, s. 2; C. S. 4227.)

Cross Reference.—See annotations under § 14-44.

Generally.—This section relates to miscarriage of, or to injury or destruction of the woman. *State v. Forte*, 222 N. C. 537, 538, 23 S. E. (2d) 842.

§ 14-46. Concealing birth of child.—If any person shall, by secretly burying or otherwise disposing of the dead body of a new-born child, endeavor to conceal the birth of such child, such person shall be guilty of a felony, and punished by fine or imprisonment, or both, such imprisonment to be in the county jail or state's prison, at the discretion of the court: Provided, that the im-

prisonment in the state's prison shall in no case exceed a term of ten years: Provided further, that nothing in this section shall be construed to prevent the mother, who may be guilty of the homicide of her child, from being prosecuted and punished for the same according to the principles of the common law. Any person aiding, counseling or abetting any woman in concealing the birth of her child shall be guilty of a misdemeanor. (Rev., s. 3623; Code, s. 1004; R. C., c. 34, s. 28; 1818, c. 985; 1883, c. 390; 21, Jac. I, c. 27. See 43 Geo. III, c. 58, s. 3; 9 Geo. IV, c. 31, s. 14; C. S. 4228.)

Editor's Note.—The editor deems it advisable to note here some of the older cases construing this section as it stood after the amendment of act 1818, chap. 985, in view of the fact that these constructions may well be applied to the section as it now stands.

Under the section as it then stood, the offense was the concealing of the death of a being on whom murder could have been committed. If, therefore, the child was stillborn, concealment would be no offense. The burden of showing that fact would, however, be on the defendant. *State v. Joiner*, 11 N. C. 350.

And a former conviction for concealing the birth of a child is no defense to an indictment for the murder of such child. *State v. Morgan*, 95 N. C. 641. See also 2 Enc. Dig. 328 et seq.

Evidence Insufficient for Directed Verdict.—Under the provisions of this section making it a felony for any person to conceal the birth of a new-born child by secretly burying or otherwise disposing of its dead body, it is reversible error for the trial judge to direct a verdict of guilty upon evidence tending to show that the defendant found the dead body of the infant in a state of decomposition and therefore buried it, and had informed the authorities thereof and directed them where he had buried it, it being required of the State to rebut the common-law presumption of innocence by establishing the defendant's guilt beyond a reasonable doubt. *State v. Arrowood*, 187 N. C. 715, 122 S. E. 759.

Art. 12. Libel and Slander.

§ 14-47. Communicating libelous matter to newspapers.—If any person shall state, deliver or transmit by any means whatever, to the manager, editor, publisher or reporter of any newspaper or periodical for publication therein any false and libelous statement concerning any person or corporation, and thereby secure the publication of the same, he shall be guilty of a misdemeanor. (Rev., s. 3635; 1901, c. 557, ss. 2, 3; C. S. 4229.)

Cross References.—As to the truth of allegations in indictment for libel as a defense, see § 15-168. As to libel by a newspaper, see §§ 99-1 and 99-2. As to derogatory reports about banks, see §§ 53-128 and 53-129. As to derogatory statements about building and loan associations, see § 54-44.

Responsibility of Newspaper Men.—“This statute punishes criminally the person who communicates libelous matter to newspapers, but that does not excuse the newspaper for publishing such libels, and the newspaper is responsible in damages for the injury done by the publication. Newspaper men (however) are not so apt to be prosecuted criminally for libel unless the publication attempts to destroy the reputation of an innocent woman by words which amount to charge of incontinency (under section 14-48), or unless there is a willful derogatory statement about the financial condition of a bank (under section 54-44).” 4 N. C. Law Rev. 27.

Cited in *State v. Pelley*, 221 N. C. 487, 20 S. E. (2d) 850.

§ 14-48. Slandering innocent women.—If any person shall attempt, in a wanton and malicious manner, to destroy the reputation of an innocent woman by words, written or spoken, which amount to a charge of incontinency, every person so offending shall be guilty of a misdemeanor. (Rev., s. 3640; Code, s. 1113; 1879, c. 156; C. S. 4230.)

Cross Reference.—As to civil liability for charging innocent women with incontinency, see § 99-4 and annotation thereto.

Object of Statute.—The object of the legislature in enacting this section was to protect the character of innocent women, that is, chaste and virtuous women, against wanton and malicious attempts to destroy their reputation by charges of incontinency. *State v. Aldridge*, 86 N. C. 680, 681.

Essential Elements of Offense.—The innocence and virtue, then, of the woman who is subject of the attempt, lie at the very foundation of the offense, and constitute its most essential element. *State v. McDaniel*, 84 N. C. 803, 805; *State v. Aldridge*, 86 N. C. 680, 681; *State v. Smith*, 155 N. C. 473, 71 S. E. 305.

What Constitutes Offense.—The offense of slandering an innocent woman consists in the attempt to destroy the reputation of an innocent woman by a charge of incontinency. *State v. Davis*, 92 N. C. 764. Not in the slander of a woman falsely by charging her with incontinency, but in the attempt to destroy her reputation by such means. *State v. McDaniel*, 84 N. C. 803, 804.

Same—Sufficiency.—And to constitute this offense, it is necessary to prove that the words alleged to have been spoken amounted to a charge of actual, definitive, illicit sexual intercourse. *State v. Moody*, 98 N. C. 671, 4 S. E. 119.

"Innocent Woman."—An "innocent woman," within the meaning of this section, is one who has never had sexual intercourse with any man, *State v. Malloy*, 115 N. C. 737, 20 S. E. 461. One who had never had actual illicit intercourse with any man, *State v. Davis*, 92 N. C. 764; *State v. Brown*, 100 N. C. 519, 6 S. E. 568; a pure woman—one whose character is "unsullied," *State v. McDaniel*, 84 N. C. 803, 805; a woman who, at the time the alleged slanderous charge was made, and at the time of the trial therefor, was chaste and virtuous. *State v. Grigg*, 104 N. C. 882, 10 S. E. 684.

Improper Conduct Short of Incontinency.—Mere lasciviousness, and the permission of liberties by men with her, although we might consider them improper, were not contemplated by the statute. *State v. Davis*, 92 N. C. 764, 765.

And a woman who has never had actual sexual intercourse with any one is an innocent woman, within the meaning of this section, even though she and a man were surprised in each other's embrace, about to commit the act of copulation, but before it took place. *State v. Hinson*, 103 N. C. 374, 9 S. E. 552.

Status of Reformed Women.—The question whether to slander a woman who had once lapsed from virtue, but who had reformed and led an exemplary life, would be a crime under this statute, was discussed but undecided in *State v. Davis*, 92 N. C. 764, the court expressing the opinion that in view of the strict construction put on the statute it would seem to exclude from the protection of its provisions every woman who had, at some time of her life, made a slip in her virtue, even though she had afterwards reformed.

Fortunately, however, the question was finally decided in favor of the reformed woman and the present law is that the fact that a woman at some former period in her life had departed from the path of virtue, will not per se entitle a defendant, indicted under the statute, to an acquittal; on the contrary, if the prosecutrix has satisfied the jury that she has reformed and led an exemplary life, she is entitled to the protection of the law. *State v. Grigg*, 104 N. C. 882, 10 S. E. 684.

Status of Seduced Women.—"A man cannot seduce a virtuous woman and then slander her with impunity, and, when indicted for such slander, claim protection against the penalties of law by pleading her disgrace, which he had caused to be brought upon her. The statute would fail to give that protection to innocent women, that was intended, if this was allowed." *State v. Misenheimer*, 123 N. C. 758, 763, 31 S. E. 852.

And a woman, seduced before marriage, but whose character was good before and since marriage, with this exception, is an "innocent woman" under this section. *State v. Grigg*, 104 N. C. 882, 10 S. E. 684; *State v. Misenheimer*, 123 N. C. 758, 31 S. E. 852.

Slander by Husband.—*State v. Edens*, 85 N. C. 522, holding that a husband is not indictable for slandering his wife, is overruled, and now, he is indictable under this section, if he wantonly and maliciously slanders his wife. *State v. Fulton*, 149 N. C. 485, 63 S. E. 145.

Malice Implied.—Where a slanderous charge is made, malice is implied, except in case of a privileged communication. *State v. Malloy*, 115 N. C. 737, 20 S. E. 461.

Burden of Proof.—The burden is upon the State to show that an innocent and virtuous woman has been slandered in order to convict under the provisions of this section. *State v. Smith*, 155 N. C. 473, 71 S. E. 305.

On trial of an indictment for slander under this section, the admission of the defendant that he spoke the words

charged does not shift the burden of proof upon him to show he had not slandered an innocent woman. Her innocence is a question for the jury upon the evidence, and no presumption of her innocence should be allowed to weigh against the defendant. *State v. McDaniel*, 84 N. C. 803.

Art. 13. Injuring Others by Use of High Explosives.

§ 14-49. Willful injury a felony; punishment.

—Any person who shall willfully and maliciously injure or attempt to injure any person, or any building in actual use for residential or business purposes or customarily devoted to any such use or any contents thereof, by the use of nitro-glycerine, dynamite, gunpowder, or other high explosive, shall be guilty of a felony, and on conviction shall be punished by imprisonment in the state prison for not less than five years and not more than thirty years. (1923, c. 80, s. 1; C. S. 4231(a).)

§ 14-50. Conspiracy declared a felony; punishment.

—If any two or more persons shall conspire to willfully and maliciously injure any person, or any building in actual use for residential or business purposes or customarily devoted to any such use or any contents thereof, by the use of nitro-glycerine, dynamite, gunpowder, or other high explosive, each and every one so conspiring shall be guilty of a felony, and on conviction shall be punished by imprisonment in the state prison for not less than two years and not more than fifteen years. (1923, c. 80, s. 2; C. S. 4231(b).)

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

Art. 14. Burglary and Other House-Breakings.

§ 14-51. First and second degree burglary.—

There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling-house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling-house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree. If such crime be committed in a dwelling-house or sleeping apartment not actually occupied by any one at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling-house or in any building not a dwelling-house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime, it shall be burglary in the second degree. (Rev., s. 3331; 1889, c. 434, s. 1; C. S. 4232.)

Cross References.—As to power of an individual to arrest a burglar, see § 15-40. As to accessories, see § 14-5 et seq. As to breaking into or entering jails with intent to kill or injure prisoners therein, see § 14-221.

In General.—Burglary, as defined at common law, was a capital offense, i. e., the breaking into and entering of the "mansion or dwelling-house of another in the night-time, with an intent to commit a felony therein," whether the intent was executed after the burglarious act or not. This has been changed by this section dividing the crime into two degrees, first and second, with certain designated differences between them, with different punishment prescribed for each. *State v. Allen*, 186 N. C. 302, 119 S. E. 504; *State v. Morris*, 215 N. C. 552, 2 S. E. (2d) 554.

The crime of burglary at common law was composed of five distinct elements, which were: (1), the breaking; (2), the entering; (3), that the breaking and entry be into a mansion house; (4), that the breaking and entering were

in the nighttime, and (5), that the breaking and entering were with the intent to commit a felony. *State v. Whit*, 49 N. C. 349, 350.

Curtilage.—The meaning of the term curtilage is a piece of ground, either inclosed or not, that is commonly used with the dwelling house. *State v. Twitty*, 2 N. C. 102.

Indictment Must Charge Intended Felony.—In order for an indictment to sustain a verdict of guilty of burglary in the first degree, it must not only charge the burglarious entry with the intent at the time, but must also charge the felony intended to be committed with sufficient definiteness, though it is not necessary that the actual commission of the intended felony be charged or proven. *State v. Allen*, 186 N. C. 302, 119 S. E. 504.

Same—Proof of a Different Intent.—An averment in an indictment for burglary, that the breaking was with the intent to commit larceny, is supported by proof that the entry was made with a purpose to commit a robbery. *State v. Halford*, 104 N. C. 874, 10 S. E. 524. The intent may be shown by circumstances. *State v. McBryde*, 97 N. C. 393, 1 S. E. 925.

Indictment Must Charge Occupancy.—The indictment charging the offense alleging that the dwelling-house was in the actual occupation of someone at the time of the commission of the crime, was not required at common law, nor under sec. 14-53, but now, under the provisions of this section omission of that averment makes the indictment good only as an indictment for burglary in the second degree. *State v. Fleming*, 107 N. C. 905, 908, 12 S. E. 131.

Burglary can not be committed in a tent or booth erected in a market or fair, although the owner lodges in it. See 1 Hawk. Pl. Cr., Ch. 38, § 35; 1 Hale Pl. Cr. 559; Roscoe Cr. Ev., 300. *State v. Jake*, 60 N. C. 471.

Burglary in a Store with Sleeping Quarters.—The offense of burglary may be committed by breaking into a store if there are sleeping quarters in the store, for the sleeping there makes it a dwelling. *State v. Foster*, 129 N. C. 704, 40 S. E. 209.

Value of Goods Stolen Immaterial.—A person who burglariously breaks and enters a dwelling at nighttime while the same is occupied is guilty of burglary in the first degree, and the fact that the value of goods stolen from the dwelling is less than \$20.00 is no defense to the capital charge, the provision of § 14-72, dividing larceny into two degrees, by its terms having no application to burglary. *State v. Richardson*, 216 N. C. 304, 4 S. E. (2d) 852.

Charging Elements of First and Second Degree.—Where a burglarious breaking into a dwelling-house has been charged in the bill of indictment, and the evidence tends only to establish the capital felony, an instruction to the jury that they might return a verdict of guilty in either degree is erroneous. *State v. Allen*, 186 N. C. 302, 119 S. E. 504.

Where there is evidence of a burglarious entry into a dwelling-house sufficient to convict of the capital offense, and also of the lesser offense, it is reversible error for the trial judge to refuse or neglect to charge the different elements of law relating to each of the separate offenses, though a verdict of guilty of the lesser offense might have been rendered, and this error is not cured under a general verdict of guilty of the greater offense. Id.

Where all the evidence shows that dwelling was actually occupied, instruction that verdict of burglary in second degree is not permissible is without error. *State v. Johnson*, 218 N. C. 604, 12 S. E. (2d) 278.

Discretionary Power of the Jury as to Degree.—The jury does not have the discretionary power to return a verdict of burglary in the second degree if all the evidence shows burglary in the first degree. But under an indictment for burglary in the first degree a verdict of second degree burglary may be returned if the evidence shows such an offense. *State v. Fleming*, 107 N. C. 905, 12 S. E. 131.

Where, in the trial of an indictment for burglary, the evidence showed that the house in which the crime was committed was actually occupied at the time, a conviction of burglary in the second degree is not authorized. *State v. Johnston*, 119 N. C. 883, 26 S. E. 163; *State v. Alston*, 113 N. C. 666, 18 S. E. 692; see sec. 15-171 and notes thereto.

One charged with burglary in the first degree and having admitted the entering and taking, the only question is whether it was done at nighttime, and the jury should not be charged that they could convict of a lesser offense as provided by this section, for the offense was either burglary in the first degree or larceny. *State v. McKnight*, 111 N. C. 690, 16 S. E. 319.

Sufficient Evidence to Submit Question of First Degree Burglary to Jury.—Evidence that the house was broken into by forcing the door open, that the time was late at night, and that the prosecuting witness and his wife were asleep in the room entered, together with evidence that

tracks in the freshly fallen snow were followed and led to defendant's room in another house in a distant part of the city, where defendant was apprehended, is held sufficient to be submitted to the jury on the question of defendant's guilt of burglary in the first degree. *State v. Oakley*, 210 N. C. 206, 186 S. E. 244.

Sufficient Evidence to Submit Question of Second Degree Burglary.—Evidence that defendants encountered the owner of a dwelling house immediately outside of the house at nighttime, and marched him into the house at the point of firearms and stole money which was hidden in the house, is sufficient to be submitted to the jury on the charge of second degree burglary, the method of entry being a constructive "breaking". *State v. Rodgers*, 216 N. C. 572, 5 S. E. (2d) 831.

Submission of Question of Guilt of Nonburglarious Breaking.—The evidence tended to show unlawful entry into a dwelling at nighttime while same was actually occupied, and the actual commission thereof of the felony charged in the bill of indictment. The evidence also tended to show that a window of the room in which felony was committed was open, and that the perpetrator of the crime was first seen in this room, and that after the commission of the crime he escaped by the open window. There was also circumstantial evidence that entry was made by opening a window of another room of the house. There was also sufficient evidence tending to identify defendant as the perpetrator of the crime. Held: Although there is no evidence of burglary in the second degree, the evidence tends to show burglary in the first degree, or a nonburglarious breaking and entering with intent to commit a felony, depending upon whether the perpetrator of the crime entered by the open window or burglariously "broke" into the dwelling, and therefore the trial court should have charged that the defendant might be found guilty of burglary in the first degree, guilty of a nonburglarious breaking and entering of the dwelling house with intent to commit a felony or other infamous crime therein, or not guilty, and its failure to submit the question of defendant's guilt of nonburglarious entry constitutes reversible error. *State v. Chambers*, 219 N. C. 442, 11 S. E. (2d) 280.

Applied in *State v. Robertson*, 210 N. C. 266, 186 S. E. 247; *State v. Walls*, 211 N. C. 487, 191 S. E. 232.

Cited in *State v. Lawrence*, 199 N. C. 481, 154 S. E. 741; *State v. Brown*, 206 N. C. 747, 175 S. E. 116; *State v. Hamlet*, 206 N. C. 568, 174 S. E. 451; *State v. Stevenson*, 212 N. C. 648, 194 S. E. 81.

§ 14-52. Punishment for burglary.—Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death: Provided, if the jury shall so recommend, the punishment shall be imprisonment for life in the state's prison. Anyone so convicted of burglary in the second degree shall suffer imprisonment in the state's prison for life, or for a term of years, in the discretion of the court. (Rev., s. 3330; Code, s. 994; 1889, c. 434, s. 2; 1870-1, c. 222; 1941, c. 215, s. 1; C. S. 4233.)

Cross References.—As to jury returning verdict for second degree burglary when first degree was charged in the indictment, see § 15-171 and annotation thereto. See also, annotation to § 14-51.

Editor's Note.—The 1941 amendment inserted the proviso.

Quoted in *State v. Oakley*, 210 N. C. 206, 186 S. E. 244; *State v. Johnson*, 218 N. C. 604, 12 S. E. (2d) 278.

Cited in *State v. Lawrence*, 199 N. C. 481, 154 S. E. 741.

§ 14-53. Breaking out of dwelling-house burglary.—If any person shall enter the dwelling-house of another with intent to commit any felony or other infamous crime therein, or being in such dwelling-house, shall commit any felony or other infamous crime therein, and shall, in either case, break out of such dwelling-house in the nighttime, such person shall be guilty of burglary. (Rev., s. 3332; Code, s. 995; R. C., c. 34, s. 8; 12 Anne, c. 7, s. 3; C. S. 4234.)

Indictment Must Charge Breaking Out.—One charged by indictment of breaking into a house cannot be convicted of breaking out, and a charge of the court to that effect is error. *State v. McPherson*, 70 N. C. 239.

§ 14-54. Breaking into or entering houses otherwise than burglariously.—If any person, with intent to commit a felony or other infamous crime therein, shall break or enter either the dwelling-house of another otherwise than by a burglarious breaking; or any storehouse, shop, warehouse, banking-house, counting-house or other building where any merchandise, chattel, money, valuable security or other personal property shall be; or any uninhabited house, he shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail not less than four months nor more than ten years. (Rev., s. 3333; Code, s. 996; 1874-5, c. 166; 1879, c. 323; C. S. 4235.)

Intent Must Be Shown.—In order to convict under this section it is necessary to show intent and a failure to show intent leaves no other course except acquittal. *State v. Spear*, 164 N. C. 452, 79 S. E. 869.

The case of *State v. Hooker*, 145 N. C. 581, 59 S. E. 866, is cited and it is said that the construction of the statute in that case, which is that intent should only apply to a breaking into an uninhabited house, was obiter dictum as that point was not raised in the case. *Clark, C. J.*, dissents on the grounds that a conviction for a less offense should be sustained.—Ed. Note.

In *State v. Crisp*, 188 N. C. 799, 801, 125 S. E. 543, it is said: "The trial court was doubtless misled by the dictum in *State v. Hooker*, 145 N. C. 581, 582, 59 S. E. 866, to the effect that, as used in section 3333 of the Revisal, the words 'with intent to commit a felony or other infamous crime therein,' applied only to the clause with which it was closely connected, and not to all the clauses in the section; but this was expressly disapproved in *State v. Spear*, 164 N. C. 452, 79 S. E. 869. And further, it should be noted that this section of the Revisal has been restated in accordance with the decision in the *Spear* case, brought forward as section 4235 [now G. S. 14-54] in the Consolidated Statutes."

"Unlawfully Breaking" Charges Intent.—An indictment under this section for housebreaking, is sufficient when charging "that defendant did break and enter (otherwise than burglarious breaking) the storeroom and house, etc., with intent to commit a felony, to wit, with intent the goods, etc., etc., feloniously to steal, etc." and is not defective for the failure to allege that the breaking and entering was feloniously done, there being no distinction between the words "unlawfully breaking" and "entering with the intent to commit a felony." *State v. Goffney*, 157 N. C. 624, 73 S. E. 162.

Intent to Commit More Than One Offense.—An indictment for entering a house with an intent to commit a felony or other infamous crime is not defective because it charges an intent to commit more than one offense. *State v. Christmas*, 101 N. C. 749, 8 S. E. 361.

Owner Procuring Act to Be Done.—In order to convict of housebreaking under this section there must have been an unlawful entry by the prisoner, and when the owner has procured the act to be done by the prisoner in company with and at the instance of the one selected by the owner for the purpose, the entry is lawful, and no crime is shown to have been committed, whatever the intent of the prisoner may have been at the time. *State v. Goffney*, 157 N. C. 624, 73 S. E. 162.

Entry without Breaking.—It is evident it was the intention of the Legislature to make it a penal offense to wilfully break into a store-house where merchandise, etc., is kept, or into an uninhabited house, or to wilfully enter into a dwelling-house in the night otherwise than by breaking, with the intent to commit a felony. *State v. Hughes*, 86 N. C. 662, 664.

Crime Therein Distinct from Breaking and Entering.—"Prosecution for larceny will not bar a subsequent prosecution for breaking and entering with intent to commit larceny, the larceny being necessarily distinct from the breaking and entering. *State v. Ridley*, 48 Iowa, 370; *Fisher v. State*, 46 Ala., 717; *State v. Ford*, 30 La. Ann. (Part I), 311; *People v. Curtis*, 76 Cal., 517; *Smith v. State*, 22 Tex. App., 350; *Copenhagen v. State*, 15 Ga. 64." *State v. Hooker*, 145 N. C. 581, 584, 59 S. E. 866.

Erroneous Instruction.—The state's evidence tended to show that defendant broke and entered the dwelling house in question at night while same was occupied as a sleeping apartment, stole some money and ran when the female occupant discovered him and screamed. Defendant contended, upon supporting evidence, that at the time he was too drunk to know where he was or what he was doing. The court instructed the jury that defendant might be con-

victed of burglary in the first degree, or of burglary in the second degree, if they found that the room was unoccupied, but if they found defendant was too drunk to form felonious intent they should return a verdict of not guilty. Held: The instruction required the jury to find the defendant guilty of burglary in the first degree or not guilty, since there was no evidence that the room was unoccupied, and defendant is entitled to a new trial for error of the court in failing to instruct that defendant might be found guilty of breaking and entering otherwise than burglariously, or of an attempt to commit the offense. *State v. Feyd*, 213 N. C. 617, 197 S. E. 171.

Question for the Jury.—Under sec. 15-40 a person in whose presence a felony is committed has power to arrest the offender. Where some one breaks into the garage of another and the owner of the garage is killed in trying to make the arrest, the question of the offense being committed in his presence should be submitted to the jury. *State v. Blackwelder*, 182 N. C. 899, 109 S. E. 644.

Evidence Sufficient for Conviction.—Evidence that a cotton mill had been broken into and that goods taken therefrom had been found in defendant's possession within an hour or two thereafter, with further evidence of his unlawful possession, is sufficient for conviction, under the provisions of this section and defendant's demurrer to the State's evidence, or motion for dismissal thereon, is properly overruled. *State v. Williams*, 187 N. C. 492, 122 S. E. 13.

Duty of Court to Submit to Jury Question of Guilt Hereunder Where Indictment Charges First Degree Burglary.—Where the evidence is sufficient to justify it upon a bill of indictment charging a defendant with burglary in the first degree, it is the duty and mandatory upon the court to submit to the jury the question of whether or not the defendant is guilty of breaking and entering the dwelling house in question at the time and place mentioned in the bill of indictment otherwise than burglariously, and it is error for the court to fail or refuse to do so. *State v. Johnson*, 218 N. C. 604, 12 S. E. (2d) 278.

The evidence tended to show unlawful entry into a dwelling at nighttime while same was actually occupied, and the actual commission therein of the felony charged in the bill of indictment. The evidence also tended to show that the window of the room in which the felony was committed was open, and that the perpetrator of the crime was first seen in this room, and that after the commission of the crime he escaped by the open window. There was also circumstantial evidence that entry was made by opening a window of another room of the house. There was also sufficient evidence tending to identify defendant as the perpetrator of the crime. Held: Although there is no evidence of burglary in the second degree, the evidence tends to show burglary in the first degree, or a nonburglarious breaking and entering with intent to commit a felony, depending upon whether the perpetrator of the crime entered by the open window or burglariously "broke" into the dwelling, and therefore the trial court should have charged that the defendant might be found guilty of burglary in the first degree, guilty of a nonburglarious breaking and entering of the dwelling house with intent to commit a felony or other infamous crime therein, or not guilty, and its failure to submit the question of defendant's guilt of nonburglarious entry constitutes reversible error. *State v. Chambers*, 218 N. C. 442, 11 S. E. (2d) 280.

Evidence held sufficient to sustain conviction under this section. *State v. Hargett*, 196 N. C. 692, 146 S. E. 801.

Cited in *State v. Ellsworth*, 130 N. C. 690, 41 S. E. 548, in dissenting opinion, *State v. Gadberry*, 117 N. C. 811, 23 S. E. 477; *State v. Ratcliff*, 199 N. C. 9, 11, 153 S. E. 605; *State v. Setzer*, 198 N. C. 663, 153 S. E. 118.

§ 14-55. Preparation to commit burglary or other house-breakings.—If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit a felony or other infamous crime therein; or shall be found having in his possession, without lawful excuse, any pick-lock, key, bit or other implement of house-breaking; or shall be found in any such building, with intent to commit a felony or other infamous crime therein, such person shall be guilty of a felony and punished by fine or imprisonment in the state's prison, or both, in the discretion of the court. (Rev., s. 3334; Code, s. 997; 1907, c. 822; C. S. 4236.)

The offense of possessing implements of housebreaking

without lawful excuse, does not require the proof of any "intent" or "unlawful use." *State v. Vick*, 213 N. C. 235, 195 S. E. 779.

A sentence of not less than twenty-five nor more than thirty years upon a plea of guilty of possession of weapons and implements for house breaking, in violation of this section is within the discretion of the court conferred by the statute, and is not objectionable as a cruel and unusual punishment within the meaning of Art. I, sec. 14, of the Constitution of North Carolina. *State v. Cain*, 209 N. C. 275, 183 S. E. 300.

§ 14-56. Breaking into or entering railroad cars.—If any person shall, with intent to commit larceny or other felony, break any seal upon a railroad car containing any goods, wares, freight or other thing of value, or shall unlawfully and willfully break or enter into any railroad car containing any goods, wares, freight or other thing of value, such person shall upon conviction be punished by confinement in the penitentiary in the discretion of the court for a term not exceeding five years. Any person found unlawfully in such car shall be presumed to have entered in violation of this section. (1907, c. 468; C. S. 4237.)

Cited in *State v. Brown*, 198 N. C. 41, 150 S. E. 635; *State v. Hendricks*, 207 N. C. 873, 178 S. E. 557.

§ 14-57. Burglary with explosives.—Any person who, with intent to commit crime, breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by use of nitro-glycerine, dynamite, gunpowder, or any other explosive, or acetylene torch, shall be deemed guilty of burglary with explosives. Any person convicted under this section shall be punished as for burglary in the second degree, as provided in § 14-52. (1921, c. 5; C. S. 4237(a).)

Cited in *State v. Vick*, 213 N. C. 235, 195 S. E. 779.

Art. 15. Arson and Other Burnings.

§ 14-58. Punishment for arson.—Any person convicted according to due course of law of the crime of arson shall suffer death: Provided, if the jury shall so recommend, the punishment shall be imprisonment for life. (Rev., s. 3335; Code, s. 985; R. C., c. 34, s. 2; 1870-1, c. 222; 1941, c. 215, s. 2; C. S. 4238.)

Cross References.—As to accomplices, see § 14-5 et seq. As to arrest of offender by insurance commissioner and prosecution, see § 69-2.

Editor's Note.—At common law arson was defined by Lord Coke as "the malicious and voluntary burning of the house of another by night or by day." "House" was meant to designate dwelling house and did not apply to barns and other buildings. Some of the states have extended the term so as to apply it to all property, and the common-law idea of "an offense against the security of the habitation" has been extended to an "offense against property." With this extension of application and meaning has come a change in the penalty, and but few states punish the offense by death.

In this state all offenses against property other than the habitation are covered by statutes making the offense punishable by imprisonment. So the offense that carries the death penalty is one against the habitation only and one that will greatly endanger human life. The 1941 amendment added the provision for life imprisonment upon recommendation of the jury.

By the act of 1869 the punishment for arson was confinement in the penitentiary, but by the act of 1871 a death penalty was fixed. In *State v. Wise*, 66 N. C. 120, the defendant was convicted and received the death sentence but judgment was arrested because the indictment did not specify which of the two acts it was found under. The failure to set out in the indictment the date of the offense left a question as to which of the statutes should apply as both of them provided punishment, one for offenses before April 4, 1871, the other for offenses after that date.

Wood Must Be Charred.—Where the statute requires that

the building be "burned" an indictment charging "setting fire to" is not sufficient for there can be a setting fire to without charring the wood, as required to constitute burning. But if the statute provides "setting fire to," the indictment charging "setting fire to and burning" is sufficient as the charge of burning is surplusage and not detrimental to the indictment. *State v. Hall*, 93 N. C. 571.

Cited in *State v. Freeman*, 197 N. C. 376, 148 S. E. 450; *State v. Wilfong*, 222 N. C. 746, 24 S. E. (2d) 629.

§ 14-59. Burning of certain public and other corporate buildings.—If any person shall willfully and maliciously burn the statehouse, or any of the public offices of the state, or any courthouse, jail, arsenal, clerk's office, register's office, or any house belonging to any county or incorporated town in the state or to any incorporated company whatever, in which are kept the archives, documents, or public papers of such county, town or corporation, he shall, on conviction, be imprisoned in the state's prison for not less than five nor more than ten years. (Rev., s. 3344; Code, s. 985, subsec. 3; R. C., c. 34, s. 7; 1830, c. 41, s. 1; 1868-9, c. 167, s. 5; C. S. 4239.)

Intent Necessary.—"If the prisoner put fire to the jail, not with an intention of destroying it, he is not guilty under the act of assembly. But if he put fire to the jail and burnt it with an intent to burn it down and destroy it, he is guilty, notwithstanding the fire went out, or was put out by others before the intention of the prisoner was completed by burning down the jail; and this is the law, although his main intention was to escape." *State v. Mitchell*, 27 N. C. 350, 353.

§ 14-60. Setting fire to schoolhouse.—If any person shall willfully set fire to any schoolhouse, or procure the same to be done, he shall be guilty of a felony, and upon conviction shall be punished by imprisonment in the state's prison or the county jail, and may also be fined, in the discretion of the court. (Rev., s. 3345; 1901, c. 4, s. 28; 1919, c. 70; C. S. 4240.)

§ 14-61. Burning or attempting to burn certain bridges and buildings.—If any person, with intent to destroy the same, shall willfully and maliciously set fire to and burn any public bridge, or private toll-bridge, or the bridge of any incorporated company, or any fire-engine house, or any house belonging to any county or incorporated town, used for public purposes other than the keeping of archives, documents and public papers, or any house belonging to an incorporated company and used in the business of such company; or if any person shall willfully and maliciously attempt to burn any of such houses or bridges, or any of the houses or buildings mentioned in this article, the person offending shall be guilty of a felony and shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years. (Rev., s. 3337; Code, s. 985, subsec. 4; R. C., c. 34, s. 30; 1825, c. 1278; C. S. 4241.)

City Market House.—A person charged with damaging a market house by fire must be tried under this section and not under a municipal ordinance as the general law must prevail over the ordinance, when they conflict. The municipal court would have jurisdiction only by express legislation conveying it. *Washington v. Hammond*, 76 N. C. 33.

§ 14-62. Setting fire to churches and certain other buildings.—If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any church, chapel or meeting-house, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or to any building or erec-

tion used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be guilty of a felony, and shall be imprisoned in the state's prison for not less than two nor more than forty years. (Rev., s. 3338; 1885, c. 66; 1903, c. 665, s. 2; 1874-5, c. 228; Code, s. 985, subsec. 6; 1927, c. 11, s. 1; C. S. 4242.)

I. In General.

II. Indictment.

III. Evidence.

IV. Question for Jury.

Cross References.

As to buildings destroyed by a tenant, see § 42-11 and annotation thereto. As to burning crops in fields, see § 14-141. As to burning of gin-houses, tobacco houses, and stables, see § 14-64. As to setting fire to grass and brush lands and woodlands, see § 14-136.

I. IN GENERAL.

Editor's Note.—By the amendment Public Laws 1927, c. 11, that part immediately after "set fire to" reading as follows "or burn or cause to be burned, or aid, counsel or procure the burning of," was added.

Crime Fixed Herein Is Separate from That in § 14-66.—A verdict of not guilty on a count brought under this section does not necessarily carry a verdict of not guilty on a second count brought under § 14-66, the counts being separate and distinct and each requiring proof of facts which the other does not. State v. Pierce, 208 N. C. 47, 179 S. E. 8.

Barn Defined.—A building of hewn logs (twenty-six feet by fifteen), divided by a partition of the same, upon one side of which were horses and upon the other corn, oats and wheat (threshed and unthreshed), also hay, fodder, etc., having sheds adjoining, under which were wagons and other farming utensils, is a "barn" within the meaning of this section. State v. Cherry, 63 N. C. 493.

But a house seventeen feet long and twelve wide, setting on blocks in a stable yard, having two rooms in it—one quite small, used for storing nubbins and refuse corn to be first fed to the stock, and the other used for storing peas, oats, and other products of the farm—is not a barn within the meaning of the statute. State v. Laughlin, 53 N. C. 455.

II. INDICTMENT.

"Wantonly and Wilfully" Must Be Charged.—An indictment charged that the defendant "did unlawfully, wilfully and feloniously set fire to and burn a certain gin house, belonging to B. and in the possession of one G." Verdict of guilty and defendant moved in arrest of judgment for that this section had been amended (Laws 1885, Chapter 66,) by striking out the words "unlawfully and maliciously" and inserting in lieu thereof "wantonly and wilfully," and that the words used in the indictment are not synonymous with those required by the amended statute. The objection would be well taken if this indictment was sustainable only under this section. State v. Morgan, 98 N. C. 641, 3 S. E. 27; State v. Massey, 97 N. C. 465, 2 S. E. 445. But it is a valid indictment under section 14-64, as was held in State v. Thorne, 81 N. C. 555, cited and followed by State v. Green, 92 N. C. 779. It seems to be the rule that "unlawfully and wilfully" do not answer the requirements under this section but under section 14-64 it is sufficient in the indictment. State v. Pierce, 123 N. C. 745, 746, 31 S. E. 847.

Charge of Particular Intent Not Necessary.—An indictment for burning a mill, under this section, as amended by the Laws of 1885, Ch. 66, need not allege that the prisoner set fire to the mill with the intent to injure some particular person. State v. Rogers, 94 N. C. 860.

It was formerly the rule that an indictment under this section for burning a barn must aver that the act was done "with intent thereby to injure or defraud" some person. And an indictment for such offense at common law must charge that the barn contained hay or grain, or is a parcel of the dwelling house. State v. Porter, 90 N. C. 719.

Title to Property Immaterial.—In the indictment it is not necessary to set out that the burned property "was the property of" or "was in the possession of" anyone. The constituent element is "wilful and wanton." State v. Daniel, 121 N. C. 574, 28 S. E. 255.

Kind of Building Must Be Specified.—An indictment for burning a gin house will not lie under this section as a gin house is not specified. An indictment describing the subject of offense as "house" is sufficient to describe a dwelling,

and "house" is only used to describe dwellings. This section applies only to specified buildings. State v. Thorne, 81 N. C. 555.

III. EVIDENCE.

In General.—Under an indictment for burning a barn evidence of bad blood for the owner of the barn, footprints, failure of defendant to go to fire when the remainder of the neighborhood was there, the hour defendant arose, and his acts when notified of the fire is admissible and is sufficient to sustain a verdict of guilty. State v. Allen, 149 N. C. 458, 62 S. E. 597.

Admissibility.—On trial under indictment under this section for burning a barn to collect fire insurance thereon, evidence that the defendant at another place, at some indefinite time in the past, had another barn to burn is incompetent and does not come within the exceptions to the general rule, there being no causal relation between the two fires, or logical or natural connection between them, nor were they a part of the same transaction. State v. Deadmon, 195 N. C. 705, 143 S. E. 514.

Motive or Intent.—"It is not always necessary to show either a motive or an intent, for in some offenses the intent to do the forbidden act is the criminal intent, and the act committed with that intent constitutes the crime. If the person has done the act which in itself is a violation of the law, he will not be heard to say that he did not have the intent. State v. King, 86 N. C. 603; State v. Voight, 90 N. C. 741; State v. Smith, 93 N. C. 516; State v. McBrayer, 98 N. C. 619, 2 S. E. 755; State v. McLean, 121 N. C. 589, 28 S. E. 140, 42 L. R. A., 721. But this principle does not apply when the act is itself equivocal and becomes criminal only by reason of the intent." State v. Morgan, 136 N. C. 628, 629, 48 S. E. 670.

Bad Feeling.—It is entirely competent for the State to show motive upon the part of the defendant to burn a barn occupied and used by the witness, and to that end it was proper to show that bad feeling existed, and the reason for it, but that part of a reply of a witness in which he stated that defendant had been convicted of stealing and sent to the chain gang should be excluded and the jury carefully cautioned not to regard it as it puts the character of the defendant in issue. State v. Barrett, 151 N. C. 665, 666, 65 S. E. 894.

Where the only evidence against a person accused of burning a barn is threats made by him, without any evidence connecting him with the execution of said threats, or with the offense charged, the trial judge should withdraw the case from the jury. State v. Freeman, 131 N. C. 725, 42 S. E. 575.

The proof of threats directed against the son and grandson, from their near relationship to the owner of a burned house, is relevant, though perhaps feeble, in showing general ill will to the family and a motive for the act. State v. Rash, 34 N. C. 382; State v. Gailor, 71 N. C. 88; State v. Green, 92 N. C. 779; State v. Thompson, 97 N. C. 496, 498, 1 S. E. 921.

Same—Toward Agent.—Ill will toward an agent of the owner of a building is not sufficient to show motive for setting fire to the building, as such evidence is too remote. State v. Battle, 126 N. C. 1036, 35 S. E. 624.

Clark, J., dissents on the ground that malice toward the owner is not necessary to constitute the offense, and though the ill will was remote it was a circumstance to show motive.

Proof of Title Not Necessary.—"Ownership is alleged only to identify the property, and is sufficiently proved by showing occupancy. State v. Daniel, 121 N. C. 574, 576, 28 S. E. 255; State v. Thompson, 97 N. C. 496, 1 S. E. 921; State v. Jaynes, 78 N. C. 504, 507; State v. Gailor, 71 N. C. 88." State v. Sprouse, 150 N. C. 860, 861, 64 S. E. 900.

"This section is copied from the English Statute of 7 and 8 Geo. IV., c. 30; and under that it was sufficient to allege the building simply 'of' A. (Archb. Cr. Pl. [3d Am. Ed.] 262, and lxiv.); and this is the better practice, proof of either possession or property being sufficient identification." State v. Daniel, 121 N. C. 574, 577, 28 S. E. 255.

Subsequent Attempt to Fire Another Building.—Where the defendant was indicted for setting fire to an outhouse, evidence is competent to show that at the same time an attempt was made to fire a dwelling-house near it, the evidence directly connecting the defendant with the latter attempt. State v. Thompson, 97 N. C. 496, 1 S. E. 921.

Blood Hounds.—On the trial of defendant for burning a barn, the tracing by the bloodhounds some two hours later of a track leading from the rear of the barn to defendant's residence, together with the identification of the track as that of defendant by one of his shoes, with evidence of motive, is sufficient evidence of guilt to take the case to the jury. State v. Thompson, 192 N. C. 704, 135 S. E. 775.

IV. QUESTION FOR JURY.

Must Be Sufficient Evidence.—The general rule is, if there

be any evidence tending to prove the fact in issue the weight of it must be left to the jury, but if there be no evidence conducing to that conclusion the Judge should say so, and, in a criminal case, direct an acquittal. In *State v. Vinson*, 63 N. C. 335, it is said: "But it is confessedly difficult to draw the line between evidence which is very slight, and that which, as having no bearing on the fact to be proved, is in relation to that fact no evidence at all." The evidence must be more than sufficient to raise a suspicion or a conjecture. *State v. Rhodes*, 111 N. C. 647, 650, 15 S. E. 1038.

Where, in a prosecution under this section, the evidence fails to establish the felonious origin of the fire or the identity of the defendant as the one who committed the offense charged, or circumstances from which these facts might reasonably be inferred, it is insufficient to be submitted to the jury. *State v. Church*, 202 N. C. 692, 163 S. E. 874.

On trial for wilfully and wantonly burning a barn in violation of this section, evidence of the felonious origin of the fire and of the identity of the defendant as the culprit is sufficient to be submitted to the jury that defendant had committed the crime, the corpus delicti being reasonably inferable from the circumstances, there being evidence that a fresh boot track found at the scene of the crime was made by defendant's boot, and that defendant failed to answer charges of his brother, made in the presence of officers, under circumstances calling for a reply. *State v. Wilson*, 205 N. C. 376, 171 S. E. 338.

Intent.—It is *prima facie* presumed that a person intended the natural consequence of his act when he set fire to a building. But this is subject to rebuttal by evidence to the contrary and then "intent" becomes a question for the jury. *State v. Phifer*, 90 N. C. 721.

Alibi.—The burden of proving an alibi does not rest on the prisoner, but the burden of proving the guilt of the prisoner rests on the state. It is for the jury to decide, and it is only necessary for the prisoner to offer enough evidence to produce in the mind of the jury a reasonable doubt. *State v. Jaynes*, 78 N. C. 504.

§ 14-63. Burning boats and barges.—If any person, with the intent to destroy the same, shall willfully and maliciously, or for a fraudulent purpose, set fire to and burn any boat, barge or float, whether he be the owner thereof or not, he shall be guilty of a felony and shall be punished by imprisonment in the state's prison for not less than four months nor more than ten years, or fined in the discretion of the court. (1909, c. 854; C. S. 4243.)

§ 14-64. Burning of gin-houses, tobacco houses and stables.—Every person convicted of the willful burning of any gin-house or tobacco house, or any part thereof, or, in the nighttime, of any stable containing a horse or a mule, or cattle, shall be imprisoned in the state's prison not less than two nor more than ten years. (Rev., s. 3341; 1863, c. 17; 1868-9, c. 167, s. 5; 1903, c. 665, s. 1; Code, s. 985, subsec. 2; C. S. 4244.)

Cross References.—As to burning crops in the field, see § 14-141. As to setting fire to churches and certain other buildings, see § 14-62. As to setting fire to grass and brush lands and woodlands, see §§ 14-136 and 14-137.

Indictment in General.—That any informality will not be grounds for quashing proceeding if the charge is set out in a clear manner and enough matter appears to enable the court to proceed to judgment, see sec. 15-153. That judgments will not be vitiated for failure to aver certain unnecessary matter, see section 15-155. *State v. Rogers*, 168 N. C. 112, 83 S. E. 161.

Necessity of Alleging "Wilful Burning."—In the case of *State v. Thorne*, 81 N. C. 555, there was an indictment for unlawfully, maliciously and feloniously burning a ginhouse. The court was asked to charge the jury that the defendant could not be convicted under the act of 1869, because the burning was not charged to have been wilfully done. The court held that the word maliciously was more comprehensive and included wilfully. *State v. Green*, 92 N. C. 779, 783.

"Nighttime" Must Be Alleged.—An indictment which omits to allege that the burning was in the "nighttime," is defective. *State v. England*, 78 N. C. 552.

Necessity of Showing Motive.—It is never indispensable to a conviction that a motive for the commission of the crime should appear. But when the State has to rely upon circumstantial evidence to establish the guilt to the defendant,

it is not only competent, but often very important, in strengthening the evidence for the prosecution, to show a motive for committing the crime. *State v. Green*, 92 N. C. 779, 782.

§ 14-65. Fraudulently setting fire to dwelling-houses.—If any person, being the occupant of any building used as a dwelling-house, whether such person be the owner thereof or not, or, being the owner of any building designed or intended as a dwelling-house, shall willfully and wantonly or for a fraudulent purpose set fire to or burn or cause to be burned, or aid, counsel or procure the burning of such building, he shall be guilty of a felony, and shall be punished by imprisonment in the state's prison or county jail, and may also be fined, in the discretion of the court. (Rev., s. 3340; Code, s. 985; 1903, c. 665, s. 3; 1909, c. 862; 1927, c. 11, s. 2; C. S. 4245.)

Editor's Note.—By the amendment Public Laws 1927, c. 11, that part of the section immediately following "set fire to" reading as follows "or burn or cause to be burned, or aid, counsel or procure the burning of," was added.

Specifying Particular Fraudulent Purpose.—Where in a prosecution under this section the indictment charges that the defendant burned his dwelling-house for the fraudulent purpose of obtaining insurance money thereon, and the court charges the jury that if they should find beyond a reasonable doubt that the defendant did the act charged for a fraudulent purpose, it was not necessary for the bill of indictment to specify any particular fraudulent purpose, and the unnecessary allegation in the bill is not, necessarily, fatal. *State v. Morrison*, 202 N. C. 60, 161 S. E. 725.

Sufficiency of Evidence.—Evidence that fire in defendant's house started in a closet in which was hanging a quilt soaked in kerosene, that kindling wood was on the floor of the closet, that the closet had no ceiling, but opened at the top into the attic, that defendant was being pressed to pay installments on the mortgage on the house, and was threatened with foreclosure, with other incriminating circumstantial evidence, establishes a motive and an opportunity for the defendant to commit the crime, and that the fire was of incendiary origin, and is sufficient to be submitted to the jury in a prosecution under this section. *State v. Moses*, 207 N. C. 139, 176 S. E. 267.

Cited in *State v. Klutts*, 206 N. C. 726, 727, 175 S. E. 81.

§ 14-66. Willful and malicious burning of personal property.—Any person who shall willfully or maliciously burn, or cause to be burned, or aid, counsel, or procure the burning of any goods, wares, merchandise, or other chattels or personal property of any kind, whether the same shall be at the time insured, by any person or corporation against loss or damage by fire, or not, with intent to injure or prejudice the insurer, creditor or the person owning the property, or any other person, whether the same be the property of such person or another, shall be guilty of a felony. (1921, c. 119; C. S. 4245(a).)

See the note to § 14-62.

Evidence that defendant's car was driven away from defendant's house shortly before defendant's personal property therein was destroyed by fire, and that the car had been driven to the house several times during the days preceding the fire, and that the occupants of the car were heard in the house, is held insufficient, in the absence of evidence that defendant was one of the occupants of the car, to resist defendant's motions for judgment as of nonsuit in a prosecution under this section, although there was ample evidence that the fire was of incendiary origin and destroyed personal property of defendant which had been insured by him. *State v. Simms*, 208 N. C. 459, 181 S. E. 269.

§ 14-67. Attempting to burn dwelling-houses and certain other buildings.—If any person shall willfully attempt to burn any dwelling-house, uninhabited house, barn, stable or outhouse, or any mill, manufacturing house, cotton gin, tobacco barn, granary or turpentine distillery, the prop-

erty of another, he shall be guilty of a felony, and shall be punished by imprisonment in the state's prison or county jail, and may also be fined, in the discretion of the court. (Rev., s. 3336; Code, s. 985, subsec. 7; 1876-7, c. 13; C. S. 4246.)

See notes to section 14-64.

In General.—A conviction for burning a ginhouse can be had either under this section or section 14-64. All that is required is a clear statement of the charge and because of sections 15-153, 15-155 if sufficient matter is set out in the charge, the proceedings will not be quashed, because of use of terms that have the same meaning as those used in the statute. If the punishment does not exceed that prescribed by either section it is immaterial under which section the conviction was had. *State v. Rogers*, 168 N. C. 112, 83 S. E. 161.

Cited in *State v. Hampton*, 210 N. C. 283, 186 S. E. 251.

§ 14-68. Failure of owner of property to comply with orders of public authorities.—If the owner or occupant of any building or premises shall fail to comply with the orders of the chief of the fire department, or of the insurance commissioner, he shall be guilty of a misdemeanor, and shall be fined not less than ten nor more than fifty dollars for each day's neglect. (Rev., s. 3343; 1899, c. 58, s. 4; C. S. 4247.)

§ 14-69. Failure of officers to investigate incendiary fires.—If any town or city officer shall fail, neglect or refuse to comply with any of the requirements of the law in regard to the investigation of incendiary fires, he shall be guilty of a misdemeanor and may be fined not less than twenty-five nor more than two hundred dollars. (Rev., s. 3342; 1899, c. 58, s. 5; C. S. 4248.)

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

Art. 16. Larceny.

§ 14-70. Distinction between grand and petit larceny abolished.—All distinctions between petit and grand larceny, where the same has had the benefit of clergy, are abolished; and the offense of felonious stealing, where no other punishment shall be specifically prescribed therefor by statute, shall be punished as petit larceny is: Provided, that in cases of much aggravation, or of hardened offenders, the court may, in its discretion, sentence the offender to the state's prison for a period not exceeding ten years. (Rev., s. 3500; Code, s. 1075; R. C., c. 34, s. 26; C. S. 4249.)

Cross References.—As to larceny from dwelling by breaking and entering, see § 14-51 et seq. As to stealing of aircraft, see § 63-25. As to obtaining property by false pretense, see § 14-100 et seq. As to taking away or injuring exhibits at fairs, see § 14-164. As to robbing fishing nets, see § 113-248. As to theft of property from public libraries, museums, etc., see § 14-398. As to restitution of stolen property to its owner, see § 15-8. As to taking shellfish from private grounds, see § 113-215. As to robbery, see § 14-87.

Intent Necessary.—"To constitute the crime of larceny, there must be an original, felonious intent, general or special, at the time of the taking. If such intent be present, no subsequent act or explanation can change the felonious character of the original act. But if the requisite intent be not present, the taking is only a trespass, and it cannot be felony by any subsequent misconduct or bad faith on the part of the taker. *State v. Arkle*, 116 N. C. 1017, 1031, 21 S. E. 408." *State v. Holder*, 188 N. C. 561, 563, 125 S. E. 113.

Stolen Property Must Be Designated in Indictment.—"There is required a reasonable certainty in the designation of stolen property to enable the defendant to know and meet the specific charge if he can, and to protect himself if he cannot, from a second prosecution for the same offense."

State v. Clark, 30 N. C. 226; *State v. Horan*, 61 N. C. 571; *State v. Bragg*, 86 N. C. 688, 690.

Evidence Must Sustain Charge.—A charge of stealing two barrels of turpentine is not supported by proof of the taking of that quantity from the box cut in the tree to receive and hold the descending sap. *State v. Moore*, 33 N. C. 70; *State v. Bragg*, 86 N. C. 688, 690.

One Act Two Offences.—A person committing larceny from the person, upon two persons at the same time may be tried and convicted for both offences. *State v. Bynum*, 117 N. C. 749, 23 S. E. 218; *State v. Bynum*, 117 N. C. 752, 23 S. E. 219.

Accessories Abolished.—There are no accessories to larceny. All that counsel and aid are guilty of the offence as principals. *State v. Gaston*, 73 N. C. 93.

Larceny and Malicious Mischief Distinguished.—An indictment for larceny at common law for stealing a cow is not supported by proof that the defendant shot the cow down and then cut off her ears. Such an act is not larceny, but malicious mischief. *State v. Butler*, 65 N. C. 309, cited in note in 29 L. R. A., N. S., 40. See section 14-85.

Exclusive Jurisdiction in Superior Court.—"Under the general law all misdemeanors are punishable by fine and imprisonment at the discretion of the Superior Court, so by the Constitution the jurisdiction over such offenses appertains exclusively to the Superior Courts, unless some statute has limited the punishment to a fine not exceeding fifty dollars or imprisonment not exceeding one month. Art. IV, sec. 15. (Amended Const., Art. IV, sec. 25)." *Washington v. Hammond*, 76 N. C. 33, 35.

Sentence Not Excessive.—A sentence to the common jail of the county for a period of 12 months, and an assignment to work the public roads, upon defendant's plea of nolo contendere to a charge of stealing an automobile of the value of \$325.00, is not excessive. *State v. Parker*, 220 N. C. 416, 17 S. E. (2d) 475.

§ 14-71. Receiving stolen goods.—If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing the same to have been feloniously stolen or taken, he shall be guilty of a misdemeanor, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security or other thing, shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such receiver may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession or in any county in which the thief may be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county where he actually received such chattel, money, security, or other thing; and such receiver shall be punished as one convicted of larceny. (Rev., s. 3507; Code, s. 1074; R. C., c. 34, s. 56; 1797, c. 485, s. 2; C. S. 4250.)

Included in Indictment for Larceny Charge.—An indictment for larceny if concluded at common law may include two counts, one for larceny, the other for receiving stolen goods. The count for receiving stolen goods must conclude against this section. If the offence of larceny charged is punishable by statute with a sentence greater than is provided by this section and if the count charging larceny concludes against the statute the two counts can not be joined, as the punishment is different, but if the count charging larceny concludes at common law, which provided whipping, the two counts may be joined, for by abolishing whipping the punishment for the two offences was made the same. *State v. Lawrence*, 81 N. C. 522, 523.

A judgment upon a general verdict of guilty upon an indictment containing two counts—one for horse stealing, under sec. 14-81, and the other for receiving, under this section, is erroneous—the offenses not being of the same grade and the punishment being different. *State v. Goings*, 98 N. C. 766, 4 S. E. 121.

This section makes guilty knowledge one of the essential elements of the offense of receiving stolen goods. This knowledge may be actual, or it may be implied when the circumstances under which the goods were received are

sufficient to lead the party charged to believe they were stolen. *State v. Stathos*, 208 N. C. 456, 181 S. E. 273.

It is necessary to establish either actual or implied knowledge on the part of the person charged of the facts that the goods were stolen. The question involved is whether the person charged had knowledge of the fact that the goods had been stolen at the time he received them, and not whether a reasonably prudent man in the transaction of his business would have gained such knowledge under the circumstances. *Id.*

The test is as to the knowledge, actual or implied, of the defendant, and not what some other person would have believed from the facts attending the receipt of the goods. *Id.*

Guilty knowledge is an essential element of the offense defined by this section, and while such knowledge may be implied or inferred by the jury from the facts and circumstances, it is error for the court to instruct the jury to the effect that defendant would have knowledge within the meaning of the statute if he received the goods under circumstances "such as to cause defendant to reasonably believe or know" that the property had been stolen, "reasonable belief" and "implied knowledge" not being synonymous. *State v. Miller*, 212 N. C. 361, 193 S. E. 388.

Felonious intent in receiving stolen goods with knowledge at the time that they had been stolen is necessary to a conviction under this section, and a charge which fails to submit the question of such intent to the jury entitled defendant to a new trial. *State v. Morrison*, 207 N. C. 804, 178 S. E. 562.

Interest Not Necessary for Conviction.—It is not necessary that one receiving stolen goods do it for the purpose of making them his own or to derive profit from them, if he receives them to help the thief, as a friendly act he is nevertheless guilty. *State v. Rushing*, 69 N. C. 29.

Goods Received Through Agent.—If stolen goods are received by an agent of the accused, at his instance, that is sufficient to sustain a conviction if he knew that they were stolen goods. *State v. Stroud*, 95 N. C. 626.

Failure to Prove Ownership of Property.—In a prosecution under this section where there was no evidence on the record tending to show that the property alleged to have been stolen was that of the owner named in the indictment, the defendant's motion for dismissal or nonsuit should be allowed. *State v. Pugh*, 196 N. C. 725, 147 S. E. 7.

The inference or presumption arising from the recent possession of stolen property, without more, does not extend to the charge of this section of receiving said property knowing it to have been feloniously stolen or taken. *State v. Best*, 202 N. C. 9, 10, 161 S. E. 535; *State v. Lowe*, 204 N. C. 572, 173, 169 S. E. 180.

Accessories Abolished.—By abolishing the distinction between petit and grand larceny the offense of accessory after the fact was also abolished, and one receiving stolen goods is treated and punished as principal. *State v. Tyler*, 85 N. C. 569.

Verdict Need Not Specify Value of Goods.—In a prosecution under this section, it is not required that the jury should determine the value of the goods in its verdict. *State v. Morrison*, 207 N. C. 804, 178 S. E. 562.

Defective Verdict.—Where the verdict in an indictment under this section is "guilty of receiving stolen goods," it is defective as not being responsive to the charge or falling within the requirements of the statute to constitute the offense made in the indictment, and thereon a judgment may not be entered or a sentence imposed. *State v. Shaw*, 194 N. C. 690, 140 S. E. 621; *State v. Cannon*, 218 N. C. 466, 11 S. E. (2d) 301.

Same—Failure to Charge as to Guilty Knowledge.—Where the evidence is conflicting as to whether the defendant knew at the time of receiving goods that they were stolen, and the charge of the court fails to instruct that finding of such knowledge was necessary for conviction, the verdict of guilty without finding that the defendant possessed such knowledge at the time he received the goods is defective, and a venire de novo will be ordered on appeal. *State v. Barbee*, 197 N. C. 248, 148 S. E. 249.

Punishment.—Receiving stolen goods is only a misdemeanor under this section but it may be punished as larceny at the discretion of the court. *State v. Brite*, 73 N. C. 2.

An exception to a judgment of imprisonment in the state's prison for a term of three years, pronounced against a defendant upon a verdict of guilty of receiving stolen goods, knowing them to be stolen, was untenable, in that the judgment was within this section. *State v. Reddick*, 222 N. C. 520, 23 S. E. (2d) 909.

Applied in *State v. Whitley*, 208 N. C. 661, 182 S. E. 338; *State v. Camby*, 209 N. C. 50, 182 S. E. 715.

Cited in dissenting opinion in *State v. Kittelle*, 110 N. C. 560, 15 S. E. 103; *State v. Brown*, 198 N. C. 41, 150 S. E. 635; *Factor v. Laubenheimer*, 290 U. S. 276, 299, 54 S. Ct. 191, 78 L. Ed. 151; *State v. Ray*, 209 N. C. 772, 184 S. E. 836; *State v. Conner*, 212 N. C. 668, 194 S. E. 291.

§ 14-72. Larceny of property, or the receiving of stolen goods, not exceeding fifty dollars in value.—The larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of not more than fifty dollars, is hereby declared a misdemeanor, and the punishment therefor shall be in the discretion of the court. If the larceny is from the person, or from the dwelling by breaking and entering, this section shall have no application: Provided, that this section shall not apply to horse stealing. In all cases of doubt the jury shall, in the verdict, fix the value of the property stolen. (Rev., s. 3506; 1895, c. 285; 1913, c. 118, s. 1; 1941, c. 178, s. 1; C. S. 4251.)

Editor's Note.—Prior to the amendment of 1913 there was no express provision in this section making it inapplicable to breaking and entering a house at night and stealing less than \$20. The section provided that it should not apply if the larceny was from the person or from a house in the daytime. In the case of *State v. Shuford*, 152 N. C. 809, 67 S. E. 923, the prisoner was indicted for burglary and was convicted of larceny, and was sentenced to three years imprisonment. It was contended by defendant that as this section provided for only one year punishment for larceny of property valued less than \$20 the sentence should be for no more than one year. The Court construed the section liberally and by the nature of the offence and in the light of section 14-70, providing for discretionary sentences for hardened criminals, decided that the legislature did not intend to give a longer sentence to daytime breakers than nighttime breakers, and the judgment of the lower court was sustained.

In the case of *In re Holley*, 154 N. C. 163, 69 S. E. 872, the question of punishment under this section again arose, and the court followed the rule laid down in *State v. Shuford* setting out additional grounds for the ruling; that this section only provided punishment for misdemeanors and that under section 14-2 and section 14-3 the punishment in all cases unless otherwise provided would be from 4 months to ten years. By the amendment of 1913 this section was made to cover all cases of such nature and remove any ground for contention as to how it should be construed in such cases.

The 1941 amendment substituted "fifty dollars" for "twenty dollars."

Knowledge that the goods were stolen at the time of receiving them is an essential element of the offense of receiving stolen goods, and although guilty knowledge may be inferred from incriminating circumstances, a charge that such knowledge might be actual or implied, without specifying that it would have to exist at the time of the receiving, is erroneous. *State v. Spaulding*, 211 N. C. 63, 188 S. E. 647.

Indictment for Larceny from the Person.—It is not necessary for the indictment to allege that the larceny was from the person for it to be shown. *State v. Bynum*, 117 N. C. 749, 23 S. E. 218.

Exclusive Jurisdiction in Superior Court.—The crime of larceny is a felony punishable in the State's Prison, and a recorder's court, not having jurisdiction thereof, may not make orders disposing of a juvenile "delinquent" under the statute providing for reclamation of such, whether the offense be termed therein a misdemeanor or otherwise, Const., Art. I, secs. 12 and 13; and when such has been attempted, it will be disregarded upon conviction of this offense in the Superior Court having jurisdiction. *State v. Newell*, 172 N. C. 933, 90 S. E. 594.

Larceny from the person regardless of the value of the property is within the exclusive jurisdiction of the Superior Court, as punishment under section 14-70 may be as much as ten years. *State v. Brown*, 150 N. C. 867, 64 S. E. 775.

Burglary.—A person who burglariously breaks and enters a dwelling at nighttime while the same is occupied is guilty of burglary in the first degree, and the fact that the value of goods stolen from the dwelling is less than \$20 is no defense to the capital charge, this section dividing larceny into two degrees having no application to burglary. *State v. Richardson*, 216 N. C. 304, 4 S. E. (2d) 852.

Applied in *State v. Davidson*, 124 N. C. 839, 32 S. E. 957.

Cited in *State v. Corpening*, 207 N. C. 805, 178 S. E. 564; *State v. Parker*, 220 N. C. 416, 17 S. E. (2d) 475.

§ 14-73. Jurisdiction of the superior courts in cases of larceny and receiving stolen goods.—The superior courts shall have exclusive jurisdiction of the trial of all cases of the larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of more than fifty dollars. (1913, c. 118, s. 2; 1941, c. 178, s. 2; C. S. 4252.)

Editor's Note.—The 1941 amendment substituted "fifty dollars" for "twenty dollars."

See notes to § 14-72.

§ 14-74. Larceny by servants and other employees.—If any servant or other employee, to whom any money, goods or other chattels, or any of the articles, securities or choses in action mentioned in the following section, by his master shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master and go away with such money, goods or other chattels, or any of the articles, securities or choses in action mentioned as aforesaid, or any part thereof, with intent to steal the same and defraud his master thereof, contrary to the trust and confidence in him reposed by his said master; or if any servant, being in the service of his master, without the assent of his master, shall embezzle such money, goods or other chattels, or any of the articles, securities or choses in action mentioned as aforesaid, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal them, or to defraud his master thereof, the servant so offending shall be fined or imprisoned in the state prison or county jail not less than four months nor more than ten years, at the discretion of the court: Provided, that nothing contained in this section shall extend to apprentices or servants within the age of sixteen years. (Rev., s. 3499; Code, s. 1065; R. C., c. 34, s. 18; 21 Hen. VIII, c. 7, ss. 1, 2; C. S. 4253.)

Cross Reference.—As to embezzlement, see 14-90 et seq.

Servant Defined.—In a strict sense all employees are servants but the term servant is usually applied, and meant to apply to one of menial rank. *State v. Higgins*, 1 N. C. 36.

Trust Relation Necessary.—A person employed as a clerk, who takes goods from his employer's store and sends them to another at a distance to be sold cannot be convicted under this statute as there was no parting with possession by the owner which brought about a trust relation. *State v. Higgins*, 1 N. C. 36.

Trust Relation Must Be Alleged.—In an indictment under this section, it is necessary to allege that the property was received and held by the defendant in trust, or for the use of the owner, and being so held it was feloniously converted or made away with by the servant or agent. *State v. Wilson*, 101 N. C. 730, 7 S. E. 872.

Averment of Age.—"The averment that the defendant, when committing the act, was not within—that is, was of the age of eighteen years or more, and thus negatives that she was under sixteen years of age—does not invalidate the indictment, although the negative goes beyond the statutory requirement, for the greater includes the less." *State v. Wilson*, 101 N. C. 730, 734, 7 S. E. 872.

Cited in *State v. Connelly*, 104 N. C. 794, 797, 10 S. E. 462.

§ 14-75. Larceny of chose in action.—If any person shall feloniously steal, take and carry away, or take by robbery, any bank-note, check or other order for the payment of money issued by or drawn on any bank or other society or corporation within this state or within any of the United States, or any treasury warrant, debenture, certificate of stock or other public security, or certificate of stock in any corporation, or any order, bill of exchange, bond, promissory note or other obligation, either for the payment of money or for

the delivery of specific articles, being the property of any other person, or of any corporation (notwithstanding any of the said particulars may be termed in law a chose in action), such felonious stealing, taking and carrying away, or taking by robbery, shall be a felony of the same nature and degree and in the same manner as it would have been if the offender had feloniously stolen, or taken by robbery, money, goods or property of any value, and the offender for every such offense shall suffer the same punishment and be subject to the same pains, penalties and disabilities as he should or might have suffered if he had feloniously stolen or taken by robbery money, goods or other property of value. (Rev., s. 3498; Code, s. 1064; R. C., c. 34, s. 20; 1811, c. 814, s. 1; C. S. 4254.)

Cross Reference.—As to description of stolen money in indictment, see § 15-149.

Treasury Notes.—Treasury notes issued by the United States Treasury Department are covered by this statute as they are "public securities." Although a class of securities issued after the enactment of the statute they are subject to larceny the same as any other note issued after the enactment. *State v. Thompson*, 71 N. C. 146.

Due-Bills.—While a "due-bill" is not a promissory note, and negotiable by endorsement, it is within the meaning of the words, "or other obligation," in this section. The larceny of such a paper is indictable. *State v. Campbell*, 103 N. C. 344, 9 S. E. 410.

A pension check on the United States treasury comes under this section. *State v. Bishop*, 98 N. C. 773, 4 S. E. 357.

Larceny of the Instrument and Paper Distinguished.—When a person is indicted for stealing a promissory note or any other chose in action, it is upon the state to prove the larceny of the instrument, and proof of larceny of a piece of paper is not sufficient. If the instrument has been paid before the alleged felonious taking, the indictment charging only larceny of a chose in action is not sufficient to convict. *State v. Campbell*, 103 N. C. 344, 9 S. E. 410.

Charter of Bank Issuing Immateral.—If a stolen note was issued by a bank within one of the United States, it is within the letter of the act, and there can not be the slightest doubt but that it is also within its spirit and meaning. The act is silent as to the authority by which the bank must be chartered, and the mischief of stealing one of its notes from a bona fide holder is the same, whether it derived its existence from an act of Congress or from the Legislature of New York. *State v. Banks*, 61 N. C. 577, 578.

Sufficient Description.—An indictment for larceny which describes the thing stolen, as "one promissory note issued by the treasury department of the government of the United States for the payment of one dollar," is in that respect sufficient. *State v. Fulford*, 61 N. C. 563.

Amount Must Be Set Out.—An indictment for stealing a bank note is sufficient if it states the amount of the note and what bank it was drawn on. Some cases hold that the mere statement of the amount of the note is sufficient description. *State v. Rout*, 10 N. C. 618.

Cited in *State v. Freeman*, 89 N. C. 469.

§ 14-76. Larceny, mutilation, or destruction of public records and papers.—If any person shall steal, or for any fraudulent purpose shall take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney or any original document whatsoever, of or belonging to any court of record, or relating to any matter, civil or criminal, begun, pending or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order or decree or any original document whatsoever, of or belonging to any court or relating to any cause or matter begun, pending or terminated in any such court, every such offender shall be guilty of a misdemeanor; and in any indictment or such offense it shall

not be necessary to allege that the article, in respect to which the offense is committed, is the property of any person or that the same is of any value. If any person shall steal or for any fraudulent purpose shall take from the register's office, or from any person having the lawful custody thereof, or shall unlawfully and willfully obliterate, injure or destroy any book wherein deeds or other instruments of writing are registered, or any other book of registration or record required to be kept by the register of deeds or shall unlawfully destroy, obliterate, deface or remove any records of proceedings of the board of county commissioners, or unlawfully and fraudulently abstract any record, receipt, order or voucher or other paper-writing required to be kept by the clerk of the board of commissioners of any county, he shall be guilty of a misdemeanor. (Rev., s. 3508; Code, s. 1071; R. C., c. 34, s. 31; 8 Hen. VI, c. 12, s. 3; 1881, c. 17; C. S. 4255.)

In General.—An indictment will lie under this section for changing, injuring or obliterating tax books, and the oral testimony of the register of deeds is competent to show the amount of the abstract made by him and sent to the auditor, the changed amount, and the acts of the deputy sheriff, as circumstances to show his guilt. *State v. Gouge*, 157 N. C. 602, 72 S. E. 994.

Notemendature does not always determine the grade or class of a crime; a felony is a crime which is or may be punishable either by death or by imprisonment in the State prison and any other crime is a misdemeanor. Calling an offense a misdemeanor does not make it so when the punishment imposed makes it a felony and construed with § 14-3 the offense prescribed by this section is punishable by imprisonment in the penitentiary, and therefore a felony. *State v. Harwood*, 206 N. C. 87, 89, 173 S. E. 24.

Must Show Offense Committed on Day of Opportunity.—On a trial under this section for the destruction of certain pages of a book in the office of the register of deeds, wherein the defendant's interest in so doing has been shown, it is required of the State to show that the offense was committed on the day the defendant had an opportunity to commit the offense, and a margin of several weeks, in which the offense might have been committed, during which time the books were open to the public generally, is insufficient evidence to be submitted to the jury, and defendant's motion as of nonsuit should have been allowed. *State v. Swinson*, 196 N. C. 100, 144 S. E. 555.

§ 14-77. Larceny, concealment or destruction of wills.—If any person, either during the life of the testator or after his death, shall steal or, for any fraudulent purpose, shall destroy or conceal any will, codicil or other testamentary instrument, he shall be guilty of a misdemeanor. (Rev., s. 3510; Code, s. 1072; R. C., c. 34, s. 32; C. S. 4256.)

Cross Reference.—As to clerk's power to compel production of will when one in whose custody it is refuses to produce it, see § 31-15.

Basis.—Obviously the basis for making the fraudulent suppression of a will a crime as provided by this section is the fact that it is the policy of the law that wills should be probated, and that the rights of the parties in cases of dispute should be openly arrived at according to the orderly process of law. *Wells v. Odum*, 207 N. C. 226, 228, 176 S. E. 563.

§ 14-78. Larceny of ungathered crops.—If any person shall steal or feloniously take and carry away any maize, corn, wheat, rice or other grain, or any cotton, tobacco, potatoes, peanuts, pulse, fruit, vegetable or other product cultivated for food or market, growing, standing or remaining ungathered in any field or ground, he shall be guilty of larceny, and shall be punished accordingly. (Rev., s. 3503; Code, s. 1069; 1811, c. 816; R. C., c. 34, s. 21; 1868-9, c. 251; C. S. 4257.)

At Common Law.—"By the common law, larceny can not be committed of things which savor of the realty, and are at

the time they are taken a part of the freehold, such as corn and the produce of land. 2 Russell Crimes, 136; *State v. Foy*, 82 N. C. 679." *State v. Thompson*, 93 N. C. 537, 538.

What Indictment Must Allege.—On trial of an indictment for larceny charging the defendant with stealing "seed cotton and lint cotton," evidence that defendant took the gleanings of the cotton from the field, is not admissible. To render such evidence competent, the indictment should be framed under the statute, and described the crop as "growing, standing or ungathered" in the field, and cultivated for food or market. *State v. Bragg*, 86 N. C. 688.

In the case of *State v. Liles*, 78 N. C. 496, the defendant was indicted for the larceny of figs, "remaining ungathered in a certain field," etc., and the words "cultivated for food or market," were omitted, and it was held by this Court that the indictment, for that reason, was fatally defective. *State v. Thompson*, 93 N. C. 537, 539.

Indictment Must Conclude Against the Statute.—An indictment for larceny of growing cabbage must conclude against the statute, and a failure to so conclude makes the indictment one at common law. As the offence at common law was not larceny but only a civil trespass there can be no judgment. *State v. Foy*, 82 N. C. 679.

Applies to All Crops.—This section applies to any growing crops cultivated for food or market, and is not restricted to several articles specifically named. *State v. Ballard*, 97 N. C. 443, 1 S. E. 685.

Exclusive Jurisdiction of Superior Court.—The punishment for an offence under this section is greater than a justice of the peace can adjudge under the Constitution, Art. IV, sec. 5. *State v. Cherry*, 72 N. C. 123. Therefore exclusive jurisdiction is vested in the Superior Court. *State v. Graham*, 76 N. C. 195.

§ 14-79. Larceny of ginseng.—If any person shall take and carry away, or shall aid in taking or carrying away, any ginseng growing upon the lands of another person, with intent to steal the same, he shall be guilty of a felony, and shall be imprisoned not less than two years nor more than five years, in the discretion of the court: Provided, that such ginseng, at the time the same is taken, shall be in beds and the land upon which such beds are located shall be surrounded by a lawful fence. (Rev., s. 3502; 1905, c. 211; C. S. 4258.)

Cross Reference.—As to digging ginseng out of season on the lands of another, see § 14-392.

§ 14-80. Larceny of wood and other property from land.—If any person, not being the present owner or bona fide claimant thereof, shall willfully and unlawfully enter upon the lands of another, carrying off or being engaged in carrying off any wood or other kind of property whatsoever, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping or care, such person shall, if the act be done with felonious intent, be guilty of larceny, and punished as for that offense; and if not done with such intent, he shall be guilty of a misdemeanor. (Rev., s. 3511; Code, s. 1070; 1866, c. 60; C. S. 4259.)

Cross References.—As to cutting, injuring, or removing another's timber, see § 14-135. As to larceny of branded timber, see §§ 80-21 and 80-22.

In General.—This section and section 14-134 were enacted immediately after the Civil War to protect land owners from aimless wanderers who entered land without force, but often did great damage. It was not intended to prevent entry by person who had an honest claim to the land, nor was it intended to apply when force was employed. *State v. Crawley*, 103 N. C. 353, 9 S. E. 409. It was intended to prevent the willful and unlawful taking from the land of another property that was not by common law or prior statute subject to larceny. *State v. Vosburg*, 111 N. C. 718, 720, 16 S. E. 392.

The word "whatsoever" shows a clear intent of the Legislature to make it general in its application.

The taking of a brass rail from around an engine that is stationary is larceny under this section. The rule in *State v. Burt*, 64 N. C. 619 in holding that taking a loose nugget of gold from a loose pile of stone is not larceny is not approved. It, although decided after this section was enacted,

was probably decided under the common law as this section is not mentioned by the Court and in all probability was not called to its attention. *State v. Beck*, 141 N. C. 829, 53 S. E. 843. In the case of *State v. Graves*, 74 N. C. 396, it is held that an indictment for trespass to personal property can not be supported for the taking of rails from a fence as the taking is "one continuous act" and is trespass to the realty. *State v. Burt* is cited and approved, and no reference is made to this section. The technical distinction of one continuous act is exactly what was repealed.

One having title to the land or a bona fide claim thereto is not liable under this section by its express terms. One who enters as a servant of a bona fide claimant or one having title is not subject to the application of this section as the protection afforded the master extends to his servant.

In the case of *State v. Boyce*, 109 N. C. 739, 14 S. E. 98, it is held that a tenant of seven acres being a part of a tract of thirty five acres claimed by the landlord, when expressly prohibited from cutting timber on any of the tract except the seven acres on which he is a tenant, may as the servant of a third person claiming adversely go on the other part of the tract and cut timber, and he will not be estopped to deny his landlord's title except as to the seven acres leased to him, nor will he be liable under this section if the person whose servant he has been can prove his title or bona fide claim. *Davis, J., and Avery, J., dissent.*

Purpose of Section.—This section was enacted to eliminate a defect in the common law rule and to extend it so as to make chattels real, such as growing trees, plants, minerals, metals and fences, connected in some way with the land, the subject of larceny. The obvious intent of the act was to prevent the willful and unlawful entry upon the land of another and the taking and carrying away of such articles as were not, at common law or by previous statute, the subject of larceny. *State v. Jackson*, 218 N. C. 373, 11 S. E. (2d) 149.

Money Not Included.—The penalty for entering the lands of another and carrying off wood or any other kind of property whatsoever growing or being thereon, does not contemplate or embrace such taking and carrying away of money; it means such property as was not, at common law, subject to larceny. *State v. Vosburg*, 111 N. C. 718, 16 S. E. 392.

Turpentine which has flowed down trees into boxes made to catch it, and is in a state to be dipped out, is a subject of larceny. *State v. Moore*, 33 N. C. 70, cited in note in 49 L. R. A., N. S., 966; *State v. King*, 98 N. C. 648, 4 S. E. 44.

Trespass upon land is an essential element of the offense hereby created. *State v. Jackson*, 218 N. C. 373, 11 S. E. (2d) 149.

Claim of Interest Must Be Founded.—An entry, without a survey and grant from the state is not sufficient to support a claim to the land, and is no defense to an indictment under this section. *State v. Calloway*, 119 N. C. 864, 26 S. E. 46.

Tombstones.—Defendant was charged with feloniously stealing and carrying away one tombstone erected at the grave of a deceased person, being the goods and chattels of a named person. The court instructed the jury that the offense charged was larceny, which is the wrongful and felonious taking and carrying away of personal property of some value belonging to another, with felonious intent. Held: Neither the indictment nor the theory of trial refer to trespass constituting an element of the statutory crime or larceny of chattels real, nor to the distinction of taking with, and taking without felonious intent set forth in this section, and there is a fatal variance between the indictment for common law larceny and the proof of the statutory larceny of a chattel real, and defendant's motion to nonsuit should have been granted. *State v. Jackson*, 218 N. C. 373, 11 S. E. (2d) 149.

Quaere: As § 14-148, and cognate statutes relate expressly to tombstones, graveyards and graves, does this not exclude such property from the provisions of this section. *Id.*

§ 14-81. Larceny of horses and mules.—If any person shall steal any horse, mare, gelding or mule, he shall suffer imprisonment at hard labor for not less than one nor more than twenty years, at the discretion of the court. A count under this section may be joined in a bill of indictment with a count under section 14-82. (Rev., s. 3505; Code, s. 1066; 1868, c. 37, s. 1; 1879, c. 234, s. 2; 1866-7, c. 62; 1917, c. 162, s. 2; C. S. 4260.)

Taking with Belief of Interest.—One taking a mule from the stable of another at night and without the consent of the owner is not guilty of larceny if he believed at the time when

he took the mule that he had an interest in it. *State v. Thompson*, 95 N. C. 596.

Same—Question for a Jury.—One who takes a mule from the stable of another in a manner indicating felonious purpose but under a claim of interest should have the question of his act being under a bona fide claim submitted to the jury, and a charge that if the taking was not under a bona fide belief that he had a property or interest in the mule he would be guilty of larceny was not error. *State v. Thompson*, 95 N. C. 596.

Joinder with Charge of Receiving Stolen Goods.—An indictment for horse stealing concluded at common law is punishable as petit larceny. If there are two counts and the second is for receiving stolen goods and concludes against the statute, the punishment for the two is the same and they may be joined, but on conviction a sentence of ten years is all that can be given. *State v. Lawrence*, 81 N. C. 522, 523.

An indictment having two counts, one for horse stealing, the other for receiving stolen property, both concluding upon a statute, is defective as the offences are not of the same grade and a conviction is error. *State v. Johnson*, 75 N. C. 123.

§ 14-82. Taking horses or mules for temporary purposes.—If any person shall unlawfully take and carry away any horse, gelding, mare or mule, the property of another person, secretly and against the will of the owner of such property, with intent to deprive the owner of the special or temporary use of the same, or with the intent to use such property for a special or temporary purpose, the person so offending shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both fined and imprisoned, in the discretion of the court. (Rev., s. 3509; Code, s. 1067; 1879, c. 234, s. 1; 1913, c. 11; C. S. 4261.)

Indictment.—An indictment for stealing the temporary use of a horse in violation of this section is not defective because it charges the stealing of the temporary use of a buggy also. *State v. Darden*, 117 N. C. 697, 23 S. E. 106.

Employee Liable.—An occasional employee, who took the employer's mule at night and drove it off without the knowledge or consent of the employer, was guilty of a tortious conversion, and an act indictable under this section; and where the mule died in his possession he was liable for its value, at least in the absence of any evidence in support of his claim that the death was accidental. *Clark v. Whitehurst*, 171 N. C. 1, 86 S. E. 78.

§ 14-83: Repealed by Session Laws 1943, c. 543.

§ 14-84. Larceny of taxed dogs misdemeanor.—The larceny of any dog upon which the license tax provided in article two of the chapter entitled Dogs has been paid shall be a misdemeanor. (1919, c. 116, s. 9; C. S. 4263.)

Cross Reference.—See also, §§ 67-15 and 67-27.

§ 14-85. Pursuing or injuring livestock with intent to steal.—If any person shall pursue, kill or wound any horse, mule, ass, jennet, cattle, hog, sheep or goat, the property of another, with the intent unlawfully and feloniously to convert the same to his own use, he shall be guilty of a felony, and shall be punishable, in all respects, as if convicted of larceny, though such animal may not have come into the actual possession of the person so offending. (Rev., s. 3504; Code, s. 1068; 1866, c. 57; C. S. 4264.)

Sufficiency of Indictment.—An indictment under this section for injury to livestock, in which the animal alleged to have been injured is described as a "certain cattle beast," is sufficiently definite. *State v. Credle*, 91 N. C. 640.

§ 14-86. Destruction or taking of soft drink bottles.—It shall be unlawful for any person, firm or corporation, or any employee thereof, to maliciously take up, carry away, destroy or in any way dispose of bottles or other property belonging to

any bottler, bottling company, person, firm or corporation engaged in the business of bottling and/or distributing in bottles or other closed containers soda water, coca-cola, pepsi-cola, cheri-wine, chero-cola, ginger ale, grape and other fruit juices or imitations thereof, carbonated or malted beverages and like preparations commonly known as soft drinks. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1937, c. 322, ss. 1, 2.)

Cross Reference.—As to pollution of soft drink bottles, see § 14-288.

Art. 17. Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons.—Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years. (1929, c. 187, s. 1.)

Possession Necessary.—The purpose and intent of this section is to provide for more severe punishment for the commission of robbery with firearms, and other specified weapons, than is prescribed for common law robbery, and construing the title and context of the statute together to ascertain the legislative intent, it is held that possession of firearms or other of the specified weapons is necessary to constitute the offense of "robbery with firearms" under this section, and it is reversible error for the court to refuse to so instruct the jury in accordance with defendants' prayers for special instructions upon evidence tending to show that defendants sought to make their victim believe they had firearms, and threatened to use same, but that they actually carried no weapon. *State v. Keller*, 214 N. C. 447, 199 S. E. 620.

Where an indictment charged defendants with robbery with firearms from the companion of the person they were formerly charged with killing, the two offenses having been committed at the same time, and evidence of guilt of one of the offenses being substantially the same as the evidence of guilt of the other, the acquittal or conviction for one offense will not bar a subsequent prosecution for the other. *State v. Dills*, 210 N. C. 178, 185 S. E. 677, distinguishing *State v. Clemmons*, 207 N. C. 276, 176 S. E. 760.

Applied in *State v. Riddle*, 205 N. C. 591, 172 S. E. 400.

Cited in *State v. Murph*, 212 N. C. 494, 193 S. E. 709; *State v. Proctor*, 213 N. C. 221, 195 S. E. 816.

§ 14-88. Train robbery.—If any person shall enter upon any locomotive engine or car on any railroad in this state, and by threats, the exhibition of deadly weapons or the discharge of any pistol or gun, in or near any such engine or car, shall induce or compel any person on such engine or car to submit and deliver up, or allow to be taken therefrom, or from him, anything of value, he shall be guilty of train robbery, and on conviction thereof shall be punished by imprisonment in the state's prison for not less than ten years nor more than twenty years. (Rev., s. 3765; 1895, c. 204, s. 2; C. S. 4266.)

§ 14-89. Attempted train robbery.—If any person shall stop, or cause to be stopped, or impede, or cause to be impeded, or conspire with others for that purpose, any locomotive engine or car on any railroad in this state, by intimidation of

those in charge thereof or by force, threats or otherwise, for the purpose of taking therefrom or causing to be delivered up to such person so forcing, threatening or intimidating, anything of value, to be appropriated to his own use, he shall be guilty of attempting train robbery, and, on conviction thereof, shall be punished by confinement in the state's prison for not less than two years nor more than twenty years. (Rev., s. 3766; 1895, c. 204, s. 1; C. S. 4267.)

Art. 18. Embezzlement.

§ 14-90. Embezzlement of property received by virtue of office or employment.—If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any receiver, or any other fiduciary, or any officer or agent of a corporation, or any agent, consignee, clerk, bailee or servant, except persons under the age of sixteen years, of any person, shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make way with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever belonging to any other person or corporation, which shall have come into his possession or under his care, he shall be guilty of a felony, and shall be punished as in cases of larceny. (Rev., s. 3406; Code, s. 1014; 21 Hen. VII, c. 7; 1871-2, c. 145, s. 2; 1889, c. 226; 1891, c. 188; 1897, c. 31; 1919, c. 97, s. 25; 1931, c. 158; 1939, c. 1; 1941, c. 31; C. S. 4268.)

Cross References.—As to larceny by servants or other employees, see § 14-74. As to the embezzlement of funds of a corporation by its officers, see § 14-254. As to embezzlement of funds of a bank by its officers, see § 53-129. As to embezzlement by a member of the state sinking fund commission, see § 142-40. As to description in indictment for embezzlement, see § 15-150.

Editor's Note.—The Act of 1931 amended this section so as to add "trustees" to the list of persons who may be guilty of embezzlement. Section 14-92 applies only to trustees of public bodies and institutions. The addition was probably necessary because of the fact that embezzlement is wholly a statutory crime. 9 N. C. Law Rev. 398.

The 1939 amendment inserted after the word "trustee" in the third line the words "or any receiver, or any other fiduciary", and was enacted to meet the decision in *State v. Whitehurst*, 212 N. C. 300, 193 S. E. 657, 113 A. L. R. 740. See 17 N. C. Law Rev. 348.

The 1941 amendment made this section applicable to baillees. For comment, see 19 N. C. Law Rev. 478.

Origin and Purpose.—Embezzlement was not a common-law offense. *State v. Hill*, 91 N. C. 561. It was first made a criminal offense in England by statute, 21 Henry VIII, ch. 7, to punish the appropriation by servants of the property of their masters in violation of the trust and confidence reposed on them. 1 McLain Cr. Law, § 621. It was enacted in consequence of a decision that a banker's clerk, who received money from a customer and appropriated it to his own use, could not be convicted of larceny on the ground that the money had never been in the employer's possession. *Clark's Cr. Law*, p. 308. *State v. McDonald*, 133 N. C. 680, 683, 45 S. E. 582.

Compared with Section 14-254.—The use of the word "abstract" in section 14-254 differentiates it from this section. The latter applies to embezzlement and excepts offenders under sixteen years of age. It is not necessary under section 14-254 to allege that the defendant is more than sixteen years old. *State v. Switzer*, 187 N. C. 88, 121 S. E. 143.

Cannot Be Extended by Construction.—This section is a

penal statute, creating a new offense, and cannot be extended by construction to persons not within the classes designated. *State v. Eurell*, 220 N. C. 519, 17 S. E. (2d) 669.

The fact that ch. 31, Public Laws 1941, amended this section, by adding "bailee" to the classes of persons specified constitutes a legislative declaration that theretofore a bailee was not included in the definition of classes of persons made by the statute. *Id.*

The mere converting or appropriating the property of another to one's own use is not sufficient to constitute the crime of embezzlement, fraudulent intent in the act of such conversion or appropriation being an essential element of the offense. *State v. Cohoon*, 206 N. C. 388, 174 S. E. 91.

Fraudulent intent is a necessary element of the statutory offense of embezzlement and the State must prove such intent beyond a reasonable doubt, but direct proof is not necessary, it being sufficient if facts and circumstances are shown from which it may be reasonably inferred. *State v. McLean*, 209 N. C. 38, 182 S. E. 700.

Meaning of Fraudulent Intent.—Fraudulent intent within the meaning of this section is the intent to willfully or corruptly use or misapply the property of another for purposes other than that for which it is held, and evidence tending to show that defendant, without authorization, applied funds of his employer to his own use, although defendant testified that he used the funds to pay a debt due him by his employer, is sufficient to be submitted to the jury on the question of fraudulent intent. *State v. McLean*, 209 N. C. 38, 182 S. E. 700; *State v. Howard*, 222 N. C. 291, 22 S. E. (2d) 917.

Conversion Not Necessary.—To embezzle is for an agent fraudulently to misapply the property of his principal; it is not necessary that the agent should convert it to his own use, that is, expend the money for his own benefit. *State v. Foust*, 114 N. C. 842, 843, 19 S. E. 276.

Necessity of Demand for Payment.—A demand is not necessary to support a prosecution under this section as it is not made a prerequisite to prosecution. *State v. Blackley*, 138 N. C. 620, 50 S. E. 310.

Property of Prosecutor.—The property alleged to have been embezzled must be the property of the prosecutor. *State v. Barton*, 125 N. C. 702, 34 S. E. 553.

Goods Received under Special Directions.—Where goods come into the possession of a servant, out of the ordinary course of his employment, but in pursuance of special directions from the master to receive them, and the servant embezzle the same, he is indictable under this section. *State v. Costin*, 89 N. C. 511.

Intent to Repay No Defense.—An intent to restore the property embezzled or a readiness and willingness at a latter date is not a defense to a prosecution under this section. *State v. Summers*, 141 N. C. 841, 53 S. E. 856.

To Whom Section Applies.—A contractor is not an officer, clerk or servant within the meaning of this section. *State v. Barton*, 125 N. C. 702, 34 S. E. 553. Nor is the relation of lessor and lessee embraced by the statute. *State v. Keith*, 126 N. C. 1114, 36 S. E. 169. And it does not apply to clerks of the superior courts and like officers who would seem to fall within the terms of section 14-92. *State v. Connelly*, 104 N. C. 794, 10 S. E. 469.

Commissioner in Equity Cannot Be Convicted as Agent or Attorney.—A commissioner appointed by a court of equity to sell land is empowered to do one specific act, viz.: to sell the land and distribute the proceeds to the parties entitled thereto; immediately upon his appointment he ceases to be an attorney or agent for either party, and where the indictment charges the defendant with embezzlement of funds under this section as commissioner the defendant could not be convicted as agent or attorney. *State v. Ray*, 207 N. C. 642, 644, 178 S. E. 224.

Allegations and Proof.—The name of the person from whom the money was received need not be stated. *State v. Lanier*, 89 N. C. 517, 88 N. C. 658. And it need not be alleged or proved that the property charged to have been embezzled had been committed to the care of defendant, nor that any breach of confidence of trust, save that which grows out of the relation of owner and servant or agent, had occurred. *State v. Wilson*, 101 N. C. 730, 7 S. E. 872. The averment that the defendant is neither an apprentice nor under the age of sixteen years, is a substantial compliance with the statute. *State v. Lanier*, 89 N. C. 517, 88 N. C. 658, 660.

The crime of embezzlement rests upon statute alone and conviction thereof under an indictment drawn under this section, when the evidence tends only to show a violation of § 14-92, is erroneous upon the ground that the proof is at variance with the offense charged in the bill. *State v. Grace*, 196 N. C. 280, 145 S. E. 399.

Evidence—Intent Must Be Shown.—The conversion being admitted or shown, the burden is on the State to show be-

yond a reasonable doubt the intent to defraud. *State v. McDonald*, 133 N. C. 680, 45 S. E. 582. But the burden of showing that he is under age is on the defendant and the state is not called on to prove that he is past sixteen years old, for this is a matter of defence and within the defendant's knowledge. *State v. Blackley*, 138 N. C. 620, 50 S. E. 310.

It is not necessary that a warrant for embezzlement issued by a justice of the peace should describe the criminal offense with the legal accuracy required in an indictment. *Durham v. Jones*, 119 N. C. 262, 25 S. E. 873.

Where there is evidence that an agent is charged with the duty of selling a load of tobacco upon a local market on behalf of the principal only, and accordingly receiving the price, he intentionally and wrongfully converted it to his use, it is sufficient to constitute the crime of embezzlement under this section and to sustain a verdict of guilty. *State v. Eubanks*, 194 N. C. 319, 139 S. E. 451.

Accusation of Embezzlement Actionable Per Se in Slander.—The offense defined in this section is a felony, and a false accusation thereof is slander, actionable per se, and malice is presumed. *Elmore v. Atlantic Coast Line R. Co.*, 189 N. C. 658, 127 S. E. 710.

It is unnecessary to determine whether an indictment could be sustained under other of the cognate statutes, §§ 14-91 to 14-99, where an indictment of a bank receiver for embezzlement is drawn under this section. *State v. Whitehurst*, 212 N. C. 300, 193 S. E. 657, 113 A. L. R. 740.

Illustrations of Wrongful Misapplications.—By a treasurer of a society depositing money in his private bank. See *State v. Dunn*, 138 N. C. 672, 50 S. E. 772. By a sales agent for automobiles. See *State v. Klingman*, 172 N. C. 947, 90 S. E. 690. By an agent selling a load of tobacco. See *State v. Eubanks*, 194 N. C. 319, 139 S. E. 451.

By an agent to buy a lot and build house. See *State v. McClure*, 205 N. C. 11, 169 S. E. 809. By a Consignee and Agent of a Piano Co. See *State v. Dula*, 206 N. C. 745, 175 S. E. 80.

Stated in *In re Hege*, 205 N. C. 625, 629, 172 S. E. 345.

Cited in *Beck v. Bank*, 161 N. C. 201, 76 S. E. 722; *State v. Connor*, 142 N. C. 700, 708, 55 S. E. 787; *State v. Dunn*, 134 N. C. 663, 668, 46 S. E. 949; *State v. Hill*, 91 N. C. 561; *State v. Harper*, 94 N. C. 936, 939; *State v. Wadford*, 194 N. C. 336, 139 S. E. 608; *State v. Shore*, 206 N. C. 743, 744, 175 S. E. 116; *State v. Harwood*, 206 N. C. 87, 173 S. E. 24.

§ 14-91. Embezzlement of state property by public officers and employees.—If any officer, agent or employee of the state, or other person having or holding in trust for the same any bonds issued by the state, or any security, or other property and effects of the same, shall embezzle or knowingly and willfully misapply or convert the same to his own use, or otherwise willfully or corruptly abuse such trust, such offender and all persons aiding and abetting, or otherwise assisting therein, shall be guilty of a felony, and shall be fined not less than ten thousand dollars, or imprisoned in the state's prison not less than twenty years, or both, at the discretion of the court. (Rev., s. 3407; Code, s. 1015; 1874-5, c. 52; C. S. 4269.)

The word "property" is sufficiently all inclusive to embrace money, goods, chattels, evidences of debt and things in action. *State v. Ward*, 222 N. C. 316, 22 S. E. (2d) 922.

The fraudulent intent which constitutes a necessary element of the crime of embezzlement, within this section, is the intent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held. *State v. Howard*, 222 N. C. 291, 293, 22 S. E. (2d) 917.

Instructions.—Where, in a prosecution for embezzlement, under this and the preceding section, counsel for defendant, in argument to the jury, commented on the severity of the minimum punishment in this section, and the court in its charge read the section to the jury and the indictment thereunder and also a portion of the general probation statute, carefully cautioning them that they were to decide the issue upon the evidence without regard to the punishment which might or might not be imposed, the charge was proper and not prejudicial. *State v. Ward*, 222 N. C. 316, 22 S. E. (2d) 922. See also, *State v. Howard*, 222 N. C. 291, 22 S. E. (2d) 917.

Cited in *State v. Connelly*, 104 N. C. 798, 10 S. E. 469; *State v. Hill*, 91 N. C. 561, 562.

§ 14-92. Embezzlement of funds by public officers and trustees.—If any officer, agent, or employee of any city, county or incorporated town, or of any penal, charitable, religious or educational institution; or if any person having or holding any moneys or property in trust for any city, county, incorporated town, penal, charitable, religious or educational institution, shall embezzle or otherwise willfully and corruptly use or misapply the same for any purpose other than that for which such moneys or property is held, such person shall be guilty of a felony, and shall be fined and imprisoned in the state's prison in the discretion of the court. If any clerk of the superior court or any sheriff, treasurer, register of deeds or other public officer of any county or town of the state shall embezzle or wrongfully convert to his own use, or corruptly use, or shall misapply for any purpose other than that for which the same are held, or shall fail to pay over and deliver to the proper persons entitled to receive the same when lawfully required so to do, any moneys, funds, securities or other property which such officer shall have received by virtue or color of his office in trust for any person or corporation, such officer shall be guilty of a felony. The provisions of this section shall apply to all persons who shall go out of office and fail or neglect to account to or deliver over to their successors in office or other persons lawfully entitled to receive the same all such moneys, funds and securities or property aforesaid. The punishment shall be imprisonment in the state's prison or county jail, or fine in the discretion of the court. (Rev., s. 3408; Code, s. 1016; 1891, c. 241; 1876-7, c. 47; C. S. 4270.)

Compared with Section 14-231.—Under section 14-231 failure by an officer to pay over money coming into his hands is a misdemeanor. That section is very broad and seems to cover every case of failure by an officer to pay to the proper person funds coming into his hands. By this section the offence is declared a felony. An officer indicted for failure to pay to proper persons funds coming into his hands should be allowed the privilege of having the facts submitted to the jury. *State v. Windley*, 178 N. C. 670, 100 S. E. 116.

Meaning of "Willfully and Corruptly."—In a charge upon the trial of county officials for the misapplication of county funds under the provisions of this section, the definition that "willfully and corruptly" meant with "bad faith and without regard to the rights of others and in the interest of such parties for whom the funds were held" is not erroneous under the circumstances of this case. *State v. Shipman*, 202 N. C. 518, 163 S. E. 657.

Applies Only to Public Funds.—This section does not embrace the unlawful appropriation of the property of private individuals. *State v. Connelly*, 104 N. C. 794, 10 S. E. 469.

Clerks of Courts.—In the case of *State v. Connelly*, 104 N. C. 794, 10 S. E. 469, it was held that this section was not applicable to clerks of the Superior Courts but by an amendment at the next session of the Legislature it was expressly made applicable to clerks of Superior Courts. *State v. Windley*, 178 N. C. 670, 672, 100 S. E. 116.

Cited in *State v. Hill*, 91 N. C. 561, 562; *New York Indemnity Co. v. Corporation Commission*, 197 N. C. 562, 563, 150 S. E. 16.

§ 14-93. Embezzlement by treasurers of charitable and religious organizations.—If any treasurer or other financial officer of any benevolent or religious institution, society or congregation shall lend any of the moneys coming into his hands to any other person or association without the consent of the institution, association or congregation to whom such moneys belong; or, if he shall fail to account for such moneys when called on, he shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment, or both, in the

discretion of the court. (Rev., s. 3409; Code, s. 1017; 1879, c. 105; C. S. 4271.)

Two Offenses Created.—Under this section two offenses are created which apply to certain officers of benevolent or religious institutions. One offense is the lending their moneys without consent; the other is the failure to account for such moneys. *State v. Dunn*, 138 N. C. 672, 50 S. E. 772.

Association for Members Solely.—An association organized for the benefit of its members solely is not a benevolent or religious association and an indictment under this section cannot be sustained against an officer who misappropriates funds of the association. *State v. Dunn*, 134 N. C. 663, 46 S. E. 949.

Cited in *State v. Hill*, 91 N. C. 561, 562.

§ 14-94. Embezzlement by officers of railroad companies.—If any president, secretary, treasurer, director, engineer, agent or other officer of any railroad company shall embezzle any moneys, bonds or other valuable funds or securities, with which such president, secretary, treasurer, director, engineer, agent or other officer shall be charged by virtue of his office or agency, or shall in any way, directly or indirectly, apply or appropriate the same for the use or benefit of himself or any other person, state or corporation, other than the company of which he is president, secretary, treasurer, director, engineer, agent or other officer, for every such offense the person so offending shall be guilty of a felony, and on conviction in the superior or criminal court of any county through which the railroad of such company shall pass, shall be imprisoned in the state's prison not less than three nor more than ten years, and fined not less than one thousand nor more than ten thousand dollars. (Rev., s. 3403; Code, s. 1018; 1870-1, c. 103, s. 1; C. S. 4272.)

§ 14-95. Conspiring with officers of railroad companies to embezzle.—If any person shall agree, combine, collude or conspire with the president, secretary, treasurer, director, engineer or agent of any railroad company to commit any offense specified in § 14-94, such person so offending shall be guilty of a felony, and on conviction in the superior or criminal court of a county through which the railroad of any company against which such offense may be perpetrated passes, shall be imprisoned in the state's prison for not less than three nor more than ten years, and fined not less than one thousand nor more than ten thousand dollars. (Rev., s. 3404; Code, s. 1019; 1870-1, c. 103, s. 2; C. S. 4273.)

Cited in *State v. Lewis*, 142 N. C. 626, 633, 55 S. E. 600; *State v. Hill*, 91 N. C. 561, 562.

§ 14-96. Embezzlement by insurance agents and brokers.—If any insurance agent or broker who acts in negotiating a contract of insurance by an insurance company, association or fraternal order or society, lawfully doing business in this state, embezzles or fraudulently converts to his own use, or, with intent to use or embezzle, takes, secretes or otherwise disposes of, or fraudulently withholds, appropriates, lends, invests or otherwise uses or applies any money or substitute for money received by him as such agent or broker, contrary to the instructions or without the consent of the company for or on account of which the same was received by him, he shall be deemed guilty of larceny. (Rev., s. 3489; 1889, c. 54, s. 103; 1911, c. 196, s. 8; C. S. 4274.)

§ 14-97. Appropriation of partnership funds by partner to personal use.—Any person engaged

in a partnership business in the state of North Carolina who shall, without the knowledge and consent of his copartner or copartners, take funds belonging to the partnership business and appropriate the same to his own personal use with the fraudulent intent of depriving his co-partners of the use thereof, shall be guilty of a misdemeanor. Any person or persons violating the provisions of this section, upon conviction, shall be punished as is now done in cases of misdemeanor. (1921, c. 127; C. S. 4274(a).)

Fraudulent intent is an essential element of this crime and must be proved by the State, and in a prosecution under this section an instruction that the jury should return a verdict of guilty if they found beyond a reasonable doubt the facts to be as the evidence tended to show, is error, the question of fraudulent intent being a question for the jury to determine from the evidence. *State v. Rawls*, 202 N. C. 397, 162 S. E. 899.

§ 14-98. Embezzlement by surviving partner.—If any surviving partner shall willfully and intentionally convert any of the property, money or effects belonging to the partnership to his own use, and refuse to account for the same on settlement, he shall be guilty of a felony, and upon conviction shall be punished by fine or imprisonment in the state's prison in the discretion of the court. (Rev., s. 3405; 1901, c. 640, s. 9; C. S. 4275.)

§ 14-99. Embezzlement of taxes by officers.—If any officer appropriates to his own use the state, county, school, city or town taxes, he shall be guilty of embezzlement, and may be punished by confinement in the state's prison not exceeding five years, at the discretion of the court. (Rev., s. 3410; Code, s. 3705; 1883, c. 136, s. 49; C. S. 4276.)

Whether Felony or Misdemeanor.—As this section is silent as to whether or not the offense set out is a felony or a misdemeanor it will be construed as a misdemeanor as an offense will never be made a felony by construction of any doubtful or ambiguous words in the statute. *State v. Hill*, 21 N. C. 561. But see section 14-1, as that seems to change the construction as given in this case and make all offenses punishable by imprisonment felonies.—Ed. Note.

Inference of Fraudulent Intent.—While the intent to commit the offense of embezzlement is an essential ingredient of the crime, the fraudulent intent may be inferred by the jury under evidence sufficient to show it, and where under such evidence the trial court correctly defines such intent, and places the burden of proof throughout the trial on the State to show the intent beyond a reasonable doubt, an exception that the court failed to instruct the jury upon the element of felonious intent is untenable. *State v. Lancaster*, 202 N. C. 204, 162 S. E. 367.

Cited in *State v. Connelly*, 104 N. C. 794, 797, 10 S. E. 469.

Art. 19. False Pretenses and Cheats.

§ 14-100. Obtaining property by false tokens and other false pretenses.—If any person shall knowingly and designedly, by means of any forged or counterfeited paper, in writing or in print, or by any false token, or other false pretense whatsoever, obtain from any person or corporation within the state any money, goods, property or other thing of value, or any bank-note, check or order for the payment of money, issued by, or drawn on, any bank or other society or corporation within this state or any of the United States, or any treasury warrant, debenture, certificate of stock or public security, or any order, bill of exchange, bond, promissory note or other obligation, either for the payment of money or for the delivery of specific articles, with intent to cheat or defraud any person or corporation of the same, such person shall be guilty of a felony, and shall

be imprisoned in the state's prison not less than four months nor more than ten years, or fined, in the discretion of the court: Provided, that if, on the trial of any one indicted for such crime, it shall be proved that he obtained the property in such manner as to amount to larceny, he shall not, by reason thereof, be entitled to be acquitted of the felony; and no person tried for such felony shall be liable to be afterwards prosecuted for larceny upon the same facts: Provided further, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud. (Rev., s. 3432; Code, s. 1025; R. C., c. 34, s. 67; 1811, c. 814, s. 2; 33 Hen. VIII, c. 1, ss. 1, 2; 30 Geo. II, c. 24, s. 1; C. S. 4277.)

Cross Reference.—As to alleging intent in the indictment, see § 15-151.

Origin of Section.—This section was derived from the English Statutes, 33 Hen VIII, and 30 George II. *State v. Yarboro*, 194 N. C. 498, 140 S. E. 216.

Elements of the Crime.—To constitute the crime of false pretense, a mistake, a pretense, a false pretense, a mere promise of opinion is not sufficient. It must be a (1) false representation of a subsisting fact, whether in writing or in words or in acts; (2) which is calculated to deceive and intended to deceive, and (3) which does in fact deceive (4) by which one man obtains value from another without compensation. *State v. Simpson*, 10 N. C. 621; *State v. Roberts*, 189 N. C. 93, 126 S. E. 161, 162; cited in *State v. Yarboro*, 194 N. C. 498, 140 S. E. 216; *State v. Howley*, 220 N. C. 113, 16 S. E. (2d) 705.

The constituent elements of the offense of false pretense are: (1) That the representation was made as alleged; (2) that property or something of value was obtained by reason of the representation; (3) that the representation was false; (4) that it was made with intent to defraud; (5) that it actually did deceive and defraud the person to whom it was made. *State v. Carlson*, 171 N. C. 818, 89 S. E. 30; *State v. Johnson*, 195 N. C. 506, 507, 142 S. E. 775.

Same—Subsisting Fact.—It is settled that a promise is not a pretense. No matter what the form, or however false the promise to do something in the future, it will not come within the statute. There must be a false allegation of some subsisting fact. *State v. Phifer*, 65 N. C. 321, 324; *State v. Knott*, 124 N. C. 814, 32 S. E. 798.

Same—Whether in Writing or Words.—It was held formerly that some false writing or token was necessary to constitute the offense. See *State v. Simpson*, 10 N. C. 620. This case was overruled in *State v. Phifer*, 65 N. C. 321, 323, where it is held that a naked lie meeting the other requirements enumerated in the preceding paragraph is a crime within the meaning of the section. This latter case is followed in *State v. Dixon*, 101 N. C. 741, 743, 7 S. E. 870. In fact the false pretense may be by act or conduct without spoken words. See *State v. Matthews*, 121 N. C. 604, 28 S. E. 469.

Same—Intent to Deceive.—The intent to cheat and defraud the prosecutor is an essential ingredient in the crime of false pretense. *State v. Blue*, 84 N. C. 807; *State v. Oakley*, 103 N. C. 408, 9 S. E. 575. In the absence of such definite finding, the uniform practice is to grant a new trial. *State v. McCloud*, 151 N. C. 730, 731, 66 S. E. 568.

Same—Actual Deceit.—Another of the elements is that the party to whom the false representation was made was deceived by it. *State v. Whedbee*, 152 N. C. 770, 67 S. E. 60. If he is so deceived it matters not whether he parted with goods for the sake of gain or for a charitable purpose. *State v. Matthews*, 91 N. C. 635.

Caveat Emptor.—The doctrine of caveat emptor "let the buyer beware" does not apply to actual fraud or obtaining property by false representation. By this doctrine the pur-

chaser is forewarned of tricks of the trade, bluster, puffs and empty boasts on the part of the person putting his property on the market; but the seller can not escape the penalty by reason of the doctrine where the facts constituting the crime, as stated in the second paragraph of this note, are made to appear. See *State v. Jones*, 70 N. C. 75; *State v. Burke*, 108 N. C. 750, 751, 12 S. E. 1000; *State v. Young*, 76 N. C. 258.

False Representations as to Deed of Trust.—A representation that a deed of trust covered certain land, which was not in fact included, on the faith of which defendant obtained money is a false pretense within this section. *State v. Roberts*, 189 N. C. 93, 126 S. E. 161.

False Representations as to Standing Timber.—A conviction under this section for false and fraudulent representations as to the quantity of standing timber on land sold to the prosecutor cannot be sustained where the amount of the purchase price for land is to be determined by the number of feet of timber cut therefrom, the prosecutor not being damaged thereby; nor can the conviction be sustained for misrepresentations as to the quality of the trees when the prosecutor had ample opportunity to inspect them and had been urged to do so by the defendant. *State v. Corey*, 199 N. C. 209, 153 S. E. 923.

Passing Counterfeit Money.—Where a person buys goods from another and the change given back by the seller is counterfeit an indictment under this section cannot be had, for there has been no fraudulent representations, nor intent to defraud before the defendant received the money. *State v. Alfred*, 84 N. C. 749.

Representation to Agent of Owner of Goods.—It is not necessary that the false representations be made to the owner of the goods directly, but it is sufficient if they were made to his agent. *State v. Taylor*, 131 N. C. 711, 42 S. E. 539.

Corporations Liable.—"In *State v. Rowland Lumber Co.* 153 N. C. 610, 612, 69 S. E. 58, it is said: 'The first ground, that corporations cannot be convicted of an offense where the intent is an ingredient, is no longer tenable. They are as fully liable in such cases as individuals. They are liable for libel, assaults and battery, etc. Corporate existence can be shown, though not charged in the bill. *State v. Shaw*, 92 N. C. 768.' This is fully sustained by all the late authorities." *State v. Salisbury Ice, etc., Co.*, 166 N. C. 366, 367, 81 S. E. 737.

The Indictment.—The indictment must allege all of the essential elements of the offense. *State v. Claudius*, 164 N. C. 521, 526, 80 S. E. 261.

"The indictment must show a causal connection between the false representation and the parting with the property (*State v. Whedbee*, 152 N. C. 770, 774, 67 S. E. 60) but 'no particular form of words is necessary; an allegation that "by means of the false pretense" or "relying on the false pretense," or the like, is sufficient, where it is apparent that the delivery of the property was the natural result of the pretense alleged. 19 Cyc. 430.'" *State v. Claudius*, 164 N. C. 521, 525, 80 S. E. 261.

The charge as to the persons intended to be cheated is surplusage and immaterial, all that is necessary is a charge of intent. *State v. Ridge*, 125 N. C. 655, 658, 34 S. E. 439; *State v. Salisbury Ice, etc., Co.*, 166 N. C. 366, 367, 81 S. E. 737.

Indictment held sufficient. *State v. Howley*, 220 N. C. 113, 16 S. E. (2d) 705.

Necessity of Averring Property Obtained.—The indictment must describe the thing alleged to have been thereby obtained with reasonable certainty, and by the name or term usually employed to describe it; and where the indictment charges obtaining money by a false pretense, and the State's evidence tends only to show that the defendant had obtained the signature of the prosecutor as an indorser or surety to a negotiable instrument, there is a fatal variance between the charge and the proof, and defendant's motion to nonsuit should be sustained. *State v. Gibson*, 169 N. C. 318, 85 S. E. 7. No averment of the value of the property obtained is necessary. *State v. Gillespie*, 80 N. C. 396. And where the allegation is that money was obtained and the proof is that property was obtained but the defendant made no exception, there is no ground for reversal. *State v. Ashford*, 120 N. C. 588, 26 S. E. 915. Nonsuit is the proper method of raising the question of variance. *State v. Gibson*, supra.

The offense is a felony and a bill of indictment charging such offense and which omits the word "feloniously" is defective, and judgment will be arrested on a verdict of guilty. *State v. Caldwell*, 112 N. C. 854, 16 S. E. 1010.

Applied in *State v. Hollingsworth*, 206 N. C. 739, 175 S. E. 99.

Cited in *State v. Jones*, 65 N. C. 395; *State v. Howard*, 129 N. C. 584, 40 S. E. 71; *Factor v. Laubenheimer*, 290 U. S. 276, 299, 54 S. Ct. 191, 78 L. Ed. 151.

§ 14-101. Obtaining signatures or property by false pretenses.—If any person, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, the false making of which would be punishable as forgery, or obtain from any person any money, goods, wares, merchandise or other property or valuable thing whatsoever, he shall be punishable by fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the state's prison for a term of not less than one year nor more than five years, or both, at the discretion of the court. (Rev., s. 3433; Code, s. 1026; 1871-2, c. 92; C. S. 4278.)

Cross References.—See annotations under § 14-100. As to forgery, see § 14-119 et seq. As to uttering a false bill of lading, see § 21-42.

Offense Is a Felony.—This section provides for imprisonment in the penitentiary, and therefore since the enactment of section 14-1 all offenses under this section are felonies, and an indictment must charge "feloniously." *State v. Caldwell*, 112 N. C. 854, 16 S. E. 1010.

This case overrules the case of *State v. Crumple*, 90 N. C. 701 in which it was held that as this section did not specify that the offense was a felony it would be treated as a misdemeanor in spite of the punishment being as for felonies.—Ed. Note.

Signing or Endorsing Note.—It has been held in *S. v. Gibson*, 169 N. C. 318, 85 S. E. 7, that it is an indictable offense under this section, to procure a person to sign or endorse a note by means of false representation and with intent to cheat and defraud. *State v. Johnson*, 195 N. C. 506, 507, 142 S. E. 775.

Same—Element of Intent.—In order to constitute false pretense in the discounting a note at the bank by a maker upon misrepresentation to one of the endorsers that he had secured certain endorsers with him, when, in fact he had used the note without other endorsers, evidence that the maker had turned over to the endorsers on the note his entire stock of merchandise and that he had thereupon had a civil judgment in their favor canceled of record, is material and competent upon the element of intent necessary to constitute the offense charged. *State v. Johnson*, 195 N. C. 506, 142 S. E. 775.

Representation as to Titles to Land.—One who obtains money as the purchase price of land sold by him to another upon the representation that the land is unencumbered when it is encumbered by a mortgage, is liable under this section. *State v. Munday*, 78 N. C. 460.

Sufficient Indictment.—An indictment for false pretense charging that defendant wilfully, knowingly, falsely and feloniously pretended to the prosecutor that he had cut for him, for the use of another, twenty cords of wood, whereas in truth and in fact he had not cut the same, and by means of said false pretense did obtain from the prosecutor three dollars in money, with intent, etc., is sufficient. *State v. Eason*, 86 N. C. 674.

Same—Must Allege Certain Offense.—An indictment should state with reasonable certainty the offense charged, and an indictment charging the defendant with obtaining money when he obtained a note, is defective. *State v. Gibson*, 169 N. C. 318, 85 S. E. 7.

Cited in *State v. Gibson*, 169 N. C. 318, 85 S. E. 7.

§ 14-102. Obtaining property by false representation of pedigree of animals.—If any person shall, with intent to defraud or cheat, knowingly represent any animal for breeding purposes as being of greater degree of any particular strain of blood than such animal actually possesses, and by such representation obtain from any other person money or other thing of value, he shall be guilty of a misdemeanor, and upon conviction thereof shall for each offense be punished by a fine of not less than sixty dollars nor more than three hundred dollars, or by imprisonment for a term not exceeding six months. (Rev., s. 3307; 1891, c. 94, s. 2; C. S. 4279.)

§ 14-103. Obtaining certificate of registration of animals by false representation.—If any person shall, by any false representation or pretense, with intent to defraud or cheat, obtain from any club, association, society or company for the improvement of the breed of cattle, horses, sheep, swine, fowls or other domestic animals or birds, a certificate of registration of any animal in the herd register of any such association, society or company, or a transfer of any such registration, upon conviction thereof he shall be punished by imprisonment for a term not exceeding three months or a fine not exceeding one hundred dollars, or by both such fine and imprisonment. (Rev., s. 3308; 1891, c. 94, s. 1; C. S. 4280.)

§ 14-104. Obtaining advances under promise to work and pay for same.—If any person, with intent to cheat or defraud another, shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation upon and by color of any promise or agreement that the person making the same will begin any work or labor of any description for such person or corporation from whom the advances are obtained, and the person making the promise or agreement shall willfully fail, without a lawful excuse, to commence or complete such work according to contract, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3431; 1889, c. 444; 1891, c. 106; 1905, c. 411; C. S. 4281.)

Cross Reference.—As to tenant or cropper willfully abandoning landlord after advances have been made, see § 14-358.

Editor's Note.—The 1905 amendment, which made failure to perform services after being paid therefor presumptive evidence of fraudulent intent, has been held to contravene the constitutions both of North Carolina and of the United States. *State v. Griffin*, 154 N. C. 611, 70 S. E. 292. A similar provision in an Alabama statute was held to be unconstitutional by the United States Supreme Court in *Bailey v. Alabama*, 219 U. S. 219, 31 S. Ct. 145, 55 L. Ed. 191.

Constitutional.—The gist of the offence of procuring advances "with intent to cheat and defraud" is not the obtaining the advances, and afterwards refusing to perform the labor, but in the fraudulent intent at the time of obtaining the advances, and making the promise. This section is constitutional. *State v. Norman*, 110 N. C. 484, 14 S. E. 968. This case was decided before the 1905 amendment discussed above.

Intent Must Be Shown.—To convict under this section it is necessary to show the fraudulent intent on the part of the promisor; and merely the facts of obtaining the advances, the promise to do the work, and a breach of that promise, are insufficient to sustain a conviction. *State v. Griffin*, 154 N. C. 611, 70 S. E. 292; *State v. Islay*, 164 N. C. 491, 79 S. E. 1105.

No Day of Grace.—Where, upon a promise to begin work on the following Monday, the prosecutor made advances to the defendant, and the latter failed, without proper excuse, to begin work at the time stipulated, and was arrested on complaint of prosecutor on Tuesday: Held, to be a failure to begin work within the meaning of the statute. *State v. Norman*, 110 N. C. 484, 14 S. E. 968.

§ 14-105. Obtaining advances under written promise to pay therefor out of designated property.—If any person shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation, upon any written representation that the person making the same is the owner of any article of produce, or of any other specific chattel or personal property, which property, or the proceeds of which the owner in such representation

thereby agrees to apply to the discharge of the debt so created, and the owner shall fail to apply such produce or other property, or the proceeds thereof, in accordance with such agreement, or shall dispose of the same in any other manner than is so agreed upon by the parties to the transaction, the person so offending shall be guilty of a misdemeanor, whether he shall or shall not have been the owner of any such property at the time such representation was made. (Rev., s. 3434; Code, s. 1027; 1879, cc. 185, 186; 1905, c. 104; C. S. 4282.)

Constitutional.—It is not the failure to pay the debt which is made indictable, but the failure to apply certain property, which, in writing, has been pledged for its payment, and advances made on the faith of such pledge; on this ground it is declared constitutional. *State v. Torrence*, 127 N. C. 550, 553, 37 S. E. 268; *State v. Mooney*, 173 N. C. 798, 92 S. E. 610.

Representations Must Be of Existing Facts.—An indictment for obtaining goods under a false pretense, must be founded on a false representation by the defendant of an existing fact, and the pledging of a check to be received at a subsequent date does not come within the meaning of the section. *State v. Whidbee*, 124 N. C. 796, 32 S. E. 318.

Indictment Should Charge Exact Terms.—The indictment should charge in the exact terms of the statute, and on failure to follow the statute it is subject to being quashed. *State v. Mooney*, 173 N. C. 798, 92 S. E. 610.

Compared with Section 14-114.—This section is on the same footing as section 14-114 for disposing of mortgaged property. It is not the failure to pay the debt which is made indictable, but the fraud in disposing of or withholding property which the owner has in writing agreed shall be applied in payment of advances made on the faith of such quasi mortgage, to one who has thus pro tanto become the owner thereof, and the subsequent conversion of said property, and diversion of the proceeds to the detriment of the equitable owner and in fraud of his rights. *State v. Mooney*, 173 N. C. 798, 799, 92 S. E. 610.

§ 14-106. Obtaining property in return for worthless check, draft or order.—Every person who, with intent to cheat and defraud another, shall obtain money, credit, goods, wares or any other thing of value by means of a check, draft or order of any kind upon any bank, person, firm or corporation, not indebted to the drawer, or where he has not provided for the payment or acceptance of the same, and the same be not paid upon presentation, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. The giving of the aforesaid worthless check, draft, or order shall be prima facie evidence of an intent to cheat and defraud. (1907, c. 975; 1909, c. 647; C. S. 4283.)

Local Modification.—New Hanover: Pub. Loc. 1927, c. 636.

Cross Reference.—As to false warehouse receipts, see § 27-54 et seq.

It is a misdemeanor for any person knowingly to utter a worthless check in this state and such act involves moral turpitude under this section if done with intent to defraud. *Oats v. Wachovia Bank, etc., Co.*, 205 N. C. 14, 169 S. E. 869.

Intent to Cheat or Defraud.—In order to convict a defendant under the provisions of this section for obtaining property in return for a worthless check, the indictment must sufficiently charge an intent to cheat or defraud or that the defendant obtained a thing of value. *State v. Horton*, 199 N. C. 771, 155 S. E. 866.

Signing in Name of Company.—Upon the trial under indictment for violating this section, the evidence tended to show that the check in question was signed in the name of a certain company by the defendant, and was conflicting as to whether the defendant was a member of the concern. It was held, that the question as to whether the defendant was a member of the company when he drew the check in question was not necessarily decisive of his guilt, and an instruction to find him guilty if the jury should find from the evidence he was not a partner, was

reversible error. *State v. Anderson*, 194 N. C. 377, 139 S. E. 701.

Same—Burden of Proof.—The burden of proving the guilt of defendant in violating this section, the worthless check statute, is on the State, and where the check in question has been signed by him in the name of a certain firm and there is evidence tending to show that other checks similarly signed had been paid, with further evidence that defendant's authority to sign such checks had been revoked, the burden of proving defendant's guilt is on the State, and raises the question as to the defendant's good faith for the jury to determine. *State v. Anderson*, 194 N. C. 377, 139 S. E. 701.

§ 14-107. Worthless checks.—It shall be unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation.

Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor. [If the amount due on such check is not over fifty dollars, the punishment shall not exceed a fine of fifty dollars or imprisonment for thirty days.]

The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of any such check or draft. The part of this section in brackets shall only apply to Pitt county, Robeson county, Iredell county, Martin county, Lee county, Rutherford county, Bladen county, Cumberland county, Mecklenburg county, Catawba county, Sampson county, Alleghany county, Lenoir county, Randolph county, Gaston county, Hoke county, Madison county, Burke county, Transylvania county, Rockingham county, Halifax county, Hertford county, Richmond county, Chatham county, Pamlico county, Wake county, Haywood county, Granville county, Davidson county, Anson county, Carteret county, Davie county, Forsyth county, Greene county, Jackson county, Henderson county, Stokes county, Onslow county, Macon county, Currituck county, Chowan county, Vance county, Edgecombe county, Northampton county, Stanly county, Cabarrus county, Mitchell county, Yancey county, Avery county, Alamance county, Franklin county, Yadkin county, Caldwell county, Gates county, Ashe county, Washington county, Nash county, Johnston county, Duplin county, Wayne county, Guilford county, Rowan county, Bertie county, Moore county, Harnett county, Columbus county, Watauga county, Lincoln county, Caswell county, Orange county, Buncombe county, Wilkes county, Hyde county, Swain county, Clay county, Graham county, Cherokee county, Scotland county, Union county, and Surry county. (1925, c. 14; 1927, c. 62; 1929, c. 273, ss. 1, 2; 1931, cc. 63, 138; 1933, cc. 43, 64, 93, 170, 265, 362, 458; 1939, c. 346.)

Local Modification.—For an act amending an Act that was never passed by the legislature, and applying only to Durham County, see Public Laws 1931, c. 292.

Cross Reference.—See annotation to § 14-106.

Editor's Note.—The part of this section appearing in brackets in the second paragraph, and some of the counties to which applicable, were added by the Act of 1929. The Acts of 1931, 1933 and 1939 added other counties.

As pointed out in the Article in 3 N. C. Law Rev.

141, the giving of worthless checks was first regulated in this state by the Acts of 1907, and 1909. Those acts are partly quoted and the elements of the crime analysed in the article. It was pointed out that although not expressly stated a logical interpretation discloses that under those acts the checks must have been given for present value and it was held that the freight for a car load of lumber was a present value within the section. (See *State v. Freeman*, 172 N. C. 925, 90 S. E. 507.)

In 1925 the legislature passed a new bad check law which left out the element of intent to defraud, etc., so that under it the giving of a check with insufficient funds was a crime. The elements of the crime under that law are outlined by Mr. Justice Adams in *State v. Edwards*, 190 N. C. 322, 130 S. E. 10, and repeated in the Law Review Article. It was also pointed out that the indictment must have charged both "insufficient funds" and "insufficient credits" to charge a violation. The question of the constitutionality of this act was raised both in the article previously cited and in 5 N. C. Law Rev. 75, where the position was taken that the law was violative of the constitution, Art. I, section 16, as permitting the imprisonment for debt.

Subsequently the legislature at the 1927 session repealed the act and passed the present section which cures the defect pointed out in the Law Review, and it has been upheld by the supreme court. See *State v. Yarbboro*, 194 N. C. 498, 140 S. E. 216.

It would seem that this section does not require that the check be given for present value. The essence of the crime seems to be the giving of a check for the payment of money or its equivalent knowing that there are insufficient funds or credit with which to pay upon presentation whether for a pre-existing debt or for present value. See *State v. Yarbboro*, 194 N. C. 498, 504, 140 S. E. 216.

It is also apparent that this section does not require an actual intent to cheat or defraud. This element is presumed, no doubt, from the knowledge of lack of funds.

The prior laws contain a provision allowing the drawer 10 days within which to make the check good; the present law contains no such provision.

Under the prior laws which made intent to cheat or defraud an element of the crime, the uttering of the check raised a prima facie presumption of such intent and this cast the burden upon the defense of disproving the element. This section contains no such provision and the burden of proving the knowledge of lack of funds is upon the state, it would seem.

For a general note on the subject, see XIV Va. Law Rev. 134; as to applicability of Virginia Statute to post-dated checks, see XIV Va. Law Rev. 145.

Public Detriment.—The gravamen of the offense prescribed by this section is the putting into circulation worthless commercial paper to the public detriment, and not that of the individual payee. *State v. Levy*, 220 N. C. 812, 18 S. E. (2d) 355.

Postdated Check.—A postdated check given for a past due account and so accepted is not a representation importing a criminal liability if untrue that comes within the intent and meaning of the "bad check law," making it a misdemeanor for a person to issue and deliver to another any check on any bank or depository for the payment of money or its equivalent knowing at the time that he has not sufficient funds on deposit or credit with the bank or depository for its payment. *State v. Crawford*, 198 N. C. 522, 152 S. E. 504.

Indictment—Necessity of Charging All Elements.—In order to charge a statutory offense (the giving of a bad check), the indictment should set forth all the essential requisites therein prescribed, and no element should be left to inference or implication, and where the indictment is defective a demurrer is good. *State v. Edwards*, 190 N. C. 322, 130 S. E. 10.

Issuance as Fraud.—The issuance of a check on a bank in violation of this law is a false representation of subsisting facts that the maker has on deposit sufficient funds for its payment at the bank, upon its presentation, or that he has made the necessary arrangements with the bank therefor, and is in effect a fraud upon the payee, the payee accepting it in good faith. *State v. Yarbboro*, 194 N. C. 498, 140 S. E. 216. See dissenting opinion.

Fatal Variance in Allegata and Probata.—An indictment charging the defendant with obtaining money on a day named by the issuance of a worthless check in violation of our statute, and evidence that it was given for the hire of an automobile, ten days later, are at fatal variance, and will not support a conviction. *State v. Corpening*, 191 N. C. 751, 133 S. E. 14.

The indictment charged that defendant issued a worthless check knowing at the time that he did not have sufficient funds or credit for its payment. The proof was that defendant issued a check of a corporation of which he was an

executive officer, and that the corporation did not have sufficient funds or credit for its payment. There is a fatal variance between allegation and proof, and defendant's motion to nonsuit should have been allowed. *State v. Dowless*, 217 N. C. 589, 9 S. E. (2d) 18.

Waiver of Right to Trial by Jury.—Where the defendant in a criminal action enters the plea of "not guilty," the requirement of our State Constitution, Art. 1, § 13, of trial by jury may not be waived by the accused nor another method substituted by agreement, and where a defendant is indicted for violating the statute commonly known as the "bad check law," an agreement between the State and the accused that the judge may find the facts under a plea of "not guilty," will be disregarded on appeal and the case remanded to be tried according to law. *State v. Crawford*, 197 N. C. 513, 149 S. E. 729.

Instruction held proper. *State v. Levy*, 220 N. C. 812, 18 S. E. (2d) 355.

Sentence.—Upon defendant's conviction upon two warrants charging the issuance of worthless checks, a sentence of two years imprisonment on the first warrant and one year imprisonment on the second, the sentences to run consecutively, cannot be held excessive, cruel or unusual, since the sentences were within the limits prescribed by this section. *State v. Levy*, 220 N. C. 812, 18 S. E. (2d) 355.

Cited in *State v. Byrd*, 204 N. C. 162, 167 S. E. 626; *Oates v. Wachovia Bank, etc., Co.*, 205 N. C. 14, 16, 169 S. E. 869.

§ 14-108. Obtaining property or services from slot machines, etc., by false coins or tokens.—Any person who shall operate, or cause to be operated, or who shall attempt to operate, or attempt to cause to be operated any automatic vending machine, slot machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, by means of a slug or any false, counterfeited, mutilated, sweated or foreign coin, or by any means, method, trick or device whatsoever not lawfully authorized by the owner, lessee or licensee of such machine, coin-box telephone or receptacle, or who shall take, obtain or receive from or in connection with any automatic vending machine, slot machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, any goods, wares, merchandise, gas, electric current, article of value, or the use or enjoyment of any telephone or telegraph facilities or service, or of any musical instrument, phonograph or other property, without depositing in and surrendering to such machine, coin-box telephone or receptacle lawful coin of the United States of America to the amount required therefor by the owner, lessee or licensee of such machine, coin-box telephone or receptacle, shall be guilty of a misdemeanor, punishable by a fine or imprisonment, or in the discretion of the court, by both. (1927, c. 68, s. 1.)

§ 14-109. Manufacture, sale, or gift of devices for cheating slot machines, etc.—Any person who, with intent to cheat or defraud the owner, lessee, licensee or other person entitled to the contents of any automatic vending machine, slot machine, coin-box telephone or other receptacle, depository or contrivance designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, or who, knowing that the same is intended for unlawful use, shall manufacture for sale, or sell or give away any slug, device or substance whatsoever intended or calculated to be placed or deposited in any such automatic vending machine,

slot machine, coin-box telephone or other such receptacle, depository or contrivance, shall be guilty of a misdemeanor, punishable by a fine or imprisonment, or in the discretion of the court, by both. (1927, c. 68, s. 2.)

§ 14-110. Obtaining entertainment at hotels and boarding-houses without paying therefor.—Any person who obtains any lodging, food or accommodation at an inn, boarding-house or lodging-house without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at an inn, boarding-house or lodging-house by the use of any false pretense, or who, after obtaining credit or accommodation at an inn, boarding-house or lodging-house, absconds and surreptitiously removes his baggage therefrom without paying for his food, accommodation or lodging, shall be guilty of a misdemeanor, and shall upon conviction be fined or imprisoned at the discretion of the court. (1907, c. 816; C. S. 4284.)

Local Modification.—*Pitt*: 1929, c. 103; *Martin, Wake, Watauga*: 1931, c. 9; *Buncombe, Jackson, Franklin*: 1933, c. 531; *Lee*: 1937, c. 168; *Rockingham*: 1939, c. 53.

Cross Reference.—As to liens on baggage, see § 44-30 et seq.

Constitutionality.—The misdemeanor prescribed by this section expressly applies, when the contract has been made with a fraudulent intent, and this intent also exists in surreptitiously absconding and removing baggage without having paid the bill, and this statute is not inhibited by Article I, section 16, of the State Constitution, as to imprisonment for the mere nonpayment of a debt, either in a civil action or by indictment. *State v. Barbee*, 187 N. C. 703, 122 S. E. 753.

Boarding House Defined.—One who has not been licensed to keep a boarding house, and who does not hold his place out as such, but who has received a boarder in his home, for pay, is not the keeper of a boarding house. *State v. McRae*, 170 N. C. 712, 86 S. E. 1039.

Evidence Insufficient for Conviction.—In order to convict under the provisions of this section, it is necessary for the State to show the fraudulent intent of the one who has failed or refused to pay for his lodging or food at an inn, boarding house, etc., or the like intent as to his surreptitiously leaving with his baggage without having paid his bill; and evidence tending only to show his inability to pay, under the circumstances, but his arrangement with the keeper of the inn or boarding house to pay in a certain way and within a fixed period after leaving, and his payment in part, and that his wife, remaining longer than he, thereafter took away his baggage without his knowledge or participation therein, and in the separation following he received no benefit therefrom, is insufficient for a conviction of the statutory offense. *State v. Barbee*, 187 N. C. 703, 122 S. E. 753.

Evidence Sufficient to Convict.—Where there is evidence that one having received accommodation at a hotel left with his baggage without notice to the proprietor, and without having paid his bill, it is sufficient to convict under this section, the question of intent being for the jury. *State v. Hill*, 166 N. C. 298, 81 S. E. 408.

§ 14-111. Fraudulently obtaining credit at hospitals and sanatoriums.—Any person who obtains accommodation at any public or private hospital or sanatorium without paying therefor, with intent to defraud the said hospital or sanatorium, or who obtains credit at such hospital or sanatorium by the use of any false pretense, or who, after obtaining credit or accommodation at a hospital or sanatorium, absconds and surreptitiously removes his baggage therefrom without paying for the accommodation or credit, shall be guilty of a misdemeanor, and shall, upon conviction, be fined or imprisoned at the discretion of the court. (1931, c. 214.)

§ 14-112. Obtaining merchandise on approval.—If any person, with intent to cheat and defraud, shall solicit and obtain from any merchant any

article of merchandise on approval, and shall thereafter, upon demand, refuse or fail to return the same to such merchant in an unused and undamaged condition, or to pay for the same, such person so offending shall be guilty of a misdemeanor. Evidence that a person has solicited a merchant to deliver to him any article of merchandise for examination or approval and has obtained the same upon such solicitation, and thereafter, upon demand, has refused or failed to return the same to such merchant in an unused and undamaged condition, or to pay for the same, shall constitute prima facie evidence of the intent of such person to cheat and defraud, within the meaning of this section: Provided, this section shall not apply to merchandise sold upon a written contract which is signed by the purchaser. (1911, c. 185; 1941, c. 242; C. S. 4285.)

Editor's Note.—The 1941 amendment substituted the word "merchandise" for the words "wearing apparel" formerly appearing in this section. It also added the proviso at the end of the section.

§ 14-113. Obtaining money by false representation of physical defect.—It shall be unlawful for any person to falsely represent himself or herself in any manner whatsoever as blind, deaf, dumb, or crippled or otherwise physically defective for the purpose of obtaining money or other thing of value or of making sales of any character of personal property. Any person so falsely representing himself or herself as blind, deaf, dumb, crippled or otherwise physically defective, and securing aid or assistance on account of such representation, shall be deemed guilty of a misdemeanor. (1919, c. 104; C. S. 4286.)

Cross References.—As to regulation of beggars, see § 108-81 et seq. As to fraudulently obtaining old age assistance, see § 108-42. As to defrauding the North Carolina governmental employees' retirement system for counties, cities, and towns, see § 128-32.

Art. 20. Frauds.

§ 14-114. Fraudulent disposal of mortgaged personal property.—If any person, after executing a chattel mortgage, deed of trust or other lien for a lawful purpose, shall make any disposition of any personal property embraced in such mortgage, deed of trust or lien, with intent to hinder, delay or defeat the rights of any person to whom or for whose benefit such deed was made, every person so offending and every person with a knowledge of the lien buying the property embraced in any such deed or lien, and every person assisting, aiding or abetting the unlawful disposition of such property, with intent to hinder, delay or defeat the rights of any person to whom or for whose benefit any such deed or lien was made, shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment, or both, in the discretion of the court. In all indictments for violations of the provisions of this section it shall not be necessary to allege or prove the person to whom any sale or disposition of the property was made, but proof of the possession of the property embraced in such chattel mortgage, deed of trust or lien, by the grantor thereof, after the execution of said chattel mortgage, deed of trust, or lien, and while it is in force, the further proof of the fact that the sheriff or other officer charged with the execution of process cannot after due diligence find such property under process directed to him for his

seizure, for the satisfaction of such chattel mortgage, deed of trust or lien, or that the mortgagee demanded the possession thereof of the mortgagor for the purpose of sale to foreclose said mortgage, deed of trust or lien, after the right to such foreclosure had accrued, and that the mortgagor failed to produce, deliver or surrender the same to the mortgagee for that purpose, shall be prima facie proof of the fact of the disposition or sale of such property, by the grantor, with the intent to hinder, delay or defeat the rights of the person to whom said chattel mortgage, deed of trust or lien was made. (Rev., s. 3435; Code, s. 1059; 1887, c. 14; 1873-4, c. 31; 1874-5, c. 215; 1883, c. 61; C. S. 4287.)

Cross Reference.—As to fraudulent conveyances, see § 39-15 et seq.

Three Classes of Offenders.—The statute is directed against three classes of offenders: (1) The maker of the lien who shall dispose of the property with the unlawful intent; (2) those who buy with a knowledge of the lien, and (3) those who aid or abet either the maker or purchaser in the unlawful acts. State v. Woods, 104 N. C. 898, 10 S. E. 555.

Intent Necessary.—Under this section the forbidden act must, in order to be indictable, be accomplished with a specific intent, and the courts cannot disregard this clearly expressed purpose of the Legislature. State v. Manning, 107 N. C. 910, 911, 12 S. E. 248. The actual sale of mortgaged crops raises a presumption of fraudulent intent. State v. Holmes, 120 N. C. 573, 26 S. E. 692. In a trial under this section the burden is upon the defendant to disprove the criminal intent. State v. Surles, 117 N. C. 720, 23 S. E. 324; State v. Holmes, 120 N. C. 573, 26 S. E. 692.

Result of Sale Must Injure.—If the property included in the mortgage (other than that disposed of), was abundantly sufficient and available to pay the indebtedness, there could be no such prejudicial result as is contemplated by the statute. State v. Manning, 107 N. C. 910, 912, 12 S. E. 248.

Justice Jurisdiction.—Under the original acts justices of the peace have exclusive jurisdiction of the offense of fraudulently disposing of personal property embraced in a chattel mortgage. State v. Jones, 83 N. C. 657.

Infant's Liability.—An indictment under this section for disposing of crops under mortgage cannot be sustained, where it appears that the defendant is an infant. The alleged disposition was a disaffirmance of the contract and renders it void. State v. Howard, 88 N. C. 651.

Indictment Must Charge Maker, Buyer or Assistant.—If the indictment does not charge the defendant as the maker of the lien nor the buyer of the property with knowledge of it, nor as assisting, aiding or abetting in the unlawful disposition of the property no offense is charged. State v. Woods, 104 N. C. 898, 900, 10 S. E. 555.

Indictment Must Charge Lien and Manner of Sale.—An indictment for disposing of mortgaged property is fatally defective, if it fails to set forth that the lien was in force at the time of sale, the party to whom sold, and the manner of disposition. State v. Burns, 80 N. C. 376; State v. Pickens, 79 N. C. 652.

Indictment in Two Counts.—Where an indictment for disposing of mortgaged property contained two counts, one alleging a disposal with intent to defraud G., "business manager" of an association, and the other a disposal with intent to defraud G., "business manager and agent" of such association, the counts are not repugnant to each other, since they relate to one transaction, varied only to meet the probable proof, and the court will neither quash the bill nor force the State to elect on which count it will proceed. State v. Surles, 117 N. C. 720, 721, 23 S. E. 324.

Prior Lien as Defense.—It is competent for the defendant, in an indictment for unlawfully disposing of mortgaged property—a crop of tobacco—to show that he, in good faith, applied the entire crop to the discharge of his landlord's lien. State v. Ellington, 98 N. C. 749, 4 S. E. 534.

Evidence of Other Sales Inadmissible.—On a trial of one charged with unlawfully disposing of an article of personal property covered by a chattel mortgage, with intent to defeat the right of the mortgagee, evidence that, five months after the offense was committed, the defendant offered to dispose of another article covered by the same mortgage is inadmissible to prove the intent with which the offense was committed. State v. Jeffries, 117 N. C. 727, 23 S. E. 163.

Cited in State v. Barrett, 138 N. C. 630, 635, 50 S. E. 506; State v. Torrence, 127 N. C. 550, 553, 37 S. E. 268.

§ 14-115. Secreting property to hinder enforcement of lien.—Any person removing, exchanging or secreting any personal property on which a lien exists, with intent to prevent or hinder the enforcement of the lien, shall be guilty of a misdemeanor. (Rev., s. 3436; 1887, c. 14; C. S. 4288.)

Local Modification.—Pitt: 1941, c. 284.

§ 14-116. Fraudulent entry of horses at fairs.—If any person shall knowingly enter or cause to be entered in competition for any purse, prize, premium, stake or sweepstake offered or given by any agricultural or other society, association or person in this state, any horse, mare, gelding, colt or filly under an assumed name or out of its proper class, he shall be punished by a fine not less than one hundred nor more than one thousand dollars, or by imprisonment in the state's prison for not less than one nor more than five years, or by both fine and imprisonment, at the discretion of the court. (Rev., s. 3429; 1893, c. 387; C. S. 4289.)

§ 14-117. Fraudulent and deceptive advertising.—It shall be unlawful for any person, firm, corporation or association, with intent to sell or in anywise to dispose of merchandise, securities, service or any other thing offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, to make public, disseminate, circulate or place before the public or cause directly or indirectly to be made, published, disseminated, circulated or placed before the public in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill circular, pamphlet or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service or any other thing so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading: Provided, that such advertising shall be done willfully and with intent to mislead. Any person who shall violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (1915, c. 218; C. S. 4290.)

Cross References.—As to making misleading and false representations as to fertilizer, see § 106-43. As to the use of private marks or labels to defraud, see § 80-12. As to the misbranding of sacks, see § 80-14.

Cited in State v. Pelley, 221 N. C. 487, 20 S. E. (2d) 850.

§ 14-118. Blackmailing.—If any person shall knowingly send or deliver any letter or writing demanding of any other person, with menaces and without any reasonable or probable cause, any chattel, money or valuable security; or if any person shall accuse, or threaten to accuse, or shall knowingly send or deliver any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death or by imprisonment in the state's prison, with the intent to extort or gain from such person any chattel, money or valuable security, every such offender shall be guilty of a misdemeanor. (Rev., s. 3428; Code, s. 989; R. C., c. 34, s. 110; C. S. 4291.)

Indictment.—Where the offence charged was the sending of a letter, under this section, and the letter was set out in the indictment, from which it is deducible by necessary implication that the defendant threatened to indict the prosecutor for an offence punishable by imprisonment in the penitentiary, with a view and intent to extort money a criminal offence is sufficiently charged. State v. Harper, 94 N. C. 936.

Circumstantial Evidence.—Letters demanding a sum of money from the prosecutor, the first requiring that he drop the amount along the road at a certain place at a designated time and at a certain signal, followed by the burning of the prosecutor's barn on his failing to comply; and the second one referring to this fact and making the same demand, and the apprehension of the defendant at the place at the time appointed, as he appeared after the signals were given, though circumstantial evidence, is adjudged sufficient under an indictment for blackmailing to sustain a conviction. State v. Frady, 172 N. C. 978, 90 S. E. 802.

Art. 21. Forgery.

§ 14-119. Forgery of bank-notes, checks and other securities.—If any person shall falsely make, forge or counterfeit, or cause or procure the same to be done, or willingly aid or assist therein, any bill or note in imitation of, or purporting to be, a bill or note of any incorporated bank in this state, or in any of the United States, or in any of the territories of the United States; or any order or check on any such bank or corporation, or on the cashier thereof; or any of the securities purporting to be issued by or on behalf of the state, or by or on behalf of any corporation, with intent to injure or defraud any person, bank or corporation, or the state, the person so offending shall be guilty of a felony and shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years, or by a fine in the discretion of the court. (Rev., s. 3419; Code, s. 1030; R. C., c. 34, s. 60; 1819, c. 994, s. 1; C. S. 4293.)

Cross Reference.—As to alleging intent in the indictment, see § 15-151.

Elements of Offense.—To constitute an indictable forgery, it is not alone sufficient that there be a writing, and that the writing be false: it must also be such as, if true, would be of some legal efficacy, real or apparent, since otherwise it has no legal tendency to defraud. 2 Bishop Cr. Law, sec. 533; Barnes v. Crawford, 115 N. C. 76, 79, 20 S. E. 386. While an intent to defraud is an essential element of forgery, it is not essential that any person be actually defrauded, or that any act be done other than the fraudulent making, or altering of the instrument. State v. Hall, 108 N. C. 776, 13 S. E. 189; State v. Cross, 101 N. C. 770, 7 S. E. 715.

Indictment Must Allege Existence of Bank.—In an indictment under this section to punish the making, passing, etc., of counterfeit bank notes, if the note alleged to have been passed be of a bank not within the State, the indictment should aver that such a bank exists as that by which the counterfeit note purports to have been issued. State v. Twitty, 9 N. C. 248.

Evidence of Former Acts.—Upon an indictment for uttering forged money, knowing it to be forged, evidence may be received of former acts and transactions which tend to bring home the scienter to the defendant, notwithstanding such evidence may fix upon him other charges beside that on which he is tried. State v. Twitty, 9 N. C. 248.

Cited in State v. Peter, 53 N. C. 19, 23.

§ 14-120. Uttering forged paper.—If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall utter or publish any such false, forged or counterfeited bill, note, order, check or security as is mentioned in the preceding section; or shall pass or deliver, or attempt to pass or deliver, any of them to another person (knowing the same to be falsely forged or counterfeited), the person so offending shall be punished by imprisonment in the county jail or state's prison not less than four

months nor more than ten years. (Rev., s. 3427; Code, s. 1031; R. C., c. 34, s. 61; 1819, c. 994, s. 2; 1909, c. 666; C. S. 4294.)

Cross Reference.—As to payment of a forged check, see § 53-52.

Delivering to Agent.—"It is putting spurious paper into circulation, and not defrauding the individual who takes it, that the statute has in view. Hence, upon a similar statute, it was held, that delivering a forged note to an agent, that he might dispose of it in buying goods, was a passing within the act. *Palmer's case*, R. and R. 72." *State v. Harris*, 27 N. C. 287, 293.

Cited in dissenting opinion *State v. Jarvis*, 129 N. C. 598, 40 S. E. 220.

§ 14-121. Selling of certain forged securities.—If any person shall sell, by delivery, indorsement or otherwise, to any other person, any judgment for the recovery of money purporting to have been rendered by a justice of the peace, or any bond, promissory note, bill of exchange, order, draft or liquidated account purporting to be signed by the debtor (knowing the same to be forged), the person so offending shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years. (Rev., s. 3425; Code, s. 1033; R. C., c. 34, s. 63; C. S. 4295.)

§ 14-122. Forgery of deeds, wills and certain other instruments.—If any person, of his own head and imagination, or by false conspiracy or fraud with others, shall wittingly and falsely forge and make, or shall cause or wittingly assent to the forging or making of, or shall show forth in evidence, knowing the same to be forged, any deed, lease or will, or any bond, writing obligatory, bill of exchange, promissory note, endorsement or assignment thereof; or any acquittance or receipt for money or goods; or any receipt or release for any bond, note, bill or any other security for the payment of money; or any order for the payment of money or delivery of goods, with intent, in any of said instances, to defraud any person or corporation, and thereof shall be duly convicted, the person so offending shall be punished by imprisonment in the state's prison or county jail not less than four months nor more than ten years, or fined in the discretion of the court. (Rev., s. 3424; Code, s. 1029; R. C., c. 34, s. 59; 1801, c. 572; 5 Eliz., c. 14, ss. 2, 3; 21 James I, c. 26; C. S. 4296.)

Cross References.—As to forgery of certificate of discharge from the armed forces of the United States, see § 47-112. As to uttering a false bill of lading, see § 21-42. As to forgery of trademarks, etc., see §§ 80-12 and 80-13.

General Considerations.—Differing from false pretenses it is not an element of this offence that the forgery was "calculated to deceive and did deceive," intent alone suffices to constitute the crime. *State v. Collins*, 115 N. C. 716, 20 S. E. 452; *State v. Hall*, 108 N. C. 776, 138 S. E. 189. It is immaterial to whom the advantages of the forgery would accrue. *State v. Cross*, 101 N. C. 770, 7 S. E. 715.

An instrument in writing on which forgery can be predicated is one which, if genuine, could operate as the foundation of another man's liability, or the evidence of his rights, such as a letter of recommendation of a person as a man of property and pecuniary responsibility, an order for the delivery of goods, a receipt, or a railroad pass, as well as a bill of exchange, or other express contract. 3 Greenleaf Ev., 103. *Barnes v. Crawford*, 115 N. C. 76, 78, 20 S. E. 386.

To constitute an "order for the delivery of goods," a forgery within the meaning of this section, there must appear to be a drawer, a person drawn upon, who is under obligation to obey, and there must appear to be a person to whom the goods are to be delivered, and if the paper-writing set forth in the indictment as a forgery does not contain these requisites, there cannot be a conviction for forgery under this section, *State v. Lamb*, 65 N. C. 419; but

in such case a conviction will be sustained for the offense at common law. *State v. Leak*, 80 N. C. 403, cited in note in 32 L. R. A., N. S., 331.

Possession Raises Presumption of Guilt.—One possessing a forged instrument is presumed to have either forged it or consented to the forgery, and nothing else appearing such holder will be presumed guilty. *State v. Peterson*, 129 N. C. 556, 40 S. E. 9.

"In *State v. Britt*, 14 N. C. 122, *Ruffin*, J., says: 'That the order was not in the handwriting of the defendant did not rebut the legal presumption of his guilt. Being in possession of the forged order, drawn in his own favor, were facts constituting complete proof that, either by himself or by false conspiracy with others, he forged or assented to the forgery of the instrument; that he either did the act or caused it to be done until he showed the actual perpetrator and that he himself was not privy.' To the same effect is *State v. Morgan*, 19 N. C. 348. It is wholly immaterial whether the defendant himself forged the order or procured and caused it to be done. In either case his guilt is the same." *State v. Lane*, 80 N. C. 407, 408.

Lost Instruments.—If the forged instrument is lost it is not necessary to set it out in the indictment, and the substance of the forged instrument is all that need be charged, though in such case it would be better practice to aver the loss. *State v. Peterson*, 129 N. C. 556, 40 S. E. 9.

Misspelled Signature.—An indictment lies for forgery of an order for the payment of money, although the signature is misspelled, *State v. Covington*, 94 N. C. 913, cited in notes in 24 L. R. A. 33, 27 L. R. A., N. S., 1004; or the names of a firm are in reverse order if it is clear who the parties intended to be designated are. *State v. Lane*, 80 N. C. 407.

Falsely putting a witness' name to a bond not required to be attested by a subscribing witness does not affect the validity of the bond, and is not forgery. *State v. Gherkin*, 29 N. C. 206.

Erasure or Obliteration Not a Forgery.—Obliterating by erasure, or otherwise, a release or acquittance on the back of a bond or elsewhere, with the intent to defraud any person thereby, is not according to the law of North Carolina, a forgery. *State v. Thornburg*, 28 N. C. 79, cited in note in 54 L. R. A. 798.

Forgery of One of Two Names.—Where the alleged forged instrument has the names of two or more persons affixed, it is sufficient if one of them is proved to have been forged. *State v. Cross*, 101 N. C. 770, 7 S. E. 715.

Instrument Partly Printed and Partly in Writing.—An indictment for forging "a certain instrument in writing" is supported by proof of the forgery of an instrument partly printed and partly in writing. *State v. Ridge*, 125 N. C. 655, 34 S. E. 439.

"Railroad Pass" Insufficiency of Description.—A description of the forged instrument as a "railroad pass" merely, is insufficient. The circumstances showing authority of the officer whose name is forged, and the obligation of the company to honor it, must be set out in the indictment. *State v. Weaver*, 94 N. C. 836, cited in note in 24 L. R. A. 43.

Cited in dissenting opinion *State v. Jarvis*, 129 N. C. 598, 40 S. E. 220.

§ 14-123. Forging names to petitions and uttering forged petitions.—If any person shall willfully sign, or cause to be signed, or willfully assent to the signing of the name of any person without his consent, or of any deceased or fictitious person, to any petition or recommendation with the intent of procuring any commutation of sentence, pardon or reprieve of any person convicted of any crime or offense, or for the purpose of procuring such pardon, reprieve or commutation to be refused or delayed by any public officer, or with the intent of procuring from any person whatsoever, either for himself or another, any appointment to office, or to any position of honor or trust, or with the intent to influence the official action of any public officer in the management, conduct or decision of any matter affecting the public, he shall be guilty of a felony, and shall be fined not exceeding one thousand dollars, or imprisoned in the county jail or state's prison not exceeding five years, or both, at the discretion of the court; and if any person shall willfully use any such paper for any of the purposes or intents above recited,

knowing that any part of the signatures to such petition or recommendation has been signed thereto without the consent of the alleged signers, or that names of any dead or fictitious persons are signed thereto, he shall be guilty of a felony, and shall be punished in like manner. (Rev., s. 3426; Code, s. 1034; 1883, c. 275; C. S. 4297.)

§ 14-124. Forging certificate of corporate stock and uttering forged certificates.—If any officer or agent of a corporation shall, falsely and with a fraudulent purpose, make, with the intent that the same shall be issued and delivered to any other person by name or as holder or bearer thereof, any certificate or other writing, whereby it is certified or declared that such person, holder or bearer is entitled to or has an interest in the stock of such corporation, when in fact such person, holder or bearer is not so entitled, or is not entitled to the amount of stock in such certificate or writing specified; or if any officer or agent of such corporation, or other person, knowing such certificate or other writing to be false or untrue, shall transfer, assign or deliver the same to another person, for the sake of gain, or with the intent to defraud the corporation, or any member thereof, or such person to whom the same shall be transferred, assigned or delivered, the person so offending shall be imprisoned in the county jail or state's prison not less than four months nor more than ten years. (Rev., s. 3421; Code, s. 1032; R. C., c. 34, s. 62; C. S. 4298.)

§ 14-125. Forgery of bank-notes and other instruments by connecting genuine parts.—If any person shall fraudulently connect together different parts of two or more bank-notes, or other genuine instruments, in such a manner as to produce another note or instrument, with intent to pass all of them as genuine, the same shall be deemed a forgery, and the instrument so produced a forged note, or forged instrument, in like manner as if each of them had been falsely made or forged. (Rev., s. 3420; Code, s. 1037; R. C., c. 34, s. 66; C. S. 4299.)

SUBCHAPTER VI. CRIMINAL TRESPASS.

Art. 22. Trespasses to Land and Fixtures.

§ 14-126. Forcible entry and detainer.—No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor. (Rev., s. 3670; Code, s. 1028; R. C., c. 49, s. 1; 5 Ric. II, c. 8; C. S. 4300.)

Cross Reference.—As to trespass after being forbidden, see § 14-134.

Force.—Actual force or appearances tending to inspire a just apprehension of violence is necessary to constitute the offense. 13 Am & Eng. Enc. (2 Ed.) 757. A forcible entry is not proved by evidence of a mere trespass; there must be proof of such force, or at least such show of force, as is calculated to prevent resistance. State v. Leary, 136 N. C. 578, 48 S. E. 570; State v. Davenport, 156 N. C. 596, 72 S. E. 7. So riding into the yard of a house occupied by a woman and remaining there cursing her constitutes force. State v. Davenport, supra. But where a person, in the absence of the prosecutor, merely unlocked and took off the lock put on by the prosecutor and put his own lock on, without breaking anything or doing any violence, and committed no

violence upon the return of the prosecutor, he is not guilty of forcible entry and detainer. State v. Leary, supra.

Same—Title No Excuse.—The right or title to land cannot be vindicated with the bludgeon, but the party who claims the better title must, if it be denied or the actual possession of the land be refused, upon a lawful demand made for the same, resort to the peaceful methods and processes of the law for his redress and the recovery of his property. If, instead of pursuing this course, he elects to use violence, the law holds him criminally responsible for his act. State v. Webster, 121 N. C. 586, 28 S. E. 234, where it is said: "As forcible trespass is essentially an offense against the possession of another and does not depend upon the title, it is proper to exclude evidence of title in defendants on trial under an indictment for such offense." State v. Davenport, 156 N. C. 596, 602, 72 S. E. 7.

Original Entry Unlawful.—In order to convict of a misdemeanor under the provisions of this section it is not necessary that the act of going on the lands be unlawful, if the accused thereafter have in overpowering numbers cursed and abused the one in lawful possession, using threatening and abusive language. State v. Fleming, 194 N. C. 42, 138 S. E. 342.

Same—Title Not Invalid.—The offense of forcible trespass under this section, does not involve title to the premises, but is directed against the possession, and when the possession is in the prosecuting witness, and the entry is made in such a manner with such show of force, after being prohibited by the prosecuting witness, as tends to a breach of the peace, it is sufficient for conviction. State v. Earp, 196 N. C. 164, 144 S. E. 23.

Extent of Liability of Title Holder.—The court quoting from Reeder v. Purdy, 41 Ill. 279, says: "The reasoning upon which we rest our conclusion lies in the briefest compass, and is hardly more than a simple syllogism. The statute of forcible entry and detainer, not in terms, but by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another. Such entry is, therefore, unlawful. If unlawful, it is a trespass, and an action for the trespass must necessarily lie. Although the occupant may maintain trespass against the owner for a forcible entry, yet he can only recover such damages as have directly accrued to him from injuries done to his person or property through the wrongful invasion of his possession, and such exemplary damages as the jury may (under proper instructions) think proper to give. But a person having no title to the premises clearly can not recover damages for any injury done to them by him who has the title." Mosseller v. Deaver, 106 N. C. 494, 497, 11 S. E. 529.

Actual Possession Necessary.—The essential element of the offense of forcible entry, that the lands, etc., must be in the actual possession of him whose possession is charged to have been interfered with. To constitute actual possession, there must be an actual exercise of authority and control over the land, either in person or by the family or servants of the person alleged to be in possession. He need not at all times be personally present on the premises. State v. Bryant, 103 N. C. 436, 9 S. E. 1. This element must be charged in the indictment. Id. It is a sufficient compliance with this rule to allege that the owner was "then and there in peaceable possession." State v. Eason, 70 N. C. 88, 91.

Right of Tenant of Sufferance.—Where the possession of the prosecutor in forcibly entry and detainer is only by sufferance, the prosecution cannot be sustained. State v. Leary, 136 N. C. 578, 48 S. E. 570.

No Accessories.—In misdemeanors there are no accessories, and those who were present in numbers, some armed with axes and others with guns, while one of their number caused the prosecutor's agents to abandon the locus in quo, were his aiders and abettors and equally guilty of forcible trespass. State v. Davenport, 156 N. C. 596, 72 S. E. 7.

Jurisdiction of a Justice of the Peace.—The distribution of judicial powers by Art. IV of the Constitution is a virtual repeal of all laws giving jurisdiction to Justices of the Peace in case of forcible entry and detainer, except for the binding of trespassers to the Superior Court to answer a criminal charge. State v. Yarborough, 70 N. C. 250; Atlantic, etc., R. Co. v. Sharpe, 70 N. C. 509.

Entry under Void Warrant.—Where four or more men enter upon premises in the actual possession of another by virtue of a warrant and proceedings before a magistrate, which are a nullity, and eject such person and his family from the house they were occupying, they are guilty of a forcible trespass. State v. Yarborough, 70 N. C. 250; Atlantic, etc., R. Co. v. Johnston, 70 N. C. 348.

§ 14-127. Malicious injury to real property.—If any person shall maliciously commit any damage,

injury or spoil upon any real property whatsoever, either of a public or private nature, for which no punishment is provided by any existing law, every person so offending shall be guilty of a misdemeanor: Provided, that nothing herein shall extend to any case where the party trespassing or doing the injury acted under a fair and reasonable belief that he had a right to do the act complained of, nor to any trespass, not being willful and malicious, committed in hunting, fishing or the pursuit of game. When the owner, or one of the owners, of an estate in possession shall complain of the injury before a justice of the peace of the county in which the offense is charged to have been committed before the regular term of the superior court next after the commission of the offense, and shall fail to state in his complaint that the damage exceeds ten dollars, the punishment, upon conviction of the offense, shall not exceed a fine of fifty dollars or imprisonment for thirty days. (Rev., s. 3677; Code, s. 1081; R. C., c. 34, s. 111; 1873-4, c. 176, s. 5; C. S. 4301.)

§ 14-128. Injury to trees, woods, crops, etc., near highway; depositing trash near highway.—Any person, not being on his own lands, or without the consent of the owner thereof, who shall, within one hundred yards of any State highways of North Carolina or within a like distance of any other public road or highway, willfully commit any damage, injury, or spoliation to or upon any tree, wood, underwood, timber, garden, crops, vegetables, plants, lands, springs, or any other matter or thing growing or being thereon, or who cuts, breaks, injures, or removes any tree, plant, or flower within such limits, or shall deposit any trash, debris, garbage, or litter within such limits, shall be guilty of a misdemeanor, and upon conviction fined not exceeding fifty dollars (\$50) or imprisoned not exceeding thirty days: Provided, however, that this section shall not apply to the officers, agents, and employees of the State Highway and Public Works Commission or county road authorities while in the discharge of their duties. (Ex. Sess. 1924, c. 54.)

Editor's Note.—It was said in 3 N. C. Law Rev. 25 that it is hoped that this section may prevent the laying waste of gardens, flowers, etc., by tourists who are not in the habit of regarding another's property rights and who usually leave trash and garbage at every place they stop to eat.

§ 14-129. Taking, etc., of certain wild plants from land of another.—No person, firm or corporation shall dig up, pull up or take from the land of another or from any public domain, the whole or any part of any trailing arbutus, American holly, white pine, red cedar, hemlock or other coniferous trees, or any flowering dogwood, any mountain laurel, any rhododendron, or any ground pine, or any Christmas greens, or any Judas tree, or any leucothea, or any azalea, without having in his possession a permit to dig up, pull up or take such plants, signed by the owner of such land, or by his duly authorized agent. Any person convicted of violating the provisions of this section shall be fined not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00) for each offense. The provisions of this section shall not apply to the counties of Avery, Cabarrus, Carteret, Catawba, Cherokee, Chowan, Cumberland, Currituck, Dare, Duplin, Durham, Edgecombe, Franklin, Gaston, Granville, Hertford, McDowell, Mitchell, Pamlico,

Pender, Person, Richmond, Rockingham, Rowan, Swain and Warren. (1941, c. 253.)

§ 14-130. Trespass on public lands.—If any person shall erect a building on any public lands before the same shall have been sold or granted by the state, or on any lands belonging to the state board of education before the same shall have been sold and conveyed by them, or cultivate or remove timber from any of such lands, he shall be guilty of a misdemeanor. Moreover, the state board of education can recover from any person cutting timber on its land three times the value of the timber which is cut. When any person shall be in possession of any part of such land, it shall be the duty of the sheriff of the county in which the land is situated, and he is hereby required, to give notice in writing to such person, commanding him to depart therefrom forthwith; and if the person in possession, upon being so notified, shall not, within two weeks after the time of notice, remove therefrom, the sheriff is required to remove him immediately, and if necessary, he shall summon the power of the county to assist him in so doing. (Rev., s. 3746; Code, s. 1121; R. C., c. 34, s. 42; 1823, c. 1190; 1842, c. 36, s. 4; 1909, c. 891; C. S. 4302.)

Cited in *Worth v. Commissioners*, 118 N. C. 118, 125, 24 S. E. 778; *Eastern Carolina Land, etc., Co. v. State Board*, 101 N. C. 35, 7 S. E. 573.

§ 14-131. Trespass on land under option by the federal government.—On lands under option which have formally or informally been offered to and accepted by the North Carolina department of conservation and development by the acquiring federal agency and tentatively accepted by said department for administration as state forests, state parks, state game refuges or for other public purposes, it shall be unlawful to cut, dig, break, injure or remove any timber, lumber, firewood, trees, shrubs or other plants; or any fence, house, barn or other structure; or to pursue, trap, hunt or kill any bird or other wild animals or take fish from streams or lakes within the boundaries of such areas without the written consent of the local official of the United States having charge of the acquisition of such lands.

Any person, firm or corporation convicted of the violation of this section shall be guilty of a misdemeanor and shall be subject to a fine of not more than fifty dollars or to imprisonment for not to exceed thirty days, or to both such fine and imprisonment.

The department of conservation and development through its legally appointed forestry, fish and game wardens is hereby authorized and empowered to assist the county law enforcement officers in the enforcement of this section. (1935, c. 317.)

§ 14-132. Disorderly conduct in and injuries to public buildings.—If any person shall make any rude or riotous noise or be guilty of any disorderly conduct in or near any of the public buildings of the state, or of any county or municipality, or shall write or scribble on, mark, deface, besmear, or injure the walls of any of the public buildings of the state or of any county or municipality, or any statue or monument, or shall do or commit any nuisance in or near any public building of the state or of any county or municipality, he shall be

guilty of a misdemeanor. The keeper of the capitol or any person in charge of any of such public buildings shall have authority to arrest summarily and without warrant for a violation of this section. The words "public buildings," as used in this section, shall include the grounds around such buildings. (Rev., s. 3742; Code, s. 2308; R. C., c. 103, ss. 7, 8; 1829, c. 29, ss. 1, 2; 1842, c. 47; 1915, c. 269; C. S. 4303.)

§ 14-133. Erecting artificial islands and lumps in public waters.—If any person shall erect artificial islands or lumps in any of the waters of the state east of the Atlantic Coast Line Railroad running from Wilmington to Weldon by way of Burgaw, Warsaw, Goldsboro, Wilson, Rocky Mount, and Halifax (formerly the Wilmington and Weldon Railroad) and running from Weldon to the North Carolina-Virginia state boundary by way of Garysburg and Pleasant Hill (formerly the Petersburg and Weldon Railroad), he shall be guilty of a misdemeanor. (Rev., s. 3543; Code, s. 986; 1883, c. 109; C. S. 4304.)

§ 14-134. Trespass on land after being forbidden; license to look for estrays.—If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days: Provided, that if any person shall make a written affidavit before a justice of the peace of the county that any of his cattle or other livestock (which shall be specially described in such affidavit) have strayed away, and that he has good reason to believe that they are on the lands of a certain other person, then the justice may, in his discretion, allow the affiant to enter on the premises of such person with one or more servants, without firearms, in the daytime (Sunday excepted), between the hours of sunrise and sunset, and make search for his estrays for such limited time as to the justice shall appear reasonable. The only effect of such license shall be to protect the persons entering from indictment therefor, and the license shall have this effect only where it is made bona fide and the entry is effected without any damage except such as may be necessary to conduct the search. (Rev., s. 3688; Code, s. 1120; 1866, c. 60; C. S. 4305.)

Cross Reference.—As to forcible trespass, see § 14-126.

Entry under Claim of Right.—One who enters upon the land of another under a bona fide claim of right is guilty of no criminal offense. *State v. Crosset*, 81 N. C. 579. Mere belief of the claim is not sufficient, there must be proof of title or evidence of a reasonable belief of the existence of the right of entry. *State v. Fisher*, 109 N. C. 817, 13 S. E. 878; *State v. Durham*, 120 N. C. 546, 550, 28 S. E. 22. This bona fide claim of right must be passed on by a jury before defendant can be convicted. *State v. Wells*, 142 N. C. 590, 595, 55 S. E. 210. But the question will not be submitted as a mere abstraction; there must be evidence of a claim or of facts giving rise to a reasonable and bona fide claim. *State v. Faggart*, 170 N. C. 737, 740, 87 S. E. 31.

It must be noted that entry under a claim of right is a defense only in a criminal action, as ignorance of a trespasser will not exonerate him from civil liability. *State v. Whitener*, 93 N. C. 590, 593.

Land Sought to Be Condemned.—An indictment for willful trespass under this section will lie against an employee of a railroad company for an entry after being forbidden on land which the company is seeking to condemn, the entry being for the purpose of constructing the road and before an appraisal has been made, although a restraining order against such a trespass would be refused. *State v. Wells*, 142 N. C. 590, 55 S. E. 210.

Entry by Husband on Wife's Property.—A husband is not subject to the rule of this section, in regard to property of his wife, and although she may forbid him to enter he may enter nevertheless. *State v. Jones*, 132 N. C. 1043, 43 S. E. 939.

Entry as Servant.—Upon the trial under an indictment for trespass on lands after being forbidden, it is no defense to show that defendant acted under the instructions of his superior officer of a railroad company in entering upon the lands to construct a railroad. Evidence that such superior officer therein acted by the advice of counsel learned in the law is incompetent. *State v. Mallard*, 143 N. C. 666, 57 S. E. 351.

One who enters upon the land of another, after being forbidden, as the servant, and at the command of a bona fide claimant, is not guilty of any criminal offense. *State v. Winslow*, 95 N. C. 649.

Entry by Former Tenant to Gather Crops.—For a conviction under the provisions of this section for unlawful trespass on lands after being forbidden, it is not alone sufficient to show that the trespass had been forbidden, when there is evidence tending to show that the trespasser peacefully entered upon a claim of title, founded upon a reasonable belief that he had the right to go upon the lands; and a peremptory instruction to find the prisoner guilty upon the evidence is held as error, there being evidence that the trespasser had been a tenant upon the lands of the prosecutor, and had entered upon the lands to gather the crops he had sown and cultivated, after he had moved to another place with the intention to return for this purpose, believing he had the right, though forbidden to do so by the prosecutor. *State v. Faggart*, 170 N. C. 737, 87 S. E. 31.

Entry as Guest of Tenant.—One forbidden by the landlord to enter his land is not guilty under this section if he enters a part of the land in the possession of a tenant and as a guest of the tenant. *State v. Lawson*, 101 N. C. 717, 7 S. E. 905.

License to Enter Must Be Negated in Indictment.—In an indictment for entering on the land of another and taking therefrom turpentine, etc., it is necessary that a "license so to enter" should be distinctly negated as an essential part of the description of the offense. *State v. Bullard*, 72 N. C. 445.

An indictment in which it is charged that the defendant did unlawfully enter upon the premises of the prosecutors, he, the said defendant, having been forbidden to enter on said premises, and not having a license so to enter, etc., is sufficient. *State v. Whitehurst*, 70 N. C. 85.

Court Having Jurisdiction.—Justices of the peace have exclusive original jurisdiction of the offense under this section. *State v. Dudley*, 83 N. C. 660.

In *State v. Presley*, 72 N. C. 204, the rule at that time was held to be that Justices of the Peace and Superior Courts had concurrent jurisdiction and after six months the Superior Court had exclusive jurisdiction. In *State v. Edney*, 80 N. C. 360, the court held that because of the wording of the statute and Art. IV sec. 33 of the Constitution Justices of the Peace had no jurisdiction. These irregularities were removed by legislation, and *State v. Dudley*, supra construed this section as it was no doubt originally intended by the Legislature to be construed.

Warrant May Be Amended.—The Superior Court has power to amend, after verdict, a warrant brought by appeal of defendant from a Justice's court, charging defendant with going upon the land of another, after being forbidden to do so, so as to charge that the entry was "willful and unlawful," and to make the charge conclude, "against the peace and dignity of the State." *State v. Smith*, 103 N. C. 410, 9 S. E. 200.

Warrant with Affidavit Attached.—A warrant for trespass will not be quashed because it does not contain the necessary descriptive words of the alleged offense, when it refers to an "annexed affidavit" in which all the essential averments are made, as the reference to the affidavit makes it a part of the warrant. *State v. Winslow*, 95 N. C. 649.

Cited in *State v. Connor*, 142 N. C. 700, 708, 55 S. E. 787; *State v. Holmes*, 120 N. C. 573, 576, 26 S. E. 692.

§ 14-135. Cutting, injuring, or removing another's timber.—If any person, not being the bona fide owner thereof, shall knowingly and willfully cut down, injure or remove any standing, growing or fallen tree or log, the property of another, he shall be guilty of a misdemeanor, and shall be punished by a fine of not more than fifty dollars or by imprisonment for not more than thirty days. (Rev., s. 3687; 1889, c. 168; C. S. 4306.)

Local Modification.—Burke, Caldwell, Cherokee, McDowell,

Mitchell, Watauga, Wilkes, Yadkin: C. S. 4307, 4308; Duplin: 1929, c. 174.

§ 14-136. Setting fire to grass and brush lands and woodlands.—If any person shall intentionally set fire to any grass land, brush land or woodland, except it be his own property, or in that case without first giving notice to all persons owning or in charge of lands adjoining the land intended to be fired, and without also taking care to watch such fire while burning and to extinguish it before it shall reach any lands near to or adjoining the lands so fired, he shall for every such offense be guilty of a misdemeanor and shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned for a period of not less than sixty days nor more than four months for the first offense, and for a second or any subsequent similar offense shall be imprisoned not less than four months nor more than one year. If wilful or malicious intent to damage the property of another shall be shown, said person shall be guilty of a felony, and shall, upon conviction, be punished by imprisonment in the state prison for not less than one nor more than five years. This section shall not prevent an action for the damages sustained by the owner of any property from such fires. For the purposes of this section, the term "woodland" is to be taken to include all forest areas, both timber and cut-over land, and all second-growth stands on areas that have at one time been cultivated. Any person who shall furnish to the state evidence sufficient for the conviction of a violation of this statute shall receive the sum of fifty dollars, to be taxed as part of the court costs. (Rev., s. 3346; Code, ss. 52, 53; R. C., c. 16, ss. 1, 2; 1777, c. 123, ss. 1, 2; 1915, c. 243, ss. 8, 11; 1919, c. 318; 1925, c. 61, s. 1; 1943, c. 661; C. S. 4309.)

Local Modification.—Graham: Pub. Loc. 1933, c. 301; Onslow: 1929, c. 185, 1939, c. 160.

Editor's Note.—By amendment of this section, Public Laws 1925 c. 61 sec. 1, the punishment was changed from "a fine not less than ten dollars or more than fifty dollars, or imprisonment not exceeding thirty days" to "a fine not less than fifty dollars nor more than five hundred dollars or imprisonment not less than sixty days nor more than four months for the first offence, and for subsequent similar offences imprisonment from four months to one year."

The sum provided for one furnishing state evidence was raised from twenty dollars to fifty dollars.

The 1943 amendment inserted the second sentence.

This section formerly provided only for setting fire to woodland, and one who let fire escape while burning other lands was not liable, under this section. *Averitt v. Murrell*, 49 N. C. 322, but was only liable for negligence. *Cato v. Toler*, 160 N. C. 104, 75 S. E. 929. In the case of *Hall v. Crawford*, 50 N. C. 3 it was held that "an old field which had turned out without any fence around it and which had grown up in broom sedge and pine brushes" came within the meaning of woodland. This case was pointed out in *Achenback v. Johnston*, 84 N. C. 264, as stretching the doctrine of liability too far. There it was held that a field grown up in grass and used as a pasture was not woodland. By Public Laws 1917 this section was made applicable to setting fire to grassland and bushland as well as woodland, so the prior constructions so strictly made in regard to firing woodland are no longer applicable as this section now seems to cover burning of any lands.

Care No Defense.—If one firing woods fails to give the statutory notice to adjoining owners and damages ensue, the cause of action is complete, no matter what degree of care may have been shown. *Lamb v. Sloan*, 94 N. C. 534.

Waiver of Notice Bars Damages.—A waiver of notice is a sufficient answer to an action for damages caused to woodland by fire. *Roberson v. Kirby*, 52 N. C. 477; *Lamb v. Sloan*, 94 N. C. 534. Waiver when made by a tenant in common while in possession is also a sufficient defense. See *Stanland v. Rousk*, 168 N. C. 568, 84 S. E. 845.

Waiver by Adjoining Owner No Bar to Penalty.—When an adjoining owner waives notice of the intended fire such waiver does not waive the penalty of this section, but is only a waiver of the land owner's right of action for damages to his land caused by the spreading of the fire. *Lamb v. Sloan*, 94 N. C. 534.

Liability to One Not an Adjoining Owner.—The notice required by this section applies only to adjoining owners and one is not subject to the penalty for failure to give notice to one who is not an adjoining owner, but by the express terms of the statute there is a liability in damages for damages to "any property." See *Robinson v. Morgan*, 113 N. C. 991, 992, 24 S. E. 667.

Firing to Protect Property.—In the case of *Lamb v. Sloan*, 94 N. C. 534, it was held that if one set fire to his property to protect it he was not liable under the statute in force at that time which provided the act must be "wilfully." This section now provides that if the act is "intentionally" alone there is a liability. It would seem that this covers all except accidental fires.

No Evidence to Show Fire Started by Defendant.—Where the evidence tends only to show that the fire started on defendant's land and spread to the plaintiff's land, but that the defendant had ordered his employees not to set out a fire on account of the dry conditions, and there is neither direct nor circumstantial evidence tending to show the fire had been started either by the defendant or his employees under his authority, a judgment as of nonsuit is proper. *Sutton v. Herrin*, 202 N. C. 599, 163 S. E. 578.

Burning Off Railroad Right of Ways.—In case of *Nizzell v. Bramming Mfg. Co.*, 158 N. C. 265, 73 S. E. 802, it was held under a prior statute, similar in some respects to this except that it did not provide against burning grassland and bushland, that the statute did not apply to railroad burning off their rights of way that were covered with grass and tree tops.

Action to Recover Penalty.—Action for a recovery of penalties provided for by this section may be brought before any justice of the peace where service can be had on the defendant. *Fisher v. Bullard*, 109 N. C. 574, 13 S. E. 799.

§ 14-137. Wilfully or negligently setting fire to woods and fields.—If any person, firm or corporation shall wilfully or negligently set on fire, or cause to be set on fire, any woods, lands or fields, whatsoever, every such offender, upon conviction, shall be fined or imprisoned in the discretion of the court. This section shall apply only in those counties under the protection of the state forest service in its work of forest fire control. It shall not apply in the case of a landowner firing, or causing to be fired, his own open, non-wooded lands, or fields in connection with farming or building operations at the time and in the manner now provided by law: Provided, he shall have confined the fire at his own expense to said open lands or fields. (1907, c. 320, ss. 4, 5; 1925, c. 61, s. 2; 1941, c. 258; C. S. 4310.)

Editor's Note.—Prior to the 1941 amendment this section applied only to certain named counties.

Evidence that the county in which defendant negligently or wilfully started forest fires was in charge of the state forest service and that this section was applicable to the county, defendant having offered no evidence to the contrary, was sufficient to show a violation of the section. *State v. Patton*, 221 N. C. 117, 19 S. E. (2d) 142.

Cited in *Lumber Co. v. Hayes*, 157 N. C. 333, 72 N. C. 1078.

§ 14-138. Setting fire to woodlands and grass lands with campfires.—Any wagoner, hunter, camper or other person who shall kindle a campfire or shall authorize another to kindle such fire, unless all combustible material for the space of ten feet surrounding the place where such fire is kindled has been removed, or shall leave a campfire without fully extinguishing it, or who shall accidentally or negligently by the use of any torch, gun, match or other instrumentality, or in any manner whatever, start any fire upon any grass land, brush land or woodland without fully extinguishing the same, shall be guilty of a misde-

meanor, and upon conviction shall be punished by a fine of not less than ten dollars nor more than fifty dollars, or by imprisonment not exceeding thirty days. For the purposes of this section the term "woodland" is to be taken to include all forest areas, both timber and cut-over land, and all second-growth stands on areas that have at one time been cultivated. (Rev., s. 3347; Code, s. 54; 1885, c. 126; 1913, c. 8; 1915, c. 243, ss. 9, 11; C. S. 4311.)

Local Modification.—Graham: Pub. Loc. 1933, c. 301.

§ 14-139. Starting fires within five hundred feet of areas under protection of state forest service.—It shall be unlawful for any person, firm or corporation to start or cause to be started any fire or ignite any material in any of the areas of woodlands under the protection of the state forest service or within five hundred feet of any such protected area, between the first day of February and the first day of June, inclusive or between the first day of October and the thirtieth day of November, inclusive, in any year, without first obtaining from the state forester or one of his duly authorized agents a permit to set out fire or ignite any material in such above mentioned protected areas; no charge shall be made for the granting of said permits. This section shall not apply to any fires started or caused to be started within five hundred feet of a dwelling house. Any person, firm or corporation violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty (50) dollars, or imprisoned for a period of not more than thirty (30) days. (1937, c. 207; 1939, c. 120.)

Editor's Note.—The 1939 amendment changed the dates mentioned in this section, and the last sentence as to punishment.

§ 14-140. Certain fires to be guarded by watchman.—All persons, firms or corporations who shall burn any tar kiln or pit of charcoal, or set fire to or burn any brush, grass or other material, whereby any property may be endangered or destroyed, shall keep and maintain a careful and competent watchman in charge of such kiln, pit, brush or other material while burning. Any person, firm or corporation violating the provisions of this section shall be punishable by a fine of not less than ten dollars nor more than fifty dollars, or by imprisonment for not exceeding thirty days. Fire escaping from such kiln, pit, brush or other material while burning shall be prima facie evidence of neglect of these provisions. (1915, c. 243, s. 10; C. S. 4312.)

Local Modification.—Graham: Pub. Loc. 1933, c. 301.

§ 14-141. Burning or otherwise destroying crops in the field.—If any person shall willfully burn or destroy any other person's corn, cotton, wheat, barley, rye, oats, buckwheat, rice, tobacco, hay, straw, fodder, shucks or other provender in a stack, hill, rick or pen, or secured in any other way out of doors, or grass or sedge standing on the land, he shall be guilty of a felony, and shall be punished by imprisonment in the county jail or state's prison for not less than four months nor more than five years. (Rev., s. 3339; 1885, c. 42; 1874-5, c. 133; Code, s. 985, subsec. 2; C. S. 4313.)

Cross Reference.—As to arson, see § 14-58 et seq.

Out of Doors Defined.—One who burns cotton in a railroad car cannot be convicted under this section as the cotton is not out of doors. State v. Avery, 109 N. C. 798, 13

S. E. 931. Clark, J., dissents on the ground that it is merely secured out of doors and comes within the application of the statute.

Formerly Misdemeanor.—The burning provided in this section was at one time a misdemeanor. State v. Huskins, 126 N. C. 1070, 35 S. E. 608.

Indictment.—An indictment should charge a statutory crime in the words of the statute. Therefore an indictment charging setting fire to a lot of fodder without charging the burning, is defective. State v. Hall, 93 N. C. 571.

It is not necessary under this section to aver in the indictment that the stack burned was "out of doors." State v. Huskins, 126 N. C. 1070, 35 S. E. 608.

§ 14-142. Injuries to dams and water channels of mills and factories.—If any person shall cut away, destroy or otherwise injure any dam, or part thereof, or shall obstruct or damage any race, canal or other water channel erected, opened, used or constructed for the purpose of furnishing water for the operation of any mill, factory or machine works, or for the escape of water therefrom, he shall, upon conviction, be fined or imprisoned, or both, at the discretion of the court. (Rev., s. 3678; Code, s. 1087; 1866, c. 48; C. S. 4315.)

Obstruction Below Dam or Channel.—This section only applies to obstructions and damages to the dam or channel and an indictment cannot be had for obstructions below the dam or channel. State v. Tomlinson, 77 N. C. 528.

Cited in State v. Suttle, 115 N. C. 784, 20 S. E. 725.

§ 14-143. Taking unlawful possession of another's house.—If any person shall enter upon the lands of another and take possession of any house or other building thereon, without permission of the owner or his agent and without a bona fide claim of right or title so to enter and take possession, and shall fail or refuse to vacate such premises within ten days after being notified personally in writing to do so, he shall be guilty of a misdemeanor and shall be fined or imprisoned at the discretion of the court. (Rev., s. 3685; 1893, c. 347; C. S. 4316.)

Local Modification.—Durham: 1929, c. 109.

Editor's Note.—See notes to section 14-134.

§ 14-144. Injuring houses, churches, fences and walls.—If any person shall, by any other means than burning or attempting to burn, unlawfully and willfully demolish, destroy, deface, injure or damage any of the houses or other buildings mentioned in this chapter in the article entitled Arson and Other Burnings; or shall unlawfully and willfully burn, demolish, pull down, destroy, deface, damage or injure any church, uninhabited house, outhouse or other house or building not mentioned in such article; or shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall or other inclosure, or any part thereof, surrounding or about any yard, garden, cultivated field or pasture, or about any church or graveyard, or about any factory or other house in which machinery is used, every person so offending shall be guilty of a misdemeanor. (Rev., s. 3673; Code, s. 1062; R. C., c. 34, s. 103; C. S. 4317.)

I. Houses.

II. Fences Around Fields.

Cross References.

See also, § 14-159. As to willful destruction of a fence which does not enclose something, see § 68-4. As to injury to stock-law fences, see § 68-36.

I. HOUSES.

Trespass Necessary Part of Offense.—It is held, to con-

stitute a criminal offense under this section, there must be a trespass. *State v. Williams*, 44 N. C. 197; *State v. Watson*, 86 N. C. 626; *State v. McCracken*, 118 N. C. 1240, 24 S. E. 530. And a party in lawful possession cannot commit a trespass upon the property he is in possession of. *State v. Howell*, 107 N. C. 835, 12 S. E. 509; *State v. Reynolds*, 95 N. C. 616; *Dobbs v. Gullidge*, 20 N. C. 197. Therefore, according to the logic of these decisions, if a defendant is shown to have been in the actual possession of the house at the time he tore it down, he committed no criminal offense under this section. We say the lawful possession, to distinguish his possession from that of a mere trespasser, which would not protect him from the penalty of the statute. *State v. Jones*, 129 N. C. 508, 39 S. E. 795, 796.

Tenant's and Landlord's Liability to One Another.—A tenant is not subject under this section for damage done to property in his possession, but the owner of the reversion would be subject to prosecution for damage to property in the possession of a tenant, as the statute covers offences against possession. *State v. Mason*, 35 N. C. 341; *State v. Whitener*, 92 N. C. 798.

A tenant cannot divest the possession of his landlord by an attempted attornment to another, and if the person to whom the attempted attornment is made enters the land and damages buildings he is liable under this section, in spite of proof of good faith and claim of title. *State v. Howell*, 107 N. C. 835, 12 S. E. 569.

Same—Tenant at Sufferance.—If a building is torn down by a landlord while it is in the possession of a tenant at sufferance an indictment under this section cannot be supported, for this section was intended to protect property which the tenant at sufferance has no interest in. *State v. Mace*, 65 N. C. 344.

Houses Erected Through Mistake.—One who peaceably enters upon lands believing at the time that he had the right to do so, and erects houses thereon, but, being still in possession, tears them down and removes them upon discovering that he was upon the lands of another, is not such a trespasser as will subject him to a conviction under this section. *State v. Reynolds*, 95 N. C. 616.

School Houses Held by Adverse Possession.—If defendants are in the adverse possession of the schoolhouse and bona fide claiming it as their own, it is not a crime in them to pull it down. *State v. Roseman*, 66 N. C. 634, 635.

"Other Houses."—It is manifest that the words "other house or building," embrace a jail, a jail-house or building. *State v. Bryan*, 89 N. C. 531, 533.

Dynamiting a Crib.—An indictment will lie under this section for injury to a crib by an explosion of dynamite. See *State v. Martin*, 173 N. C. 808, 92 S. E. 597.

II. FENCES AROUND FIELDS.

Cultivated Field Defined.—"Where a piece or tract of land has been cleared and fenced, and cultivated, or proposed to be cultivated and is kept and used for cultivation according to the ordinary course of husbandry, although nothing may be growing within the enclosure at the time of the trespass, it is a 'cultivated field' within the description of the statute." *State v. McMinn*, 81 N. C. 585, 588. *State v. Allen*, 35 N. C. 36.

Same.—The ruling in *State v. Allen*, 35 N. C. 36, was cited and approved in *State v. McMinn*, 81 N. C. 585, in which case it was also held that the smallness of the tract made no difference; that a town lot, if inclosed and cultivated, could be described as a "field" under this statute, unless it was used as a "garden," in which case it should be so described. *State v. Campbell*, 133 N. C. 640, 642, 45 S. E. 344.

Fence Must Enclose Something.—It is necessary under this section that the fence destroyed or injured surround or enclose something and a fence along a road to prevent passers-by from turning into the field to avoid mud in the road, when not connected with any other fence is not within the meaning of this section. See *State v. Roberts*, 101 N. C. 744, 7 S. E. 714.

Instruction That Pasture Is a Field.—Where in a criminal prosecution for the violation of this section providing that a person removing a fence surrounding "any yard, garden, cultivated field, or pasture" should be guilty of a misdemeanor, the indictment charges the defendant with having removed a fence surrounding a cultivated field, and the evidence is that the fence surrounded a pasture, the words "pasture" and "cultivated field" are not synonymous and are distinguished in the statute by a disjunctive, and an instruction which charges that a pasture is a cultivated field within the meaning of the statute is erroneous. *State v. Cornett*, 199 N. C. 634, 155 S. E. 451.

Title to Land No Defense.—It is well settled that where the state, in an indictment under this section, for unlawfully and wilfully removing a fence, shows actual possession

in the prosecutor, the defendant cannot excuse himself by showing title to the land upon which the fence was situated. *State v. Campbell*, 133 N. C. 640, 45 S. E. 344; *State v. Fender*, 125 N. C. 649, 34 S. E. 448; *State v. Hovis*, 76 N. C. 117; *State v. Howell*, 107 N. C. 835, 12 S. E. 569; *State v. Marsh*, 91 N. C. 632; *State v. Graham*, 53 N. C. 397; *State v. Taylor*, 172 N. C. 892, 90 S. E. 294, 295.

Question of Title Cannot Be Raised.—Where a party has neither possession, nor a right of possession to land, he cannot, upon an indictment for unlawfully removing a fence therefrom, raise a question as to a right of entry, nor is it any defence to him that he did the act to bring on a civil suit in order to try the title. *State v. Graham*, 53 N. C. 397.

Agency No Defence.—Under an indictment for tearing down a fence the defendant cannot avoid liability by showing that he acted as agent for another. *State v. Campbell*, 133 N. C. 640, 45 S. E. 344.

Destroying Fence When Line Is in Dispute.—Although a defendant cannot plead his title as a defense to an indictment for destroying fences, etc., on the land in possession of another, he can plead his title if the land is not in the possession of the prosecutor. In case of a disputed line if the prosecutor erects a fence on land in possession of the defendant, the defendant is not liable under this section for pulling it down. *State v. Fender*, 125 N. C. 649, 34 S. E. 448; *State v. Watson*, 86 N. C. 626. Nor is a quasi tenant occupying by the consent of the owner subject to prosecution under this section for the removal of a fence. *State v. Williams*, 44 N. C. 197.

Right to Reclaim Fence.—Although rails of which a fence around an enclosure is made were taken from the land of another, no right to go on the land and remove the fence exists in favor of the person from whom the rails were taken as the fence is a part of the realty, and such a trespass comes within the meaning of this section. *State v. McMinn*, 81 N. C. 585.

Applicable to Wire Fences.—An indictment for cutting and destroying a wire fence may be maintained under this section if it charges that the wire fence was an enclosure. *State v. Biggers*, 108 N. C. 760, 12 S. E. 1024.

Defective Bill of Indictment.—A motion in arrest of judgment after conviction for a removal of fences on the ground that the bill of indictment is defective, will not be granted, unless it appears that the bill is so defective that judgment cannot be pronounced upon it. *State v. Taylor*, 172 N. C. 892, 90 S. E. 294, 295.

Fences Across a Street Removed by Officer.—A fence erected across a public street is a public nuisance, and a city marshal will not be liable for abating the nuisance by pulling it down. *State v. Godwin*, 145 N. C. 461, 59 S. E. 132.

§ 14-145. Unlawful posting of advertisements.

—Any person who in any manner paints, prints, places, or affixes, or causes to be painted, printed, placed, or affixed, any business or commercial advertisement on or to any stone, tree, fence, stump, pole, automobile, building, or other object, which is the property of another without first obtaining the written consent of such owner thereof, or who in any manner paints, prints, places, puts, or affixes, or causes to be painted, printed, placed, or affixed, such an advertisement on or to any stone, tree, fence, stump, pole, mile-board, mile-stone, danger-sign, danger-signal, guide-sign, guide-post; automobile building or other object within the limits of a public highway, shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars (\$50) or imprisoned not exceeding thirty (30) days. (Ex. Sess. 1924, c. 109.)

Cross Reference.—As to injuring, defacing, or destroying notices and advertisements, see §§ 14-384 and 14-385.

Editor's Note.—It was suggested in 3 N. C. Law Rev. 25 that the first part of this section seems to apply to posting advertisements anywhere on private property, while the last part applies to those posted within the limits of the public highway.

§ 14-146. Injuring bridges.—If any person shall unlawfully and wilfully demolish, destroy, break, tear down, injure or damage any bridge across any of the creeks or rivers or other streams in the state, he shall be guilty of a misdemeanor, and fined or imprisoned, or both, in the discre-

tion of the court. (Rev., s. 3771; Code, s. 993; 1883, c. 271; C. S. 4318.)

§ 14-147. Removing, altering or defacing landmarks.—If any person, firm or corporation shall knowingly remove, alter or deface any landmark in anywise whatsoever, or shall knowingly cause such removal, alteration or defacement to be done, such person, firm or corporation shall be guilty of a misdemeanor. This section shall not apply to landmarks, such as creeks and other small streams, which the interest of agriculture may require to be altered or turned from their channels, nor to such persons, firms or corporations as own the fee simple in the lands on both sides of the lines designated by the landmarks removed, altered or defaced. Nor shall this section apply to those adjoining landowners who may by agreement remove, alter or deface landmarks in which they alone are interested. (Rev., s. 3674; Code, s. 1063; 1858-9, c. 17; 1915, c. 248; C. S. 4319.)

Removal of Stakes.—As between the parties stakes are evidence of a definite location of land, as also is the planting of a stone, and a removal of such stakes comes within the meaning of this section. *State v. Jenkins*, 164 N. C. 527, 529, 80 S. E. 231.

Indictment Must Aver.—An indictment charging that one A. B., with force and arms, etc., willfully and unlawfully did alter, deface and remove a corner tree, the property of C., against the form of the statute, is good without a negative averment of the matter contained in the proviso to the act creating the offense. *State v. Bryant*, 111 N. C. 693, 36 S. E. 326.

§ 14-148. Removing or defacing monuments and tombstones.—If any person shall, unlawfully and on purpose, remove from its place any monument of marble, stone, brass, wood or other material, erected for the purpose of designating the spot where any dead body is interred, or for the purpose of preserving and perpetuating the memory, name, fame, birth, age or death of any person, whether situated in or out of the common burying ground, or shall unlawfully and on purpose break or deface such monument, or alter the letters, marks or inscription thereof, he shall be guilty of a misdemeanor. (Rev., s. 3680; Code, s. 1088; R. C., c. 34, s. 102; 1840, c. 6; C. S. 4320.)

Cross References.—As to removal after abandonment, see § 65-15. As to abandonment of a cemetery by a municipality and removal of monuments and graves, see § 160-200, paragraph 36. See note to § 14-150.

Right of Landowner to Remove.—Where the owner of land consents, either expressly or by implication to the interment of dead bodies on his land, he has no right to afterwards remove the bodies or to deface or pull down the gravestones and monuments erected to perpetuate their memory. *State v. Wilson*, 94 N. C. 1015.

Indictment.—It is not necessary, to charge in the indictment that the monument removed was intended to designate the spot where the dead body of a particular person named, or a person unknown, was interred. *State v. Wilson*, 94 N. C. 1015.

It is not necessary to charge in terms that the dead body was that of a dead person. *State v. Wilson*, 94 N. C. 1015.

Generally.—This section creates a misdemeanor not defined as larceny. *State v. Jackson*, 218 N. C. 373, 11 S. E. (2d) 149.

Construction with Section 14-80.—Quaere: As this section and cognate statutes relate expressly to tombstones, graveyards and graves, does this not exclude such property from the provisions of § 14-80? *State v. Jackson*, 218 N. C. 373, 11 S. E. (2d) 149.

§ 14-149. Interfering with graveyards.—If any person shall unlawfully take away any stone, brick, iron or other material that encloses private graveyards, or shall cut or keep open any ditch or drainway, or put any permanent log or other obstruc-

tion not intended as a monument to a grave in such graveyards, or knowingly plow over and tear up any grave, or shall remove or change the location of any fence around such graveyard without the consent of such person or persons as may have parents, children or brothers or sisters buried therein, he shall be guilty of a misdemeanor, and on conviction shall be fined not more than ten dollars or imprisoned not more than thirty days. (Rev., s. 3681; 1889, c. 130; 1919, c. 218; C. S. 4321.)

§ 14-150. Disturbing graves.—If any person shall, without due process of law, or the consent of the surviving husband or wife or the next of kin of the deceased, and of the person having the control of such grave, open any grave for the purpose of taking therefrom any dead body, or any part thereof buried therein, or anything interred therewith, he shall be guilty of a felony, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (Rev., s. 3672; 1885, c. 90; C. S. 4322.)

Cross References.—As to removal after abandonment, see § 65-15. As to abandonment of a cemetery by a municipality and removal of monuments and graves, see § 160-200, paragraph 37.

Intent.—The intent to open a grave and remove the dead body is sufficient criminal intent, and proof of the intent to disturb the grave is conclusive. *State v. McLean*, 121 N. C. 589, 28 S. E. 140.

Persons Liable.—The mayor or other town officers counseling their subordinates to remove bodies are liable under this section although they were honestly mistaken as to the scope of their official power. *State v. McLean*, 121 N. C. 589, 28 S. E. 140.

When Lot Is Not Paid for.—The fact that the lot has not been paid for will not excuse the disturbance of a body only for the purpose of moving it to a pauper section. *State v. McLean*, 121 N. C. 589, 28 S. E. 140.

§ 14-151. Interfering with gas, electric and steam appliances.—If any person shall willfully, with intent to injure or defraud, commit any of the acts set forth in the following subsections, he shall be guilty of a misdemeanor:

1. Connect a tube, pipe, wire or other instrument or contrivance with a pipe or wire used for conducting or supplying illuminating gas, fuel, natural gas or electricity in such a manner as to supply such gas or electricity to any burner, orifice, lamp or motor where the same is or can be burned or used without passing through the meter or other instrument provided for registering the quantity consumed; or,

2. Obstruct, alter, injure or prevent the action of a meter or other instrument used to measure or register the quantity of illuminating fuel, natural gas or electricity consumed in a house or apartment, or at an orifice or burner, lamp or motor, or by a consumer or other person other than an employee of the company owning any gas or electric meter, who willfully shall detach or disconnect such meter, or make or report any test of, or examine for the purpose of testing any meter so detached or disconnected; or,

3. In any manner whatever change, extend or alter any service or other pipe, wire or attachment of any kind, connecting with or through which natural or artificial gas or electricity is furnished from the gas mains or pipes of any person, without first procuring from said person written permission to make such change, extension or alterations; or,

4. Make any connection or reconnection with the gas mains, service pipes or wires of any person, furnishing to consumers natural or artificial gas or electricity, or turn on or off or in any manner interfere with any valve or stop-cock or other appliance belonging to such person, and connected with his service or other pipes or wires, or enlarge the orifice of mixers, or use natural gas for heating purposes except through mixers, or electricity for any purpose without first procuring from such person a written permit to turn on or off such stop-cock or valve, or to make such connection or reconnections, or to enlarge the orifice of mixers, or to use for heating purposes without mixers, or to interfere with the valves, stop-cocks, wires or other appliances of such, as the case may be; or,

5. Retain possession of or refuse to deliver any mixer, meter, lamp or other appliance which may be leased or rented by any person, for the purpose of furnishing gas, electricity or power through the same, or sell, lend or in any other manner dispose of the same to any person other than such person entitled to the possession of the same; or,

6. Set on fire any gas escaping from wells, broken or leaking mains, pipes, valves or other appliances used by any person in conveying gas to consumers, or interfere in any manner with the wells, pipes, mains, gate-boxes, valves, stop-cocks, wires, cables, conduits or any other appliances, machinery or property of any person engaged in furnishing gas to consumers unless employed by or acting under the authority and direction of such person; or,

7. Open or cause to be opened, or reconnect or cause to be reconnected any valve lawfully closed or disconnected by a district steam corporation; or,

8. Turn on steam or cause it to be turned on or to reënter any premises when the same has been lawfully stopped from entering such premises. (Rev., s. 3666; 1901, c. 735; C. S. 4323.)

§ 14-152. Injuring fixtures and other property of gas companies; civil liability.—If any person shall willfully, wantonly or maliciously remove, obstruct, injure or destroy any part of the plant, machinery, fixtures, structures or buildings, or anything appertaining to the works of any gas company, or shall use, tamper or interfere with the same, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not more than thirty days for such offense. Such person shall also forfeit and pay to the company so injured, to be sued for and recovered in a civil action, double the amount of the damages sustained by any such injury. (Rev., s. 3671; 1889 (Pr.), c. 35, s. 3; C. S. 4324.)

§ 14-153. Tampering with engines and boilers.—If any person shall willfully turn out water from any boiler or turn the bolts of any engine or boiler, or meddle or tamper with such boiler or engine, or any other machinery in connection with any boiler or engine, causing loss, damage, danger or delay to the owner in the prosecution of his work, he shall be guilty of a misdemeanor. (Rev., s. 3667; 1901, c. 733; C. S. 4325.)

Cited in *State v. Hargett*, 196 N. C. 692, 693, 146 S. E. 801.

telephone, telegraph and electric-power companies.—If any person shall willfully injure, destroy or pull down any telegraph, telephone or electric-power-transmission pole, wire, insulator or any other fixture or apparatus attached to a telegraph, telephone or electric-power-transmission line, he shall be guilty of a misdemeanor, and shall be fined and imprisoned at the discretion of the court. (Rev., s. 3847; Code, s. 1118; 1881, c. 4; 1883, c. 103; 1907, c. 827, s. 1; C. S. 4326.)

§ 14-155. Making unauthorized connections with telephone and telegraph wires.—It shall be unlawful for any person to tap or make any connection with any wire or apparatus of any telephone or telegraph company operating in this state, except such connection as may be authorized by the person or corporation operating such wire or apparatus. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than ten dollars or imprisoned not more than ten days for each offense. Each day's continuance of such unlawful connection shall be a separate offense. (1911, c. 113; C. S. 4327.)

§ 14-156. Injuring fixtures and other property of electric-power companies.—It shall be unlawful for any person willfully and wantonly, and without the consent of the owner, to take down, remove, injure, obstruct, displace or destroy any line erected or constructed for the transmission of electrical current, or any poles, towers, wires, conduits, cables, insulators or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances or apparatus connected therewith, or to sever any wire or cable thereof, or in any manner to interrupt the transmission of electrical current over and along any such line, or to take down, remove, injure or destroy any house, shop, building or other structure or machinery connected with or necessary to the use of any line erected or constructed for the transmission of electrical current, or to wantonly or willfully cause injury to any of the property mentioned in this section by means of fire. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars or imprisoned not longer than one year, or both fined and imprisoned, in the discretion of the court. (1907, c. 919; C. S. 4328.)

§ 14-157. Felling trees on telephone and electric-power wires.—If any person shall negligently and carelessly cut or fell any tree, or any limb or branch therefrom, in such a manner as to cause the same to fall upon and across any telephone, electric light or electric-power-transmission wire, from which any injury to such wire shall be occasioned, he shall be guilty of a misdemeanor, and shall also be liable to penalty of fifty dollars for each and every offense. (Rev., s. 3849; 1903, c. 616; 1907, c. 827, s. 2; C. S. 4329.)

§ 14-158. Interfering with telephone lines.—If any person shall unnecessarily disconnect the wire or in any other way render any telephone line, or any part of such line, unfit for use in transmitting messages, or shall unnecessarily cut, tear down, destroy or in any way render unfit for the transmission of messages any part of the wire of a tele-

phone line, he shall be guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned for a term not exceeding two years, in the discretion of the court. (Rev., s. 3845; 1901, c. 318; C. S. 4330.)

Civil Action for Damages.—The willful cutting of a telephone wire in public use for hire is made a misdemeanor punishable by fine or imprisonment by this section, and where such act has caused damages to another the action sounds in tort, making the tortfeasor liable for any injuries naturally following and flowing from the wrongful act, independent of any contractual relations between the parties. *Hodges v. Virginia-Carolina R. Co.*, 179 N. C. 566, 103 S. E. 145.

§ 14-159. Injuring buildings or fences; taking possession of house without consent.—If any person shall deface, injure or damage any house, uninhabited house or other building belonging to another; or deface, damage, pull down, injure, remove or destroy any fence or wall enclosing, in whole or in part, the premises belonging to another; or shall move into, take possession of and/or occupy any house, uninhabited house or other building situated on the premises belonging to another, without having first obtained authority so to do and consent of the owner or agent thereof, he shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days. (1929, c. 192, s. 1.)

Cross References.—See also, § 14-144. As to willful destruction by a tenant, see § 42-11.

Art. 23. Trespasses to Personal Property.

§ 14-160. Malicious injury to personal property.—If any person shall wantonly and willfully injure the personal property of another, he shall be guilty of a misdemeanor, whether the property be destroyed or not, and shall be punished by fine or imprisonment, or both, in the discretion of the court. (Rev., s. 3676; Code, s. 1082; 1885, c. 53; 1876-7, c. 18; C. S. 4331.)

Cross Reference.—As to definition of personal property, see § 12-3, paragraph 6.

Things That Are Personality.—A promissory note or due bill being an "evidence of debt" is personal property within the meaning of this section and section 12-3, par. 6. *State v. Sneed*, 121 N. C. 614, 28 S. E. 365.

An electric street car is personality and not a fixture. *State v. Sneed*, 121 N. C. 614, 28 S. E. 365.

Malice Not Necessary.—It is not necessary to allege or prove any malice to the owner of personal property on the part of one who wantonly and willfully injures it nor is it material whether the property was destroyed or not. *State v. Sneed*, 121 N. C. 614, 28 S. E. 365.

"Wantonly and Wilfully" Necessary.—An indictment for injury to personal property, under this section, which charged that the act was "wantonly and wilfully" done, was not defective because it did not aver the act to have been unlawfully perpetrated. Lawful acts are not done wantonly and wilfully. *State v. Martin*, 107 N. C. 904, 12 S. E. 194.

But an indictment cannot be sustained under this section if there is neither an allegation or finding that the injury was "wilfully and wantonly" done. The words "unlawfully and on purpose" will not supply their place. *State v. Tweedy*, 115 N. C. 704, 20 S. E. 183.

Malicious Mischief at Common Law.—This section was not intended to supersede the common law as to malicious mischief, and though malice must be charged at common law it is not necessary under this section. *State v. Martin*, 141 N. C. 832, 53 S. E. 874.

No Accessories.—As there are no accessories in misdemeanors, the offence under this section may be committed jointly by several persons, one doing the act the others aiding and abetting or participating. *State v. Martin*, 141 N. C. 832, 53 S. E. 874.

Destroying Whisky.—The mere possession of whisky gives no title; and a revenue officer who seizes a barrel concealed on private premises, and in good faith destroys it, is not

guilty of a misdemeanor under this section. *North Carolina v. Vanderford*, 35 Fed. 282.

Conviction under This Section in Place of Section 14-165.—Where there is an erroneous conviction under this section, when the indictment should have been drawn under section 14-165, et seq., the prisoner should be discharged with permission to the solicitor to send another bill, if so advised. *State v. Reed*, 196 N. C. 357, 145 S. E. 691.

§ 14-161. Malicious removal of packing from railway coaches and other rolling stock.—If any person shall willfully and maliciously take or remove the waste or packing from the journal box of any locomotive, engine, tender, carriage, coach, car, caboose or truck used or operated upon any railroad whether the same be operated by steam or electricity, he shall upon conviction thereof be fined or imprisoned in the jail or state's prison, in the discretion of the court. (Rev., s. 3759; 1905, c. 335; C. S. 4332.)

§ 14-162. Removing boats or their fixtures and appliances.—If any person shall take away from any landing or other place where the same shall be, or shall loose, unmoor, or turn adrift from the same, any boat, canoe, pettiaugua, oars, paddles, sails or tackle belonging to or in the lawful custody of any person; or if any person shall direct the same to be done without the consent of the owner, or the person having the custody or possession of such property, he shall forfeit and pay to such owner, or person having the custody and possession as aforesaid, the sum of two dollars, and shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days, in the discretion of the court. The owner may also have his action for such injury. The penalties aforesaid shall not extend to any person who shall press any such property by public authority. (Rev., s. 3544; Code, s. 2288; 1889, c. 378; R. C., c. 14, ss. 1, 3; C. S. 4333.)

§ 14-163. Injuring livestock not inclosed by lawful fence.—If any person shall willfully and unlawfully kill or abuse any horse, mule, hog, sheep or other cattle, the property of another, in any enclosure not surrounded by a lawful fence, such person shall be guilty of a misdemeanor, and fined or imprisoned, at the discretion of the court. (Rev., s. 3313; Code, s. 1003; 1868-9, c. 253; C. S. 4334.)

At Common Law.—Wounding of cattle maliciously is not an indictable offense at common law. *State v. Manuel*, 72 N. C. 201.

Purpose of Section.—The obvious purpose of the statute is to prohibit and prevent every person from unlawfully and willfully killing and abusing live-stock of another, that may get into and trespass upon inclosures not surrounded and protected by a lawful fence. This is the mischief to be suppressed. *State v. Godfrey*, 97 N. C. 507, 508, 1 S. E. 779.

Offence May Be Completed Elsewhere.—In order to complete the offense of injury to live-stock, it is not necessary that the offense should be consummated within the inclosure not surrounded by a lawful fence, for if it is begun therein and completed outside of such inclosure, the offence is complete. *State v. Godfrey*, 97 N. C. 507, 1 S. E. 779.

Cattle Defined.—The word "cattle" has a restricted sense which applies only to the bovine species, and also a broader meaning which includes all domestic animals. That it is used in this section in the latter and broader sense is apparent from the context, "horse, mule, hog, sheep or other cattle." *State v. Groves*, 119 N. C. 822, 823, 25 S. E. 819.

Injuries in Enclosed Fields.—A person is not liable under this section for injuring stock within his own field which is enclosed and under cultivation. *State v. Waters*, 51 N. C. 276.

Indictment Must Charge.—An indictment for injuring stock under this section must charge that the cattle abused

or killed were property of some one, the abusing or killing must be charged to have been willfully and unlawfully done while the animal was in an enclosure not surrounded by a lawful fence. *State v. Deal*, 92 N. C. 802; *State v. Simpson*, 73 N. C. 269.

An indictment charging an offence under this section but not setting out who owned the inclosure, although not encouraged because of its looseness, is sufficient. *State v. Allen*, 69 N. C. 23; *State v. Painter*, 70 N. C. 70.

"The Field" Is Too General.—An indictment which simply charges the injury, etc., to have been committed on stock in "the field" is not certain to that extent required in such pleading. *State v. Staton*, 66 N. C. 640.

§ 14-164. Taking away or injuring exhibits at fairs.—If any person, without the license of the owner, or any agricultural or other society, shall unlawfully carry away, remove, destroy, mar, deface or injure anything, animate or inanimate, while on exhibition on the grounds of any such society, or going to or returning from the same, he shall be guilty of a misdemeanor. It shall be sufficient in any indictment for any such offense, or for the larceny of any such thing, animate or inanimate as aforesaid, to charge that the thing so carried away, destroyed, marred, injured or feloniously stolen is the property of the society to which the said thing shall be forwarded for exhibition. (Rev., s. 3668; Code, s. 2796; 1870-1, c. 184, s. 4; C. S. 4335.)

Cross Reference.—As to fraudulent entries at fairs, see section 14-116.

Art. 24. Vehicles and Draft Animals—Protection of Bailor against Acts of Bailee.

§ 14-165. Malicious or wilful injury to hired personal property.—Any person who shall rent or hire from any person, firm or corporation, any horse, mule or like animal, or any buggy, wagon, truck, automobile, or other like vehicle, for temporary use, who shall maliciously or wilfully injure or damage the same by in any way using or driving the same in violation of any statute of the State of North Carolina, or who shall permit any other person so to do, shall be guilty of a misdemeanor and subject to punishment as hereinafter provided. (1927, c. 61, s. 1.)

Cross Reference.—See annotation under § 14-160.

§ 14-166. Sub-letting of hired property.—Any person who shall rent or hire, for temporary use, any horse, mule, or other like animal, or any buggy, wagon, truck, automobile, or other like vehicle, who shall, without the permission of the person, firm or corporation from whom such property is rented or hired, sub-let or rent the same to any other person, firm or corporation, shall be guilty of a misdemeanor and punished as hereinafter provided. (1927, c. 61, s. 2.)

§ 14-167. Failure to return hired property.—Any person who shall rent or hire, for temporary use, any horse, mule or other like animal, or any buggy, wagon, truck, automobile, or other vehicle, and who shall wilfully fail to return the same to the possession of the person, firm or corporation from whom such property has been rented or hired at the expiration of the time for which such property has been rented or hired, shall be guilty of a misdemeanor and punished as hereinafter provided. (1927, c. 61, s. 3.)

§ 14-168. Hiring with intent to defraud.—Any person who shall, with intent to cheat and defraud the owner thereof of the rental price there-

for, hire or rent for temporary use any horse or mule or any other like animal, or any buggy, wagon, truck, automobile or other like vehicle, or who shall obtain the possession of the same by false and fraudulent statements made with intent to deceive, which are calculated to deceive, and which do deceive, shall be guilty of a misdemeanor and punished as hereinafter provided. (1927, c. 61, s. 4.)

§ 14-169. Violation made misdemeanor.—Any person violating the provisions of this article shall be guilty of a misdemeanor and punished at the discretion of the court. (1927, c. 61, s. 5; 1929, c. 38, s. 1.)

Editor's Note.—Prior to the 1929 amendment, this section provided for a maximum fine of fifty dollars and a maximum jail sentence of thirty days. The amendatory act provided that prosecutions instituted and crimes committed before its ratification on February 20, 1929, should be determined by the statute as it was before the amendment.

Art. 25. Regulating the Leasing of Storage Batteries.

§ 14-170. "Rental battery" defined; identification of rental storage batteries.—As used in this article the words "rental battery" are defined as an electric storage battery loaned, rented or furnished for temporary use by any person, firm or corporation engaged in the business of buying, selling, repairing or recharging electric storage batteries. All such persons, firms or corporations may mark any such rental batteries belonging to them with the word "rental," or any other word of similar meaning, printed or stamped upon or attached to such battery together with such words as shall identify such batteries as the property of the person, firm or corporation so marking the same. It shall be unlawful for any person, firm or corporation to so mark any such batteries which are not the property of such person, firm or corporation. (1933, c. 185, s. 1.)

§ 14-171. Defacing word "rental" prohibited.—It is unlawful for any person, firm or corporation to remove, deface, alter or destroy the word "rental" on any rental battery or any other word, mark or character printed, painted or stamped upon or attached to any rental battery to identify the same as belonging to or being the property of any person, firm or corporation. (1933, c. 185, s. 2.)

§ 14-172. Sale, etc., of rental battery prohibited.—It is unlawful for any person, firm or corporation other than the owner thereof to sell, dispose of, deliver, rent or give to any other person, firm or corporation any rental battery marked by the owner as provided by section 14-170. (1933, c. 185, s. 3.)

§ 14-173. Repairing another's rental battery prohibited.—It is unlawful for any person, firm or corporation engaged in the business of buying, selling, repairing or recharging electric storage batteries to recharge or repair any rental battery not owned by such person, firm or corporation marked by the owner thereof as provided by section 14-170. (1933, c. 185, s. 4.)

§ 14-174. Time limit on possession of rental battery without written consent.—It is unlawful for any person, firm or corporation to retain in

his, their or its possession for a longer period than ten (10) days, without the written consent of the owner, any rental battery marked as such by the owner as provided by section 14-170. Demand must be made on any person who so retains a rental battery in his possession at least five days before a prosecution can be instituted: Provided, however, that proof of a registered letter having been sent to the person so offending at his last known address shall be accepted as conclusive evidence of such demand. (1933, c. 185, s. 5.)

§ 14-175. Violation made misdemeanor.—Any person, firm or corporation, and the officers, agents, employees, and members of any firm or corporation violating any of the provisions of sections 14-170—14-174 shall be guilty of a misdemeanor and upon conviction thereof shall be sentenced to pay a fine not exceeding fifty dollars or be imprisoned for a term of not exceeding thirty days in the discretion of the court. (1933, c. 185, s. 6.)

§ 14-176. Rebuilding storage batteries out of old parts and sale of, regulated.—Any person, firm or corporation who assembles or rebuilds an electric storage battery for use on automobiles, in whole or in part, out of second-hand or used material such as containers, separators, plates, groups or other battery parts, and sells same or offers same for sale in the state of North Carolina without the word "rebuilt" placed in the side of the container, shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine not exceeding two hundred and fifty dollars or imprisoned for a term not exceeding six months or both. (1933, c. 535.)

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

Art. 26. Offenses against Public Morality and Decency.

§ 14-177. Crime against nature.—If any person shall commit the abominable and detestable crime against nature, with mankind or beast, he shall be imprisoned in the state's prison not less than five nor more than sixty years. (Rev., s. 3349; Code, s. 1010; R. C., c. 34, s. 6; 1868-9, c. 167, s. 6; 5 Eliz., c. 17; 25 Hen. VIII, c. 6; C. S. 4336.)

Scope of Section.—This section includes all kindred acts of bestial character whereby degraded and perverted sexual desires are sought to be gratified. *State v. Griffin*, 175 N. C. 767, 769, 94 S. E. 678. It includes unnatural intercourse between male and male. *State v. Fenner*, 166 N. C. 247, 80 S. E. 970.

Conviction for Attempt.—Upon the trial of an indictment for the crime against nature the prisoner may be convicted of the crime charged therein, or of an attempt to commit a less degree of the same crime. *State v. Savage*, 161 N. C. 245, 246, 76 S. E. 238.

Applied in *State v. Callett*, 211 N. C. 563, 191 S. E. 27; *State v. Spivey*, 213 N. C. 45, 195 S. E. 1.

§ 14-178. Incest between certain near relatives.

—In all cases of carnal intercourse between grandparent and grandchild, parent and child, and brother and sister of the half or whole blood, the parties shall be guilty of a felony, and shall be punished for every such offense by imprisonment in the state's prison for a term not exceeding fifteen years, in the discretion of the court. (Rev., s. 3351; Code, s. 1060; 1879, c. 16, s. 1; 1911, c. 16; C. S. 4337.)

In General.—Incest was not indictable at common law. *State v. Sauls*, 190 N. C. 810, 811, 130 S. E. 848, and cases cited. The amendment of 1911 increasing the punishment was held not retroactive. *State v. Broadway*, 157 N. C. 598, 72 S. E. 987.

Carnal intercourse by the father with his illegitimate daughter constitutes the offense. *State v. Lawrence*, 95 N. C. 659. Both parties are not necessarily guilty. *Strider v. Lewey*, 176 N. C. 448, 97 S. E. 398.

Evidence.—Confessions of the wife to the husband are not admissible in a trial for incest. *State v. Brittain*, 117 N. C. 783, 23 S. E. 433. But proof of other similar acts is competent in corroboration. *State v. Broadway*, 157 N. C. 598, 72 S. E. 987.

Failure to Charge "Carnal" Knowledge.—The mere fact that indictment failed to charge "carnal" knowledge, is not a fatal defect that would sustain the defendant's motion to quash the indictment. *State v. Sauls*, 190 N. C. 810, 130 S. E. 848.

§ 14-179. Incest between uncle and niece and nephew and aunt.—In all cases of carnal intercourse between uncle and niece, and nephew and aunt, the parties shall be guilty of a misdemeanor, and shall be punished by a fine or imprisonment in the discretion of the court. (Rev., s. 3352; Code, s. 1061; 1879, c. 16, s. 2; C. S. 4338.)

With Daughter of Half Sister.—It has been held under this section that carnal intercourse of a man with the daughter of his half sister is incest. *State v. Harris*, 149 N. C. 513, 62 S. E. 1090.

§ 14-180. Seduction.—If any man shall seduce an innocent and virtuous woman under promise of marriage, he shall be guilty of a felony, and upon conviction shall be fined or imprisoned at the discretion of the court, and may be imprisoned in the state prison not exceeding the term of five years: Provided, the unsupported testimony of the woman shall not be sufficient to convict: Provided further, that marriage between the parties shall be a bar to further prosecution hereunder. But when such marriage is relied upon by the defendant, it shall operate as to the costs of the case as a plea of nolo contendere, and the defendant shall be required to pay all the costs of the action or be liable to imprisonment for nonpayment of the same. (Rev., s. 3354; 1885, c. 248; 1917, c. 39; C. S. 4339.)

Who May Be Convicted.—A male, at the marriageable age of 18 years, is indictable for seduction under this section. *State v. Creed*, 171 N. C. 837, 88 S. E. 511.

Distinguishing Civil and Criminal Action.—It is only necessary for plaintiff's recovering damages in her civil action, in tort, for wrongful seduction, to show that the defendant induced the intercourse by persuasion, deception, enticement, or other artifice; not requiring, as in prosecution under this section, that the intercourse was procured under a promise of marriage, though when existent this may be shown in the civil action as a means used by the defendant to accomplish his purpose. *Hardin v. Davis*, 183 N. C. 46, 110 S. E. 602.

Three Elements of Offense.—To convict the defendant of seduction, it is incumbent upon the state to satisfy the jury beyond a reasonable doubt of every element essential to the offense. The three elements are: (1) The innocence and virtue of the prosecutrix; (2) the promise of marriage; and (3) the carnal intercourse induced by such promise. *State v. Crook*, 189 N. C. 545, 127 S. E. 579. *State v. Pace*, 159 N. C. 462, 74 S. E. 1018; *State v. Brackett*, 218 N. C. 369, 11 S. E. (2d) 146. If any one of these elements is lacking there can be no seduction. *State v. Ferguson*, 107 N. C. 841, 848, 12 S. E. 574. See also *State v. McDade*, 208 N. C. 197, 179 S. E. 755.

Decelt is the very essence of this offence, the warp and woof of it, so to speak. *State v. Crowell*, 116 N. C. 1052, 1053, 1057, 21 S. E. 502. The promise of marriage alone makes the seduction criminal. *State v. Whitley*, 141 N. C. 823, 824, 53 S. E. 820. Consent is no defense. *State v. Horton*, 100 N. C. 443, 6 S. E. 238.

Meaning of "Innocent and Virtuous."—Should any woman committing the act of adultery induced by her own lascivious desires, with or without the promise, her conduct is

not such as to bring her within the intent and meaning of this section as an innocent and virtuous woman. *State v. Johnson*, 182 N. C. 883, 109 S. E. 786. See *State v. Crowell*, 116 N. C. 1052, 1058, 21 S. E. 502; *State v. Ferguson*, 107 N. C. 841, 12 S. E. 574.

Permitting familiarities not amounting to incontinence may be considered by the jury in determining whether the prosecutrix was virtuous. *State v. Whitley*, 141 N. C. 823, 53 S. E. 820. But when permitted by the prosecutrix after the act they do not negative evidence that she was innocent and virtuous prior thereto, though they may be properly considered by the jury with reference to the weight of her evidence. *State v. Lang*, 171 N. C. 778, 87 S. E. 957.

An adulteress may reform and become innocent and even virtuous, and the statute protects her just as much as if she had never fallen. *State v. Johnson*, 182 N. C. 883, 109 S. E. 786.

Promise of Marriage Must Be Unconditional.—In order for conviction under this section, the promise of marriage must be absolute and unconditional, and a promise at the time to marry the woman in the event "anything should happen to her," is insufficient for a conviction under the statute. *State v. Shatley*, 201 N. C. 83, 159 S. E. 362.

Testimony of Woman Must Be Corroborated as to Each Element.—The statute provides that the unsupported testimony of the woman shall not be sufficient to convict. This proviso has been construed to mean that the prosecutrix must be supported by independent facts and circumstances as to each element of the offense. *State v. Crook*, 189 N. C. 545, 127 S. E. 579. See also, *State v. Maness*, 192 N. C. 708, 135 S. E. 777. See *State v. Forbes*, 210 N. C. 567, 187 S. E. 760; *State v. Brewington*, 212 N. C. 244, 193 S. E. 24.

For cases setting out facts held either sufficient or insufficient to support, see *State v. Cooke*, 176 N. C. 731, 97 S. E. 171; *State v. Raynor*, 145 N. C. 472, 59 S. E. 344; *State v. Maloney*, 154 N. C. 200, 69 S. E. 786; *State v. Pace*, 159 N. C. 462, 74 S. E. 1018; *State v. Brackett*, 218 N. C. 369, 11 S. E. (2d) 146.

The weight and credibility of the evidence supporting that of the woman, upon the trial of seduction, under this section, is for the jury, if it comes within the requirement of being legal evidence, however slight it may be. *State v. Doss*, 188 N. C. 214, 124 S. E. 156.

Supporting Evidence Need Not Be Direct.—It is not required that the "supporting evidence" of the promise of marriage coincide with the testimony of the prosecutrix as to the time the promise was made, since it is not required that the "supporting evidence" be direct, adiminiclar proof being sufficient. *State v. Smith*, 217 N. C. 591, 9 S. E. (2d) 9.

The proviso that "the unsupported testimony of the woman shall not be sufficient to convict" is fully met where the testimony of the prosecutrix was corroborated in respect to each essential element of the offense charged; as to the promise of marriage by evidence of the prosecutrix' statements to others, and by the witness who "heard them talking," and by the further circumstance of the long and constant association of the defendant with the prosecutrix; as to her innocence and virtue by the evidence of her good character; and as to the intercourse by the admission of the defendant. *State v. Tuttle*, 207 N. C. 649, 650, 178 S. E. 76.

Resemblance of Child to Defendant.—It is not error to permit a child to be exhibited to the jury that they may trace a resemblance to one charged with having begotten it; and such evidence is admissible on an indictment for seduction. *State v. Horton*, 100 N. C. 443, 6 S. E. 238.

Effect of Marriage upon Consent Judgment.—Where, in a prosecution for seduction a consent judgment is entered requiring the defendant to pay a certain sum to the prosecutrix, a subsequent marriage of the parties before the whole sum is paid does not discharge the judgment, the consent of all parties being necessary to set aside such judgment. For the defendant to get the benefit of this section the marriage must be before he is adjudged guilty. *State v. McKay*, 202 N. C. 470, 163 S. E. 586.

Indictments—No Set Form of Words.—In the trial of an indictment for seduction under this section, no set form of words is necessary to show the causal relation between the promise and the act of sexual intercourse. *State v. Maloney*, 154 N. C. 200, 69 S. E. 786.

Limitation of Action.—Deceit being the very essence of the offense of seduction, section 15-1 exempting certain crimes, including deceit, from the two years statute of limitations, applies to the offense of seduction under promise of marriage. *State v. Crowell*, 116 N. C. 1052, 21 S. E. 502.

Insufficient Evidence to Show Promise of Marriage.—In prosecution for seduction, the only evidence in support of the testimony of prosecutrix on the essential element of promise of marriage was the testimony of a witness that

prosecutrix had told the witness that she and defendant were going to be married, and the further testimony that she had seen prosecutrix and defendant together over a certain period. No other witness testified that prosecutrix and defendant had been seen together. This is not sufficient to constitute proof of the promise of marriage by facts and circumstances independent of the testimony of prosecutrix, and defendant's motion to nonsuit should have been granted. *State v. Forbes*, 210 N. C. 567, 187 S. E. 760.

Burden of Proof on State.—In order to convict, the burden of proof is upon the State to show beyond a reasonable doubt that the seduction was accomplished under and by means of the promise of marriage, and that the prosecutrix was at that time an innocent and virtuous woman. It must affirmatively appear that the inducing promise preceded the intercourse, and that the promise was absolute and not conditional. *State v. Wells*, 210 N. C. 738, 188 S. E. 326, holding evidence insufficient to establish that seduction was induced by previous unconditional promise of marriage.

Punishment.—This section, providing that one convicted of seduction under promise of marriage "shall be fined or imprisoned," at the discretion of the court, does not authorize the imposition of both fine and imprisonment. *State v. Crowell*, 116 N. C. 1052, 1053, 21 S. E. 502.

Defendant's contention that he was subjected to cruel and unusual punishment in that the trial court sentenced him to the maximum prison term permitted by statute for the offense of seduction of which he was convicted, and in addition dictated a letter to the parole commissioner in which he requested that no clemency be extended defendant, and also directed the solicitor to institute prosecution against defendant for failure to support his illegitimate child, is untenable, since the letter to the parole commissioner and the instructions to the solicitor are not parts of the sentence imposed. *State v. Brackett*, 218 N. C. 369, 11 S. E. (2d) 146.

Cited in *State v. Wade*, 197 N. C. 571, 150 S. E. 32.

§ 14-181. Miscegenation.—All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive, are forever prohibited, and shall be void. Any person violating this section shall be guilty of an infamous crime, and shall be punished by imprisonment in the county jail or state's prison for not less than four months nor more than ten years, and may also be fined, in the discretion of the court. (Rev., s. 3369; Code, s. 1084; Const., Art. XIV, s. 8; R. C., c. 68, s. 7; 1834, c. 24; 1838-9, c. 24; C. S. 4340.)

Editor's Note.—Under the act of 1838-9, ch. 24, declaring void all marriages between white persons and free negroes and persons of color, all marriages between white persons and Indians were void, if within the third degree, and any violation thereof was punishable by indictment for fornication. *State v. Melton*, 44 N. C. 49.

The law has not been affected by the changes in the State or Federal Constitution. See *State v. Puit*, 94 N. C. 709, 718, and cases there cited.

Domicile in This State.—A marriage solemnized in a State whose laws permit such marriage between a negro and a white person domiciled in this State, and who leave it for the purpose of evading this law and with intent to return, is not valid in this State. *State v. Kennedy*, 76 N. C. 251; *State v. Ross*, 76 N. C. 242.

Domicile in Another State.—A marriage solemnized in a State whose laws permit such marriage between a negro and a white person domiciled in such State is valid in this State. *State v. Ross*, 76 N. C. 242.

Evidence.—It was not error to admit evidence that the wife was reputed to be of mixed blood within the prohibited degrees, or to permit the witness to state his opinion on that point, although he was not an expert. It was also competent corroboration of other evidence tending to show the taint of blood to show that the wife usually associated with colored people. *Hopkins v. Bowers*, 111 N. C. 175, 16 S. E. 1.

Cited in *Corporation Commission v. Transportation Committee*, 198 N. C. 317, 323, 151 S. E. 648.

§ 14-182. Issuing license for marriage between white person and negro; performing marriage ceremony.—If any register of deeds shall knowingly issue any license for marriage between any person of color and a white person; or if any

clergyman, minister of the gospel or justice of the peace shall knowingly marry any such person of color to a white person, the person so offending shall be guilty of a misdemeanor. (Rev., s. 3370; Code, s. 1085; R. C., c. 34, s. 80; 1830, c. 4, s. 2; C. S. 4341.)

§ 14-183. Bigamy.—If any person, being married, shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail for any term not less than four months nor more than ten years. Any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time; nor to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage; nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction. (Rev., s. 3361; Code, s. 988; R. C., c. 34, s. 15; 1790, c. 323; 1809, c. 783; 1829, c. 9; 1913, c. 26. See 9 Geo. IV, c. 31, s. 22; C. S. 4342.)

Editor's Note.—At common law, the second marriage was always void and from the earliest history of England polygamy has been treated as an offense against society. It is considered as a crime against the marital relation rather than against the wife. Bigamy and polygamy are likewise crimes by the laws of all civilized and Christian countries.

Mr. Chief Justice Waite said: "From that day (the date of the enactment of the bigamy statute in Virginia, 12 Henr. 8's Stat. 691), to this we think it may safely be said there never has been a time in any state of the Union when polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity." Reynolds v. United States, 98 U. S. 145, 165, 25 L. Ed. 244.

Offense against Society.—At common law and under this section bigamy is an offense against society rather than against the lawful spouse of the offender. State v. Williams, 220 N. C. 445, 17 S. E. (2d) 769, reversed on other grounds in Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 189.

Constitutes a Felony.—While at common law bigamy was not an indictable offense, and even as late as the enactment of 1885, it was only a misdemeanor, it is now a felony under this statute. State v. Burns, 90 N. C. 707.

Necessity of Valid Marriage.—That the first marriage was celebrated without procurement of a license, while subjecting the parties to punishment, will not so invalidate the marriage so that bigamy cannot be predicated thereon. State v. Robbins, 28 N. C. 23.

In a trial for bigamy, an instruction that defendant could not be convicted, unless the jury was satisfied beyond a reasonable doubt that the magistrate who solemnized the first marriage was a "duly appointed, qualified, and acting justice of the peace," was properly refused, it being sufficient if such justice was a de facto officer. State v. Davis, 109 N. C. 780, 14 S. E. 55.

The evidence showing that there were a number of eyewitnesses to the marriage, and a certified copy of the license with return endorsed being produced, it was not error to charge the jury that it would be presumed the ceremony was valid. State v. Davis, 109 N. C. 780, 14 S. E. 55.

Belief That First Wife Is Dead.—A belief by the defendant that his first wife is dead or his ignorance of her being alive, she having been away for less than seven years, is no defense in a prosecution for bigamy. State v. Goulden, 134 N. C. 743, 47 S. E. 450.

Absence of Wife.—"The burden is on the defendant to show as a matter of defense that his wife had absented herself for the space of seven years next before the second marriage, and that he was ignorant all that time that she was living." State v. Goulden, 134 N. C. 743, 47 S. E. 450.

Admissions as to Prior Marriage.—In a prosecution for bigamy an admission of the defendant is competent to prove the first marriage. State v. Goulden, 134 N. C. 743, 47 S. E. 450.

Where a defendant charged with bigamy, upon the preliminary examination before a Justice of Peace, and after being cautioned that his statements could be used against him, stated that he had been married to his former wife while a slave in South Carolina, had children by her and was subsequently married in North Carolina to his present wife, such admissions were competent to go to the jury, on his trial in the superior court, as to his guilt. State v. Melton, 120 N. C. 591, 26 S. E. 933.

Testimony of First Wife.—In an indictment for bigamy the first wife of the defendant is a competent witness to prove the marriage. State v. Melton, 120 N. C. 591, 26 S. E. 933.

The record book of marriage for the county or the original marriage license signed by the Justice solemnizing the marriage is admissible to prove a marriage. State v. Melton, 120 N. C. 591, 26 S. E. 933.

Second Marriage out of State.—It was held formerly that the courts of this State could not take jurisdiction of the case where the second marriage took place out of the State. See State v. Barnett, 83 N. C. 615, 616. Subsequent to this decision a clause was inserted in the section in furtherance of a purpose to make the offense cognizable "whether the second marriage shall have taken place in the State of North Carolina, or elsewhere." This clause, in State v. Cutshall, 110 N. C. 538, 15 S. E. 261, was held unconstitutional insofar as it attempted to make a second marriage bigamous which occurred out of the State without proving that the parties afterwards cohabited in North Carolina. The constitutionality of the section was upheld in State v. Long, 143 N. C. 670, 671, 57 S. E. 349, but from the statement of facts in that case it appears that while the second marriage took place in South Carolina the parties subjected themselves to the jurisdiction of this State by living here for four weeks thereafter. In State v. Ray, 151 N. C. 710, 66 S. E. 204, the authorities are reviewed and it is held (Clark, C. J., dissenting) that the words "or elsewhere," in the clause just quoted, were void. In recognition of these decisions the legislature, by the Public Laws of 1913, c. 26, amended the section and added the words "shall thereafter cohabit with such person in this State," which qualify and constitute a requisite to the jurisdiction when the second marriage is not in North Carolina. It has been held that this amendment is constitutional and does not confer extraterritorial jurisdiction upon the courts. See State v. Herron, 175 N. C. 754, 94 S. E. 698; State v. Moon, 178 N. C. 715, 100 S. E. 614.

Same—Pleading and Proof.—If the defendant wishes to rely upon the fact that the offense of bigamy was committed outside the state, he can not move to quash or in arrest, but must prove the fact in defense under his plea of not guilty. State v. Barrington, 141 N. C. 820, 53 S. E. 663; State v. Burton, 138 N. C. 575, 576, 50 S. E. 214; State v. Mitchell, 83 N. C. 674; State v. Long, 143 N. C. 670, 671, 57 S. E. 349.

Foreign Divorces.—Where a decree of divorce in another state, which is attacked by the prosecution for insufficient residence in such other state, is relied upon as the only defense on a trial for bigamy, the defendant must satisfy the jury, but not beyond a reasonable doubt, of the bona fides of his residence in the other state. State v. Herron, 175 N. C. 754, 94 S. E. 698.

A man and a woman went from this state to Nevada and, after residing there for a time sufficient to meet the requirement of a Nevada statute, secured decrees from a Nevada court, divorcing them from their respective spouses, in this state, in which they had been married and domiciled. They then married each other in Nevada, returned to this state and cohabited there as man and wife. Prosecuted under this section for bigamous cohabitation, they set up in defense the Nevada decrees. A general verdict was returned, after instructions permitting that the decrees be disregarded upon either of two grounds, (1) that a Nevada divorce decree based on substituted service, where defendant made no appearance, could not be recognized in this state, and (2) that defendants went to Nevada, not to es-

establish bona fide residence, but solely for the purpose of taking advantage of the laws of that state to obtain a divorce through a fraud upon the Nevada court. It was held that, as it could not be determined on the record that the verdict was not based solely upon the first ground—involving a construction and application of the Federal Constitution—the review in the supreme court of the United States must be of that ground, leaving the other out of consideration. *Williams v. North Carolina*, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 189, reversing 220 N. C. 445, 17 S. E. (2d) 769.

Proof of a divorce granted in another State, upon a trial for bigamy, in our own courts is only evidence which should be submitted to the jury under proper instructions. *State v. Herron*, 175 N. C. 754, 94 S. E. 698.

The Indictment.—An indictment for bigamy which charges that defendant “willfully, unlawfully and feloniously, being a married man, did marry one W. during the life of his first wife,” sufficiently avers the first marriage. *State v. Davis*, 109 N. C. 780, 14 S. E. 55.

Same—Name of First Wife.—It is not necessary, in an indictment for bigamy, to set out the name of the first wife. *State v. Davis*, 109 N. C. 780, 14 S. E. 55.

Same—Negating Divorce Unnecessary.—It was not necessary that an indictment for bigamy should contain an averment that the defendant had not been divorced from his wife. *State v. Norman*, 13 N. C. 222; *State v. Davis*, 109 N. C. 780, 14 S. E. 55; *State v. Melton*, 120 N. C. 591, 596, 26 S. E. 933.

Same—Time and Place of Marriage.—This section does not by its language make it necessary for the indictment to state the dates of the marriages, and section 15-155 expressly enacts that such a statement shall not be necessary. *State v. Long*, 143 N. C. 671, 57 S. E. 349.

Under this section it is unnecessary to state where the second marriage took place, and it is not necessary that the offense should be committed in the county where the bill is found to confer jurisdiction. *State v. Long*, 143 N. C. 671, 57 S. E. 349.

Bill of Particulars.—As in other offenses a bill of particulars is necessary if defendant desires further information upon which to prepare his defense. *State v. Long*, 143 N. C. 671, 57 S. E. 349.

Venue.—Defendant may be prosecuted for bigamy in the county in which he is apprehended, and it is not required that the prosecution be instituted in the county in which the bigamous cohabitation takes place. *State v. Williams*, 220 N. C. 445, 17 S. E. (2d) 769, reversed on other grounds in *Williams v. North Carolina*, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 189.

§ 14-184. Fornication and adultery.—If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor: Provided, that the admissions or confessions of one shall not be received in evidence against the other. (Rev., s. 3350; Code, s. 1041; R. C., c. 34, s. 45; 1805, c. 684; C. S. 4343.)

General Consideration.—Adultery is an aggravated species of fornication. *State v. Crowell*, 26 N. C. 231, 232. Fornication occurs upon cohabitation after miscegenation. See § 14-181 and notes thereto.

The Indictment.—The use of the word “adulterously” dispenses with the necessity of alleging that the parties were not married (*State v. McDuffie*, 107 N. C. 885, 12 S. E. 83) and were of different sex. *State v. Britt*, 150 N. C. 811, 812, 62 S. E. 1056. The words “lewdly and lasciviously” need not be used. *Id.* The state is not called upon to allege or prove the criminal intent. *State v. Cutshall*, 109 N. C. 764, 14 S. E. 107. The fact that the female is erroneously alleged to be a “spinster” is not ground of arrest. *State v. Guest*, 100 N. C. 410, 6 S. E. 253.

Evidence.—The admissions or confessions of one party are not to be received against the codefendant. *State v. Rhinehart*, 106 N. C. 787, 11 S. E. 512. However, it has been held that under certain circumstances such declarations are admissible when made by the female defendant in the presence of the male. See *State v. Roberts*, 188 N. C. 460, 124 S. E. 833.

It is competent to prove that either defendant had a living spouse. *State v. Manly*, 95 N. C. 661. Statements and conduct prior to the offense charged are admissible; *State v. Austin*, 108 N. C. 780, 13 S. E. 219, as is also testimony as to conduct of the parties after indictment. *State v. Stubbs*, 108 N. C. 774, 13 S. E. 90.

Acquittal as to One Party.—Where only one party is convicted and the other acquitted, there can be no judgment against the one convicted. *State v. Mainor*, 28 N. C. 340.

This holding was followed in the case of *State v. Lyrerly*, 52 N. C. 158, and was held as law in this state until doubted in the opinion of Mr. Justice Davis in *State v. Rhinehart*, 106 N. C. 787, 11 S. E. 512. The question came before the court again in *State v. Cutshall*, 109 N. C. 764, 14 S. E. 107, when it was held that an acquittal of one defendant did not work the same result as to the other, or prevent the court from rendering judgment. This seems to be the present status of the law on this point. It was followed in *State v. Simpson*, 133 N. C. 676, 45 S. E. 567.

Both Convicted—New Trial as to One.—Following a line of reasoning similar to that discussed in the foregoing paragraph, the court in *State v. Parham*, 50 N. C. 416, 417, held that if both defendants are convicted, a new trial may be granted as to one party without disturbing the verdict as to the other.

Punishment.—In fixing the punishment of persons convicted under this section, the courts have looked to the provisions of section 14-3 which prescribes the punishment of misdemeanors for which a specific punishment has not been fixed.—*Ed. Note.*

Persons convicted of fornication and adultery may be imprisoned in the common jail for a period to be fixed in the discretion of the court. *State v. Manly*, 95 N. C. 61, 662, citing *State v. McNeal*, 75 N. C. 15; *State v. Jackson*, 82 N. C. 565.

The court has power, during the term, to correct or modify an unexecuted judgment in criminal as well as in civil actions. *State v. Manly*, 95 N. C. 661, 663. See also, *In re Brittain*, 93 N. C. 587.

Applied in *State v. Miller*, 214 N. C. 317, 199 S. E. 89.

§ 14-185. Inducing female persons to enter hotels or boarding-houses for immoral purposes.—

Any person who shall knowingly persuade, induce or entice, or cause to be persuaded, induced or enticed, any woman or girl to enter a hotel, public inn or boarding-house for the purpose of prostitution or debauchery or for any other immoral purpose, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished in the discretion of the court. (1917, c. 158, s. 1; C. S. 4344.)

§ 14-186. Opposite sexes occupying same bedroom at hotel for immoral purposes; falsely registering as husband and wife.—Any man and woman found occupying the same bedroom in any hotel, public inn or boarding-house for any immoral purpose, or any man and woman falsely registering as, or otherwise representing themselves to be, husband and wife in any hotel, public inn or boarding-house, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished in the discretion of the court. (1917, c. 158, s. 2; C. S. 4345.)

§ 14-187. Permitting unmarried female under eighteen in house of prostitution.—Whoever, being the keeper of a house of prostitution, or assignment house, building or premises in this state where prostitution, fornication or concubinage is allowed or practiced, shall suffer or permit any unmarried female under the age of eighteen years to live, board, stop, or room in such house, building or premises, shall be guilty of a misdemeanor. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 18; C. S. 4346.)

§ 14-188. Certain evidence relative to keeping disorderly houses admissible; keepers of such houses defined.—On a prosecution in any court for keeping a disorderly house or bawdy-house, or permitting a house to be used as a bawdy-house, or used in such a way as to make it disorderly, or a common nuisance, evidence of the general reputation or character of the house shall be admissible and competent; and evidence of the lewd, dissolute and boisterous conversation of the inmates and frequenters, while in and around such

house, shall be prima facie evidence of the bad character of the inmates and frequenters, and of the disorderly character of the house. The manager or person having the care, superintendency or government of a disorderly house or bawdy-house is the "keeper" thereof, and one who employs another to manage and conduct a disorderly house or bawdy-house is also "keeper" thereof. (1907, c. 779; C. S. 4347.)

Constitutionality.—This section is constitutional. *State v. Price*, 175 N. C. 804, 95 S. E. 478.

Disorderly House Defined.—Illustrations. — A disorderly house is kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular neighborhood, or the passers-by. *State v. Wilson*, 93 N. C. 608.

A few of the decided cases are given here in order that the counsel may have an idea as to what situations and conditions have been held to be included in the definition set out in the above paragraph.

The following have been held to constitute disorderly houses: A shop in which disorderly crowds assemble. *State v. Robertson*, 86 N. C. 628. A store in which persons collect and disturb the neighborhood. *State v. Thornton*, 44 N. C. 252.

The following have been held not to constitute disorderly houses: A private dwelling wherein an uproar was frequently raised but which disturbed few people. *State v. Wright*, 51 N. C. 25. The residence of an unchaste woman. *State v. Evans*, 27 N. C. 603.

Persons Leasing Premises as a "Keeper."—A person who leases a house knowing that it is to be used for disorderly and unlawful purposes is treated as a direct offender. *State v. Boyd*, 175 N. C. 791, 95 S. E. 161.

Powers of City Authorities.—The extent of the powers of the authorities of a municipality to enact ordinances concerning houses of ill-fame is discussed by Mr. Justice Avery in *State v. Webber*, 107 N. C. 962, 12 S. E. 598.

Evidence.—This section authorizes the admission of evidence tending to show the lewd, dissolute, and boisterous conversation of the inmates and frequenters of the house, and especially provides that evidence of the general reputation or character of the house shall be admissible and competent. *State v. Hilderbran*, 201 N. C. 780, 161 S. E. 488.

§ 14-189. Obscene literature.—It shall be unlawful for any person, firm or corporation to exhibit for the purpose of gain, or display for sale, lend or hire, or otherwise publish or sell for the purpose of gain, or exhibit in any school, college, or other institution of learning, or have in his possession for the purpose of sale or distribution, any obscene literature, as determined and defined in the postal laws and regulations of the United States post office department, in the form of book, paper-writing, print, drawing, or other representation, at any newsstand, book store, drug store or other public or private places; or if any person shall post any indecent placards, writings, pictures or drawings on walls, fences, billboards or other public or private places, he shall be guilty of a misdemeanor. (Rev., s. 3731; 1885, c. 125; 1907, c. 502; 1935, c. 57; C. S. 4348.)

Editor's Note.—The amendment of 1935 made many changes in this section and a comparison is necessary to determine its full extent. Prior to the amendment, the section also covered the offense of indecent exposure. This is now the subject of section 14-190.

Test of Immorality.—It has been suggested that the test of immorality is whether the literature "has a tendency to shock the moral sense of the average, normal head of a family." If such a test would prevent the publication of writings of an educational value on sex hygiene, commercialized vice and the like, the remedy would be a matter for the legislature, since the Constitution only prevents restrictions upon, and not enlargement of, the right to publish. 4 N. C. Law Rev. 33.

§ 14-190. Indecent exposure; immoral shows, etc.—Any person who in any place wilfully exposes his person, or private parts thereof, in the presence of one or more persons of the opposite

sex whose person, or the private parts thereof, are similarly exposed, or who aids or abets in any such act, or who procures another so as to expose his person, or the private parts thereof, or take part in any immoral show, exhibition or performance where indecent, immoral or lewd dances or plays are conducted in any booth, tent, room or other public or private place to which the public is invited; or any person, who, as owner, manager, lessee, director, promoter or agent, or in any other capacity, hires, leases or permits the land, buildings, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for any such immoral purposes, shall be guilty of a misdemeanor. Any person who shall wilfully make any indecent public exposure of the private parts, of his or her person in any public place or highway shall be guilty of a misdemeanor. (Rev., s. 3731; 1885, c. 125; 1907, c. 502; 1935, c. 57; 1941, c. 273; C. S. 4348(a).)

Editor's Note.—The 1941 amendment added the last sentence to this section. For comment on the amendment, see 19 N. C. Law Rev. 479.

§ 14-191. Sheriffs and deputies to report violations of two preceding sections.—It shall be the duty of the sheriffs and their deputies of the various counties to see that the provisions of §§ 14-189 and 14-190 are enforced by reporting violations of said sections to the presiding judge of a superior court, county or municipal court, or justice of the peace, who shall have warrants issued to cause such violators to come before their courts for immediate trial. (1935, c. 57.)

Editor's Note.—The case treated under this section was decided under section 14-189 as it read prior to the 1935 amendment. Prior to the enactment of this section there was no provision providing for the enforcement of section 14-189.

Powers of Officers.—Under section 14-189 it was held that the chief of police and his lawful officers or subordinates had the right to prevent or suppress an indecent or immoral show, given in any public place or in any place to which the public were invited and, in the proper discharge of these duties, they could act immediately whenever such exhibitions were taking place in their presence or were imminent and their interference was required to prevent them. *Brewer v. Wynne*, 163 N. C. 319, 79 S. E. 629.

§ 14-192. Cutting or painting obscene words or pictures near public places.—It shall be unlawful for any person to write, cut or carve any indecent word, or to paint, cut or carve any obscene or lewd picture or representation, on any tree or other object near the public highways or other public places. Any person guilty of violating this section shall be fined not more than fifty dollars, or imprisoned not more than thirty days. (1907, c. 344; C. S. 4349.)

§ 14-193. Exhibition of obscene or immoral pictures; posting of advertisements.—If any person, firm, or corporation shall, for the purpose of gain or otherwise, exhibit any obscene or immoral motion pictures; or if any person, firm or corporation shall post any obscene or immoral placard, writings, pictures, or drawings on walls, fences, billboards, or other places, advertising theatrical exhibitions or moving picture exhibitions or shows; or if any person, firm, or corporation shall permit such obscene or immoral exhibitions to be conducted in any tent, booth, or other place or building owned or controlled by said person, firm, or corporation, the person, firm, or corporation performing either one or all of the said acts

shall be guilty of a misdemeanor, and punishable in the discretion of the court. For the purpose of enforcing this statute any spectator at the exhibition of an obscene or immoral moving picture may make the necessary affidavit upon which the warrant for said offense is issued. (1921, c. 212; C. S. 4349(a).)

§ 14-194. Circulating publications barred from the mails.—It shall be unlawful for any news agent, news dealer, book-seller, or any other person, firm, or corporation to offer for sale, sell, or cause to be circulated within the State of North Carolina any magazine, periodical, or other publication which is now or may hereafter be excluded from the United States mails.

It shall be unlawful for any person, firm, or corporation to offer for sale, sell, or give to any person under the age of twenty-one years any such magazine, periodical, or other publication which is now or may hereafter be excluded from the United States mails.

This section shall not be construed to in any way conflict with or abridge the freedom of the press, and shall in no way affect any publication which is permitted to be sent through the United States mails.

Any person, firm, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor. (Ex. Sess. 1924, c. 45.)

Editor's Note.—A practical criticism of the effect of this section upon the freedom of the press will be found in 4 N. C. Law Rev. 35. See also the review in 3 N. C. Law Rev. 26.

§ 14-195. Using profane or indecent language on passenger trains.—It shall be unlawful for any person to curse or use profane or indecent language on any passenger train. Any person so offending shall upon conviction be fined not more than fifty dollars or imprisoned not more than thirty days. (1907, c. 470, ss. 1, 2; C. S. 4350.)

§ 14-196. Using profane or indecent language to female telephone operators.—It shall be unlawful for any person to use any lewd or profane words, or any words of vulgarity, or to use indecent language to any female telephone operator operating any telephone, switchboard, circuit or line. Any person violating this section shall upon conviction be guilty of a misdemeanor. (1913, c. 35; 1915, c. 41; C. S. 4351.)

§ 14-197. Using profane or indecent language on public highways, counties exempt.—If any person shall, on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, use indecent or profane language, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. The following counties shall be exempted from the provisions of this section: Beaufort, Brunswick, Camden, Cleveland, Craven, Dare, Macon, Martin, Orange, Pasquotank, Pitt, Stanly, Swain, Transylvania, Tyrell, Washington and Watauga. (1913, c. 40; Pub. Loc. Ex. Sess. 1924, c. 65; 1933, c. 309; 1937, c. 9; 1939, c. 73; C. S. 4352.)

Editor's Note.—Public Laws of 1933, c. 309, omitted Gates from the list of excepted counties.

The 1937 amendment struck out Perquimans and the 1939 amendment struck out Jones.

§ 14-198. Lewd women within three miles of colleges and boarding-schools.—If any loose woman or woman of ill-fame shall commit any act of lewdness with or in the presence of any student, who is under twenty-one years old, of any boarding-school or college, within three miles of such school or college, she shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Upon the trial of any such case students may be competent but not compellable to give evidence. No prosecution shall be had under this section after the lapse of six months. (Rev., s. 3353; 1889, c. 523; C. S. 4353.)

§ 14-199. Obstructing way to places of public worship.—If any person shall maliciously stop up or obstruct the way leading to any place of public worship, or to any spring or well commonly used by the congregation, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3776; Code, s. 3669; R. C., c. 97, s. 5; 1785, c. 241; C. S. 4354.)

Cross References.—As to procedure for laying out church roads, see § 136-71. As to obstruction of such highway, see § 136-90 and annotations thereto.

§ 14-200. Disturbing religious assembly by certain exhibitions.—If any person shall bring within half a mile of any place where the people are assembled for divine worship, and stop for exhibition, any stallion or jack, or shall bring within that distance any natural or artificial curiosities and there exhibit them, he shall forfeit and pay to any one who will sue therefor the sum of twenty dollars and shall also be guilty of a misdemeanor: Provided, that nothing herein shall be construed to prohibit such exhibitions at any time if made within the limits of any incorporated town, or without such limits if made before the hour of ten o'clock in the forenoon or after three o'clock in the afternoon. (Rev., s. 3705; Code, s. 3670; R. C., c. 97, s. 6; 1809, c. 779, s. 1; 1907, c. 412; C. S. 4355.)

Local Modification.—Dare, Hatteras township: C. S. 4355.

§ 14-201. Permitting stone-horses and stone-mules to run at large.—If any person shall let any stone-horse or stone-mule of two years old or upwards run at large, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3323; Code, s. 2325; R. C., c. 17, s. 6; 1907, c. 412; C. S. 4356.)

Local Modification.—Dare, Hatteras township: C. S. 4356.

§ 14-202. Secretly peeping into room occupied by woman.—Any person who shall peep secretly into any room occupied by a woman shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1923, c. 78; C. S. 4356(a).)

Editor's Note.—It was suggested in 1 N. C. Law Rev. 286 that although this law is made to apply generally to all persons, it is believed that it will not interfere with police officers or detectives who may be compelled to violate the letter of the law to get evidence.

Art. 27. Prostitution.

§ 14-203. Definition of terms.—The term "prostitution" shall be construed to include the offering or receiving of the body for sexual intercourse for

hire, and shall also be construed to include the offering or receiving of the body for indiscriminate sexual intercourse without hire. The term "assignment" shall be construed to include the making of any appointment or engagement for prostitution or any act in furtherance of such appointment or engagement. (1919, c. 215, s. 2; C. S. 4357.)

Quoted in *State v. Johnson*, 220 N. C. 773, 18 S. E. (2d) 358.

Cited in *State v. Fletcher*, 199 N. C. 815, 155 S. E. 927.

§ 14-204. Prostitution and various acts abetting prostitution unlawful.—It shall be unlawful:

1. To keep, set up, maintain, or operate any place, structure, building or conveyance for the purpose of prostitution or assignment.

2. To occupy any place, structure, building, or conveyance for the purpose of prostitution or assignment; or for any person to permit any place, structure, building or conveyance owned by him or under his control to be used for the purpose of prostitution or assignment, with knowledge or reasonable cause to know that the same is, or is to be, used for such purpose.

3. To receive, or to offer or agree to receive any person into any place, structure, building, or conveyance for the purpose of prostitution or assignment, or to permit any person to remain there for such purpose.

4. To direct, take, or transport, or to offer or agree to take or transport, any person to any place, structure, or building or to any other person, with knowledge or reasonable cause to know that the purpose of such directing, taking, or transporting is prostitution or assignment.

5. To procure, or to solicit, or to offer to procure or solicit for the purpose of prostitution or assignment.

6. To reside in, enter, or remain in any place, structure, or building, or to enter or remain in any conveyance, for the purpose of prostitution or assignment.

7. To engage in prostitution or assignment, or to aid or abet prostitution or assignment by any means whatsoever. (1919, c. 215, s. 1; C. S. 4358.)

Cross Reference.—As to declaring houses of prostitution to be nuisances, see § 19-1.

Transporting.—Where defendants, taxi drivers, were apprehended in a clearing in the woods, each under the wheel of his taxi with motor running, and carrying soldiers, the evidence of the character of the scene and the other circumstantial evidence was sufficient to support the inference that defendants knew their destination and brought their passengers to the place for the purpose of engaging in prostitution. *State v. Willis*, 220 N. C. 712, 18 S. E. (2d) 118.

Aiding and Abetting.—A warrant alleging that defendant on a particular day in the designated county "did unlawfully, and willfully aid and abet in the prostitution and assignment contrary to the form of the statute and against the peace and dignity of the state" follows the language of subsection 7 of this section, and is sufficient to charge the offense therein proscribed. *State v. Johnson*, 220 N. C. 773, 18 S. E. (2d) 358.

Competency of Evidence.—Evidence of the reputation of the upstairs of a building owned by defendant, and of the persons frequenting it, is competent in a prosecution under this section. *State v. Waggoner*, 207 N. C. 306, 176 S. E. 566.

Cited in *State v. Fletcher*, 199 N. C. 815, 155 S. E. 927.

§ 14-205. Prosecution: in what courts.—Prosecutions for the violation of any of the provisions of this article shall be tried in the courts of this state wherein misdemeanors are triable except those courts the jurisdiction of which is so limited

by the constitution of this state that such jurisdiction cannot by statute be extended to include criminal actions of the character herein described. (1919, c. 215, s. 6; C. S. 4359.)

§ 14-206. Reputation and prior conviction admissible as evidence.—In the trial of any person charged with a violation of any of the provisions of this article, testimony of a prior conviction, or testimony concerning the reputation of any place, structure, or building, and of the person or persons who reside in or frequent the same, and of the defendant, shall be admissible in evidence in support of the charge. (1919, c. 215, s. 3; C. S. 4360.)

§ 14-207. Degrees of guilt.—Any person who shall be found to have committed two or more violations of any of the provisions of § 14-204 of this article within a period of one year next preceding the date named in an indictment, information, or charge of violating any of the provisions of such section, shall be deemed guilty in the first degree. Any person who shall be found to have committed a single violation of any of the provisions of such section shall be deemed guilty in the second degree. (1919, c. 215, s. 4; C. S. 4361.)

Province of Judge.—When the degree of guilt has been properly ascertained the judge doubtless has the right to hear testimony for the purpose of fixing the terms of imprisonment within the limits of the statute; but this right does not extend to or include the finding by the judge of the degree of the offender's guilt. *State v. Barnes*, 122 N. C. 1031, 29 S. E. 381; *State v. Lee*, 192 N. C. 225, 134 S. E. 458; *State v. Brinkley*, 193 N. C. 747, 748, 138 S. E. 138.

§ 14-208. Punishment; probation; parole.—Any person who shall be deemed guilty in the first degree, as set forth in § 14-207, shall be guilty of a misdemeanor, and may be fined or imprisoned in the discretion of the court, or may be committed to any penal or reformatory institution in this state: Provided, that in case of a commitment to a reformatory institution, the commitment shall be made for an indeterminate period of time of not less than one nor more than three years in duration, and the board of managers or directors of the reformatory institution shall have authority to discharge or to place on parole any person so committed after the service of the minimum term or any part thereof, and to require the return to said institution for the balance of the maximum term of any person who shall violate the terms or conditions of the parole.

Any person who shall be deemed guilty in the second degree, as set forth in § 14-207, shall be guilty of a misdemeanor, and shall be fined or imprisoned at the discretion of the court: Provided, that the defendant may be placed on probation in the care of a probation officer designated by law, or theretofore appointed by the court.

Probation or parole shall be granted or ordered in the case of a person infected with venereal disease only on such terms and conditions as shall insure medical treatment therefor and prevent the spread thereof, and the court may order any convicted defendant to be examined for venereal disease.

No girl or woman who shall be convicted under this article shall be placed on probation or on parole in the care or charge of any person except

a woman probation officer. (1919, c. 215, s. 5; 1921, c. 101; C. S. 4362.)

Admission of Guilt—Effect on Time Limitation.—A defendant sentenced for the crime of prostitution upon his own admission of guilt, may not successfully resist a sentence therefor upon the ground that the offense charged in the indictment did not come within the period of time prescribed by the statute. *State v. Brinkley*, 193 N. C. 747, 138 S. E. 138.

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

Art. 28. Perjury.

§ 14-209. Punishment for perjury.—If any person shall willfully and corruptly commit perjury, on his oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the state, or in any deposition or affidavit taken pursuant to law, or in any oath or affirmation duly administered of or concerning any matter or thing whereof such person is lawfully required to be sworn or affirmed, every person so offending shall be guilty of a felony and shall be fined not exceeding one thousand dollars, and imprisoned in the county jail or state's prison not less than four months nor more than ten years. (Rev., s. 3615; Code, s. 1092; R. C., c. 34, s. 49; 1791, c. 338, s. 1; C. S. 4364.)

Cross References.—As to form of bill for perjury, see § 15-145. As to false swearing by creditor in assignment for benefit of creditors, see § 23-9. As to swearing falsely in connection with an election, see § 163-197. As to false swearing in an investigation before the insurance commissioner, see § 69-3. As to false swearing in an investigation of trusts and combinations in restraint of trade, see § 75-12. As to making false affidavits in applications for motor vehicle licenses, see § 20-31. As to perjury in application for oyster license, see § 113-203. As to stevedore's false oath, see § 44-25. As to swearing falsely to official reports, see § 14-232.

Essential Elements.—The administration of an oath is an essential element of perjury. *State v. Glisson*, 93 N. C. 506. Another is jurisdiction of the court. *Bolling v. Luther*, 4 N. C. 635; *State v. Wyatt*, 3 N. C. 56; *State v. Alexander*, 11 N. C. 182, cited in note in 54 L. R. A. 513. The false testimony given must be material. *State v. Cline*, 146 N. C. 640, 61 S. E. 522.

Irregularity of Warrant Immaterial.—When perjury is charged to have been committed by a witness in the trial of a criminal proceeding which was begun by warrant, if the court had jurisdiction to investigate the offense charged, it is no defense that the warrant was issued without complaint or affidavit. *State v. Peters*, 107 N. C. 876, 12 S. E. 74.

Burden of Proof on State.—The burden is not on the defendant in perjury to show the truth of the matter at issue, but the burden is on the state to show that it is false. *State v. Cline*, 150 N. C. 854, 64 S. E. 591.

Sufficient Evidence.—To prove the falsity of the oath, the evidence must not necessarily equal in weight the testimony of two witnesses. It is sufficient if there is the testimony of one witness and corroborative circumstances sufficient to turn the scale against the oath which is charged to have been false. *State v. Peters*, 107 N. C. 876, 12 S. E. 74.

The direct oath of one witness and proof of declarations of the prisoner in an action for perjury are sufficient to convict. *State v. Molier*, 12 N. C. 263.

Where the defendant swears to an answer in a civil action before one authorized to administer the oath and the answer contains a false statement of fact, in order to convict him of perjury under the provisions of this section it must be shown that he "willfully and corruptly" committed the offense. *State v. Dowd*, 201 N. C. 714, 161 S. E. 205.

Formerly Called Misdemeanor.—The former provision in this section that the offence was a misdemeanor did not make it so for the punishment was felony punishment, and the offence was treated as a felony. *State v. Hyman*, 164 N. C. 411, 79 S. E. 284.

The Indictment.—See § 15-145 and notes thereto.

Cited in *Grudger v. Penland*, 108 N. C. 593, 13 S. E. 168.

§ 14-210. Subornation of perjury.—If any person shall, by any means, procure another person

to commit such willful and corrupt perjury as is mentioned in § 14-209, the person so offending shall be punished in like manner as the person committing the perjury. (Rev., s. 3616; Code, s. 1093; R. C., c. 34, s. 50; 1791, c. 338, s. 2; C. S. 4365.)

Cross Reference.—As to bill for subornation of perjury, see § 15-146.

§ 14-211. Perjury before legislative committees.—If any person shall willfully and corruptly swear falsely to any fact material to the investigation of any matter before any committee of either house of the general assembly, he shall be subject to all the pains and penalties of willful and corrupt perjury, and, on conviction in the superior court of Wake county, shall be confined in the state's prison for the time prescribed by law for perjury. (Rev., s. 3611; Code, s. 2857; 1869-70, c. 5, s. 4; C. S. 4366.)

§ 14-212. Perjury in court-martial proceedings.—If any person shall willfully and corruptly swear falsely before any court-martial, touching and concerning any matter or thing cognizable before such court-martial, he shall be liable to the pains and penalties of perjury. (Rev., s. 3612; Code, s. 3235; R. C., c. 70, s. 73; 1812, c. 828, s. 3; C. S. 4367.)

§ 14-213. False oath to statement of insurance company.—Any person who shall make oath to a willfully false statement in the annual report or other statement required by law from an insurance company shall be guilty of perjury. (Rev., s. 3493; 1899, c. 54, s. 97; C. S. 4368.)

§ 14-214. False oath to procure benefit of insurance policy or certificate.—Any person who shall wilfully and knowingly present or cause to be presented a false or fraudulent claim, or any proof in support of such claim, for the payment of a loss, or other benefits, upon a contract of insurance; or prepares, makes or subscribes to a false or fraudulent account, certificate, affidavit or proof of loss, or other document or writing, with intent that the same may be presented or used in support of such claim, shall be punishable by imprisonment for not more than five years or by a fine of not more than five hundred (\$500.00) dollars, or by both such fine or imprisonment within the discretion of the court. (Rev., s. 3487; 1899, c. 54, s. 60; 1913, c. 89, s. 28; 1937, c. 248; C. S. 4369.)

Burden on the State.—The gravamen of the offense defined by this section is the willfully and knowingly presenting a false or fraudulent proof of claim for a loss upon a contract of insurance; and in the prosecution thereunder the burden is upon the state to prove that the claim for loss was false, that defendant knew it was false, and that, with such knowledge, he proceeded to make the claim for payment of insurance thereon. *State v. Stephenson*, 218 N. C. 258, 10 S. E. (2d) 819.

§ 14-215. False oath to statement required of fraternal benefit societies.—Any person who shall willfully make any false statement in any verified report or declaration under oath, required or authorized by law from fraternal benefit societies, shall be guilty of perjury. (1913, c. 89, s. 28; C. S. 4370.)

Cross Reference.—See also, § 58-302.

§ 14-216. False oath to certificate of mutual fire insurance company.—Any person taking a false oath in respect to the certificate required by law before issuing policies in a mutual fire insurance

company, that every subscription for insurance is genuine and made with an agreement that every subscriber will take the policies subscribed for by him within thirty days after granting a license to such company, shall be guilty of perjury. (Rev., ss. 4738, 4834; 1899, c. 54, s. 32; 1901, c. 391, ss. 3, 4; 1903, c. 438, s. 4; C. S. 4371.)

Cross Reference.—As to the oaths required of officers of a mutual fire insurance company, see § 58-92.

Art. 29. Bribery.

§ 14-217. Bribery of officials.—If any person holding office under the laws of this state who, except in payment of his legal salary, fees or perquisites, shall receive, or consent to receive, directly or indirectly, anything of value or personal advantage, or the promise thereof, for performing or omitting to perform any official act, or with the express or implied understanding that his official action, or omission to act, is to be in any degree influenced thereby, he shall be guilty of a felony, and shall be punished by imprisonment in the state's prison for a term not exceeding five years, or fined not exceeding five thousand dollars, or both, in the discretion of the court. (Rev., s. 3568; Code, s. 991; 1868-9, c. 176, s. 2; C. S. 4372.)

Cross References.—As to bank examiners' accepting bribes, see § 14-233. As to bribing agents and servants to violate duties owed employers, see § 14-353. As to bribery of baseball players, umpires, and officials, see § 14-373 et seq. As to when costs of prosecuting charges of bribery shall be paid by the state, see § 6-16.

"The distinction between bribery and extortion seems to be that the former offense consists in offering a present or receiving one, the latter in demanding a fee or present by color of office." *State v. Pritchard*, 107 N. C. 921, 12 S. E. 50.

Sufficiency of Indictment.—An allegation in an indictment against a public officer for unlawfully receiving compensation for the performance of his duty, that defendant "did receive and consent to receive" such compensation, is sufficient and is not defective because of the use of "and" instead of "or" as used in the statute. *State v. Wynne*, 118 N. C. 1206, 24 S. E. 216.

Necessity of Proving Corrupt Intent.—On the trial of an officer for bribery in taking unlawful fees, it is necessary to prove a corrupt intent. *State v. Pritchard*, 107 N. C. 921, 12 S. E. 50.

Applied in *State v. Cofer*, 205 N. C. 653, 172 S. E. 176.

§ 14-218. Offering bribes.—If any person shall offer a bribe, whether it be accepted or not, he shall be guilty of a felony, and shall be punished by imprisonment for a term not less than one year nor more than five years in the state's prison or county jail, in the discretion of the court. (Rev., s. 3569; Code, s. 992; 1870-1, c. 232; C. S. 4373.)

Not Necessary that Bribed Juror Received Fee.—In a prosecution under this section it is not necessary that the indictment should charge that the juror received any fee or other compensation, the statutes making a distinction between bribery and an offer to bribe. *State v. Noland*, 204 N. C. 329, 168 S. E. 412. As to venue, see note to § 15-134. Cited in *State v. Barkley*, 198 N. C. 349, 151 S. E. 733.

§ 14-219. Bribery of legislators.—If any person shall directly or indirectly promise, offer or give, or cause or procure to be promised, offered or given, any money, bribe, present or reward, or any promise, contract, undertaking, obligation or security for the payment or delivery of any money, goods, right of action, bribe, present or reward, or any other valuable thing whatever, to any member of the senate or house of representatives of this state after his election as such member, and either before or after he shall have qualified and taken his seat, with intent to influence his vote or decision on any question, matter, cause or

proceeding which may then be pending before the general assembly, or which may come before him for action in his capacity as a member of the general assembly, such person so offering, promising or giving, or causing or procuring to be promised, offered or given any such money, goods, bribe, present or reward, or any bond, contract, undertaking, obligation or security for the payment or delivery of any money, goods, bribe, present or reward, or other valuable thing whatever, and the member-elect who shall in anywise accept or receive the same or any part thereof, shall be guilty of a felony, and shall be fined not exceeding double the amount so offered, promised or given, and imprisoned in the state's prison not exceeding five years, and the person convicted of so accepting or receiving the same, or any part thereof, shall forfeit his seat in the general assembly and shall be forever disqualified to hold any office of honor, trust or profit under this state. (Rev., s. 3570; Code, s. 2852; 1868-9, c. 176, s. 5; C. S. 4374.)

§ 14-220. Bribery of jurors.—If any juror, either directly or indirectly, shall take anything from the plaintiff or defendant in a civil suit, or from any defendant in a state prosecution, or from any other person, to give his verdict, every such juror, and the person who shall give such juror any fee or reward to influence his verdict, or induce or procure him to make any gain or profit by his verdict, shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail not less than four months nor more than ten years. (Rev., s. 3697; Code, s. 990; R. C., c. 34, s. 34; 5 Edw. III, c. 10; 34 Edw. III, c. 8; 38 Edw. III, c. 12; C. S. 4375.)

Art. 30. Obstructing Justice.

§ 14-221. Breaking or entering jails with intent to injure prisoners.—If any person shall conspire to break or enter any jail or other place of confinement of prisoners charged with crime or under sentence, for the purpose of killing or otherwise injuring any prisoner confined therein; or if any person shall engage in breaking or entering any such jail or other place of confinement of such prisoners with intent to kill or injure any prisoner, he shall be guilty of a felony, and upon conviction, or upon a plea of guilty, shall be fined not less than five hundred dollars, and imprisoned in the state's prison or the county jail not less than two nor more than fifteen years. (Rev., s. 3698; 1893, c. 461, s. 1; C. S. 4376.)

Cross References.—As to cost of investigating lynchings, see § 6-43. As to sheriff's duty to protect prisoner, see § 162-23. As to investigation of lynchings, see § 15-98 and § 114-15. As to venue, see § 15-128.

Conviction of Attempt.—On an indictment under this section as construed with sections 15-128 and 15-170, the defendant may be found guilty of an attempt. *State v. Rumples*, 178 N. C. 717, 100 S. E. 622.

Indictment Need Not Charge Accomplices.—It was error to quash a bill of indictment under this section which charged the defendant with conspiring "with others" to commit the crime of lynching, because it did not name the others or charge that they were unknown. *State v. Lewis*, 142 N. C. 626, 55 S. E. 600. As to effect of splitting act of 1893, see note of this case under section 6-43.

Indictment in Adjoining County.—In an indictment for lynching it was error to quash the bill on the ground that it appeared on the face of the bill that the offense charged was not committed in the county in which the bill was found, but in an adjoining county. See sec. 15-128. *State v. Lewis*, 142 N. C. 626, 55 S. E. 600.

§ 14-222. Refusal of witness to appear or to testify in investigations of lynchings.—If any person summoned as a witness in the investigation of a charge of lynching shall willfully fail to attend as a witness in obedience to the process served on him, or if, after being sworn, he shall refuse to answer questions pertinent to the matter being investigated before any tribunal, he shall be guilty of a misdemeanor, and, on conviction, shall be fined or imprisoned, or both, at the discretion of the court. (Rev., s. 3699; 1893, c. 461, s. 3; C. S. 4377.)

Cross Reference.—As to privilege of witnesses, see § 15-99.

§ 14-223. Resisting officers.—If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor. (Rev., s. 3700; 1889, c. 51, s. 1; C. S. 4378.)

Cross References.—As to powers and duties of constable, see §§ 151-7 and 160-18. As to criminal authority of policemen, see § 160-21. As to arrest in general, see § 15-39 et seq.

Indictment in Two Counts.—An indictment having two counts, one against one person under this section, and the other against several persons under section 14-224, is defective, but if not objected to before a verdict which convicts on one count and acquits on the other, is not sufficient grounds for arrest of judgment, as the acquittal is equivalent to a nol. pros. *State v. Perdue*, 107 N. C. 853, 12 S. E. 253.

Quashing Indictment if Sufficient to Convict of Assault.—Where an indictment for resisting an officer is defective, as such it ought not to be quashed if the defendant may be convicted thereon for a simple assault. *State v. Dunn*, 109 N. C. 839, 13 S. E. 881.

Process Must Be Legal.—A person is not liable for resisting an unlawful arrest, as where the warrant lacked a seal and the officer did not state what he arrested him for. *State v. Curtis*, 2 N. C. 471.

Authority of Officer and Notice to Party.—“If the officer has no authority to make the arrest, or having the authority, is not known to be an officer and does not in some way notify the party that he is an officer and has authority, the party arrested may lawfully resist the arrest as if it were made by a private person.” *State v. Belk*, 76 N. C. 10, 14; *State v. Kirby*, 24 N. C. 201; *State v. Bryant*, 65 N. C. 327.

In a prosecution for resisting arrest under this section, a defense that the arrest was made by a constable outside of his township and that therefore defendant did not resist an officer in the performance of his duty is unavailing in view of § 151-7, and Art. IV, sec. 24 of the Constitution, a constable having authority to make an arrest anywhere in the county within which he is appointed. *State v. Corpening*, 207 N. C. 805, 178 S. E. 564.

Collector of Back Tax.—See *State v. Alston*, 127 N. C. 518, 37 S. E. 137.

Preventing Road Overseer Cutting Ditch.—See *State v. New*, 130 N. C. 731, 41 S. E. 1033.

Resisting Second Service of Warrant.—Defendant is not liable for assault and battery for resisting an entry into her house by an officer armed with a warrant which had once been served and returned, though defendant had entered into a recognizance and failed to appear. *State v. Queen*, 66 N. C. 615.

Persons Aiding and Abetting.—See *State v. Morris*, 10 N. C. 388.

Cited in *State v. McClure*, 166 N. C. 321, 81 S. E. 458; *State v. Scoggins*, 199 N. C. 821, 155 S. E. 927; *State v. Payne*, 213 N. C. 719, 197 S. E. 573; *State v. Wray*, 217 N. C. 167, 7 S. E. (2d) 468.

§ 14-224. Failing to aid police officers.—If any person, after having been lawfully commanded to aid an officer in arresting any person, or in retaking any person who has escaped from legal custody, or in executing any legal process, willfully neglects or refuses to aid such officer, he shall be guilty of a misdemeanor. (Rev., s. 3701; 1889, c. 51, s. 2; C. S. 4379.)

See note “Indictment in Two Counts” under preceding section.

Guilt of Party Arrested Immaterial.—The guilt or innocence of the party charged, or the false evidence on which the precept was based, does not impair this authority. *Meeds v. Carver*, 30 N. C. 298; *State v. James*, 30 N. C. 370. To the person summoned by a lawful officer to come to his aid in making an arrest it is absolutely immaterial and irrelevant what is the name of the party to be arrested or the nature of the offense.

“It is not for him to ask the reason why.” *State v. Ditmore*, 177 N. C. 592, 594, 99 S. E. 368.

Stated in *Tomlinson v. Norwood*, 208 N. C. 716, 182 S. E. 659.

§ 14-225. False, etc., reports to police radio broadcasting stations.—Any person who shall willfully make or cause to be made to a police radio broadcasting station any false, misleading or unfounded report, for the purpose of interfering with the operation thereof, or to hinder or obstruct any peace officer in the performance of his duty, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than one year or by a fine of not more than five hundred dollars (\$500.00), or by both such fine and imprisonment, in the discretion of the court. (1941, c. 363.)

Editor's Note.—For comment on this enactment, see 19 N. C. Law Rev. 477.

§ 14-226. Intimidating or interfering with jurors and witnesses.—If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a juror or witness in any of the courts of this state, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such juror or witness from attendance upon such court, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (Rev., s. 3696; 1891, c. 87; C. S. 4380.)

In General.—This section is additional to and not a repeal of the inherent power of the court to protect itself from interference by bribery or intimidation of its jurors or witnesses in both civil and criminal cases. In re *Young*, 137 N. C. 552, 50 S. E. 220.

Cited in *State v. Hodge*, 142 N. C. 665, 670, 55 S. E. 626.

§ 14-227. Failing to attend as witness before legislative committees.—If any person shall willfully fail or refuse to attend or produce papers, on summons of any committee of investigation of either house of the general assembly, either select or committee of the whole, he shall be guilty of a misdemeanor, and on conviction in the superior court of the county in which such witness may reside or be found, he shall be fined not less than five hundred dollars nor more than one thousand dollars, and shall be subject to imprisonment at the discretion of the court. (Rev., s. 3692; Code, s. 2854; 1869-70, c. 5, s. 2; C. S. 4381.)

Art. 31. Misconduct in Public Office.

§ 14-228. Buying and selling offices.—If any person shall bargain away or sell an office or deputation of an office, or any part or parcel thereof, or shall take money, reward or other profit, directly or indirectly, or shall take any promise, covenant, bond or assurance for money, reward or other profit, for an office or the deputation of an office, or any part thereof, which office, or any part thereof, shall touch or concern the administration or execution of justice, or the receipt, collection, control or disbursement of the public revenue, or shall concern or touch any clerkship in any court

of record wherein justice is administered; or if any person shall give or pay money, reward or other profit, or shall make any promise, agreement, bond or assurance for any of such offices, or for the deputation of any of them, or for any part of them, the person so offending in any of the cases aforesaid shall be guilty of a misdemeanor, and on conviction thereof shall forfeit all his right, interest and estate in such office, and every part and parcel thereof, and shall be imprisoned and fined at the discretion of the court. (Rev., s. 3571; Code, s. 998; R. C., c. 34, s. 33; 5, 6 Edw. VI, c. 16, ss. 1, 5; C. S. 4382.)

Cross References.—As to sheriff letting to farm his office, see § 162-24. As to validity of bargain to sell an office, see § 128-3.

§ 14-229. Acting as officer before qualifying as such.—If any officer shall enter on the duties of his office before he executes and delivers to the authority entitled to receive the same the bonds required by law, and qualifies by taking and subscribing and filing in the proper office the oath of office prescribed, he shall be guilty of a misdemeanor and shall be ejected from his office. (Rev., s. 3565; Code, s. 79; C. S. 4383.)

§ 14-230. Willfully failing to discharge duties.—If any clerk of any court of record, sheriff, justice of the peace, recorder, prosecuting attorney of any recorder's court, county commissioner, county surveyor, coroner, treasurer, constable or official of any of the state institutions, or of any county, city or town, shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor. If it shall be proved that such officer, after his qualification, willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense, and shall also be fined or imprisoned in the discretion of the court. (Rev., s. 3592; 1901, c. 270, s. 2; 1943, c. 347; C. S. 4384.)

Cross References.—As to failure of county commissioners to perform duty, see § 153-15. As to failure of sheriff to make return, see § 14-242. As to prosecution of officers failing to discharge duties, see § 128-16 et seq.

Editor's Note.—The 1943 amendment made this section applicable to recorders and prosecuting attorneys of recorder's courts.

In General.—"The law will not countenance or condone any attempt to defy its mandates. The private citizen must obey the law, and the public officer is not exempt from this duty by any special privilege appertaining to his office. He is not wiser than the law, nor is he above it. The truth is, that if he willfully neglects or omits to perform a public duty, he is liable to indictment at common law. State v. Commissioners, 4 N. C. 419; State v. Williams, 34 N. C. 172; State v. Com's, 48 N. C. 399; State v. Ferguson, 76 N. C. 197. If the neglect, omission, or refusal to discharge any of his official duties is willful and corrupt, it is criminal misbehavior, and subjects him to indictment for a misdemeanor and punishment by fine or imprisonment, and, as a part of the penalty, to removal from office." State ex rel. Battle v. Rocky Mount, 156 N. C. 329, 337, 72 S. E. 354.

Proceedings of Forfeiture under Section 1-515.—Forfeiture cannot be enforced by judgment of a motion from office as a part of the punishment, where the clerk has been convicted of a misdemeanor, under this section in willfully neglecting to discharge the duties of his office, but proceedings

of forfeiture must be under section 1-515. State v. Norman, 82 N. C. 687.

Willful Neglect and Injury to Public.—It is to be observed that the essentials of the crime as prescribed are: first, a willful neglect in the discharge of official duty; and second, injury to the public. State v. Anderson, 196 N. C. 771, 773, 147 S. E. 305.

Corrupt Intent Not Necessary.—It is not necessary to allege corrupt intent in a bill of indictment against county commissioners for neglect of duty in providing a necessary courthouse, and it is sufficient if the words of the statute are followed. State v. Loeper, 146 N. C. 655, 61 S. E. 585.

However honest the defendants may be (and their honesty is not called in question) the public have a right to be protected against the wrongful conduct of their servants, if there is carelessness amounting to a willful want of care in the discharge of their official duties, which injures the public. State v. Anderson, 196 N. C. 771, 147 S. E. 305, quoting from State v. Hatch, 116 N. C. 1003, 21 S. E. 436.

Liability for Honest Errors.—It is so well settled that there is nothing to the contrary that an officer who has to exercise his judgment or discretion is not liable criminally for any error which he commits, provided he acts honestly. State v. Powers, 75 N. C. 281, 284.

"If the illegal act be done mala fide, then it becomes a crime, and the officer liable both civilly and criminally, but if free of any wicked intent, then he is civilly liable only." State v. Snuggs, 85 N. C. 542, 544.

Accused Must Show Good Faith.—Where a public officer is indicted for failure to perform a duty required by law, the law raises a presumption that such failure is wilful, and makes it incumbent upon him to rebut the presumption. State v. Heaton, 77 N. C. 505.

The Indictment.—It is required that the indictment under this section sufficiently charge the offense of which such officer is accused; and where the action is against the superintendent of a State hospital for the insane, and the indictment charges that he removed or caused to be removed patients to his private farm and caused them to be worked thereon, without allegation of injury to the public or to the patients, or of personal gain to the defendant, the indictment fails to charge facts sufficient to constitute an offense under the statute, and defendant's motion in arrest of judgment should be allowed. State v. Anderson, 196 N. C. 771, 147 S. E. 305.

Cited in Moffitt v. Davis, 205 N. C. 565, 570, 172 S. E. 317.

§ 14-231. Failing to make reports and discharge other duties.—If any state or county officer shall fail, neglect or refuse to make, file or publish any report, statement or other paper, or to deliver to his successor all books and other property belonging to his office, or to pay over or deliver to the proper person all moneys which come into his hands by virtue or color of his office, or to discharge any duty devolving upon him by virtue of his office and required of him by law, he shall be guilty of a misdemeanor. (Rev., s. 3576; C. S. 4385.)

Cross References.—As to mandamus generally, see § 1-511 et seq. As to failure of sheriff to make return, see § 14-242. As to embezzlement by officers, see § 14-92. As to failure of a county officer to account for public funds, see §§ 153-47, 109-36, and 109-37.

Injurious Effect Not Necessary.—The crime exists although no injurious effects result to any individual because of the misconduct of the officer. State v. Glasgow, 1 N. C. 264.

Honesty of Purpose.—There may be neglect without corruption. Therefore honesty of purpose is not a full defense under this section. Turner v. McKee, 137 N. C. 251, 254, 49 S. E. 330, and cases there cited.

Enforcing Unconstitutional Law.—An officer is not liable for obeying the mandates of an unconstitutional statute. State v. Godwin, 123 N. C. 697, 31 S. E. 221.

Liability on Official Bonds.—See sections 109-33 et seq. and notes thereto.

Manager of Elections.—Any conduct of the manager of a primary election for county officials which interferes with the freedom or purity of the election is punishable at common law, and under this section. State v. Cole, 156 N. C. 618, 72 S. E. 221.

§ 14-232. Swearing falsely to official reports.—If any clerk, sheriff, register of deeds, county com-

missioner, county treasurer, justice of the peace, constable or other county officer shall willfully swear falsely to any report or statement required by law to be made or filed, concerning or touching the county, state or school revenue, he shall be guilty of a misdemeanor. (Rev., s. 3605; Code, s. 731; 1874-5, c. 151, s. 4; 1876-7, c. 276, s. 4; C. S. 4386.)

§ 14-233. Making of false report by bank examiners; accepting bribes.—If any bank examiner shall knowingly and willfully make any false or fraudulent report of the condition of any bank, which shall have been examined by him, with the intent to aid or abet the officers, owners, or agents of such bank in continuing to operate an insolvent bank, or if any such examiner shall keep or accept any bribe or gratuity given for the purpose of inducing him not to file any report of examination of any bank made by him, or shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be guilty of a felony, and on conviction thereof shall be imprisoned in the state prison for not less than four months nor more than ten years. (Rev., s. 3324; 1903, c. 275, s. 24; 1921, c. 4, s. 79; C. S. 4387.)

Editor's Note.—The amendment of this section by Public Laws 1921, c. 4, sec. 79, effected one change. Prior to this amendment the offense was "receiving or accepting" any bribe instead of "keeping or accepting" any bribe as the section now reads. It is easy to see the change that this amendment brings about. By the prior law one was an offender if he received a bribe no matter what his purpose might be. If he received the bribe for the sole purpose of bringing the person offering the bribe to justice, he himself was guilty. Under such law it was hard to ascertain one who would bribe a bank examiner, for the act that would make the officer guilty of bribery would also make the examiner guilty of receiving a bribe. Now the offense is only the keeping and does not subject a bank examiner to punishment for accepting bribes in an attempt to ascertain and convict crooked bank officials.

§ 14-234. Director of public trust contracting for his own benefit.—If any person, appointed or elected a commissioner or director to discharge any trust wherein the state or any county, city or town may be in any manner interested, shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor. Provided, that this section shall not apply to public officials transacting business with banks or banking institutions in regular course of business: Provided further, that such undertaking or contracting shall be authorized by said governing board. (Rev., s. 3512; Code, s. 1011; R. C., c. 34, s. 38; 1825, c. 1269; 1826, c. 29; 1929, c. 19, s. 1; C. S. 4388.)

Cross Reference.—As to state highway and public works commissioner selling materials to the commission, see § 136-14.

Editor's Note.—The Act of 1929 added the two provisos at the end of this section.

Effect of Special Validating Act.—Although municipal bonds were sold to a corporation controlled by the mayor, an act passed by the legislature expressly confirming and validating the sale removes all objections based upon the violation of the provisions of this section. *Starmount Co. v. Ohio Sav. Bank, etc., Co.*, 55 F. (2d) 649.

Additional Service.—A member of the board of county commissioners cannot recover for services rendered the board in inspecting a bridge. *Davidson v. Guilford County*, 152 N. C. 436, 67 S. E. 918.

Officer of City and Corporation.—The prohibition of this section, extends to an officer of a corporation in making contracts between the corporation and the city of which he is commissioner or an alderman. *State v. Williams*, 153 N. C. 595, 68 S. E. 900.

Contracts between city when an alderman is an employee of the other contracting party are not covered by the section. *State v. Weddell*, 153 N. C. 587, 68 S. E. 897.

Contracts for Benefit of County.—A sheriff is not guilty of a misdemeanor where he purchases county claims at less than their value, but for the benefit of the county, at the instance of the county commissioners. *State v. Garland*, 134 N. C. 749, 47 S. E. 426.

§ 14-235. Speculating in claims against towns, cities and the state.—If any clerk, sheriff, register of deeds, county treasurer or other county, city, town or state officer shall engage in the purchasing of any county, city, town or state claim, including teacher's salary voucher, at a less price than its full and true value or at any rate of discount thereon, or be interested in any speculation on any such claim, he shall be guilty of a misdemeanor and shall be fined or imprisoned, and shall be liable to removal from office at the discretion of the court. (Rev., s. 3575; Code, s. 1009; 1868-9, c. 260; 1923, c. 136, s. 208; C. S. 4389.)

Editor's Note.—The amendment of this section by Public Laws 1923, c. 136, sec. 208, added "including teacher's salary voucher," and replaced the words "speculation in any such claim" with "speculation on any such claim."

§ 14-236. Acting as agent for those furnishing supplies for schools and other state institutions.—If any member of any board of directors, board of managers, board of trustees of any of the educational, charitable, eleemosynary or penal institutions of the state, or any member of any board of education, or any county or district superintendent or examiner of teachers, or any trustee of any school or other institution supported in whole or in part from any of the public funds of the state, or any officer, agent, manager, teacher or employee of such boards, shall have any pecuniary interest, either directly or indirectly, proximately or remotely in supplying any goods, wares or merchandise of any nature or kind whatsoever for any of said institutions or schools; or if any of such officers, agents, managers, teachers or employees of such institution or school or state or county officer shall act as agent for any manufacturer, merchant, dealer, publisher or author for any article of merchandise to be used by any of said institutions or schools; or shall receive, directly or indirectly, any gift, emolument, reward or promise of reward for his influence in recommending or procuring the use of any manufactured article, goods, wares or merchandise of any nature or kind whatsoever by any of such institutions or schools, he shall be forthwith removed from his position in the public service, and shall upon conviction be deemed guilty of a misdemeanor and fined not less than fifty dollars nor more than five hundred dollars and be imprisoned, in the discretion of the court. (Rev., s. 3833; 1899, c. 732, s. 73; 1897, c. 543; C. S. 4390.)

Purchase of Property from Company Owned by Wife.—A member of the board of education of a county is not guilty under this section for voting as such member for the purchase of school buses from a company selling them owned by his wife, and in which he had no pecuniary interest and for which he worked upon a salary, when the sale was made by other agents of the company upon a commission basis. *State v. Debnam*, 196 N. C. 740, 146 S. E. 857.

§ 14-237. Buying school supplies from interested officer.—If any county board of education or school committee shall buy school supplies in which any member has a pecuniary interest, the members of such board shall be removed from their positions in the public service and shall, upon conviction, be deemed guilty of a misdemeanor. (Rev., s. 3835; 1901, c. 4, s. 69; C. S. 4391.)

§ 14-238. Soliciting during school hours without permission of school head.—No person, agent, representative or salesman shall solicit or attempt to sell or explain any article of property or proposition to any teacher or pupil of any public school on the school grounds or during the school day without having first secured the written permission and consent of the superintendent, principal or person actually in charge of the school and responsible for it.

Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1933, c. 220.)

§ 14-239. Allowing prisoners to escape; burden of proof.—If any person charged with a crime or sentenced by the court upon conviction of any offense, shall be legally committed to any sheriff, constable or jailer, or shall be arrested by any sheriff, deputy sheriff or coroner acting as sheriff, by virtue of any capias issuing on a bill of indictment, information or other criminal proceeding, and such sheriff, deputy sheriff, coroner, constable or jailer, willfully or negligently, shall suffer such person, so charged or sentenced and committed, to escape out of his custody, the sheriff, deputy sheriff, coroner, constable or jailer so offending, being thereof convicted, shall be removed from office, and shall be fined or imprisoned, or both, at the discretion of the court before whom the trial may be had; and in all such cases it shall be sufficient, in support of the indictment against such sheriff or other officer, to prove that the person so charged or sentenced was committed to his custody, and it shall lie upon the defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence: Provided, that such removal of a sheriff shall not affect his duty or power as a collector of the public revenue, but he shall proceed on such duty and be accountable as if such conviction and removal had not been had. (Rev., s. 3577; Code, s. 1022; R. C., c. 34, s. 35; 1791, c. 343, s. 1; 1905, c. 350; C. S. 4393.)

Cross References.—See also, § 14-257. As to liability for escape under civil process, see § 162-21.

General Consideration.—This is a common law offense. *State v. Ritchie*, 107 N. C. 857, 12 S. E. 251. The statute contemplates two offenses—negligently permitting or willfully promoting the escape—but charging negligence alone will suffice, *State v. McLain*, 104 N. C. 894, 10 S. E. 518. The section changes the ordinary rule of the burden of proof by shifting such burden to the defendant. *State v. Hunter*, 94 N. C. 829; *State v. Lewis*, 113 N. C. 622, 18 S. E. 69. The question of good faith and diligence of the officer is for the jury. *State v. Blockley*, 131 N. C. 726, 42 S. E. 569.

Right to Kill to Prevent Escape.—The guard has no authority to kill one convicted of a misdemeanor while fleeing to escape, without his offering resistance or showing any menace or show of force in doing so, or, anything that would suggest danger to the person of the guard. *Holloway v. Moser*, 193 N. C. 185, 136 S. E. 375.

Where the escape is due to the negligence of an assistant the only question presented is whether the defendant has

exercised due care in his selection. *State v. Lewis*, 113 N. C. 622, 18 S. E. 69.

Cited by *Avery, J.*, concurring in *State v. Kittelle*, 110 N. C. 560, 573, 15 S. E. 103; *Sutton v. Williams*, 199 N. C. 546, 155 S. E. 160.

§ 14-240. Solicitor to prosecute officer for escape.—It shall be the duty of solicitors, when they shall be informed or have knowledge of any felon, or person otherwise charged with any crime or offense against the state, having within their respective districts escaped out of the custody of any sheriff, deputy sheriff, coroner, constable or jailer, to take the necessary measures to prosecute such sheriff or other officer so offending. (Rev., s. 2822; Code, s. 1023; R. C., c. 34, s. 36; 1791, c. 343, s. 2; C. S. 4394.)

§ 14-241. Disposing of public documents or refusing to deliver them over to successor.—It shall be the duty of the clerk of the superior court of each county, and every other person to whom the acts of the general assembly, supreme court reports or other public documents are transmitted or deposited for the use of the county or the state, to keep the same safely in their respective offices; and if any such person having the custody of such books and documents, for the uses aforesaid, shall negligently and willfully dispose of the same, by sale or otherwise, or refuse to deliver over the same to his successor in office, he shall be guilty of a misdemeanor, and shall be punished by a fine or imprisonment, or both, at the discretion of the court. (Rev., s. 3598; Code, s. 1073; 1881, c. 151; C. S. 4395.)

§ 14-242. Failing to return process or making false return.—If any sheriff, constable or other officer, whether state or municipal, or any person who shall presume to act as any such officer, not being by law authorized so to do, refuse or neglect to return any precept, notice or process, to him tendered or delivered, which it is his duty to execute, or make a false return thereon, he shall forfeit and pay to anyone who will sue for the same one hundred dollars, and shall moreover be guilty of a misdemeanor. (Rev., s. 3604; Code s. 1112; R. C., c. 34, s. 118; 1818, c. 980, s. 3; 1827, c. 20, s. 4; C. S. 4396.)

Cross Reference.—See also, § 162-14 and annotation thereto.

Civil Process.—This section applies to failure to return civil as well as criminal process. *State v. Berry*, 169 N. C. 371, 85 S. E. 387, overruling *Mfg. Co. v. Buxton*, 105 N. C. 74, 11 S. E. 264; *Harrell v. Warren*, 100 N. C. 259, 6 S. E. 777.

Process That Could Not Be Served.—An officer is not subject to the penalty under this section for declining to receive process which, at the time it was tendered, he could not have executed. *Fentress v. Brown*, 61 N. C. 373.

Cited in *State v. Brown*, 119 N. C. 827, 25 S. E. 820.

§ 14-243. Failing to surrender tax-list for inspection and correction.—If any sheriff or tax collector shall refuse or fail to surrender his tax-list for inspection or correction upon demand by the authorities imposing the tax, or their successors in office, he shall be guilty of a misdemeanor, and shall be imprisoned not more than five years, and fined not exceeding one thousand dollars, at the discretion of the court. (Rev., s. 3788; Code, s. 3823; 1870-1, c. 177, s. 2; C. S. 4397.)

§ 14-244. Failing to file report of fines or penalties.—If any officer who is by law required to file any report or statement of fines or penalties with the county board of education shall fail so to

do at or before the time fixed by law for the filing of such report, he shall be guilty of a misdemeanor. (Rev., s. 3579; 1901, c. 4, s. 62; C. S. 4398.)

Cross References.—As to misappropriation of fines, see § 115-182. As to treasurer of school fund failing to report, see § 115-174.

§ 14-245. Justices of the peace soliciting official business or patronage.—If any justice of the peace shall solicit official business, and/or patronage for his or her office, he or she shall be guilty of a misdemeanor and upon conviction shall be punished in the discretion of the court. (1935, c. 58.)

§ 14-246. Failure of ex-justice of the peace to turn over books and papers.—If any justice of the peace, on expiration of his term of office, or if any personal representative of a deceased justice of the peace shall, after demand upon him by the clerk of the superior court, willfully fail and refuse to deliver to the clerk of the superior court all dockets, all law and other books, and all official papers which came into his hands by virtue or color of his office, he shall be guilty of a misdemeanor. (Rev., s. 3578; Code, ss. 828, 829; 1885, c. 402; C. S. 4399.)

Cited in Bailey v. Hester, 101 N. C. 538, 8 S. E. 164; Whitehurst v. Transportation Co., 109 N. C. 342, 344, 13 S. E. 937.

§ 14-247. Private use of publicly owned vehicle.—It shall be unlawful for any officer, agent or employee of the State of North Carolina, or of any county or of any institution or agency of the State, to use for any private purpose whatsoever any motor vehicle of any type or description whatsoever belonging to the State, or to any county, or to any institution or agency of the State. (1925, c. 239, s. 1.)

§ 14-248. Obtaining repairs and supplies for private vehicle at expense of State.—It shall be unlawful for any officer, agent or employee to have any privately owned motor vehicle repaired at any garage belonging to the State or to any county, or any institution or agency of the State, or to use any tires, oils, gasoline or other accessories purchased by the State, or any county, or any institution or agency of the State, in or on any such private car. (1925, c. 239, s. 2.)

§ 14-249. Limitation of amount expended for vehicle.—It shall be unlawful for any officer, agent, employee or department of the State of North Carolina, or of any county, or of any institution or agency of the State, to expend from the public treasury an amount in excess of fifteen hundred dollars (\$1,500) for any motor vehicle other than motor trucks; except upon the approval of the Governor and Council of State: Provided, that nothing in §§ 14-247 through 14-251 shall be construed to authorize the purchase or maintenance of an automobile at the expense of the State by any State officer unless he is now authorized by statute to do so. (1925, c. 239, s. 3.)

§ 14-250. Publicly owned vehicle to be marked.—It shall be the duty of the executive head of every department of the State Government, and of any county, or of any institution or agency of the State, to have painted on every motor vehicle owned by the State, or by any county, or by any institution or agency of the State, a statement with letters of not less than three inches in height,

that such car belongs to the State, or to some county, or institution or agency of the State, and that such car is "for official use only." Provided, however, that no automobile used by any officer or official in any county in the State for the purpose of transporting, apprehending or arresting persons charged with violations of the laws of the State of North Carolina, shall be required to be so lettered. (1925, c. 239, s. 4; 1929, c. 303, s. 1.)

Editor's Note.—The 1929 amendment added the proviso at the end of this section.

§ 14-251. Violation made misdemeanor.—Any person, firm or corporation violating any of the provisions of sections 14-247 to 14-250 shall be guilty of a misdemeanor, and punished by a fine of not less than one hundred dollars (\$100), nor more than one thousand dollars (\$1,000), or imprisonment in the discretion of the court. Nothing in §§ 14-247 through 14-251 shall apply to the purchase, use or up-keep or expense account of the car for the executive mansion and the Governor. (1925, c. 239, s. 5.)

§ 14-252. Five preceding sections applicable to cities and towns.—Sections 14-247 through 14-251 in every respect shall also apply to cities and incorporated towns. (1931, c. 31.)

Art. 32. Misconduct in Private Office.

§ 14-253. Failure of certain railroad officers to account with successors.—If the president and directors of any railroad company, and any person acting under them, shall, upon demand, fail or refuse to account with the president and directors elected or appointed to succeed them, and to transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company, they shall be guilty of a felony, and shall be punished by imprisonment in the state's prison for not less than one nor more than five years, and be fined at the discretion of the court. All persons conspiring with any such president, directors or their agents to defeat, delay or hinder the execution of this section shall be guilty of a misdemeanor, and shall be punished in like manner. The governor is hereby authorized, at the request of the president, directors and other officers of any railroad company, to make requisition upon the governor of any other state for the apprehension of any such president failing to comply with this section. (Rev., s. 3760; Code, ss. 2001, 2002; 1870-1, c. 72, ss. 1-3; C. S. 4400.)

Cross Reference.—As to duty of railroad officials to account to successors, see § 60-20.

Not Applicable to Tax Bond.—As this section has reference only to money, books, choses, etc., an indictment can not be sustained against a former president of a railroad, for refusing to transfer to his successor in office certain special tax bonds. State v. Jones, 67 N. C. 210.

§ 14-254. Malfeasance of corporation officers and agents.—If any president, director, cashier, teller, clerk or agent of any corporation shall embezzle, abstract or willfully misapply any of the moneys, funds or credits of the corporation, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or make any false

entry in any book, report or statement of the corporation with the intent in either case to injure or defraud or to deceive any officer of the corporation, or if any person shall aid and abet in the doing of any of these things, he shall be guilty of a felony, and upon conviction shall be imprisoned in the state's prison for not less than four months nor more than fifteen years, and likewise fined, at the discretion of the court. (Rev., s. 3325; 1903, c. 275, s. 15; C. S. 4401.)

Cross Reference.—As to misapplication of funds by bank officers, see § 53-129.

Art. 33. Prison Breach and Prisoners.

§ 14-255. Escape of hired prisoners from custody.—If any prisoner, who shall be removed from the prison of the respective counties, cities and towns under the law providing for the hiring out of prisoners by counties and towns, shall escape from the person or company having him in custody, he shall be guilty of a misdemeanor, and shall be imprisoned at hard labor not more than thirty days, or fined not more than fifty dollars. (Rev., s. 3658; Code, s. 3455; 1876-7, c. 196, s. 4; C. S. 4403.)

Cross Reference.—As to power of counties, cities and towns to hire out prisoners, see §§ 153-191 to 153-193.

§ 14-256. Prison breach and escape.—If any person shall break prison, being lawfully confined therein, or shall escape from the custody of any superintendent, guard or officer, he shall be guilty of a misdemeanor. (Rev., s. 3657; Code, s. 1021; R. C., c. 34, s. 19; 1 Edw. II, st. 2d; 1909, c. 872; C. S. 4404.)

Cross Reference.—As to penalty for escaping or assisting in an escape from the state prison, see § 148-45.

At Common Law.—The offense of breaking jail was a felony at common law, but by this section, all cases, no matter what the person is confined for, are reduced to a misdemeanor. *State v. Brown*, 82 N. C. 585.

Escape from Officer.—This section applies only to breaking prison or escaping therefrom and does not, because of its wording, include escape from an officer before being confined to prison. *State v. Brown*, 82 N. C. 585.

Cost of Recapture May Not Be Recovered from Prisoner.—The state may not recover of a prisoner moneys expended by it to recapture him after escape from custody, since the escape does not invade any property right of the state, but the expenditure of the sums is voluntary and made by it for the protection of the people of the state in preserving the integrity of the penal system. *State Highway, etc., Comm. v. Cobb*, 215 N. C. 556, 2 S. E. (2d) 565.

Cited in *Holloway v. Moser*, 193 N. C. 185, 136 S. E. 373.

§ 14-257. Permitting escape of or maltreating hired convicts.—If any person charged in any way with the control or management of convicts, hired for service outside of the state's prison, shall negligently permit them to escape, or shall maltreat them, he shall be guilty of a misdemeanor; but this provision shall not be held to relieve any person from any criminal liability. (Rev., s. 3659; Code, s. 3450; 1881, c. 127, s. 2; C. S. 4405.)

Cross Reference.—As to escape of prisoners from negligent officer's custody, see § 14-239.

Negligence Test of Guilt.—Officers and public agents will not be held to the rigorous common-law rule of responsibility for the custody of convicts employed in labors outside of the Penitentiary, actual negligence being the test of guilt. *State v. Johnson*, 94 N. C. 924.

Negligence Implied.—It is not necessary to prove negligence of the person having lawful custody of prisoners, for it is implied, unless occasioned by the act of God, or irresistible adverse force. *State v. Johnson*, 94 N. C. 924.

Cited in *State v. Sneed*, 94 N. C. 806, 809.

§ 14-258. Conveying messages and weapons to

or trading with convicts and other prisoners.—If any person shall convey to or from any convict any letters or oral messages, or shall convey to any convict or person imprisoned, charged with crime and awaiting trial any weapon or instrument by which to effect an escape, or that will aid him in an assault or insurrection, or shall trade with a convict for his clothing or stolen goods, or shall sell to him any article forbidden him by prison rules, he shall be guilty of a misdemeanor: Provided, that when a murder, an assault or an escape is effected with the means furnished, the person convicted of furnishing the means shall be sentenced to not less than four years hard labor in the state's prison. (Rev., s. 3662; Code, s. 3441; 1873-4, c. 158, s. 12; 1911, c. 11; C. S. 4406.)

Cross Reference.—As to furnishing prisoners with intoxicating liquors, narcotics, and fire arms, see § 14-390.

§ 14-259. Harboring or aiding escaped prisoners.—It shall be unlawful for any person knowing, or having reasonable cause to believe, that any other person has escaped from any prison, jail, reformatory, or from the criminal insane department of any state hospital, or from the custody of any peace officer who had such person in charge, or that such person is a convict or prisoner whose parole has been revoked, to conceal, hide, harbor, feed, clothe, or offer aid and comfort in any manner to any such person.

Every person who shall conceal, hide, harbor, feed, clothe, or offer aid and comfort to any other person in violation of this section shall be guilty of a felony, if such other person has been convicted of, or was in custody upon the charge of a felony, and shall be punished by imprisonment in the state prison not more than five years; and shall be guilty of a misdemeanor, if such other person had been convicted of, or was in custody upon a charge of a misdemeanor, and shall be punished in the discretion of the court.

The provisions of this section shall not apply to members of the immediate family of such escapee. For the purposes of this section "immediate family" shall be defined to be the mother, father, brother, sister, wife, husband and child of said escapee. (1939, c. 72.)

Editor's Note.—For comment on this enactment, see 17 N. C. Law Rev. 348.

§ 14-260. Injury to prisoner by jailer.—If the keeper of a jail shall do, or cause to be done, any wrong or injury to the prisoners committed to his custody, contrary to law, he shall not only pay treble damages to the person injured, but shall be guilty of a misdemeanor. (Rev., s. 3661; Code, s. 3463; R. C., c. 87, s. 8; 1795, c. 433, s. 6; C. S. 4407.)

Cross Reference.—As to the degree of protection against violence allowed the jailer in the state prison system, see § 148-46.

Evidence Sufficient for Jury.—Evidence that the plaintiff's thumb had inadvertently been placed against the door jamb when jailer started to close door of cell, and that when plaintiff pushed against the door to release his thumb the jailer pushed the door shut with his shoulder, thereby cutting off plaintiff's thumb, is sufficient to be submitted to the jury on the issue of the jailer's negligent injury to the plaintiff. *Davis v. Moore*, 215 N. C. 449, 2 S. E. (2d) 366.

§ 14-261. Confining prisoners to improper apartments.—If the sheriff or jailer shall wantonly or unnecessarily confine those committed to his custody in any apartment, other than that provided

and designated by law for persons of the description of the prisoner, he shall be guilty of a misdemeanor. (Rev., s. 3660; Code, s. 3471; R. C., c. 87, s. 16; 1795, c. 433, s. 4; C. S. 4408.)

Cross Reference.—As to apartments for prisoners, see § 153-51.

§ 14-262. Requiring female prisoners to work in chain-gang.—If any officer, either judicial, executive or ministerial, shall order or require the working of any female on the streets or roads in any group or chain-gang in this state, he shall be deemed guilty of a misdemeanor. (Rev., s. 3596; 1897, c. 270; C. S. 4409.)

§ 14-263. Classification and commutation of time for prisoners other than state prisoners.—The board of county commissioners, or such governing body as may have charge of prisoners in any county, city or town in the State of North Carolina, shall divide all prisoners into three classes, or grades, as follows:

In the first class shall be included all those prisoners who have given evidence that they will, or who it is believed will observe the rules and regulations and work diligently and are likely to maintain themselves by honest industry after their discharge. These shall be known as Grade A prisoners and shall receive a commutation of their sentences at the rate of one hundred and four days for each year served.

In the second class shall be included those prisoners who have not as yet given evidence that they can be trusted entirely, but are reasonably obedient to the rules and regulations. These shall be known as Class B prisoners and shall receive a commutation of their sentences of seventy-eight days for each year served.

In the third class shall be those prisoners who have demonstrated that they are incorrigible, have no respect for the rules and regulations and seriously interfere with the discipline and the effectiveness of the labor of the other prisoners. Such prisoners shall receive no commutation of their sentences.

All prisoners shall be admitted into Class B except where it is known by the superintendent of the prison that a prisoner is serving for a second offense. In such cases the superintendent may put the prisoner in Class C in his discretion.

Prisoners of Class A shall be known as honor prisoners and shall be worked in the discretion of the superintendent of the prison without guards. When in prison camps or in any other place of detention they may not be chained or under armed guards.

Prisoners in Class B shall be under guard and may or may not be chained in the discretion of the superintendent.

Prisoners in Class C shall wear chains during the day or night as in the opinion of the superintendent may be necessary.

Preference in assignment of work shall be given Class A prisoners.

The purpose of §§ 14-263 through 14-265 is to unify the regulations pertaining to county prisoners and to encourage industriousness among the prisoners. (1927, c. 178, s. 1; 1937, c. 88, s. 2.)

Editor's Note.—The mandatory provisions of this section with reference to the use of stripes were repealed by Public Laws 1937, c. 88, s. 2.

§ 14-264. Record to be kept; items of record.—The superintendent or other person having charge of prisoners shall keep a record showing, the name, age, date of sentence, length of sentence, crime for which convicted, home address, next of kin, and the conduct of each prisoner received. (1927, c. 178, s. 2.)

§ 14-265. Commutation of sentences for Sunday work.—All prisoners in the State's Prison, or in any county jail or county convict camp, who shall be assigned to regular work which requires the performance of the same, or substantially the same duties on Sundays as on other days of the week, shall be allowed a commutation of their sentences for each Sunday, or fractional part of a Sunday on which they shall be required to perform the duties of the task assigned to them. The commutation of sentence provided for in this section shall be in addition to all other commutations of sentence allowed such prisoners under existing statutes and laws of the State. (1931, c. 198, s. 1.)

Art. 34. Custodial Institutions.

§ 14-266. Persuading inmates to escape.—It shall be unlawful for any parent, guardian, brother, sister, uncle, aunt, or any person whatsoever to persuade or induce to leave, carry away, or accompany from any state institution, except with the permission of the superintendent or other person next in authority, any boy or girl, man or woman, who has been legally committed or admitted under suspended sentence to said institution, by juvenile, recorder's, superior, or any other court of competent jurisdiction. (1935, c. 307, s. 1; 1937, c. 189, s. 1.)

Editor's Note.—The 1937 amendment included within the provisions of this and the following section inmates who have been "admitted under suspended sentence." Apparently, there was a loophole in the old law. 15 N. C. Law Rev., p. 341.

§ 14-267. Harboring fugitives.—It shall be unlawful for any person to harbor, conceal, or give succor to, any known fugitive from any institution whose inmates are committed by court or are admitted under suspended sentence. (1935, c. 307, s. 2; 1937, c. 189, s. 2.)

Editor's Note.—See note under § 14-266.

§ 14-268. Violation made misdemeanor.—Any person violating the provision of this article, shall be guilty of a misdemeanor, and fined or imprisoned, in the discretion of the court. (1935, c. 307, s. 3.)

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

Art. 35. Offenses against the Public Peace.

§ 14-269. Carrying concealed weapons.—If any one, except when on his own premises, shall carry concealed about his person any bowie-knife, dirk, dagger, slung shot, loaded cane, brass, iron or metallic knuckles or razor or other deadly weapon of like kind, he shall be guilty of a misdemeanor, and shall be fined or imprisoned at the discretion of the court. If any one, except on his own premises, shall carry concealed about his person any pistol or gun, he shall be guilty of a misdemeanor and shall be fined not less than fifty dollars, nor

more than two hundred dollars, or imprisoned not less than thirty days nor more than two years, at the discretion of the court. Upon conviction or submission the deadly weapon with reference to which the defendant shall have been convicted shall be condemned and ordered confiscated and destroyed by the judge presiding at the trial. If any one, not being on his own lands, shall have about his person any such deadly weapon, such possession shall be prima facie evidence of the concealment thereof. This section shall not apply to the following persons: officers and soldiers of the United States army when in discharge of their official duties as such and acting under orders requiring them to carry arms or weapons, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the state guard when called into actual service, officers of the state, or of any county, city, or town, charged with the execution of the laws of the state, when acting in the discharge of their official duties. (Rev., s. 3708; Code, s. 1005; 1917, c. 76; 1919, c. 197, s. 8; 1923, c. 57; Ex. Sess. 1924, c. 30; 1929, cc. 51, 224; C. S. 4410.)

Local Modification.—Caswell: 1941, c. 90; Durham: 1923, c. 48; Franklin: 1923, c. 57, Ex. Sess. 1924, c. 30; Halifax: 1943, c. 34.

Cross References.—As to tramps carrying weapons, see § 14-339. As to going armed on Sunday, see § 103-2.

Editor's Note.—The construction of this section has frequently been before the court but the power of the legislature to prescribe the rules of evidence and fix the burden of proof to the extent herein dictated has never been questioned. Public Laws, 1929, c. 224, added the qualifying clause, appearing in the last sentence, which follows the reference to soldiers and sailors and reads "when in discharge of official duties," etc.

Includes Butcher Knife.—The act of assembly making it indictable for one to carry concealed about his person any "pistol, bowie knife, razor or other deadly weapon of like kind," embraces a butcher's knife. State v. Erwin, 91 N. C. 545.

Concealment Is Gist of Offense.—The mischief provided against, is the practice of wearing weapons concealed about the person to be used upon any emergency. State v. Broadnax, 91 N. C. 543. The intent to carry, not the intent to use, determines the guilt. State v. Reams, 121 N. C. 556, 27 S. E. 1004. But the weapon carried must be concealed. State v. Lilly, 116 N. C. 1049, 21 S. E. 563. If the weapon is carried openly the defendant could not be guilty under this section. State v. Brown, 125 N. C. 704, 34 S. E. 549.

To conceal a weapon means something more than the mere act of having it where it may not be seen. It implies an assent of the mind and a purpose to so carry it that it may not be seen. State v. Gilbert, 87 N. C. 527, 528.

The question is as to the manner of carrying, whether concealed or not, and it might be shown, in defense, that there was no intent to conceal it. State v. Brown, 125 N. C. 104, 34 S. E. 549.

But if from defendant's own testimony it appears that he necessarily knew that he was carrying it concealed intent is immaterial. State v. Simmons, 143 N. C. 613, 56 S. E. 701.

The possession of a pistol by one on the premises of another is not alone sufficient to convict of carrying a concealed weapon in violation of this section, although the statute makes such possession prima facie evidence of the concealment thereof. State v. Vanderburg, 200 N. C. 713, 158 S. E. 248.

Same—Weapon on Person Prima Facie Evidence.—The fact that defendant had a pistol about his person, off of his own premises, was prima facie evidence of concealment, which shifted the burden upon the defendant to rebut or disprove. State v. Hamby, 126 N. C. 1066, 35 S. E. 614; State v. Reams, 121 N. C. 556, 27 S. E. 1004; State v. Lilly, 116 N. C. 1049, 21 S. E. 563; State v. McManus, 89 N. C. 555.

Same—Presumption Rebutted.—To rebut the statutory presumption arising from the concealment, the absence of intent to conceal must be affirmatively found. State v. Brown, 125 N. C. 704, 34 S. E. 549; State v. Gilbert, 87 N. C. 527.

Same—Concealment Question for Jury.—Whether, in a given case, the weapon is concealed from the public and such

presumption of guilty intent is rebutted by the mode of carrying the weapon, are questions for the jury. State v. Reams, 121 N. C. 556, 27 S. E. 1004. See also State v. Lilly, 116 N. C. 1049, 21 S. E. 563.

Carrying on Own Premises.—The use of the words, "on his own premises," and not being "on his own lands," in this section, shows an intention to restrict the right to carry concealed weapons to those who are in the privacy of their own premises and not likely to be thrown into contact with the public, nor tempted, on a sudden quarrel, to use the great advantage a concealed weapon gives. State v. Perry, 120 N. C. 580, 26 S. E. 915, 1008.

A superintendent or overseer of a department of a cotton mill, is not, while therein, "on his premises," within the meaning of this section. State v. Bridgers, 169 N. C. 309, 34 S. E. 689.

Same—Servant on Employer's Premises.—A mere servant or hiring who carries concealed weapons on the premises of his employer is indictable. State v. Deyton, 119 N. C. 880, 25 S. E. 159.

Warrant Must State Defendant Carried Weapon Off His Own Premises.—In prosecution for carrying a concealed weapon, the warrant is held fatally defective in failing to embrace in the charge the essential element of the offense that the weapon was carried concealed by defendant off his own premises, the warrant itself excluding the charge that the weapon was carried off the premises by charging that defendant carried an unconcealed weapon off his premises. State v. Bradley, 210 N. C. 290, 186 S. E. 240.

Illustrations—Not on Person but Within Reach.—The language of the statute is, not "concealed on his person," but "concealed about his person," and hence, if the weapon be within reach and control of the defendant, it is sufficient to bring the case within the meaning of the statute. State v. McManus, 89 N. C. 555.

Same—Pistol in Coat on Shoulder.—Upon evidence tending to show that the defendant had a pistol with the butt end projecting above his hip pocket, and with his coat off and carried upon his shoulder, it is sufficient for the determination of the jury, upon the issue of defendant's guilt in having carried a concealed weapon in violation of this section. State v. Mangum, 187 N. C. 477, 121 S. E. 765.

Same—Carrying to Deliver to Another.—One is not guilty of a violation of this section where it appears that he had a pistol in his pocket for the purpose of delivering it to the owner who had sent him for it. State v. Broadnax, 91 N. C. 543.

Same—Apprehension of Assault.—Carrying concealed weapons in reasonable apprehension of deadly assaults is not justification of a violation of the statutory offense, but in aggravation thereof, and may be considered by the trial judge in imposing the sentence, according to the discretion given him therein by this section. State v. Woodlief, 172 N. C. 885, 90 S. E. 137.

Same—Acting upon Advice of Attorney.—A person acting in ignorance of the law in good faith and upon advice of the clerk of the court or of an attorney, but in violation of this section, is not excused. State v. Simmons, 143 N. C. 613, 56 S. E. 701.

Exceptions—Necessity of Being in Performance of Duties.—In order to come within the exception of this section, the defendant, otherwise having the authority, must have been in the actual performance of his duties at the time. State v. Simmons, 143 N. C. 613, 56 S. E. 701.

Same—Officials of Transportation Companies.—The exception in this section does not apply to the officials of corporations, such as turnpikes, railroads and others, which invite the public to use their lines of travel. State v. Perry, 120 N. C. 580, 26 S. E. 915, 1008.

Same—United States Mail Carrier.—A United States mail carrier is indictable under this section for carrying a concealed weapon while carrying the mail and while returning to his home after delivering the mail. State v. Boone, 132 N. C. 1107, 44 S. E. 595.

Same—Night Watchman.—A private night watchman is not guilty of carrying a concealed weapon, under this section, while on duty upon the premises he is employed to watch. State v. Anderson, 129 N. C. 521, 39 S. E. 824.

Jurisdiction.—The superior court does not acquire jurisdiction over a prosecution for carrying a concealed weapon by the fact at the time of the presentation of the indictment thereof it had exclusive cognizance of such offense, where, at the time of the commission of the offense sole jurisdiction was in justices of the peace. State v. Ramsour, 113 N. C. 642, 18 S. E. 707.

Former Conviction of Assault.—A conviction of assault with a deadly weapon will not sustain a plea of former conviction in a subsequent trial for carrying a concealed weapon. State v. Robinson, 116 N. C. 1046, 21 S. E. 701.

Time Not Essence of Offense.—Time is not the essence of the offense of carrying a concealed weapon, and it may be shown at a previous time to that alleged in the bill. *State v. Spencer*, 185 N. C. 765, 117 S. E. 803.

Punishment.—In a penal statute "or" will never be construed "and" so as to make it more penal. Hence one found guilty under this section could not be both fined and imprisoned. *State v. Taylor*, 124 N. C. 803, 32 S. E. 548.

Cited in *State v. Divine*, 98 N. C. 778, 784, 4 S. E. 477; *State v. Barrett*, 138 N. C. 630, 635, 50 S. E. 506; *State v. Sauls*, 199 N. C. 193, 154 S. E. 28.

§ 14-270. Sending, accepting or bearing challenges to fight duels.—If any person shall send, accept or bear a challenge to fight a duel, though no death ensue, he, and all such as counsel, aid and abet him, shall be guilty of a misdemeanor, and shall, moreover, be ineligible to any office of trust, honor or profit in the state, any pardon or reprieve notwithstanding. (Rev., s. 3628; Code, s. 1012; R. C., c. 34, s. 48; 1802, c. 608, s. 1; C. S. 4411.)

Cross Reference.—As to killing adversary in duel, see § 14-20.

See Article XIV, sec. 2, of the State Constitution.

See *State v. Fritz*, 133 N. C. 725, 45 S. E. 957; *State v. Farrier*, 8 N. C. 487.

§ 14-271. Engaging in and betting on prize fights.—If any two or more persons engage in a prize fight, sparring match or glove or fist contest for money or other valuable prize or stake; or if any person bet or lay a wager on the result thereof or advise, aid or abet in any way whatever in promoting the same, he shall be fined not less than five hundred dollars, or imprisoned in the state's prison or jail for not less than one year nor more than five years, or both, in the discretion of the court. (Rev., s. 3707; 1895, c. 28, ss. 1-4; C. S. 4412.)

Local Modification.—Robeson: Pub. Loc. 1925, c. 270; Vance: Pub. Loc. 1927, c. 497.

Cross Reference.—As to power of the governor to prevent prize fights, see § 147-12, paragraph 6.

§ 14-272. Disturbing picnics, entertainments and other meetings.—If any person shall willfully interrupt or disturb any picnic, excursion party, school entertainment, political meeting, or any meeting or other organization whatsoever lawfully and peaceably held, either at, within or without the place where such picnic, excursion party, school entertainment, political meeting or other meeting or organization is held, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, in the discretion of the court. (Rev., s. 3704; 1897, c. 213; C. S. 4413.)

Application.—The section applies to disturbing Sunday School, *State v. Branner*, 149 N. C. 559, 63 S. E. 169, and family reunions, *State v. Starnes*, 151 N. C. 724, 66 S. E. 347.

§ 14-273. Disturbing schools and scientific and temperance meetings; injuring property of schools and temperance societies.—If any person shall willfully interrupt or disturb any public or private school or temperance society or organization or any meeting lawfully and peaceably held for the purpose of literary and scientific improvement, or for the discussion of temperance or question of moral reform, either within or without the place where such meeting or school is held, or injure any school building, or deface any school furniture, apparatus or other school property, or property of any temperance society or organization, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not

more than thirty days. (Rev., s. 3838; Code, s. 2592; 1885, c. 140; 1901, c. 4, s. 28; C. S. 4414.)

Preventing Use of School Building.—To take possession of a schoolhouse when there are no pupils present, and forbid the teacher to use the building, though the school is thereby prevented from assembling, is not a violation of this section. *State v. Spray*, 113 N. C. 686, 18 S. E. 700.

§ 14-274. Disturbing students at schools for women.—It shall be unlawful for any male person to willfully disturb, annoy or harass the students of any boarding school or college for women situated anywhere in North Carolina by rude conduct or by persisting unnecessary presence on or near the property of the school or college; or by the wilful addressing or communicating orally or otherwise with said students while on school property, or while elsewhere when in charge of a teacher, officer or student of said school. The violation of this section shall be deemed a misdemeanor punishable by a fine of not less than five dollars (\$5) nor more than fifty dollars (\$50), or by imprisonment not to exceed thirty days. (1925, c. 189, s. 1.)

Editor's Note.—For a criticism of the wisdom and necessity for this law, see 3 N. C. Law Rev. 143.

§ 14-275. Disturbing religious congregations.—If any person shall be intoxicated or shall be guilty of any rude and disorderly conduct at any place where people are accustomed to meet for divine worship, and while the people are there assembled for such worship, whether such worship should have begun or not, he shall be guilty of a misdemeanor, and shall, upon conviction, be fined or imprisoned in the discretion of the court. (Rev., s. 3706; 1901, c. 738; C. S. 4415.)

In General.—In order to render indictable the disturbance of persons assembled for divine worship, the people, or some considerable number, must be collected at or about the time when worship is about to commence, and in the place where it is to be celebrated. *State v. Bryson*, 82 N. C. 576. But the congregation need not be engaged in the act of worship. *State v. Ramsey*, 78 N. C. 448. However the indictment will not lie after the congregation has dispersed. *State v. Davis*, 126 N. C. 1059, 35 S. E. 600. The act itself must disturb the congregation—information of the act, for example that a fight is in progress, will not suffice. *State v. Kirby*, 108 N. C. 772, 12 S. E. 1045.

Persistent speaking in church after remonstrance from the minister has been held sufficient to sustain a verdict under this section (see *State v. Ramsey*, 78 N. C. 448) but not persistence in singing off the key where the intention is not to disturb. *State v. Linkhaw*, 69 N. C. 214.

Disturbing Sunday School.—See note to section 14-272.

Family Gathering.—See *State v. Starnes*, 151 N. C. 724, 66 S. E. 347.

The Indictment.—The indictment should charge that the assembly had met "for divine worship," "divine service," "religious worship or service," or something of the same import. *State v. Fisher*, 25 N. C. 111.

Where the charge against the defendant is disturbing a congregation actually engaged in divine worship, it is variance to show merely the disturbance of parties assembled for such worship. *State v. Bryson*, 82 N. C. 576.

§ 14-276. Detectives going armed in a body.—If any body of men composed of more than three persons, calling themselves detectives or claiming to be in the employ of any detective agency or known and designated as detectives, shall go armed, they shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (Rev., s. 3703; 1893, c. 191; C. S. 4416.)

§ 14-277. Impersonation of peace officers.—It shall be unlawful for any person other than duly authorized peace officers or officers of the court

to represent to any person that they are duly authorized peace officers, and acting upon such representation to arrest any person, search any building, or in any way impersonate a peace officer or act in accordance with the authority delegated to duly authorized peace officers. Nothing in this section shall be construed to prohibit a private citizen in whose presence a felony has been committed from arresting such person or persons participating in the commission of said felony when such arrest is deemed necessary, or to prohibit any private citizen in whose presence an act, which would constitute a breach of the peace and for which an indictment would lie, is committed from arresting such person or persons committing said breach of the peace when such arrest is deemed necessary. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction may be fined or imprisoned at the discretion of the court. (1927, c. 229.)

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

Art. 36. Offenses against the Public Safety.

§ 14-278. **Malicious injury of property of railroads and other carriers; causing death or other physical injury thereby.**—If any person shall willfully and maliciously put or place any matter or thing upon, over or near any railroad track; or shall willfully and maliciously destroy, injure or remove the road-bed, or any part thereof, or any rail, sill or other part of the fixture appurtenant to or constituting or supporting any portion of the track of such railroad; or shall willfully and maliciously do any other thing with intent to obstruct, stop, hinder, delay or displace the cars traveling on such road, or to stop, hinder or delay the passengers or others passing over the same; or shall willfully and maliciously injure the road-bed or the fixtures aforesaid, or any part thereof, with any other intent whatsoever, such person so offending shall be guilty of a felony and shall be fined not exceeding one thousand dollars nor less than two hundred dollars, and be imprisoned in the state's prison or county jail not less than four months nor more than ten years, and shall be committed to jail till he find surety for his good behavior, for a space of time of not less than three nor more than seven years. If it shall happen that by reason of the commission of the offenses aforesaid, or any of them, any engine or car shall be displaced from the track, or shall be stopped, hindered or delayed, so that any one thereby be instantly killed, or so wounded or hurt as to die therefrom in twelve calendar months thereafter, or shall thereby be maimed or be disabled in the use of any limb or member, then, and in every such case, the party so offending, his counselors, aiders and abettors, on conviction, shall suffer death, if the person is killed, and shall be imprisoned in the state's prison not less than five nor more than sixty years if the person is maimed or disabled. If any person shall maliciously destroy or injure any plank-road, turnpike or canal, or any appurtenance or fixture belonging thereto or used therewith, or shall maliciously destroy or injure any lock, dam or sluice, the same being a part of any work erected or made for the purpose of navigation, or improving the

navigation of any water, the person so offending shall be guilty of a misdemeanor, and shall suffer the like punishment as in this section is provided for maliciously injuring a railroad. (Rev., s. 3754; Code, s. 1098; R. C., c. 34, s. 99, 100; 1838, c. 38; 1879, c. 255, s. 2; 1911, c. 200; C. S. 4417.)

§ 14-279. **Injuring without malice property of railroads and other carriers; causing death or other physical injury thereby.**—If any person, unlawfully, and on purpose, but without malice, shall commit any of the offenses mentioned in § 14-278, he shall be guilty of a misdemeanor. If it shall happen that by reason of the commission of any such offense any person shall be instantly killed, or so wounded or hurt as to die therefrom in twelve calendar months thereafter, or shall thereby be maimed or disabled in the use of any limb or member, then, and in every such case, the party so offending, his counselors, aiders and abettors, shall be imprisoned not less than twelve months, and fined at the discretion of the court. (Rev., s. 3755; Code, s. 1099; R. C., c. 34, s. 101; C. S. 4418.)

§ 14-280. **Shooting or throwing at trains or passengers.**—If any person shall willfully and unlawfully cast, throw or shoot any stone, rock, bullet, shot, pellet or other missile at, against, or into any railroad car, locomotive or train, or any person thereon, while such car or locomotive shall be in progress from one station to another, or while such car, locomotive or train shall be stopped for any purpose, the person so offending shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment in the county jail or state's prison, at the discretion of the court. (Rev., s. 3763; Code, s. 1100; 1887, c. 19; 1876-7, c. 4; 1911, c. 179; C. S. 4419.)

Intent a Question for Jury.—Where a defendant was indicted, for shooting at a train, with intent to injure it, and there was evidence tending to show that he was helplessly drunk at the time, the court properly left the question of intent to the jury, and it was for them to say whether the presumption had been rebutted. *State v. Barbee*, 92 N. C. 820.

Proof that Gun was Loaded Unnecessary.—If a gun be unloaded and this is relied on as a defense, in an action for shooting at a train, the fact must be shown by the defendant. *State v. Hinson*, 82 N. C. 597.

Proof of Conspiracy.—Upon trial for throwing stones at a train, it is not necessary to show a conspiracy, it appearing that the several defendants were not only present, but threw stones at different coaches of the same train. *State v. Holder*, 153 N. C. 606, 69 S. E. 66.

The Indictment.—Upon a trial for throwing stones at a train, a charge in the bill that it was done "from one station to another" follows the form set out in the statute, and is not void for vagueness and uncertainty. It is not necessary that the indictment contain the word "feloniously." *State v. Holder*, 153 N. C. 606, 69 S. E. 66.

But it must charge that the train was in actual motion or stopped for a temporary purpose. *State v. Boyd*, 86 N. C. 634.

§ 14-281. **Operating trains and street cars while intoxicated.**—Any train dispatcher, telegraph operator, engineer, fireman, flagman, brakeman, switchman, conductor, motorman, or other employee of any steam, street, suburban or interurban railway company, who shall be intoxicated while engaged in running or operating, or assisting in running or operating, any railway train, shifting-engine, or street or other electric car, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, in the discretion of the court. (Rev., s. 3758; Code, s.

1972; 1891, c. 114; 1871-2, c. 138, s. 38; 1907, c. 330; C. S. 4420.)

§ 14-282. Displaying false lights on seashore.—If any person shall make or display, or cause to be made or displayed, any false light or beacon on or near the seacoast, for the purpose of deceiving and misleading masters of vessels, and thereby putting them in danger of shipwreck, he shall be guilty of a felony, and shall be imprisoned in the state's prison for not less than four months nor more than ten years. (Rev., s. 3430; Code, s. 1021; R. C., c. 31, s. 58; 1831, c. 42; C. S. 4421.)

§ 14-283. Exploding dynamite cartridges and bombs.—If any person shall fire off or explode, or cause to be fired off or exploded, except for mechanical purposes in a legitimate business, any dynamite cartridge, bomb or other explosive of a like nature, he shall be guilty of a misdemeanor. (Rev., s. 3794; 1887, c. 364, s. 53; C. S. 4423.)

Cross References.—As to burglary with explosives, see § 14-57. As to willful injury with explosives, see § 14-49.

§ 14-284. Keeping for sale or selling explosives without a license.—If any dealer or other person shall sell or keep for sale any dynamite cartridges, bombs or other combustibles of a like kind, without first having obtained from the board of commissioners of the county where such person or dealer resides a license for that purpose, he shall be guilty of a misdemeanor. (Rev., s. 3817; 1887, c. 364, ss. 1, 4; C. S. 4425.)

§ 14-285. Failing to enclose marl beds.—If any person shall open any marl bed without surrounding it with a lawful fence, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, this shall not apply to any person whose marl bed is situated inside his own inclosure. (Rev., s. 3796; 1887, cc. 235, 268; C. S. 4426.)

Cited in *Wellons v. Sherrin*, 217 N. C. 534, 8 S. E. (2d) 820 (dissenting opinion).

§ 14-286. Giving false fire alarms; molesting fire alarm system.—It shall be unlawful for any person or persons to wantonly and willfully give or cause to be given, or to advise, counsel, or aid and abet any one in giving a false alarm of fire, or to break the glass key protector, or to pull the slide, arm, or lever of any station or signal box of any municipal fire alarm system, except in case of fire, or in any way to willfully interfere with, damage, deface, molest, or injure any part or portion of the fire alarm system of any municipality. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 46; C. S. 4426(a).)

§ 14-287. Leaving unused well open and exposed.—It shall be unlawful for any person, firm or corporation, after discontinuing the use of any well, to leave said well open and exposed; said well, after the use of same has been discontinued, shall be carefully and securely filled: Provided, that this shall not apply to wells on farms that are protected by curbing or board walls. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon con-

viction shall be fined or imprisoned, in the discretion of the court. (1923, c. 125; C. S. 4426(c).)

Editor's Note.—This section is said to be a sensible regulation in 1 N. C. Law Rev. 300.

Cited in *Wellons v. Sherrin*, 217 N. C. 534, 8 S. E. (2d) 820.

§ 14-288. Unlawful to pollute any bottles used for beverages.—It shall be unlawful for any person, firm or corporation having custody for the purpose of sale, distribution or manufacture of any beverage bottle, to place, cause or permit to be placed therein turpentine, varnish, wood alcohol, bleaching water, bluing, kerosene, oils, or any unclean or foul substance, or other offensive material, or to send, ship, return and deliver or cause or permit to be sent, shipped, returned or delivered to any producer of beverages, any bottle used as a container for beverages, and containing any turpentine, varnish, wood alcohol, bleaching water, bluing, kerosene, oils, or any unclean or foul substance, or other offensive material. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined on the first offense, one dollar for each bottle so defiled, and for any subsequent offense not more than ten dollars for each bottle so defiled. (1929, c. 324, s. 1.)

Cross Reference.—As to destruction or taking of soft drink bottles, see § 14-86.

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

Art. 37. Lotteries and Gaming.

§ 14-289. Advertising lotteries.—If any one, by writing or printing or by circular or letter or in any other way, advertise or publish an account of a lottery, whether within or without this state, stating how, when or where the same is to be or has been drawn, or what are the prizes therein or any of them, or the price of a ticket or any share or interest therein, or where or how it may be obtained, he shall be guilty of a misdemeanor. (Rev., s. 3725; 1887, c. 211; C. S. 4427.)

See the discussion in 5 N. C. Law Rev. 31.

§ 14-290. Dealing in lotteries.—If any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style or title the same may be denominated or known; or if any person shall, by such way and means, expose or set to sale any house, real estate, goods, chattels, cash, written evidence of debt, certificates of claims or any other thing of value whatsoever, every person so offending shall be guilty of a misdemeanor, and shall be fined not exceeding two thousand dollars or imprisoned not exceeding six months, or both, in the discretion of the court. Any person who engages in disposing of any species of property whatsoever, including money and evidences of debt, or in any manner distributes gifts or prizes upon tickets, bottle crowns, bottle caps, seals on containers, other devices or certificates sold for that purpose, shall be held liable to prosecution under this section. Any person who shall have in his possession any tickets, certificates or orders used in the operation of any lottery shall be held liable under this section, and the mere possession of such tickets shall be prima facie evidence of the violation of this section.

(Rev., s. 3726; Code, s. 1047; R. C., c. 34, s. 69; 1834, c. 19, s. 1; 1874-5, c. 96; 1933, c. 434; 1937, c. 157; C. S. 4428.)

Editor's Note.—Public Laws of 1933, c. 434, added the last sentence of this section, relating to possession of tickets, certificates, etc.

The 1937 amendment inserted the words "bottle crowns, bottle caps, seals on containers, other devices" in the second sentence of this section.

In General.—A lottery may be defined as any scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine. *State v. Lipkin*, 169 N. C. 265, 84 S. E. 340. Statutes, such as this section, regulating such schemes violate neither the State nor Federal Constitution. *Mfg. Co. v. Benjamin*, 172 N. C. 53, 89 S. E. 797; *State v. Lipkin*, 169 N. C. 265, 84 S. E. 340. They are remedial and should be liberally construed. And the fact that the device is an advertising scheme of an otherwise legitimately run business concern does not prevent the section from applying. *Id.* See also *State v. Lumsden*, 89 N. C. 572.

Amendment of 1933 Is Valid.—The 1933 amendment to this section which makes the possession of tickets, etc., used in the operation of a lottery prima facie evidence of violation of the section, is constitutional and valid, the presumption being a rational one. *State v. Fowler*, 205 N. C. 608, 172 S. E. 191.

Actual Physical Possession Unnecessary.—The possession of lottery tickets sufficient to raise prima facie evidence of the violation of this section, need not be actual physical possession, and they need not be found on defendant's person, it being sufficient if they are found in his place of business under his control. *State v. Jones*, 213 N. C. 640, 197 S. E. 152.

Note for Lottery Contract.—Notes given in pursuance of a contract prohibited by this section are for an illegal consideration, and collection thereof is not enforceable in our courts. *Brevard Mfg. Co. v. Benjamin & Sons*, 172 N. C. 53, 89 S. E. 797.

Surety to Lottery Contract.—A bond guaranteeing the performance of a "trade expansion contract" which is contrary to this section, is as unenforceable against the surety thereon as the contract upon which it is founded. *Basnight v. American Mfg. Co.*, 174 N. C. 206, 93 S. E. 734.

Lottery Privilege Not a Contract.—A right, conferred in the charter of a corporation, to dispose of property by means of lottery tickets, is not a contract between the corporation and the state, but a mere privilege or license, and is revocable at will by the legislative power. *State v. Morris*, 77 N. C. 512.

Purchaser Not Included.—This section does not embrace persons who buy lottery tickets. *State v. Bryant*, 74 N. C. 207, 209.

Admissibility of Evidence.—In establishing the promotion of the lottery by circumstantial evidence it was permissible for the State to show the association of the defendants together with their financial relation and transactions. The declaration of one defendant as to the other's participation in the enterprise and as to their protection if they were caught was also competent. *State v. Ingram*, 204 N. C. 557, 168 S. E. 837.

Sufficiency of Evidence.—Evidence that numerous lottery tickets and lottery ticket books were found in the store operated by defendant is sufficient to be submitted to the jury in a prosecution under this section, and defendant's contention that there was no evidence that he was in charge of the store is untenable when the record discloses that several witnesses referred to the locus in quo as defendant's place of business. *State v. Jones*, 213 N. C. 640, 197 S. E. 152.

Evidence that officers apprehended defendant with lottery tickets in his possession and that upon seeing the officers he tried to dispose of same, is sufficient to be submitted to the jury in prosecution for operating a lottery and for illegal possession of lottery tickets, the evidence being sufficient to make out a prima facie case under the provisions of this section. *State v. Powell*, 219 N. C. 220, 13 S. E. (2d) 232.

Applied in *State v. Blanton*, 207 N. C. 872, 180 S. E. 81.

§ 14-291. Selling lottery tickets and acting as agent for lotteries.—If any person shall sell, barter or otherwise dispose of any lottery ticket or order for any number or shares in any lottery, or shall in anywise be concerned in such lottery, by acting as agent in the state for or on behalf of any such lottery, to be drawn or paid either out of or within

the state, such person shall be guilty of a misdemeanor, and shall be punished as provided for in § 14-290. (Rev., s. 3727; Code, s. 1048; R. C., c. 34, s. 70; 1834, c. 19, s. 2; C. S. 4429.)

Cited in concurring opinion of Stacy, C. J., in *State v. Yarboro*, 194 N. C. 498, 506, 140 S. E. 216.

§ 14-291.1. Selling "numbers" tickets; possession prima facie evidence of violation.—If any person shall sell, barter or cause to be sold or bartered, any ticket, token, certificate or order for any number or shares in any lottery, commonly known as the numbers or butter and egg lottery, or lotteries of similar character, to be drawn or paid within or without the state, such person shall be guilty of a misdemeanor and shall be punished by fine or imprisonment, or both, in the discretion of the court. Any person who shall have in his possession any tickets, tokens, certificates or orders used in the operation of any such lottery shall be guilty under this section, and the possession of such tickets shall be prima facie evidence of the violation of this section. (1943, c. 550.)

§ 14-292. Gambling.—If any person play at any game of chance at which any money, property or other thing of value is bet, whether the same be in stake or not, both those who play and those who bet thereon shall be guilty of a misdemeanor. (Rev., s. 3715; 1891, c. 29; C. S. 4430.)

Cross Reference.—As to gaming contracts, see § 16-1 et seq.

See 11 N. C. Law Rev. 248, for reference to acts legalizing pari-mutuel race track betting.

In General.—Betting is essential to the offense; playing without betting is not indictable. *State v. Brannen*, 53 N. C. 208. The section does not apply to prizes given for skill—here there is no betting. *State v. Deboy*, 117 N. C. 702, 23 S. E. 167. Tenpins is not a game of chance. *State v. King*, 133 N. C. 631, 18 S. E. 169.

All who engage in gambling are principals. *State v. Deboy*, 117 N. C. 702, 23 S. E. 167. A defendant may be indicted for keeping a gaming house and playing for money, without misjoinder. *State v. Morgan*, 133 N. C. 743, 45 S. E. 1033.

Calling Transaction a Raffle.—Where several parties each put up a piece of money and then decide, by throwing dice, who shall have the aggregate sum or "pool," the game is one of chance and the fact that the aggregate sum so put up is exchanged for a turkey and the transaction is denominated a "raffle" does not change the character of the game. *State v. DeBoy*, 117 N. C. 702, 23 S. E. 167.

Horse racing is included in the category of "gaming" or "gambling." The word "game" is very comprehensive and embraces every contrivance or institution which has for its object to furnish sport, recreation, or amusement. Let a stake be laid on the chance of a game, and it is gaming. *State v. Brown*, 221 N. C. 301, 20 S. E. (2d) 286.

Betting on horse racing, or on other sort of race, is an offense against the criminal law. The fact that the race itself is one of skill and endurance on the part of the jockey and his mount does not confer immunity upon those who wager on its result. *Id.*

Ordinances as to Gambling Void.—Gambling being an offense under the general law, a city ordinance covering the same subject is void. *State v. McCoy*, 116 N. C. 1059, 21 S. E. 690.

Sufficiency of Indictment.—An indictment charging defendant with keeping and maintaining a gaming house is sufficient, though it is not alleged that the games played there were games of chance, or that they were played at a place or tables where games of chance were played. *State v. Morgan*, 133 N. C. 743, 45 S. E. 1033.

§ 14-293. Allowing gambling in houses of public entertainment; duty of police officers; penalty.—If any keeper of an ordinary or other house of entertainment, or of a house wherein liquors are retailed, shall knowingly suffer any game, at which money or property, or anything of value, is bet, whether the same be in stake or not, to be

played in any such house, or in any part of the premises occupied therewith; or shall furnish persons so playing or betting either on said premises or elsewhere with drink or other thing for their comfort or subsistence during the time of play, he shall be guilty of a misdemeanor, and shall be fined not less than five hundred dollars and be imprisoned not less than six months. Any person who shall be convicted under this section shall, upon such conviction, forfeit his license to do any of the businesses mentioned in this section, and shall be forever debarred from doing any of such businesses in this state. The court shall embody in its judgment that such person has forfeited his license, and no board of county commissioners, board of town commissioners or board of aldermen shall thereafter have power or authority to grant to such convicted person or his agent a license to do any of the businesses mentioned herein. It shall be the duty of every police officer of the cities, towns and villages of this state to make diligent inquiry and to exercise constant watchfulness to discover whether any of the offenses enumerated in this section are being committed, and to report once a week under oath to the mayor or other chief officer of his city, town or village, whether such offenses are being committed, and all the facts within his knowledge, or of which he has information relating thereto. If any such police officer shall know or have information that such offenses are being committed and shall fail or neglect to report the same to such mayor or other chief officer, together with all the information known to him, as to the person or persons committing the same, the time and place of the commission and the names of the witnesses thereto, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court, and shall forfeit his office. It shall be the duty of such mayor or other chief officer to require the report herein provided for, and to require that the same shall be verified by the oath of such policeman, and if it appear upon such report that any of the said offenses have been committed, it shall be the duty of such mayor or other chief officer to issue his warrant for the arrest of the offender. Any such mayor or other chief officer of any city, town or village who shall fail or neglect to require the reports herein mentioned, or shall fail or neglect to require of such police officer to verify the same upon oath, or who shall refuse or neglect, upon its appearing from such reports that there is probably cause to believe that any of the said offenses have been committed, to issue his warrant for the arrest of the offender, shall be guilty of a misdemeanor. Any person committing any of the offenses mentioned in this section shall be liable to a penalty of five hundred dollars, to be recovered by suit in the superior court in the county in which such offense may have been committed, one-half thereof to the use of the person bringing such suit and one-half to the school fund for the county. (Rev., s. 3716; Code, s. 1043; 1901, c. 753; R. C., c. 34, s. 76; 1799, c. 526; 1801, c. 581; 1831, c. 26; C. S. 4431.)

Gambling in Leased Room of Tavern.—Where it appeared that the room, in which the game took place, was a part of the house in which the tavern was kept, but had been leased and was not under the control of the landlord, it was held that the defendant landlord could not be convicted under this section. *State v. Keisler*, 51 N. C. 73.

Houses Where Liquor Was Retailed.—For case under this provision, see *State v. Terry*, 20 N. C. 325.

Excessive Punishment.—For the violation of this section a fine of two thousand dollars and imprisonment for thirty days, and thereafter until the fine and costs were paid, was held not excessive punishment. *State v. Miller*, 94 N. C. 904.

§ 14-294. Gambling with faro-banks and tables.—If any person shall open, establish, use or keep a faro-bank, or a faro-table, with the intent that games of chance may be played thereat, or shall play or bet thereat any money, property or other thing of value, whether the same be in stake or not, he shall be guilty of a misdemeanor, and shall be fined at least two hundred dollars and imprisoned not less than three months. (Rev., s. 3717; Code, s. 1044; R. C., c. 71; 1848, c. 34; 1856-7, c. 25; C. S. 4432.)

Cross Reference.—As to compelling testimony in cases when this section and §§ 14-295 to 14-297 have been violated, see § 8-55.

Cited in *State v. Norwood*, 94 N. C. 935.

§ 14-295. Keeping gaming tables, illegal punchboards or slot machines, or betting thereat.—If any person shall establish, use or keep any gaming table (other than a faro-bank), by whatever name such table may be called, an illegal punch board or an illegal slot machine, at which games of chance shall be played, he shall on conviction thereof be fined not less than two hundred dollars and shall be imprisoned not less than thirty days; and every person who shall play thereat or thereat bet any money, property or other thing of value, whether the same be in stake or not, shall be guilty of a misdemeanor, and shall be fined not less than ten dollars. (Rev., s. 3718; Code, s. 1045; R. C., c. 34, s. 72; 1791, c. 336; 1798, c. 502, s. 2; 1931, c. 14, s. 2; C. S. 4433.)

See notes to §§ 14-292 and 14-296.

The Indictment.—An indictment under this section is good, without any averment that the act was done "willfully and unlawfully" or that the games of chance were played at such table for money or other property. *State v. Howe*, 100 N. C. 449, 5 S. E. 671.

But a bill of indictment which does not charge that the game played was one of chance, and that it was played at a place or table where games of chance are played, will be quashed. *State v. Norwood*, 94 N. C. 935.

Evidence Admissible.—Where defendants admit keeping gaming tables, evidence may be admitted tending to show they were continuously present at the place and tending to show their large share in the receipts of these tables. *State v. Galloway*, 188 N. C. 416, 124 S. E. 745.

Cited in *State v. Bryant*, 74 N. C. 207; *State v. Humphries*, 210 N. C. 406, 186 S. E. 473; *State v. Webster*, 218 N. C. 692, 12 S. E. (2d) 272.

§ 14-296. Illegal slot machines and punchboards defined.—An illegal slot machine or punchboard within the contemplation of §§ 14-295 through 14-298 is defined as one that shall not produce for or give to the person who places coin or money or the representative of either, the same return in market value each and every time such machine is operated by placing money or coin or the representative of either therein. (1931, c. 14, s. 1.)

Editor's Note.—The Act from which this section was taken amended sections 14-295 to 14-298 to make them applicable to illegal slot machines and punch boards. The Act expressly provided that it should not have the effect of modifying in any way sections 14-301 to 14-303 and should be construed as supplemental to that act.

Cited in *Calcutt v. McGeachy*, 213 N. C. 1, 195 S. E. 49.

§ 14-297. Allowing gaming tables, illegal punchboards or slot machines on premises.—If any person shall knowingly suffer to be opened,

kept or used in his house or on any part of the premises occupied therewith, any of the gaming tables prohibited by §§ 14-289 through 14-300 or any illegal punch board or illegal slot machine, he shall forfeit and pay to any one who will sue therefor two hundred dollars, and shall also be guilty of a misdemeanor and fined and imprisoned. (Rev., s. 3719; Code s. 1046; R. C., c. 34, s. 73; 1798, c. 502, s. 3; 1800, c. 5, s. 2; 1931, c. 14, s. 3; C. S. 4434.)

See note to § 14-296.

Where the agreed statement of facts in an action to recover the penalty under this section states that defendant kept a slot machine in his store, without a finding that the machine was illegal, the findings are insufficient to support a judgment against defendant. *Nivens v. Justice*, 210 N. C. 349, 186 S. E. 237.

Cited in *State v. Webster*, 218 N. C. 692, 12 S. E. (2d) 272.

§ 14-298. Gaming tables, illegal punchboards and slot machines to be destroyed by justices and police officers.—All justices of the peace, sheriffs, constables and officers of police are hereby authorized and directed, on information made to them on oath that any gaming table prohibited to be used by §§ 14-289 through 14-300, or any illegal punchboard or illegal slot machine is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power; and they shall call to their aid all the good citizens of the county, if necessary, to effect its destruction. (Rev., s. 3720; Code, s. 1049; R. C., c. 34, s. 74; 1791, c. 336; 1798, c. 502, s. 2; 1931, c. 14, s. 4; C. S. 4435.)

See note to § 14-296.

Enjoining Officers.—The court should have found whether the slot machines involved were illegal in determining the plaintiff's right to enjoin officers from interfering with his business. *McCormick v. Proctor*, 217 N. C. 23, 6 S. E. (2d) 870.

Cited in *Daniels v. Homer*, 139 N. C. 219, 226, 252, 51 S. E. 992; *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9 (dis. op.)

§ 14-299. Property exhibited by gamblers to be seized; disposition of same.—All moneys or other property or thing of value exhibited for the purpose of alluring persons to bet on any game, or used in the conduct of any such game, shall be liable to be seized by any justice of the peace or other court of competent jurisdiction or by any person acting under his or its warrant. Moneys so seized shall be turned over to and paid to the treasurer of the county wherein they are seized, and placed in the general fund of the county. Any property seized which is used for and is suitable only for gambling shall be destroyed, and all other property so seized shall be sold in the manner provided for the sale of personal property by execution, and the proceeds derived from said sale shall be turned over and paid to the treasurer of the county wherein the property was seized, to be placed by said treasurer in the general fund of the county. (Rev., s. 3722; Code, s. 1051; R. C., c. 34, s. 77; 1798, c. 502, s. 3; 1943, c. 84; C. S. 4436.)

Editor's Note.—The 1943 amendment inserted in the first sentence the words "or used in the conduct of any such game." Prior to the amendment one-half of the moneys or property seized went to the person seizing them and the other half went to the use of the poor.

Cited in *North Carolina v. Vanderford*, 35 Fed. 282, 286.

§ 14-300. Opposing destruction of gaming tables and seizure of property.—If any person shall op-

pose the destruction of any prohibited gaming table, or the seizure of any moneys, property or other thing staked on forbidden games, or shall take and carry away the same or any part thereof after seizure, he shall forfeit and pay to the person so opposed one thousand dollars, for the use of the state and the person so opposed, and shall, moreover, be guilty of a misdemeanor. (Rev., s. 3723; Code, s. 1052; R. C., c. 34, s. 78; 1798, c. 502; s. 4; C. S. 4437.)

Cited in *North Carolina v. Vanderford*, 35 Fed. 282, 286.

§ 14-301. Operation or possession of slot machine; separate offenses.—It shall be unlawful for any person, firm or corporation to operate, keep in his possession or in the possession of any other person, firm or corporation, for the purpose of being operated, any slot machine that shall not produce for or give to the person who places coin or money, or the representative of either, the same return in market value each and every time such machine is operated by placing money or coin or the representative of either therein. Each time said machine is operated as aforesaid shall constitute a separate offense. (1923, c. 138, ss. 1, 2; C. S. 4437(a).)

Editor's Note.—It was said in 1 N. C. Law Rev. 285, that "the interesting part of the statute is the definition of unlawful machine or device as one that does not produce for or give to the person operating, playing or patronizing the machine or device 'the same return in market value each and every time such machine or device is operated or patronized by paying money or other thing of value.' The act seems to cover all possible gambling devices not already covered by the lottery provisions of the Consolidated Statutes."

Construed with § 14-304.—This and the two following sections proscribing the operation and possession of slot machines of the type therein defined, are not repealed by §§ 14-304 to 14-309, proscribing ownership, sale, lease and transportation of such slot machines, since the two statutes are not repugnant, but are complementary. *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9.

Where an indictment charged defendant in one count with ownership, sale, lease and transportation of certain slot machines and devices prohibited by law, §§ 14-304 to 14-309, and charged defendant in the second count with the operation and possession of certain illegal slot machines, under this and the two following sections, it was held that the different counts in the bill may stand as separate and distinct offenses, and separate judgments may be entered thereon, and defendant's contention of duplicity is untenable. *Id.*

Value Required to Be Given.—Under this section, a slot machine so operated that one putting into it a coin receives, in any event, the value of such coin in chewing gum, and stands to win by chance additional chewing gum or discs of commercial value without further payment, is condemned by the statute as being unlawful. But if the slot machine were so operated that one who puts in a coin receives the same return in market value each and every time such machine is operated, it would not then fall within the condemnation of the statute. *State v. May*, 188 N. C. 470, 471, 125 S. E. 9.

License of Lawful Machines Only.—The State license issued for the operation of a slot machine is for one that is lawful, and does not permit the operation of one so devised as to give to the one who happens to strike certain mechanical combinations more of the merchandise than received at other times. *State v. May*, 188 N. C. 470, 125 S. E. 9.

Sufficiency of Indictment.—An indictment charging that the defendant "unlawfully and wilfully did operate a lottery, to wit, a slot machine (chapter 138, Public Laws 1923) against the form of the statute," etc., is insufficient because it fails to inform the accused of the specific offense or the necessary ingredients thereof, notwithstanding the statute is cited. *State v. Ballangee*, 191 N. C. 700, 701, 132 S. E. 795.

Cited in *Calcutt v. McGeachy*, 213 N. C. 1, 195 S. E. 49.

§ 14-302. Punchboards, vending machines, and other gambling devices; separate offenses.—It shall be unlawful for any person, firm or corporation to operate or keep in his possession, or the possession of any other person, firm or corpora-

tion, for the purpose of being operated, any punch-board, machine for vending merchandise, or other gambling device, by whatsoever name known or called, that shall not produce for or give to the person operating, playing or patronizing same, whether personally or through another, by paying money or other thing of value for the privilege of operating, playing or patronizing same, whether through himself or another, the same return in market value, each and every time such punch-board, machine for vending merchandise, or other gambling device, by whatsoever name known or called, is operated, played or patronized by paying of money or other thing of value for the privilege thereof. Each time said punch-board, machine for vending merchandise, or other gambling device, by whatsoever name known or called, is operated, played, or patronized by the paying of money or other thing of value therefor, shall constitute a separate violation of this section as to operation thereunder. (1923, c. 138, ss. 3, 4; C. S. 4437(b).)

An indictment charging possession of gambling devices, but failing to charge that defendant operated the devices or had them in his possession for the purpose of being operated, is fatally defective. *State v. Jones*, 218 N. C. 734, 12 S. E. (2d) 292.

§ 14-303. Violation of two preceding sections a misdemeanor.—A violation of any of the provisions of §§ 14-301, 14-302 shall be a misdemeanor punishable by a fine or imprisonment, or, in the discretion of the court, by both. (1923, c. 138, s. 5; C. S. 4437(c).)

§ 14-304. Manufacture, sale, etc., of slot machines and devices.—It shall be unlawful to manufacture, own, store, keep, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or to offer to sell, rent, lease, let on shares, lend or give away, or to permit the operation of, or for any person to permit to be placed, maintained, used or kept in any room, space or building owned, leased or occupied by him or under his management or control, any slot machine or device. (1937, c. 196, s. 1.)

Editor's Note.—For comment on this and the following sections, see 15 N. C. Law Rev. 340.

Constitutionality.—This and following sections, prohibiting coin slot machines in the operation of which a player may make varying scores or tallies upon which wagers may be made, and differentiating between such machines and those returning a definite and unvarying service or things of value each time they are played, are in accord with the policy of the state to suppress gambling and have a reasonable relation to this objective, and this statute is constitutional as a reasonable regulation relating to the public morals and welfare, well within the police power of the State. *Calcutt v. McGeachy*, 213 N. C. 1, 195 S. E. 49; *State v. Abbott*, 218 N. C. 470, 11 S. E. (2d) 539, followed in 218 N. C. 480, 481, 482, 11 S. E. (2d) 545, 546, 547.

Construed with § 14-301.—See note to § 14-301.

Not Repealed by 1939 Licensing Act.—The provisions of the Flanagan Act, ch. 196, Public Laws of 1937, proscribing the possession and distribution of a coin slot machine in the operation of which the user may secure additional chances or rights to use the machine, is not repealed by § 105-66, since subsection 5 of that section expressly negatives the intention to license or legalize any gaming slot machine or device, and since subsection 1 of that section excludes from its licensing provisions slot machines which "automatically vend" any prize, coupon or reward which may be used in the further operation of such machine, the word "vend" being equivalent to the word "give" and the intent being to exclude from the licensing provisions a machine which provides a player with additional plays or games as a premium, prize, or reward irrespective of whether physical tokens of such premium, prize or reward are, or are not, delivered to the player. *State v. Abbott*,

218 N. C. 470, 11 S. E. (2d) 539, followed in 218 N. C. 480, 481, 482, 11 S. E. (2d) 545, 546, 547.

Cited in *State v. Finch*, 218 N. C. 511, 11 S. E. (2d) 547.

§ 14-305. Agreements with references to slot machines or devices made unlawful.—It shall be unlawful to make or permit to be made with any person any agreement with reference to any slot machines or device, pursuant to which the user thereof may become entitled to receive any money, credit, allowance, or anything of value or additional chance or right to use such machines or devices, or to receive any check, slug, token or memorandum entitling the holder to receive any money, credit, allowance or thing of value. (1937, c. 196, s. 2.)

§ 14-306. Slot machine or device defined.—Any machine, apparatus or device is a slot machine or device within the provisions of §§ 14-304 through 14-309, if it is one that is adapted, or may be readily converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated in such manner that the user may receive or become entitled to receive any piece of money, credit, allowance or thing of value, or any check, slug, token or memorandum, whether of value or otherwise, or which may be exchanged for any money, credit, allowance or any thing of value, or which may be given in trade, or the user may secure additional chances or rights to use such machine, apparatus or device; or in the playing of which the operator or user has a chance to make varying scores or tallies upon the outcome of which wagers might be made, irrespective of whether it may, apart from any element of chance or unpredictable outcome of such operation, also sell, deliver or present some merchandise, indication or weight, entertainment or other thing of value. This definition is intended to embrace all slot machines and similar devices except slot machines in which is kept any article to be purchased by depositing any coin or thing of value, and for which may be had any article of merchandise which makes the same return or returns of equal value each and every time it is operated, or any machine wherein may be seen any pictures or heard any music by depositing therein any coin or thing of value, or any slot weighing machine or any machine for making stencils by the use of contrivances operated by depositing in the machine any coin or thing of value, or any lock operated by slot wherein money or thing of value is to be deposited, where such slot machines make the same return or returns of equal value each and every time the same is operated and does not at any time it is operated offer the user or operator any additional money, credit, allowance, or thing of value, or check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for money, credit, allowance or thing of value or which may be given in trade or by which the user may secure additional chances or rights to use such machine, apparatus, or device, or in the playing of which the operator does not have a chance to make varying scores or tallies. (1937, c. 196, s. 3.)

An indictment charging the ownership and distribution of slot machines adapted for use in such a way that as a result of the insertion of a coin the machine may be operated in such a manner that the user may secure addi-

tional chances or rights to use such machine and upon which the user has a chance to make various scores upon the outcome of which wagers may be made, follows the language of this section and is sufficient to charge the offense therein defined. *State v. Abbott*, 218 N. C. 470, 11 S. E. (2d) 539, followed in 218 N. C. 480, 481, 482, 11 S. E. (2d) 545, 546, 547.

§ 14-307. Issuance of license prohibited.—There shall be no state, county, or municipal tax levied for the privilege of operating the machines or devices the operation of which is prohibited by §§ 14-304 through 14-309. (1937, c. 196, s. 4.)

§ 14-308. Declared a public nuisance.—An article or apparatus maintained or kept in violation of §§ 14-304 through 14-309 is a public nuisance. (1937, c. 196, s. 5.)

§ 14-309. Violation made misdemeanor.—Any person who violates any provision of §§ 14-304 through 14-309 is guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1937, c. 196, s. 6.)

Art. 38. Marathon Dances and Similar Endurance Contests.

§ 14-310. Dance marathon and walkathons prohibited.—It shall be unlawful for any person, firm, association or corporation to promote, advertise or conduct any marathon dance contests, walkathon contests and/or similar endurance contests, by whatever name called, of walking or dancing, and it shall be unlawful for any person to participate in any marathon dance contest, walkathon contest, and/or similar physical endurance contest by walking and dancing continuing or intended to continue for a period of more than eight consecutive hours, whether or not an admission is charged and/or a prize awarded, and it shall be unlawful for any person to participate in more than one such contest or performance within any period of forty-eight hours. (1935, c. 13, s. 1.)

§ 14-311. Penalty for violation.—Any persons violating the provisions of this article shall be guilty of a misdemeanor and shall be punishable by imprisonment in the county or municipal jail for not less than thirty days nor more than ninety days, or by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00), or by both such fine and imprisonment in the discretion of the court. (1935, c. 13, s. 2.)

§ 14-312. Each day made separate offense.—Each and every day that any person, firm or corporation shall continue such a contest or engage in any such activities and/or each day's participation in such contest or advertisement of the same or do any act in violation of the provisions of this article shall be and constitute a distinct and separate offense. (1935, c. 13, s. 3.)

Art. 39. Protection of Minors.

§ 14-313. Selling cigarettes to minors.—If any person shall sell, give away or otherwise dispose of, directly or indirectly, cigarettes, or tobacco in the form of cigarettes, or cut tobacco in any form or shape which may be used or intended to be used as a substitute for cigarettes, to any minor under the age of seventeen years; or if any person shall aid, assist or abet any other person in selling such articles to such minor, he shall be guilty of a mis-

demeanor, and upon conviction shall be punished by fine or imprisonment in the discretion of the court. (Rev., s. 3804; 1891, c. 276; C. S. 4438.)

Cross Reference.—As to giving intoxicants to unmarried minors under 17 years of age, see §§ 14-331 and 14-332.

§ 14-314. Aiding minors in procuring cigarettes; duty of police officers.—If any person shall aid or assist any minor child under seventeen years old in obtaining the possession of cigarettes, or tobacco in any form used as a substitute therefor, by whatsoever name it may be called, he shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court.

It shall be the duty of every police officer, upon knowledge or information that any minor under the age of seventeen years is or has been smoking any cigarette, to inquire of any such minor the name of the person who sold or gave him such cigarette, or the substance from which it was made, or who aided and abetted in effecting such gift or sale. Upon receiving this information from any such minor, the officer shall forthwith cause a warrant to be issued for the person giving or selling, or aiding and abetting in the giving or selling of such cigarette or the substance out of which it was made, and have such person dealt with as the law directs. Any such minor who shall fail or refuse to give to any officer, upon inquiry, the name of the person selling or giving him such cigarette, or the substance out of which it was made, shall be guilty of a misdemeanor. (Rev., s. 3805; 1891, c. 276, s. 2; 1913, c. 185; C. S. 4439.)

§ 14-315. Selling or giving weapons to minors.—If any person shall knowingly sell, offer for sale, give or in any way dispose of to a minor any pistol or pistol cartridge, brass knucks, bowie-knife, dirk, loaded cane or sling-shot, he shall be guilty of a misdemeanor. (Rev., s. 3832; 1893, c. 514; C. S. 4440.)

§ 14-316. Permitting young children to use dangerous firearms.—Any person, being the parent or guardian of, or standing in loco parentis to, any child under the age of twelve years, who shall knowingly permit such child to have the possession or custody of, or use in any manner whatever, any gun, pistol or other dangerous firearm, whether such firearm be loaded or unloaded, or any other person who shall knowingly furnish such child any such firearm, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (1913, c. 32; C. S. 4441.)

§ 14-317. Permitting minors to enter barrooms, billiard rooms and bowling alleys.—If the keeper or owner of any barroom, billiard room or bowling alley shall allow any minor to enter or remain in such barroom, billiard room or bowling alley, where before such minor enters or remains in such barroom, billiard room or bowling alley, the owner or keeper thereof has been notified by the parents or guardian of such minor not to allow him to enter or remain in such barroom, billiard room or bowling alley, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3729; 1897, c. 278; C. S. 4442.)

§ 14-318. **Exposing children to fire.**—If any person shall leave any child of the age of seven years or less locked or otherwise confined in any dwelling, building or enclosure, and go away from such dwelling, building or enclosure without leaving some person of the age of discretion in charge of the same, so as to expose the child to danger by fire, the person so offending shall be guilty of a misdemeanor, and shall be punished at the discretion of the court. (Rev., s. 3795; 1893, c. 12; C. S. 4443.)

§ 14-319. **Marrying females under fourteen years old.**—If any person shall marry a female under the age of fourteen years, he shall be guilty of a misdemeanor. (Rev., s. 3368; Code, s. 1083; R. C., c. 34, s. 46; 1920, c. 1041, ss. 1, 2; C. S. 4444.)

Cross Reference.—As to capacity to marry in general, see § 51-2.

Cited in Caroon v. Rogers, 51 N. C. 240.

§ 14-320. **Separating child under six months old from mother.**—It shall be unlawful for any person to separate or aid in separating any child under six months old from its mother for the purpose of placing such child in a foster home or institution, or with the intent to remove it from the state for such purpose, unless the consent in writing for such separation shall have been obtained from the clerk of the superior court and the county health officer of the county in which the mother resides, or of the county in which the child was born; and it shall be unlawful for any mother to surrender her child for such purpose without first having obtained such consent; provided, that in every instance the county superintendent of public welfare shall have made proper investigation of the condition and situation of said mother and child and shall make a written report of same to the clerk of court and the county health officer before they take action. Any person violating this section shall, upon conviction, be fined not exceeding five hundred dollars or imprisoned for one year, or both, in the discretion of the court. (1917, c. 59; 1919, c. 240; 1939, c. 56; C. S. 4445.)

Cross Reference.—As to adoption generally, see Chapter 48.

Editor's Note.—The 1939 amendment added the proviso to the first sentence.

§ 14-321. **Failing to pay minors for doing certain work.**—Whenever any person, having a contract with any corporation, company or person for the manufacture or change of any raw material by the piece or pound, shall employ any minor to assist in the work upon the faith of and by color of such contract, with intent to cheat and defraud such minor, and, having secured the contract price, shall willfully fail to pay the minor when he shall have performed his part of the contract work, whether done by the day or by the job, the person so offending shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3428a; 1893, c. 309; C. S. 4446.)

Cross Reference.—As to child labor regulations, see § 110-1 et seq.

Art. 40. Protection of the Family.

§ 14-322. **Abandonment of family by husband.**—If any husband shall willfully abandon his wife without providing adequate support for such wife,

and the children which he may have begotten upon her, he shall be guilty of a misdemeanor; Provided, that the abandonment of children by the father shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child shall arrive at the age of eighteen years. (Rev., s. 3355; Code, s. 970; 1868-9, c. 209, s. 1; 1873-4, c. 176, s. 10; 1879, c. 92; 1925, c. 290; C. S. 4447.)

Cross References.—As to failure of husband to provide adequate support for family, see § 14-325. As to competency of wife's testimony upon trial of husband for abandonment, see § 8-57.

Editor's Note.—The latter part of this section, providing that the abandonment shall be a continuing offense until the youngest child should arrive at the age of eighteen years and barring the running of the statute of limitation until that time was added by Public Laws 1925, ch. 290.

The purpose of this section was to make unlawful a willful abandonment of a wife by a husband without providing adequate support for her. It is not made unlawful for a husband to simply willfully abandon his wife—a husband is not compelled to live with his wife if he provides her adequate support. Hyder v. Hyder, 215 N. C. 239, 240, 1 S. E. (2d) 540.

Section must be strictly construed. State v. Gardner, 219 N. C. 331, 13 S. E. (2d) 529.

It has no application to illegitimate children, and therefore an indictment drawn under this section charging defendant with the abandonment of his illegitimate child fails to charge a crime. State v. Gardner, 219 N. C. 331, 13 S. E. (2d) 529.

Two Offenses Created.—The placing of a comma after the words "such wife," in this section, evinces the legislative intent to create two offenses, the one, the willful abandonment of the wife, and the other, the willful abandonment by the father of his children of the marriage; especially when construed in connection with section 14-325, making it a misdemeanor for the husband to "willfully neglect to provide adequate support for his wife and the child or children which he has begotten by her." State v. Bell, 184 N. C. 701, 115 S. E. 190.

This section in express terms constitutes the abandonment of children by the father a continuing offense. The prosecution of an offense of this nature is a bar to a subsequent prosecution for the same offense charged to have been committed at any time before the institution of the first prosecution, but it is not a bar to a subsequent prosecution for continuing the offense thereafter, as this is a new violation of the law. State v. Hinson, 209 N. C. 187, 190, 183 S. E. 397.

The willful failure and refusal to support an illegitimate child, constitutes a continuing offense. State v. Johnson, 212 N. C. 566, 194 S. E. 319.

Construed with § 14-325.—Where the husband has been convicted of willfully abandoning his wife and minor children (under this section); and, secondly, of willfully failing to support them (§ 14-325), an order suspending judgment upon the second count, to take effect, however, upon the defendant's failure to comply with the order for support under this first one, is not objectionable as being conditional or alternative. State v. Vickers, 196 N. C. 239, 145 S. E. 175.

The Indictment.—An indictment against a husband for abandoning his wife must aver his failure to support her. State v. May, 132 N. C. 1020, 43 S. E. 819.

Abandonment Must Be Willful.—The willful abandonment of the wife is an essential element of the offense made criminal by this section, and this, the prosecutrix is required to show beyond a reasonable doubt. State v. Falkner, 182 N. C. 793, 108 S. E. 756; State v. Smith, 164 N. C. 475, 79 S. E. 979.

But there is no reversible error in the charge of the court for omitting the word "willful" in one part thereof when he has elsewhere repeatedly instructed the jury that in order to convict the abandonment must have been willful, which must be proved beyond a reasonable doubt. State v. Taylor, 175 N. C. 833, 96 S. E. 22.

Where the defendant is indicted under this section for failure to provide adequate support for his minor children, and in the prosecution of the action the evidence tends to show that the defendant and his wife were living apart and that he had not provided any support for his minor children for some time, and that a judgment had been entered in a civil action by the wife awarding all his personality except his personal belongings, and that he had transferred his realty to his daughter for the support of the wife and

minor children, there is no presumption of wilfulness from the failure to provide adequate support under § 14-323, and an instruction that leaves out this essential element of the crime will be held for reversible error. *State v. Roberts*, 197 N. C. 662, 150 S. E. 199.

The word "willfully" as used in § 49-2 is used with the same import as in this section. *State v. Cook*, 207 N. C. 261, 262, 176 S. E. 757.

Providing for Support.—It is within the discretion of the trial judge to provide for the support of the wife and the minor children of the marriage from the property or labor of the husband upon his conviction of wilfully abandoning them (§§ 14-322, 14-324), and an order that he pay a certain sum of money into the clerk's office monthly for this purpose, and secure compliance therewith by executing a bond in the sum of one thousand dollars comes within the provisions of the statute. *State v. Vickers*, 196 N. C. 239, 145 S. E. 175.

Where the husband has been convicted of abandoning his wife and minor children, the order of the judge providing for their support should be definite in providing for the contingencies that may arise, such as the coming of age of the children, etc., and should state what part thereof is for the support of the wife and what part is for the support of the children; and an order requiring the defendant to pay a certain sum monthly into the office of the clerk of the Superior Court, under a bond of the defendant to secure compliance, without further provisions, will be remanded so that a more definite order be given in the judgment of the lower court. *State v. Vickers*, 196 N. C. 239, 145 S. E. 175.

Both Abandonment and Non-Support Must Be Proved.—Both the fact of wilful abandonment and that of failure to support must be alleged and proved, the abandonment, being a single act and not a continuing offense, day by day, but the duty to support being a continuing one during the marital union, to be performed by him unless relieved therefrom by legal excuse; and his wilful abandonment and failure to provide constitutes the statutory offense. *State v. Beam*, 181 N. C. 597, 107 S. E. 429.

"In *State v. Johnson*, 194 N. C. 378, 139 S. E. 697, it was said: 'An offending husband may be convicted of abandonment and nonsupport when—and only when—two things are established: First, a wilful abandonment of the wife; and, second, a failure to provide "adequate support for such wife, and the children which he may have begotten upon her." *S. v. Toney*, 162 N. C. 635, 78 S. E. 156; *S. v. Hopkins*, 130 N. C. 647, 40 S. E. 973. The abandonment must be wilful, that is, without just cause, excuse or justification. *S. v. Smith*, 164 N. C. 475, 79 S. E. 979. And both ingredients of the crime must be alleged and proved. *S. v. May*, 132 N. C. 1020, 1021, 43 S. E. 819.' " *State v. Yelverton*, 196 N. C. 64, 65, 144 S. E. 534.

Good Faith of Abandonment Question for Jury.—In a prosecution of a husband for abandonment the question whether such abandonment was in good faith for the causes assigned is for the jury. *State v. Hopkins*, 130 N. C. 647, 40 S. E. 973.

Separation by Consent.—Where the wife has consented to a separation from her husband, his leaving her is not an abandonment within the meaning of this section. *State v. Smith*, 164 N. C. 475, 79 S. E. 979.

An offer of a home when not made in good faith, and when refused, is equivalent to abandonment by the husband. *State v. Smith*, 164 N. C. 475, 79 S. E. 978.

Divorce after First Conviction No Defense on New Trial.—Where the husband has been indicted, tried, and convicted for the criminal abandonment of his wife, under this section, and upon appeal he has been granted a new trial, the fact that since his former conviction his wife has obtained an absolute divorce from him will not avail him as a defense. *State v. Faulkner*, 185 N. C. 635, 116 S. E. 168.

Abandonment of Children after Divorce.—The father's duty to the children is not lessened by the fact that a decree of absolute divorce has been obtained, the obligation to support his own children continuing after the marriage relation between him and his wife has been severed by the law. *State v. Bell*, 184 N. C. 701, 115 S. E. 190.

Denial of Paternity.—Where the husband in an action for nonsupport of a child admits the nonsupport, but denies that he is the father, and introduces evidence in support thereof, an instruction that withdraws the question of the paternity of the child from the jury is reversible error. *State v. Ray*, 195 N. C. 628, 143 S. E. 216.

Wife Guilty of Adultery.—Where a wife is guilty of adultery, her husband is not liable to prosecution for abandonment. *State v. Hopkins*, 130 N. C. 647, 40 S. E. 973.

Upon the trial of the husband for abandonment, under this section, the wife's unchastity is a defense, which he may put in issue by cross-examination or otherwise, with the burden remaining on the State to show his guilt beyond a rea-

sonable doubt. *State v. Falkner*, 182 N. C. 793, 108 S. E. 756.

While ordinarily the husband may not withdraw his support from his wife and children, and compel her to leave him without violating this section, it is one of the exceptions to the rule under which the husband may prove justification, when she has committed adultery with another man, and an instruction which deprives the husband of this defense is reversible error. *State v. Johnson*, 194 N. C. 378, 139 S. E. 697.

Competency of Wife's Testimony.—Under § 8-57 the wife is a competent witness against her husband "as to the fact of abandonment, or neglect to provide adequate support." She is not, however, a competent witness to prove the fact of marriage. *State v. Brown*, 67 N. C. 470. See § 8-57 and notes thereunder.

Not a Continuing Offense.—The crime of wilful abandonment by the husband of his wife is not a continuing offense, day by day, and where there has been a complete act of abandonment and no renewal of the marital association, the act must have occurred within two years next before indictment found. *State v. Hannon*, 168 N. C. 215, 83 S. E. 701.

Condonation by Wife Does Not Bar Prosecution.—Abandonment of the wife by the husband is a statutory offense, and it is not condoned, so far as the State's right to prosecute is concerned, by a subsequent resumption of the marital relation. *State v. Manon*, 204 N. C. 52, 167 S. E. 493.

Jurisdiction.—The constructive domicile of the wife is that of her husband, and where he has resided in another State and has left her there, and where for business or other reasonable purposes he has come to this State and made his domicile here, and she has followed him and he has then abandoned her and ceased to contribute to her support and that of his child born to them in lawful wedlock, the abandonment occurs in this State and is within the jurisdiction of the courts of this State and subject to the provisions of our statute making it a misdemeanor. *State v. Sneed*, 197 N. C. 668, 150 S. E. 197.

Venue.—When the husband has agreed to a separation from his wife upon consideration of his remitting periodically a certain sum of money to a certain county in which she was to reside, and he fails of performance, the venue of an action under the provisions of this section, is in that county. *State v. Hooker*, 186 N. C. 761, 120 S. E. 449.

Same—Where Husband Non-Resident.—Where a man willfully abandons his wife in this State and fails to send her funds for an adequate support, when he was residing in another State, he cannot direct her choice of residence and is indictable under this section in the county of her residence. *State v. Beam*, 181 N. C. 597, 107 S. E. 429.

Statute of Limitations.—Where the abandonment consisted in the failure to remit her a certain sum of money periodically to a certain county in which his conduct had forced her to reside, the failure to support occurred at the time he failed to perform his agreement, and the statute will begin to run from that date, and was not a bar under the facts of this case. *State v. Hooker*, 186 N. C. 761, 120 S. E. 449.

Same—Renewal of Cohabitation.—Where a man willfully abandons his wife, sends remittances for her support, returns and lives with her as man and wife for a while, and again abandons her, his willfully leaving her the second time without providing an adequate support for her is a fresh abandonment and failure to support, and an indictment found within two years therefrom is not barred by the statute of limitations. *State v. Beam*, 181 N. C. 597, 107 S. E. 429.

Same—Promise and Gifts.—The promise of the father to support his children and his making gifts to them is sufficient to repel the bar of the two-year statute of limitations, whether he was living in the home with them or otherwise, in proceedings under this section for his willfully abandoning them. *State v. Bell*, 184 N. C. 701, 115 S. E. 190.

Instruction.—Plaintiff's contention that the court should have charged that the failure to provide support under this section must have been wilful in order to constitute an abandonment is untenable. *Hyder v. Hyder*, 215 N. C. 239, 1 S. E. (2d) 540.

Plea in Abatement after Plea of Not Guilty.—Where the defendant has been convicted of abandoning his wife and child and failing to provide an adequate support for them under the provisions of this section, his plea in abatement comes too late after his plea of not guilty. *State v. Hooker*, 186 N. C. 761, 120 S. E. 449.

Amendment of Complaint.—See § 1-129.

Sufficient Evidence to Show Wilful Abandonment and Failure to Support Minor Child.—Evidence that defendant refused to support his minor child although repeated demands were made on him after the parties had returned to this State, is held to show that the offense of wilful abandonment and failure to support said minor child was committed by the defendant in this State, since this section

provides that the abandonment by the father of a minor child shall constitute a continuing offense. *State v. Hinson*, 209 N. C. 187, 183 S. E. 397.

Punishment for Violation.—Our Constitution, Art. II, sec. 4, making a person guilty of a misdemeanor punishable by commitment to houses of correction, leaves the matter of establishing a house of correction to the discretion of the legislature, and a husband convicted of abandonment under this section, may be imprisoned or assigned to work on the roads during his term. *State v. Faulkner*, 185 N. C. 635, 116 S. E. 168.

Husband Cannot Be Twice Convicted.—A husband once convicted of an abandonment of his wife cannot be again tried for the same offense, he not having lived with her since the original abandonment. *State v. Dunston*, 78 N. C. 418.

Autrefois Acquit and Convict.—In a prosecution for the violation of this section a plea by the defendant of former conviction of the same offense is good as to the period prior to the conviction, but it is not a bar to the prosecution for his failure to provide adequate support for his children subsequent thereto. *State v. Jones*, 201 N. C. 424, 160 S. E. 468.

Wife Not Deprived of Civil Remedies.—Requiring the state to show the husband's willful abandonment of his wife, etc., beyond a reasonable doubt, under this section, does not deprive the wife of her civil remedies under the provisions of section 50-16. *State v. Falkner*, 182 N. C. 793, 108 S. E. 756.

Quoted in *Jeffreys v. Hocutt*, 195 N. C. 339, 343, 142 S. E. 226.

Applied in *State v. Woodland*, 119 N. C. 779, 25 S. E. 719; *Junior Order of United American Mechanics v. Tate*, 212 N. C. 305, 193 S. E. 397, 113 A. L. R. 1514.

Cited in *Steel v. Steel*, 104 N. C. 631, 10 S. E. 707; *State v. Henderson*, 207 N. C. 258, 260, 176 S. E. 758; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A. L. R. 1217.

§ 14-323. Evidence that abandonment was willful.—If the fact of abandonment of and failure to provide adequate support for the wife and children shall be proved, or, while being with such wife, neglect by the husband to provide for the adequate support of such wife or children shall be proved, then the fact that such husband neglects applying himself to some honest calling for the support of himself and family, and is found sauntering about, endeavoring to maintain himself by gaming or other undue means, or is a common frequenter of drinking houses, or is a known common drunkard, shall be presumptive evidence that such abandonment and neglect is willful. (Rev., s. 3356; Code, s. 971; 1868-9, c. 209, s. 3; C. S. 4448.)

When Evidence for Defendant Necessary.—Where the nonsupport and abandonment of the husband are both established or admitted, under this section, it may be necessary for the defendant to come forward with his evidence and proof that the abandonment was not willful to avoid the risk of an adverse verdict. *State v. Falkner*, 182 N. C. 793, 108 S. E. 756.

Cited in *Steel v. Steel*, 104 N. C. 631, 10 S. E. 707.

§ 14-324. Order to support from husband's property or earnings.—Upon any conviction for abandonment, any judge or any recorder having jurisdiction thereof may, in his discretion, make such order as in his judgment will best provide for the support, as far as may be necessary, of the deserted wife or children, or both, from the property or labor of the defendant. (1917, c. 259; C. S. 4449.)

A judgment that the defendant be confined in the common jail for one year upon each count in the indictment, the term under one count to begin at the expiration of the term under the other, the judgment to be fully satisfied at the expiration of both terms, with provision that the judgment be suspended upon the payment to his abandoned wife and children certain monthly sums for a definite period and the giving of a bond for compliance therewith, is in this case held to be sufficiently certain and definite in its terms. *State v. Vickers*, 197 N. C. 62, 147 S. E. 673. See notes to § 14-322.

In Addition to Section 14-322.—This section is in addition to the powers conferred by section 14-322, and does not otherwise modify or interfere with its force and effect in making the abandonment of the wife a misdemeanor. *State v. Faulkner*, 185 N. C. 635, 116 S. E. 168.

"Husband," Applies after Divorce.—This section, uses the word "husband" as descriptio personae, in his relation to the child of the marriage to whom his duty of support continues after a decree of divorce has been entered; and does not confine the offense to the abandonment of the wife. *State v. Bell*, 184 N. C. 701, 115 S. E. 190.

A judgment under this section is not conditional because of an order that *capias* issue at any time on motion of the solicitor, for such order is void and not a part of judgment and *capias* may issue upon an order of the court. *State v. Manon*, 204 N. C. 52, 167 S. E. 493.

The practice of suspending judgments or staying executions in criminal prosecutions upon reasonable and just terms, with the consent of defendant, is established by custom and judicial decision, and in prosecutions for abandonment has received express legislative sanction under this section. *State v. Henderson*, 207 N. C. 258, 176 S. E. 758.

Judgment Entered without Notice after Default in Payment Is Void.—In *State v. Brooks*, 211 N. C. 702, 703, 191 S. E. 749, an order was entered requiring the defendant to pay into the clerk's office for the support and maintenance of his children certain monthly stipulated amounts, after indictment under § 14-322. Default having been made in said payments, judgment was entered upon the defendant's original plea without his knowledge or presence, and the defendant was sentenced to two years on the road. It was held that the judgment was void because entered without the knowledge or presence of the accused.

§ 14-325. Failure of husband to provide adequate support for family.—If any husband, while living with his wife, shall willfully neglect to provide adequate support of such wife or the children which he has begotten upon her, he shall be guilty of a misdemeanor. Upon conviction of any husband as herein provided, the court having jurisdiction thereof may in his discretion make such order as in his judgment will best provide for the support of such wife or children, and may commit the said husband to the common jail of the county, to be hired out by the county commissioners for such length of time as the court may deem proper, which said wage or salary shall be paid to the said wife or children, to be used toward their support. (Rev., s. 3357; Code, s. 972; 1868-9, c. 209, s. 2; 1873-4, c. 176, s. 11; 1879, c. 92; 1921, c. 103; C. S. 4450.)

Cross Reference.—As to abandonment of wife and children, see § 14-322.

Editor's Note.—The last sentence of the section was added by Public Laws of 1921, ch. 103.

Sufficiency of Indictment.—An indictment charging violation and following the words of the statute is sufficient. *State v. Kerby*, 110 N. C. 558, 14 S. E. 856.

Cited in *State v. Bell*, 184 N. C. 701, 115 S. E. 190.

§ 14-326. Abandonment of child by mother.—If any mother shall willfully abandon her child or children, whether legitimate or illegitimate, and under sixteen years of age, she shall be guilty of a misdemeanor. (1931, c. 57, s. 1.)

Art. 41. Intoxicating Liquors.

§ 14-327. Adulteration of liquors.—If any person shall adulterate any spirituous, alcoholic, vinous or malt liquors by mixing the same with any substance of whatever kind, except as provided in the following section, or if any person shall sell or offer to sell any spirituous, alcoholic, vinous or malt liquors, knowing the same to be thus adulterated, or shall import into this state any spirituous or intoxicating liquors, and sell or offer to sell such liquor, knowing the same to be adulterated, he shall be guilty of a misdemeanor and shall be fined

or imprisoned, or both, at the discretion of the court. (Rev., s. 3512; Code, s. 982; 1858-9, c. 57, ss. 1, 4; C. S. 4451.)

Cross Reference.—As to regulation of intoxicating liquors, see chapter 18.

§ 14-328. Selling recipe for adulterating liquors.—If any person shall sell or offer for sale any recipe or formula whatever for adulterating any spirituous or alcoholic liquors, by mixing the same with any substance of whatever kind, except as is herein provided, he shall be guilty of a felony, and shall be fined or imprisoned as is provided in the preceding section: Provided, that this section and the two sections that immediately precede and follow it respectively shall not be so construed as to prevent druggists, physicians and persons engaged in the mechanical arts from adulterating liquors for medical and mechanical purposes. (Rev., s. 3513; Code, s. 984; 1858-9, c. 57, ss. 2, 3; C. S. 4452.)

§ 14-329. Manufacturing or selling poisonous liquors.—If any person shall manufacture, sell, or in any way deal out spirituous liquors, of any name or kind, to be used as a drink or beverage, and the same shall be found to contain any foreign properties or ingredients poisonous to the human system, he shall be guilty of a felony and shall be imprisoned in the state's prison not less than five years, and may be fined in the discretion of the court. It shall be competent for any citizen, after making purchase of any spirituous liquor, to cause the same to be analyzed by some known competent chemist, and if upon such analysis it shall be found to contain any foreign poisonous matter, it shall be prima facie evidence against the party making such a sale. (Rev., s. 3522; Code, s. 983; 1873-4, c. 180, ss. 1, 2; C. S. 4453.)

§ 14-330. Selling or giving away liquor near political speaking.—If any person shall sell or give away, either directly or indirectly, any spirituous liquors, wine or bitters containing alcohol, within two miles of any place at which political public speaking shall be advertised to take place, and does take place, during the day on which such speaking shall take place, he shall be guilty of a misdemeanor, and shall be fined not less than ten dollars nor more than twenty dollars, or imprisoned not exceeding twenty days. (Rev., s. 3523; Code, s. 1079; 1879, c. 212; C. S. 4454.)

§ 14-331. Giving intoxicants to unmarried minors under seventeen years old.—If any person shall give intoxicating drinks or liquors to any unmarried minor under the age of seventeen years; or if any person shall aid, assist or abet any other person in giving such drinks or liquors to such minor, he shall be guilty of a misdemeanor, and upon conviction shall be punished by fine or imprisonment in the discretion of the court; but nothing in this section shall prevent any parent or other person standing in loco parentis from giving or administering any such drinks or liquors to his minor child for medicinal purposes, nor any physician from giving or administering such drinks or liquors to any minor patient under his care; nor shall this section apply to the giving or using of wine in the administration of the sacrament. (1915, c. 82; C. S. 4455.)

Cross Reference.—As to giving cigarettes to minors, see §§ 14-313 and 14-314.

§ 14-332. Selling or giving intoxicants to unmarried minors by dealers; liability for exemplary damages.—If any dealer in intoxicating drinks or liquors sell, or in any manner part with for a compensation therefor, either directly or indirectly, or give away such drinks or liquors, to any unmarried person under the age of twenty-one years, knowing such person to be under the age of twenty-one years he shall be guilty of a misdemeanor; and such sale or giving away shall be prima facie evidence of such knowledge. Any person who keeps on hand intoxicating drinks or liquors for the purpose of sale or profit shall be considered a dealer within the meaning of this section.

The father, or if he be dead, the mother, guardian or employer of any minor to whom a sale or gift shall be made in violation of this section, shall have a right of action in a civil suit against the person so offending by such sale or gift, and upon proof of such illicit sale or gift shall recover from the party so offending such exemplary damages as a jury may assess: Provided, that such assessment shall not be less than twenty-five dollars. (Rev., ss. 3524, 3525; Code, ss. 1077, 1078; 1873-4, c. 68; 1881, c. 242; C. S. 4456.)

For cases under this law, see *Spencer v. Fisher*, 158 N. C. 264, 73 S. E. 810; 161 N. C. 116, 76 S. E. 731; *State v. Kittelle*, 110 N. C. 560, 15 S. E. 103; *State v. Lawrence*, 97 N. C. 492, 2 S. E. 367; *State v. Walker*, 103 N. C. 413, 4 S. E. 582.

Art. 42. Public Drunkenness.

§ 14-333. Public drinking on railway passenger cars; copy of section to be posted.—Any person who shall publicly engage in the drinking of intoxicating liquors in the presence of passengers on any passenger car shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars nor more than fifty dollars, or imprisoned not to exceed thirty days. This section shall not apply to any smoking compartment or to any closet, dining or buffet car. It shall be the duty of all railway companies to have posted a copy of this section in all passenger coaches used for transporting passengers within the state. (1907, c. 455; C. S. 4457.)

§ 14-334. Public drunkenness and disorderliness.—It shall be unlawful for any person to be drunk and disorderly in any public place or on any public road or street in North Carolina; person or persons convicted of a violation hereof shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days in the discretion of the court. (1921, c. 211; C. S. 4457(a).)

Verdict of guilty of disorderly conduct but not of drunkenness will not support conviction for drunken and disorderly conduct under this section. *State v. Myrick*, 203 N. C. 8, 164 S. E. 328.

§ 14-335. Local: Public drunkenness.—If any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting, in any county, township, city, town, village or other place herein named, he shall be guilty of a misdemeanor, and upon conviction shall be punished as is provided in this section:

1. By a fine of not more than fifty dollars, or by imprisonment for not more than thirty days, in the counties of Alamance, Ashe, Avery, Brunswick, Burke, Catawba, Cherokee, Clay, Cleve-

land, Dare, Davie, Duplin, Franklin, Gaston, Graham, Greene, Haywood, Henderson, Hyde, Johnston, Lincoln, Madison, McDowell, Mitchell, Moore, Northampton, Orange, Pitt, Richmond, Rutherford, Scotland, Stanly, Union, Vance, Warren, Washington, Wayne, Wilkes and Yadkin, and at Pungo in Beaufort county. (1907, cc. 305, 785, 900, 976; 1908, c. 113; 1909, c. 815; Pub. Loc. 1915, c. 790; Pub. Loc. 1917, cc. 447, 475; Pub. Loc. 1919, cc. 148, 200; Ex. Sess. 1924, c. 5; 1929, c. 135; 1931, c. 219; 1935, c. 49, s. 1; 1935, c. 208; 1937, cc. 46, 96, 286, 329, 443; 1941, cc. 334, 336; C. S. 4458.)

2. From and after February 28, 1935, it shall be lawful for any justice of the peace in Cherokee, Jackson and Clay counties, or any mayor of any incorporated city or town in said counties, in imposing the prison sentence provided for in this section as amended, to sentence the defendant to thirty days in prison to be assigned to work on the highways of the state of North Carolina under the supervision of the State Highway and Public Works Commission, and in any case where any such defendant is so sentenced for as much as thirty days it shall be lawful for, and the duty of, the State Highway and Public Works Commission to receive and work such prisoner, as is now provided by law in case of sentences by judges of the superior court. (1935, c. 49, s. 4; 1939, c. 55.)

3. By a fine of not less than three dollars nor more than fifty dollars, or by imprisonment for not more than thirty days, in Yancey county. (1909, c. 256; C. S. 4458.)

4. By a fine of not less than two dollars and fifty cents nor more than fifty dollars, or by imprisonment for not more than thirty days, in Buncombe county. (1909, c. 271; C. S. 4458.)

5. By a fine of not less than five dollars nor more than ten dollars in Wake county. (1907, c. 908; C. S. 4458.)

6. By a fine of not less than five dollars nor more than fifty dollars, or by imprisonment for not more than ten days, in the village of Kannapolis, or on the premises or within one mile of the Kannapolis cotton mills. (1909, c. 46, s. 2; C. S. 4458.)

7. By a fine, for the first offense, of not less than ten nor more than twenty dollars; for second and further offense, not less than twenty nor more than thirty dollars, or imprisoned for not more than twenty days, in Transylvania county. (Pub. Loc. 1919, c. 190; Rev., 3733; 1897, c. 57; 1899, cc. 87, 208, 608, 638; 1901, c. 445; 1903, cc. 116, 124, 523, 758; C. S. 4458.)

8. By a fine of fifteen dollars or imprisonment for ten days for the first offense; by a fine of twenty-five dollars or imprisonment for twenty days for the second offense; by a fine of fifty dollars or imprisonment for thirty days for the third and subsequent offenses, in the King high school district, Stokes county. (1933, c. 287.)

9. By a fine of not less than five dollars or more than fifty dollars or by imprisonment for not more than thirty days, in the discretion of the court in Swain county. (1933, c. 10.)

10. In Harnett, Mecklenburg, Montgomery, Nash, Pender, and Wilson Counties, by a fine, for the first offense of not more than fifty dollars, or imprisonment for not more than thirty days; for the second offense within a period of twelve

months by a fine of not more than one hundred dollars, or imprisonment for not more than sixty days; and for the third offense within any twelve months' period, such third offense is to be declared a misdemeanor, punishable within the discretion of the court. (1935, cc. 284, 350; 1943, c. 268, ss. 1-3.)

11. In Guilford and Surry counties, by a fine, for the first offense, of not more than fifty dollars, or imprisonment for not more than thirty days; for the second offense within a period of twelve months by a fine of not more than one hundred dollars, or imprisonment for not more than sixty days; and for the third offense within any twelve months' period, such third offense to be declared a misdemeanor, punishable as a misdemeanor, within the discretion of the court. (1935, c. 207; 1937, c. 203; 1941, cc. 82, 150.)

12. In Edgecombe county, by a fine, for the first offense, of not more than fifty dollars (\$50.00), or imprisonment for not more than thirty days; for the second offense within a period of twelve months, by a fine of not more than one hundred dollars (\$100.00), or imprisonment for not more than sixty days; and for the third offense within any twelve months' period such offense is declared a misdemeanor, punishable as a misdemeanor within the discretion of the court. (1937, c. 95.)

13. In Jackson and Macon counties, any person violating this section shall be guilty of a misdemeanor and, upon conviction, shall be punished in the discretion of the court. Provided, that in the event the county commissioners of Jackson county abolish the recorder's court of said county, then, and in that event, the first sentence of this subsection shall not apply to Jackson county. (Pub. Loc. 1927, c. 17; Pub. Loc. 1931, c. 413.)

14. Any person or persons found drunk or intoxicated on the public highway, or at any public place or meeting in Currituck County, shall be guilty of a misdemeanor and upon conviction shall be fined not less than ten dollars (\$10.00), nor more than fifty dollars (\$50.00) for each offense, or be imprisoned not exceeding thirty (30) days, at the discretion of the court.

Upon complaint before any justice of the peace, he shall issue a warrant for the arrest of the accused and in the absence of a duly authorized officer to execute the said warrant, he shall deputize any citizen to execute the same. (1943, c. 506.)

Editor's Note.—By the amendment of 1929 paragraph one of this section was made applicable in Northhampton.

Public Laws of 1933, c. 287, added subdivision 8, relating to King High School District, Stokes county. Chapter 10 struck out Swain from the list of counties in subdivision 1, and added subdivision 9 applicable in that county only.

Public Laws of 1935, chapter 208, added Orange to the list of counties in subsection 1. Public Laws of 1935, chapter 49, added Cherokee and Clay to subsection 1 and deleted other subsections applicable to said counties. Section 4 of this amendatory act makes it lawful for Cherokee and Clay counties to sentence the defendant to thirty days in prison to be assigned to work on the highway. Public Laws 1939, c. 55, made said section 4 of chapter 49 of Public Laws of 1935, applicable to Jackson county. Public Laws of 1935, chapter 350, added subsection 10 to the section. Public Laws of 1935, chapter 207, added subsection 11.

The 1937 amendments made subsection 11 applicable to Surry county, and added subsection 12. The amendments also inserted several counties in the list in subsection 1 as follows: C. 46, Duplin; c. 96, Johnston; c. 286, Avery, Davie, Mitchell, Wilkes and Yadkin; c. 329, Alamance; c. 443, Brunswick.

Public Laws 1941, c. 334, amended subsection one by inserting "Burke" in the list of counties. And Public Laws 1941, c. 336, inserted "Wayne" therein.

For prior amendatory acts relating to Burke county, see Public Laws 1941, cc. 82, 150.

Subsection 10 was derived from the Public Laws of 1935 and from the first 1943 amendment. The latter struck Mecklenburg from the list of counties in subsection 1. The second 1943 amendment struck from subsection 1 the townships of Poplar Branch and Fruitville in Currituck County and added subsection 14.

Art. 43. Vagrants and Tramps.

§ 14-336. Persons classed as vagrants.—If any person shall come within any of the following classes, he shall be deemed a vagrant, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, however, that this limitation of punishment shall not be binding except in cases of a first offense, and in all other cases such person may be fined or imprisoned, or both, in the discretion of the court:

1. Persons wandering or strolling about in idleness who are able to work and have no property to support them.

2. Persons leading an idle, immoral or profligate life, who have no property to support them and who are able to work and do not work.

3. All persons able to work having no property to support them and who have not some visible and known means of a fair, honest and reputable livelihood.

4. Persons having a fixed abode who have no visible property to support them and who live by stealing or by trading in, bartering for or buying stolen property.

5. Professional gamblers living in idleness.

6. All able-bodied men having no other visible means of support who shall live in idleness upon the wages or earnings of their mother, wife or minor children, except of male children over eighteen years old.

7. Keepers and inmates of bawdy-houses, assignation houses, lewd and disorderly houses, and other places where illegal sexual intercourse is habitually carried on: Provided, that nothing here is intended or shall be construed as abolishing the crime of keeping a bawdy-house, or lessening the punishment by law for such crime. (Rev., s. 3740; 1905, c. 391; 1907, c. 1012, s. 1; 1913, c. 75; 1915, c. 1; C. S. 4459.)

Cross References.—As to effect of § 108-80 et seq. on this section, see § 108-89. As to prostitution, see § 14-203.

Editor's Note.—For a case decided under the former law, acts 1886, ch. 42, see *State v. Custer*, 65 N. C. 339.

Amendment to Warrant.—Where a warrant in a criminal action charges the defendant with "being a vagrant," it is within the discretion of the judge to allow an amendment specifying the particular act under which it has been issued; and while it is the better practice to reduce the amendment to writing at the time, the order is self executing, and failure to do so does not destroy its legal effect. *State v. Walker*, 179 N. C. 730, 102 S. E. 404. See also *State v. Price*, 175 N. C. 804, 95 S. E. 478.

Evidence.—By express statutory provision (§ 14-188), the reputation that a house is kept as a bawdy house may be received in evidence on the trial of a person for keeping one, under an indictment for vagrancy, etc., and the statute is constitutional and valid. *State v. Price*, 175 N. C. 804, 95 S. E. 478.

Imposition of Wrong Sentence.—Where a conviction for vagrancy has been legally had under this section, and the sentence has been imposed of imprisonment for twelve months allowed under section 14-208, the case will be remanded for the imposition of the proper sentence. *State v. Walker*, 179 N. C. 730, 102 S. E. 404.

§ 14-337. Police officers to furnish list of disorderly

houses; inmates competent and compellable to testify.—It shall be the duty of the chief of police, marshal, constable or other chief ministerial officer of each city and town in this state to furnish every thirty days to the police justice, recorder, mayor or other trial officer of such city or town a list of the bawdy, assignation, lewd and disorderly houses and other places where illegal sexual intercourse is carried on, together with the names of the keepers and inmates of such houses and places, in such city or town; and it shall be the duty of such police justice, recorder, mayor or other trial officer, upon the filing of such list, to issue his warrant for the persons declared in subsection seven of § 14-336 to be vagrants, and to punish in accordance with the provisions of that section such of them as may be found guilty. In all trials under said subsection seven of § 14-336 any keeper or inmate of any of the houses or places named, or his employees, shall be competent and compellable to give evidence of the character and nature of such house or place and of the character and acts of the keepers and inmates thereof; but the person so testifying shall not be prosecuted or punished for the commission of any crime about which he shall have been required to testify.

If any chief of police, marshal, constable or other chief ministerial officer of any city or town shall fail to furnish the list of houses and places provided for in this section, or shall suppress the name of any person whom he is required herein to report, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. (1907, c. 1012, ss. 2, 3; C. S. 4460.)

Cross Reference.—As to the effect of § 108-80 et seq. on this section, see § 108-89.

§ 14-338. Tramp defined and punishment provided; certain persons excepted.—If any person shall go about from place to place begging or subsisting on charity, he shall be denominated a tramp, and shall be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding thirty days: Provided, that any person who shall furnish satisfactory evidence of good character shall be discharged without cost. Any act of begging or vagrancy by any person, unless a well-known object of charity, shall be evidence that the person committing the same is a tramp. This section shall not apply to any woman, to any minor under the age of fourteen years, or to any blind person. (Rev., s. 3735; Code, ss. 3828, 3829, 3831, 3833; 1897, c. 268; 1879, c. 198, ss. 1, 4, 6; C. S. 4461.)

Cross References.—As to the effect of § 108-80 et seq. on this section, see § 108-89. As to release for good behavior of one committed to house of correction, see § 153-221.

§ 14-339. Trespassing and the carrying of dangerous weapons by tramps.—If any tramp shall enter any dwelling-house or kindle any fire on the land of another without the consent of the owner or occupant thereof, or shall kindle a fire on any highway, or shall be found carrying any firearm or other dangerous weapon, or shall threaten to do any injury to the person, or to the real or personal estate, of another, he shall be punished by imprisonment, at the discretion of the court, not to exceed twelve months. (Rev., s. 3736; Code, s. 3829; 1879, c. 198, s. 2; C. S. 4462.)

§ 14-340. Malicious injuries by tramps to persons and property.—If any tramp shall willfully and maliciously do any injury to the person, or to the real or personal estate, of another, he shall be punished by imprisonment, at the discretion of the court, not to exceed three years. (Rev., s. 3737; Code, s. 3830; 1879, c. 198, s. 3; C. S. 4463.)

§ 14-341. Arrest of tramps by persons who are not officers.—Any person, upon a view of any offense described in §§ 14-338 through 14-340, shall cause the offender to be arrested upon a warrant and taken before some justice of the peace, or he may apprehend the offender and take him before a justice of the peace, for examination, and, on his conviction, he shall be entitled to the same fee as a sheriff. (Rev., s. 3738; Code, s. 3832; 1879, c. 198, s. 5; C. S. 4464.)

Art. 44. Regulation of Sales.

§ 14-342. Selling or offering to sell meat of diseased animals.—If any person shall knowingly and willfully slaughter any diseased animal and sell or offer for sale any of the meat of such diseased animal for human consumption, or if any person knows that the meat offered for sale or sold for human consumption by him is that of a diseased animal, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the court. (Rev., s. 3442; 1905, c. 303; C. S. 4465.)

§ 14-343. Unauthorized dealing in railroad tickets.—If any person shall sell or deal in tickets issued by any railroad company, unless he is a duly authorized agent of the railroad company, or shall refuse upon demand to exhibit his authority to sell or deal in such tickets, he shall be guilty of a misdemeanor. (Rev., s. 3764; 1895, c. 83, s. 1; C. S. 4466.)

Cited in concurring opinion of Stacy, C. J., in State v. Yarboro, 194 N. C. 498, 506, 140 S. E. 216.

§ 14-344. Sale of athletic contest tickets in excess of printed price.—It shall be unlawful for any person, firm or corporation to sell or offer for sale any ticket of admission to any baseball, basketball, football game or other athletic contest of any kind in excess of the sale price written or printed on such ticket or tickets. Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1941, c. 180.)

§ 14-345. Sale of cotton at night under certain conditions.—If any person shall buy, sell, deliver or receive, for a price, or for any reward whatever, any cotton in the seed, or any unpacked lint cotton, brought or carried in a basket, hamper or sheet, or in any mode where the quantity is less than what is usually baled, or where the cotton is not baled, between the hours of sunset and sunrise, such person so offending shall be guilty of a misdemeanor. (Rev., s. 3813; Code, s. 1006; 1873-4, c. 62; 1874-5, c. 70; 1905, c. 417; C. S. 4467.)

Local Modification.—Mecklenburg, Nash: C. S. 4467.

Cited in State v. Moore, 104 N. C. 714, 10 S. E. 143; State v. Yarboro, 194 N. C. 498, 506, 140 S. E. 216.

§ 14-346. Sale of convict-made goods prohibited.—Except as hereinafter provided, the sale

anywhere within the state of North Carolina of any and all goods, wares and merchandise manufactured, produced or mined wholly or in part, by convicts or prisoners, except by convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions is hereby prohibited and declared to be unlawful.

The provisions of this section shall not apply to sales or exchanges between the state penitentiary and other penal, charitable, educational and/or custodial institutions, maintained wholly or in part by the state, or its political subdivisions, for use in said institution or by the wards thereof; nor shall the provisions of this section apply to the sale of cotton, corn, grain or other processed or unprocessed agricultural products, including seed for growing purposes, or to the sale of stone, quarried by convict labor, or to the sale of coal or chert mined by convict labor, in any mine operated by the state: Provided that this section shall apply with equal force to sales to the state or any political subdivision thereof by any state penal or correctional institution, including the state highway: Provided further that the state of North Carolina shall have the right of manufacturing in any of its penal or correctional institutions products to be used exclusively by the state or any of its agencies.

This section shall apply equally to convict or prison-made goods, wares or merchandise, whether manufactured, produced or mined within or without the state of North Carolina.

Any person, firm or corporation selling, undertaking to sell, or offering for sale any such prison-made or convict-made goods, wares or merchandise, anywhere within the State, in violation of the provisions of this section, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to fine, or imprisonment, or both, in the discretion of the court. Each sale or offer to sell, in violation of the provisions of this section, shall constitute a separate offense. (1933, c. 146, ss. 1-4.)

Art. 45. Regulation of Employer and Employee.

§ 14-347. Enticing servant to leave master.—If any person shall entice, persuade and procure any servant by indenture, or any servant who shall have contracted in writing or orally to serve his employer, to leave unlawfully the service of his master or employer; or if any person shall knowingly and unlawfully harbor and detain, in his own service and from the service of his master or employer, any servant who shall unlawfully leave the service of such master or employer, then, in either case, such person and servant shall be guilty of a misdemeanor and shall be fined not exceeding one hundred dollars or imprisoned not exceeding six months. (Rev., s. 3365; Code, ss. 3119, 3120; 1866, c. 58; 1866-7, c. 124; 1881, c. 303; C. S. 4469.)

Cross Reference.—As to a similar provision in the case of landlord and tenant or cropper, see § 14-359.

In General.—The offense was not known to the common law, *State v. Rice, 76 N. C. 194*. The section applies only where there has been an enticement, and not where a servant merely leaves his employer, even though such leaving is in violation of a contract between the parties. *State v. Daniel, 89 N. C. 553*. Nor does the section apply to the parent of a minor child who commands such child to quit employment. *State v. Anderson, 104 N. C. 771, 10 S. E. 47*. But if a minor is induced to leave his employment by a stranger, not in loco parentis, such stranger is amenable

to action under this section. *State v. Harwood*, 104 N. C. 724, 10 S. E. 171. The section does not apply where a mere contract to serve, not entered into, has been made. *Sears v. Whitaker*, 136 N. C. 37, 48 S. E. 517; *State v. Holly*, 152 N. C. 839, 67 S. E. 53.

A tenant or cropper of another is not his servant, within the meaning of this section. *State v. Etheridge*, 169 N. C. 263, 84 S. E. 264.

Sufficiency of Indictment.—It is not necessary to specify whether the contract is oral or written, nor the means by which the enticing was accomplished. *State v. Harwood*, 104 N. C. 724, 10 S. E. 171.

Cited in *Haskins v. Royster*, 70 N. C. 601, 607.

§ 14-348. Local: Hiring servant who has unlawfully left employer.—If any person shall knowingly hire, employ, harbor or detain in his own service any servant, employee, tenant, or wage hand of any other person, who shall have contracted in writing, or orally, for a fixed period of time to serve his employer, and who shall have left the service of his employer in violation of his contract, he shall be guilty of a misdemeanor, and shall be civilly liable in damages to the party so aggrieved. This section shall apply to the following counties: Beaufort, Edgecombe, Person, Pitt, Washington, Warren, Vance, Pender, Halifax, Guilford, Granville, Hertford, Richmond, Wake, Wayne and Caswell. (Rev., s. 3374; 1901, c. 682; 1903, c. 365; 1907, c. 238, s. 2; 1907, c. 402; 1919, c. 274; C. S. 4470.)

Cross Reference.—As to employing tenant or cropper who has unlawfully violated a contract with his landlord, see § 14-358.

§ 14-349. Enticing seamen from vessel.—If any person shall induce any seaman, in the employment of any domestic or foreign vessel, in any of the ports of North Carolina, to leave any such vessel before his term of service shall have expired, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days. (Rev., s. 3555; Code, s. 1108; 1879, c. 219, s. 1; 1881, c. 256, s. 1; C. S. 4471.)

§ 14-350. Secreting or harboring deserting seamen.—If any person shall secrete or harbor any seaman who has deserted from any domestic or foreign vessel, knowing that such seaman has deserted, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days; and if such seaman be found concealed or secreted by any person on his premises, such concealment and secretion shall be deemed prima facie evidence that such person knew that such seaman was a deserter. (Rev., s. 3556; Code, s. 1109; 1879, c. 219, s. 2; 1881, c. 256, s. 2; C. S. 4472.)

Cited in *State v. Barrett*, 138 N. C. 630, 636, 50 S. E. 506.

§ 14-351. Search warrants for deserting seamen.—If any credible witness shall complain, upon oath before any justice of the peace, that any person has concealed on his premises any seaman who has deserted from any such domestic or foreign vessel, it shall be lawful for such justice to grant a search warrant to be executed within the limits of his county to any proper officer, authorizing him to search for such seaman, and to arrest the person on whose premises he may be found; and the person on whose premises such seaman shall be found shall be adjudged to pay the costs of the search warrant, if on examination it shall appear that such seaman was secreted or concealed by such person; otherwise the costs shall be paid by

the party making the complaint. (Rev., s. 3557; Code, s. 1110; 1881, c. 256, s. 3; C. S. 4473.)

§ 14-352. Appeal in cases of deserting seamen regulated.—In all cases arising under §§ 14-349 through 14-351, if any appeal is prayed by either party at the time of the trial, it shall be granted; but no appeal shall be granted by any justice at any time after the final hearing of the case. In case an appeal is prayed at the trial, it shall be the duty of the justice to proceed immediately to reduce to writing the testimony of any witness whose testimony is material (if such witness shall be master, officer or seaman on board of any vessel), in the presence of the adverse party, who may cross-question such witness, which testimony shall be subscribed by such witness and returned by the justice with the papers in the case; and on the hearing in the appellate court, the testimony so taken and reduced to writing by the justice shall be read, heard and accepted as the true and lawful testimony of such witness, as if such person were in person present to give evidence. For reducing such testimony to writing the justice shall receive the same fees as are allowed for taking depositions. (Rev., s. 3558; Code, s. 1111; 1881, c. 256, ss. 4, 5; C. S. 4474.)

§ 14-353. Influencing agents and servants in violating duties owed employers.—Any person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business; any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business; any agent, employee or servant who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives, directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus, shall be guilty of a misdemeanor and shall be punished in the discretion of the court. (1913, c. 190, s. 1; C. S. 4475.)

§ 14-354. Witness required to give self-incriminating evidence; no suit or prosecution to be founded thereon.—No person shall be excused from attending, testifying or producing books, papers, contracts, agreements and other documents before any court, or in obedience to the subpoena of any court, having jurisdiction of the crime denounced in § 14-353, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or to subject him to a penalty or to a forfeiture; but no person shall be liable to any suit or prosecution, civil or criminal, for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before such court or in obedience to its

subpoena or in any such case or proceeding: Provided, that no person so testifying or producing any such books, papers, contracts, agreements or other documents shall be exempted from prosecution and punishment for perjury committed in so testifying. (1913, c. 190, s. 2; C. S. 4476.)

Cross References.—As to constitutional provisions against self-criminating evidence, see the North Carolina Constitution, Art. I, § 11, and notes thereto, and the United States Constitution, Amendment V.

Editor's Note.—For an article discussing the limits to self-incrimination, see 15 N. C. Law Rev. 229.

§ 14-355. Blacklisting employees.—If any person, agent, company or corporation, after having discharged any employee from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company or corporation, such person, agent or corporation shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars; and such person, agent, company or corporation shall be liable in penal damages to such discharged person, to be recovered by civil action. This section shall not be construed as prohibiting any person or agent of any company or corporation from furnishing in writing, upon request, any other person, company or corporation to whom such discharged person or employee has applied for employment, a truthful statement of the reason for such discharge. (1909, c. 858, s. 1; C. S. 4477.)

Intent of Section.—This section was intended to correct the abuse under the common law of statements made concerning a discharged employee out of malice, where damages for the loss of employment were difficult of admeasurement; and under the provisions of the act a statement made as to the standing of the discharged employee is not privileged, if made maliciously. *Seward v. Receivers*, 159 N. C. 241, 242, 75 S. E. 34.

Remedial Provisions.—The provisions of this and the following section are remedial and do not put the burden upon the plaintiff of showing either malice or actual damages. *Goins v. Sargent*, 196 N. C. 478, 146 S. E. 131.

What Constitutes a Violation.—Where an employer has discharged his employee for being a member of a lawful association of like employees, and has advised others, without a request from them, who would have engaged the services of such employee that he would not sell his product to them should they employ him, and thus has prevented the discharged employee from getting employment within the State, and forced him to obtain employment in another state, depriving him of his living at home here with his family, etc., the employee is entitled to recover damages in his civil action against his former employer, and a demurrer ore tenus to a complaint setting forth this cause of action is bad. *Goins v. Sargent*, 196 N. C. 478, 146 S. E. 131.

§ 14-356. Conspiring to blacklist employees.—It shall be unlawful for two or more persons to agree together to blacklist any discharged employee or to attempt, by words or writing or any other means whatever, to prevent such discharged employee, or any employee who may have voluntarily left the service of his employer, from obtaining employment with any other person or company. Persons violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court. (1909, c. 858, s. 2; C. S. 4478.)

Editor's Note.—See notes to § 14-355.

Cited in *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A. L. R. 1217.

§ 14-357. Issuing nontransferable script to laborers.—If any person who employs laborers by the

day, week or month shall issue in payment for the services of such laborers any ticket, certificate or other script bearing upon its face the word "non-transferable," or shall issue such ticket, certificate or other script in any form that would render it void by transfer from the person to whom issued, or shall refuse to pay to the person holding the same its face value, he shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than ten dollars nor more than fifty dollars for each offense, or imprisoned not more than thirty days. (Rev., s. 3730; 1889, c. 280; 1891, cc. 46, 78, 167, 370, 456; 1895, c. 127; C. S. 4479.)

"Face Value" Defined.—The "face value" is the value expressed on the face of the writing in the commodity in which it is payable. *Marriner v. Roper Co.*, 112 N. C. 164, 16 S. E. 906.

Rights of Assignee.—This section does not authorize the assignee of a ticket or scrip payable in merchandise to demand and receive payment in money instead of in merchandise. *Marriner v. Roper Co.*, 112 N. C. 164, 16 S. E. 906.

Art. 46. Regulation of Landlord and Tenant.

§ 14-358. Local: Violation of certain contracts between landlord and tenant.—If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully abandon the same without good cause and before paying for such advances; or if any landlord shall contract with a tenant or cropper to furnish him advances to enable him to make a crop, and shall willfully fail or refuse, without good cause, to furnish such advances according to his agreement, he shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Any person employing a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof, and shall also be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. This section shall apply to the following counties only: Wayne, Lenoir, Greene, Johnston, Jones, Onslow, Craven, Cleveland, Sampson, Pitt, Duplin, Gates, Cumberland, Perquimans, Chowan, Robeson, Bladen, Nash, Harnett, Edgecombe, Hertford, Wilson, Rockingham, Pender, Currituck, Gaston, Stokes, Surry, Alamance, Northampton, Beaufort, Chatham, Tyrrell, Mecklenburg, Halifax, Caswell, Camden, Cabarrus, Columbus, Martin, Washington, Wake, Alexander, Montgomery, Pamlico, Rowan, Rutherford, Bertie, Vance, Warren, Lincoln, Randolph and Lee. (Rev., s. 3366; 1905, cc. 297, 383, 445, 820; 1907, c. 84, s. 1; 1907, c. 595, s. 1; 1907, cc. 8, 639, 719, 869; Ex. Sess. 1920, c. 26; 1925, c. 285, s. 2; Pub. Loc. 1925, c. 211; Pub. Loc. 1927, c. 614; 1931, c. 136, s. 1; C. S. 4480.)

Cross References.—As to similar provisions for master and servants, see § 14-347 et seq. As to ejectment of tenant, see § 42-26 and annotation thereto.

Editor's Note.—This section was amended by Public Laws 1920 Ex. Sess., ch. 26, and Lee county added to the list of counties to which its provisions are applicable. In 1925, Public Laws 1925, ch. 285, section 2, Randolph County was added thereto. Public-Local Laws, 1925, ch. 211, added Stokes and Surry counties, and Alamance was added by Public-Local Laws, 1927, ch. 614. The Act of 1931 added Vance County.

Constitutionality of Section.—The provisions of this section contravene Article I, section 16, of our State Constitution, prohibiting imprisonment for debt, except in cases of

fraud; and an indictment thereunder, without averment of fraud, will be quashed. *State v. Williams*, 150 N. C. 802, 63 S. E. 949; *Minton v. Early*, 183 N. C. 199, 111 S. E. 347.

Jurisdiction.—A court of a justice of the peace has final jurisdiction of a willful abandonment of crop in violation of this section. *State v. Wilkes*, 149 N. C. 453, 62 S. E. 430.

Indictment Insufficient.—An indictment under the provisions of this section which does not charge that the abandonment of the crop by tenant or cropper was "without cause" and "before paying for such advances," should be quashed as insufficient. *State v. Williams*, 150 N. C. 802, 63 S. E. 949.

Cited in concurring opinion of Stacy, C. J., in *State v. Yarboro*, 194 N. C. 498, 506, 140 S. E. 216.

§ 14-359. Local: Tenant neglecting crop; landlord failing to make advances; harboring or employing delinquent tenant.—If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully refuse to cultivate such crops or negligently or willfully abandon the same without good cause and before paying for such advances; or if any landlord who induces another to become tenant or cropper by agreeing to furnish him advances to enable him to make a crop, shall willfully fail or refuse without good cause to furnish such advances according to his agreement; or if any person shall entice, persuade or procure any tenant, lessee or cropper, who has made a contract agreeing to cultivate the land of another, to abandon or to refuse or fail to cultivate such land, or after notice shall harbor or detain on his own premises, or on the premises of another, any such tenant, lessee or cropper, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars or imprisoned not more than thirty days. Any person who employs a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof. This section shall apply only to the following counties: Washington, Cabarrus, Alamance, Davidson, Harnett, Wake, Hyde, Anson, Hertford, Sampson, Franklin, Union, Richmond, Moore, Lincoln, Rowan, Rutherford, Halifax, Rockingham, Vance, Lee, Stokes, Granville, Randolph, Person and Stanly. (Rev., s. 3367; 1905, c. 299, ss. 1-7; 1907, c. 84, s. 2; 1907, c. 238, s. 1; 1907, c. 595, s. 2; 1907, cc. 543, 810; Ex. Sess. 1920, cc. 20, 26; 1923, c. 32; 1925, c. 285, s. 3; Pub. Loc. 1927, c. 614; 1929, c. 5, s. 1; 1931, c. 44; 1931, c. 136, s. 2; 1939, c. 95; C. S. 4481.)

Cross Reference.—As to willful destruction of landlord's property by the tenant, see § 42-11.

Editor's Note.—The counties of Randolph and Lee were added hereto by Public Laws 1920, Ex. Sess., ch. 20, 26; Granville and Person counties were added by Public Laws 1923, ch. 32; and Randolph County was added by Public Laws 1925, ch. 285, § 3. Alamance was added by Public Local Laws, 1927, ch. 614. The Act of 1929 added Stanley County, and in 1931 Stokes and Vance counties were added. The 1939 amendment added Washington, Cabarrus, Davidson and Harnett counties.

Cited in opinion of Stacy, C. J., in *State v. Yarboro*, 194 N. C. 498, 506, 140 S. E. 216.

Art. 47. Cruelty to Animals.

§ 14-360. Cruelty to animals; construction of section.—If any person shall willfully overdrive, overload, wound, injure, torture, torment, deprive of necessary sustenance, cruelly beat, needlessly mutilate or kill or cause or procure to be overdriven, overloaded, wounded, injured, tortured, tormented, deprived of necessary sustenance, cruelly beaten,

needlessly mutilated or killed as aforesaid, any useful beast, fowl or animal, every such offender shall for every such offense be guilty of a misdemeanor. In this section, and in every law which may be enacted relating to animals, the words "animal" and "dumb animal" shall be held to include every living creature; the words "torture," "torment" or "cruelty" shall be held to include every act, omission or neglect whereby unjustifiable physical pain, suffering or death is caused or permitted; but such terms shall not be construed to prohibit lawful shooting of birds, deer and other game for human food. (Rev., s. 3299; Code, ss. 2482, 2490; 1891, c. 65; 1881, c. 34, s. 1; 1881, c. 368, ss. 1, 15; 1907, c. 42; C. S. 4483.)

Cross Reference.—As to livestock, see also § 14-366.

In General.—Anger does not excuse the killing when it was wilful and needless. *State v. Neal*, 120 N. C. 613, 27 S. E. 81. And under such circumstances the intent is immaterial. Id. In order to convict, however, there must be a finding that the act was "wilfully and unlawfully" done. *State v. Tweedy*, 115 N. C. 704, 20 S. E. 183. Unnecessary suffering knowingly and willfully permitted constitutes the offense. *State v. Porter*, 112 N. C. 887, 16 S. E. 915.

The Indictment.—The facts constituting torturing, tormenting or cruel conduct must be set out when such conduct is charged. *State v. Watkins*, 101 N. C. 702, 8 S. E. 346. A charge that defendant "did unlawfully and wilfully beat" was held sufficient in *State v. Alleson*, 90 N. C. 733.

Injury to Prevent Depredations.—The fact that cows (*State v. Butts*, 92 N. C. 784) or chickens (*State v. Neal*, 120 N. C. 613, 27 S. E. 81) were trespassing on defendant's property is not a defense to an action under this section, where the killing or wounding was unnecessary. See also, *State v. Smith*, 156 N. C. 628, 72 S. E. 321.

Illustrations.—Shooting pigeons for sport (*State v. Porter*, 112 N. C. 887, 16 S. E. 915) and poisoning chickens (*State v. Bossee*, 145 N. C. 579, 59 S. E. 879) have been held violations of the section.

Hitting a runaway horse with a rock, however, has been held insufficient to sustain a directed verdict—the question of the wilful purpose to injure being for the jury. *State v. Isley*, 119 N. C. 862, 26 S. E. 35.

A dog is a useful animal within the meaning of this section. *State v. Dickens*, 215 N. C. 303, 1 S. E. (2d) 837.

Unnecessary to Show Dog Has Pecuniary Value.—It is unnecessary to show that a dog is of a pecuniary value to the owner to maintain an indictment for cruelty forbidden by the section. *State v. Smith*, 156 N. C. 628, 72 S. E. 321.

The word "wilful" as used in criminal statutes signifies more than the mere intention to do a thing, and means the commission of the act "without just cause, excuse, or justification." *State v. Dickens*, 215 N. C. 303, 1 S. E. (2d) 837.

Justification.—In a prosecution for needlessly killing a useful dog, evidence that a dog, not identified as the dog killed, had frequented the place where defendant was employed, resulting in unpleasant odors around the place, and that the dog had barked at night, is properly excluded from the evidence upon the state's objection, since the evidence does not tend to establish justification, the presence of the dog on the premises giving the defendant only the right to drive him away but not to injure him unnecessarily, and previous offenses committed by the dog not being justification for killing him, the right to kill being founded on the immediate necessity of protecting property, a person, or another animal. *State v. Dickens*, 215 N. C. 303, 1 S. E. (2d) 837.

Applied in *State v. Holt*, 90 N. C. 749.

§ 14-361. Instigating or promoting cruelty to animals.—If any person shall willfully set on foot, or instigate, or move to, carry on, or promote, or engage in, or do any act towards the furtherance of any act of cruelty to any animal, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3300; Code, s. 2487; 1891, c. 65; 1881, c. 368, s. 6; C. S. 4484.)

Cited in *State v. Porter*, 112 N. C. 887, 16 S. E. 915.

§ 14-362. Bear-baiting, cock-fighting and similar

amusements.—If any person shall keep, or use, or in any way be connected with, or interested in the management of, or shall receive money for the admission of any person to, any place kept or used for the purpose of fighting, or baiting any bull, bear, dog, cock, or other animal; or if any person shall encourage, aid or assist therein, or shall permit or suffer any place to be so kept or used, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3301; Code, s. 2483; 1891, c. 65; 1881, c. 368, s. 2; C. S. 4485.)

§ 14-363. Conveying animals in a cruel manner.—If any person shall carry or cause to be carried in or upon any vehicle or other conveyance, any animal in a cruel or inhuman manner, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. Whenever an offender shall be taken into custody therefor by any officer, the officer may take charge of such vehicle or other conveyance and its contents, and deposit the same in some safe place of custody. The necessary expenses which may be incurred for taking charge of and keeping and sustaining the vehicle or other conveyance shall be a lien thereon, to be paid before the same can be lawfully reclaimed; or the said expenses, or any part thereof remaining unpaid, may be recovered by the person incurring the same of the owner of such animal in an action therefor. (Rev., s. 3302; Code, s. 2486; 1891, c. 65; 1881, c. 368, s. 5; C. S. 4486.)

Art. 48. Animal Diseases.

§ 14-364. Selling, using or exposing diseased animals.—If any person shall sell, offer for sale, use or expose, or cause or procure to be sold, offered for sale, used or exposed, any horse or other animal having the disease known as glanders or farcy, or any other contagious or infectious disease known by such person to be dangerous to the life, or which shall be diseased past recovery, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3295; Code, s. 2488; 1891, c. 65; 1881, c. 368, s. 7; C. S. 4487.)

Art. 49. Protection of Livestock Running at Large.

§ 14-365. Failing to show hide and ears of livestock killed while running at large.—If any person shall kill any neat cattle, sheep or hogs in the woods or range, and shall for two days fail to show the hide and ears to the nearest justice or to two freeholders, he shall be guilty of a misdemeanor. (Rev., s. 3315; Code, s. 2318; R. C., c. 17, s. 2; 1901, c. 546; 1907, c. 821; C. S. 4493.)

Local Modification.—Tyrrell: C. S. 4493.

§ 14-366. Molesting or injuring livestock.—If any person shall unlawfully and on purpose drive any livestock, lawfully running at large in the range, from said range, or shall kill, maim or injure any livestock, lawfully running at large in the range or in the field or pasture of the owner, whether done with actual intent to injure the owner, or to drive the stock from the range, or with any other unlawful intent, every such person,

his counselors, aiders, and abettors, shall be guilty of a misdemeanor: Provided, that nothing herein contained shall prohibit any person from driving out of the range any stock unlawfully brought from other states or places. In any indictment under this section it shall not be necessary to name in the bill or prove on the trial the owner of the stock molested, maimed, killed or injured. (Rev., s. 3314; Code, s. 1002; 1885, c. 383; 1887, c. 368; 1895, c. 190; R. C., c. 34, s. 104; 1850, c. 94, ss. 1, 2; C. S. 4494.)

Local Modification.—Graham, Haywood, Jackson, Swain, Transylvania: C. S. 4494.

Cross Reference.—As to cruelty to animals, see § 14-360.

Cited or applied in State v. Pollard, 83 N. C. 598; State v. Tweedy, 115 N. C. 704, 20 S. E. 183.

§ 14-367. Altering the brands of and misbranding another's livestock.—If any person shall knowingly alter or deface the mark or brand of any other person's horse, mule, ass, neat cattle, sheep, goat, or hog, or shall knowingly mismark or brand any such beast that may be unbranded or unmarked, not properly his own, with intent to defraud any other person, the person so offending shall be guilty of a felony, and shall be punished as if convicted of larceny. (Rev., s. 3317; Code, s. 1001; R. C., c. 34, s. 57; 1797, c. 485, s. 2; C. S. 4495.)

Cross Reference.—As to cattle brands, their registration, defacement, etc., see § 80-45 et seq.

§ 14-368. Placing poisonous shrubs and vegetables in public places.—If any person shall throw into or leave exposed in any public square, street, lane, alley or open lot in any city, town or village, or in any public road, any mockorange or other poisonous shrub, plant, tree or vegetable, he shall be liable in damages to any person injured thereby and shall also be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court. (Rev., s. 3318; 1887, c. 338; C. S. 4496.)

Cross Reference.—As to putting out poisonous food stuffs, see § 14-401.

§ 14-369. Wounding, capturing or killing of homing pigeons prohibited.—It shall be unlawful for any person or persons at any time or in any manner to hurt, pursue, take, capture, wound, maim, disfigure or kill any homing pigeon then and there owned by another person, or to trap the same by use of any pit, pitfall, scaffold, cage, snare, trap, net, baited hook or similar trapping device, or make use of any drug, poison, explosive or chemical for the purpose of injuring, capturing or killing any such homing pigeon. Any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished in the discretion of the court. (1941, c. 10.)

Art. 50. Protection of Letters, Telegrams, and Telephone Messages.

§ 14-370. Wrongfully obtaining or divulging knowledge of telephonic messages.—If any person wrongfully obtains, or attempts to obtain, any knowledge of a telephonic message by connivance with a clerk, operator, messenger or other employee of a telephone company, or, being such clerk, operator, messenger or employee, willfully divulges to any but the person for whom it was intended, the contents of a telephonic message or

dispatch intrusted to him for transmission or delivery, or the nature thereof, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the court. (Rev., s. 3848; 1903, c. 599; C. S. 4497.)

§ 14-371. Violating privacy of telegraphic messages; failure to transmit and deliver same promptly.—If any person wrongfully obtains, or attempts to obtain, any knowledge of a telegraphic message by connivance with a clerk, operator, messenger, or other employee of a telegraph company, or, being such clerk, operator, messenger, or other employee, willfully divulges to any but the person for whom it was intended, the contents of a telegraphic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, or willfully refuse or neglect duly to transmit or deliver the same, he shall be guilty of a misdemeanor. (Rev., s. 3846; 1889, c. 41, s. 1; C. S. 4498.)

Cross Reference.—As to penalty for failure to transmit an intrastate telegraphic message within a reasonable time, see § 56-11.

§ 14-372. Unauthorized opening, reading or publishing of sealed letters and telegrams.—If any person shall willfully, and without authority, open or read, or cause to be opened or read, a sealed letter or telegram, or shall publish the whole or any portion of such letter or telegram, knowing it to have been opened or read without authority, he shall be guilty of a misdemeanor. (Rev., s. 3728; 1889, c. 41, s. 2; C. S. 4499.)

The Indictment.—It is necessary to charge, in an indictment for a violation of this section and to prove upon the trial, that the letter or telegram was "sealed," or that it was published with knowledge that it had been opened and read without authority. *State v. Bagwell*, 107 N. C. 859, 12 S. E. 254.

Art. 51. Protection of the Game of Baseball.

§ 14-373. Bribery of baseball players, umpires, and officials.—If any person shall bribe or offer to bribe, any baseball player with the intent to influence his play, action or conduct in any baseball game, or if any person shall bribe or offer to bribe any umpire of a baseball game, with intent to influence his decision or bias his opinion or judgment, in relation to any baseball game, or if any person shall bribe or offer to bribe any manager, or other official of a baseball club, league, or association by whatsoever named called conducting said game of baseball, such person shall be guilty of a felony, and, upon conviction, shall be punished by imprisonment in the state penitentiary for not less than one nor more than five years. (1921, c. 23, s. 1; C. S. 4499(a).)

§ 14-374. Acceptance of bribes by baseball players, umpires, or officials.—If any baseball player shall accept, or agree to accept, a bribe offered for the purpose of influencing his play, action or conduct in any baseball game, or if any umpire of a baseball game shall accept or agree to accept a bribe offered for the purpose of influencing his decision or biasing his opinions, rulings or judgment, or if any manager of a baseball club, or club or league official shall accept or agree to accept any bribe offered for the purpose of inducing him to lose or cause to be lost any baseball game, as set forth in § 14-373 of this article, such baseball player, manager, official, or umpire shall be

guilty of a felony, and upon conviction, shall be punished by confinement in the state penitentiary for not less than one year nor more than five years. (1921, c. 23, s. 2; C. S. 4499(b).)

§ 14-375. Completion of offenses set out in sections 14-373, 14-374.—To complete the offenses mentioned in §§ 14-373, 14-374, it shall not be necessary that the baseball player, manager, umpire, or official, shall, at the time, have been actually employed, selected, or appointed to perform their respective duties; it shall be sufficient if the bribe be offered, accepted or agreed to with the view of the probable employment, selection or appointment of the person to whom the bribe is offered or by whom it is accepted. Neither shall it be necessary that such baseball player, umpire or manager actually play or participate in a game or games concerning which said bribe is offered or accepted; it shall be sufficient if the bribe be given, offered, or accepted in view of his or their possibly participating therein. (1921, c. 23, s. 3; C. S. 4499(c).)

§ 14-376. "Bribe" defined.—By a "bribe" as used in this article, is meant any gift, emolument, money or thing of value, testimonial, privilege, appointment or personal advantage, or the promise of either, bestowed or promised for the purpose of influencing, directly or indirectly, any baseball player, manager, umpire, club or league official, to see which game an admission fee may be charged, or in which game of baseball any player, manager or umpire is paid any compensation for his services. Said bribe as defined in this article need not be direct; it may be such as is hidden under the semblance of a sale, bet, wager, payment of a debt, or in any other manner designed to cover the true intention of the parties. (1921, c. 23, s. 4; C. S. 4499(d).)

§ 14-377. Intentional losing of baseball game or aiding therein.—If any baseball player, manager or club official shall commit any willful act of omission or commission in playing or directing the playing of a baseball game with intent to cause the ball club with which he is affiliated to lose a baseball game; or if any umpire officiating in a baseball game, or league official, shall commit any willful act connected with his official duties for the purpose and with the intent to cause a baseball club to win or lose a baseball game which it would not otherwise have won or lost under the rules governing the playing of said game, he or they shall be guilty of a felony, and upon conviction, shall be punished by imprisonment in the state penitentiary for not less than one nor more than five years. (1921, c. 23, s. 5; C. S. 4499(e).)

§ 14-378. Venue.—In all prosecutions under this article the venue may be laid in any county where the bribe herein referred to was given, offered or accepted, or in which the baseball game was played in relation to which the bribe was offered, given or accepted, or the acts referred to in § 14-377 committed. (1921, c. 23, s. 6; C. S. 4606(c).)

§ 14-379. Bonus or extra compensation.—Nothing in this article shall be construed to prohibit the giving or offering of any bonus or extra compensation to any manager or baseball player by any person to encourage such manager or player

to a higher degree of skill, ability or diligence in the performance of his duties. (1921, c. 23, s. 7; C. S. 4499(f).)

§ 14-380. Application of article. — This article shall apply only to baseball league and club officials, umpires, managers and players who are officials of, or employed by, baseball clubs who are members of "The National Association of Professional Baseball Leagues." (1921, c. 23, s. 7a; C. S. 4499(g).)

Art. 52. Miscellaneous Police Regulations.

§ 14-381. Desecration of state and national flag. —Any person who in any manner, for exhibition or display, shall place or cause to be placed any word, figure, mark, picture, design, drawing, or any advertisement of any nature upon any flag, standard, color or ensign of the United States or state flag or ensign of this state, or shall expose or cause to be exposed to public view any such flag, standard, color or ensign upon which shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed or annexed, any word, figure, mark, picture, design or drawing or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale or to give away, or for use for any purpose, any article or substance of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached or otherwise placed a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark or distinguish the article or substance upon which it is so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon or cast contempt, either by words or act, upon any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding fifty dollars or by imprisonment for not more than thirty days. Any person violating this section shall also forfeit a penalty of fifty dollars for each offense, to be recovered with costs in a civil action or suit in any court having jurisdiction. Such action or suit may be brought by and in the name of any citizen of this state, and such penalty, when collected, less the costs and expenses of the action or suit, shall be paid one-half to the person suing and one-half to the school fund of the county in which suit was brought; and two or more penalties may be sued for and recovered in the same action or suit.

The words, flag, standard, color or ensign, as used in this section, shall include any flag, standard, color, ensign, or any picture or representation of any of them, made of any substance or represented on any substance, and of any size, evidently purporting to be a flag, standard, color or ensign of the United States of America, or a picture or a representation of any of them, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe it to represent the flag, colors, standard or ensign of the United States of America.

The possession by any person other than a public officer, as such, of a flag, standard, color, ensign,

article, substance, or thing, on which there is anything made unlawful by this section, shall be presumptive evidence that the same is in violation of this section. (1917, c. 271; C. S. 4500.)

§ 14-382. Pollution of water or lands used for dairy purposes.—It shall be unlawful for any person, firm, or corporation owning lands adjoining the lands of any person, firm, or corporation which are or may be used for dairy purposes or for grazing milk cows, to dispose of or permit disposal of any animal, mineral, chemical, or vegetable refuse, sewage or other deleterious matter in such way as to pollute the water on the lands so used or which may be used for dairy purposes or for grazing milk cows, or to render unfit or unsafe for use the milk produced from cows feeding upon the grasses and herbage growing on such lands. This section shall not apply to incorporated towns maintaining a sewer system. Anyone violating the provisions of this section shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned for not more than thirty days, or both, and each day that such pollution is committed or exists shall constitute a separate offense. (1919, c. 222; C. S. 4501.)

Cross References.—As to pollution of waters for the purpose of killing or catching fish, see §§ 113-245 and 113-170. As to discharge of deleterious matter into waters, see § 113-172.

§ 14-383. Cutting timber on town watershed without disposing of boughs and debris; misdemeanor.—Any person, firm or corporation owning lands or the standing timber on lands within four hundred feet of any watershed held or owned by any city or town, for the purpose of furnishing a city or town water supply, upon cutting or removing the timber or permitting the same cut or removed from lands so within four hundred feet of said watershed, or any part thereof, shall, within three months after cutting, or earlier upon written notice by said city or town, remove or cause to be burned under proper supervision all tree-tops, boughs, laps and other portions of timber not desired to be taken for commercial or other purposes, within four hundred feet of the boundary line of such part of such watershed as is held or owned by such town or city, so as to leave such space of four hundred feet immediately adjoining the boundary line of such watershed, so held or owned, free and clear of all such tree-tops, laps, boughs and other inflammable material caused by or left from cutting such standing timber, so as to prevent the spread of fire from such cutover area and the consequent damage to such watershed. Any such person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor. (1913, c. 56; C. S. 4502.)

In General.—The section constitutes a valid exercise of the police power and is constitutional. *State v. Perley*, 173 N. C. 783, 92 S. E. 504.

The motive is immaterial and where the intent to violate the section is shown the defendant is punishable. *Id.*

§ 14-384. Injuring notices and advertisements.—If any person shall wantonly or maliciously mutilate, deface, pull or tear down, destroy or otherwise damage any notice, sign or advertisement, unless immoral or obscene, whether put up by an officer of the law in performance of the duties of his office or by some other person for a lawful purpose, before the object for which such

notice, sign or advertisement was posted shall have been accomplished, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding twenty-five dollars or imprisoned not exceeding thirty days at the discretion of the court. Nothing herein contained shall apply to any person mutilating, defacing, pulling or tearing down, destroying or otherwise damaging notices, signs or advertisements put upon his own land or lands of which he may have charge or control, unless consent of such person to put up such notice, sign or advertisement shall have first been obtained, except those put up by an officer of the law in the performance of the duties of his office. (Rev., s. 3709; 1885, c. 302; C. S. 4503.)

Cross Reference.—As to the unlawful posting of advertisements, see § 14-145.

§ 14-385. Defacing or destroying public notices and advertisements.—If any person shall willfully and unlawfully deface, tear down, remove or destroy any legal notice or advertisement authorized by law to be posted by any officer or other person, the same being actually posted at the time of such defacement, tearing down, removal or destruction, during the time for which such legal notice or advertisement shall be authorized by law to be posted, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3710; Code, s. 981; 1876-7, c. 215; C. S. 4504.)

§ 14-386. Erecting signals and notices in imitation of those of railroads.—No person, firm or corporation other than a railroad or street railway company shall, for advertisement or other purposes, erect and maintain on or near any highway any cross-arm post or other post or standard containing the words "Stop! Look! Listen!" or other such words or combinations of words in imitation of railroad signals or notices. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by fine or imprisonment, in the discretion of the court. (1917, c. 230; C. S. 4505.)

§ 14-387. Operating automobile while intoxicated.—Any person who shall, while intoxicated or under the influence of intoxicating liquors or biters, morphine or other opiates, operate a motor vehicle upon any public highway or cartway or other road, over which the public has a right to travel, of any county or the streets of any city or town in this State, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars or imprisoned not less than thirty days, or both, at the discretion of the court, and the judge shall upon conviction, deny said person or persons the right to drive a motor vehicle on any of the roads defined in this section for a period of not more than twelve months nor less than ninety days. (1919, c. 234; 1925, c. 283; 1927, c. 230, s. 1; C. S. 4506.)

Local Modification.—Gates: Pub. Loc. 1925, c. 41; Bertie: Pub. Loc. 1925, c. 27.

Cross Reference.—As to the revocation of driver's license for driving while intoxicated, see § 20-17.

Editor's Note.—This section was amended by Public Laws 1925, ch. 283 and cartways and other roads used by the public included herein. At the same time the provision, giving the judge the right to revoke for twelve months the right to drive an automobile, of any one found guilty of violating

this section, was added. The section was again amended in 1927 when the revocation of license was made mandatory upon the judge.

Operation of Vehicle Imports Motion.—In a prosecution under this section defendant testified that he was not driving the truck, but that the driver got out to examine the motor when the truck stalled, and that defendant placed his foot on the brake to keep the truck from rolling backward. The court charged the jury to the effect that holding his foot on the brake to keep the truck from rolling backward was an operation of the truck within the meaning of the statute. Held: The operation of a motor vehicle within the meaning of the statute imports motion of the vehicle, and does not include the acts of defendant as testified to by him. *State v. Hatcher*, 210 N. C. 55, 185 S. E. 435.

Jurisdiction of Municipal Court.—Where a statute creating a municipal court does not give it criminal jurisdiction over the offense described by this section, this jurisdiction is acquired by this section to the extent only of binding the defendant over to the superior court upon conviction. *State v. Jones*, 181 N. C. 543, 106 S. E. 827.

Policeman May Arrest without Warrant.—A policeman may arrest without a warrant a person in his presence violating this section. *State v. Loftin*, 186 N. C. 205, 119 S. E. 209.

Instruction.—In a prosecution for drunken driving, an instruction that defendant was under the influence of intoxicating liquor if he had drunk enough to make him act or think differently than he would have acted or thought if he had not drunk any, regardless of the amount he drank, is held without error. *State v. Harris*, 213 N. C. 648, 197 S. E. 142.

Sentence Not Reviewable on Appeal.—Where a statute leaves a punishment for its violation within the sound discretion of the trial court, the sentence imposed therein will not be reviewed by the Supreme Court on appeal where its exercise has not been grossly and palpably abused. *State v. Jones*, 181 N. C. 543, 106 S. E. 827.

Sentence Not Excessive.—A sentence to the county jail for a term of six months, and to be assigned to work on the public roads, upon defendant's plea of nolo contendere to a warrant charging him with the operation of an automobile upon the public highways while under the influence of intoxicating liquor, is not excessive. *State v. Parker*, 220 N. C. 416, 17 S. E. (2d) 475.

Manslaughter.—In a prosecution for manslaughter it was held that the violation of this section was not the proximate result of the fatal accident. *State v. Miller*, 220 N. C. 660, 18 S. E. (2d) 143.

Cited in *State v. McKnight*, 210 N. C. 57, 185 S. E. 437.

§ 14-388: Repealed by Session Laws 1943, c. 543.

§ 14-389. Sale of Jamaica ginger.—It shall be unlawful for any person, firm, or corporation to sell the compound known as Jamaica ginger except upon the prescription of a duly licensed and regularly practicing physician; the person, firm, or corporation selling Jamaica ginger upon prescription shall keep a list of said prescriptions, and shall allow said list to be examined by any officer of the law, and no prescription shall ever be filled but once; it shall be unlawful for any physician to give a prescription for Jamaica ginger except to a person directly under his care, and then only in good faith for medicinal purposes only. (1919, c. 288; Pub. Loc. 1913, c. 761; C. S. 4507.)

§ 14-390. Furnishing intoxicants, poisons or fire-arms to inmates of charitable and penal institutions.—If any person shall sell or give to any inmate of any charitable or penal institution any intoxicating drink or any narcotic, poison or poisonous substance, except upon the prescription of a physician, or shall give or sell to any such inmate any deadly weapon, or any cartridge or ammunition for firearms of any kind, he shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned at the discretion of the court; and if he be an officer or employee of any institution of the state, he shall be

dismissed from his office. (Rev., s. 3517; 1899, c. 1, s. 52; C. S. 4508.)

Cross Reference.—As to conveying messages, weapons, or instruments with which to effect an escape to prisoners, see § 14-258.

§ 14-391. Usurious loans on household and kitchen furniture or assignments of wages.—Any person, firm or corporation who shall lend money in any manner whatsoever by note, chattel mortgage, conditional sale or otherwise, upon any article of household or kitchen furniture or upon any assignment or sale of wages, earned or to be earned, and shall take, receive, reserve or charge a greater rate of interest than six per cent, either before or after the interest may accrue, or who shall refuse to give receipts for payments on interest or principal of such loan, or who shall fail and refuse to surrender the note and security when the same is paid off or a new note and mortgage is given in renewal, unless such new mortgage shall state the amount still due by the old note or mortgage and that the new one is given as additional security, shall be guilty of a misdemeanor, and in addition thereto shall forfeit double the interest which has been theretofore paid. (1907, c. 110; 1927, c. 72; C. S. 4509.)

Cross Reference.—As to interest in general, see § 24-1 et seq.

Editor's Note.—This section was broadened by the Public Laws of 1927, ch. 72, by the addition of the portion relating to the assignment of wages.

This section is constitutional. *State v. Davis*, 157 N. C. 648, 73 S. E. 130.

Interest Need Not Be Received.—The charge of the usurious interest constitutes the offense without the necessity of having received it. *State v. Davis*, 157 N. C. 648, 73 S. E. 130.

§ 14-392. Digging ginseng on another's land during certain months.—All persons shall be allowed to dig ginseng at any time of the year for the purpose of replanting the same. If any person dig ginseng, except on his own premises, or for the purpose of replanting the same, between the first day of April and the first day of September, he shall forfeit and pay the sum of ten dollars for each day's or part of a day's digging, and shall also be guilty of a misdemeanor. (Rev., ss. 3502, 3714; Code, s. 1053; 1866-7, c. 30; 1905, c. 211; C. S. 4510.)

Cross Reference.—As to the larceny of ginseng, see § 14-79.

§ 14-393. Purchase of ginseng; register to be kept; details.—Every person, firm or corporation buying ginseng in any quantity shall keep a register, and shall keep therein a true and accurate record of each purchase, showing the amount of the ginseng, the name and residence of the person from whom purchased, the source from which obtained, and amount paid for the same and the date of the purchase. A failure to comply with the above requirements, or the making of a false entry in regard to the purchasing of such ginseng, shall be a misdemeanor, punishable in the discretion of the court. (1923, c. 199; C. S. 4510(a).)

Editor's Note.—This section supplements section 14-392, relative to digging ginseng and section 14-79 relative to the larceny thereof, by requiring the accurate record.

§ 14-394. Anonymous or threatening letters, mailing or transmitting.—It shall be unlawful for any person, firm, or corporation, or any association of persons in this state, under whatever name styled, to write and transmit any letter, note, or

writing, whether written, printed, or drawn, without signing his, her, their, or its true name thereto, threatening any person or persons, firm or corporation, or officers thereof with any personal injury or violence or destruction of property of such individuals, firms, or corporations, or using therein any language or threats of any kind or nature calculated to intimidate or place in fear any such person, firms or corporations, or officers thereof, as to their personal safety or the safety of their property, or using vulgar or obscene language, or using such language which if published would bring such persons into public contempt and disgrace, and any person, firm, or corporation violating the provisions of this section shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 112; C. S. 4511(a).)

§ 14-395. Commercialization of American Legion emblem; wearing by non-members.—It shall be unlawful for any one not a member of the American Legion, an organization consisting of ex-members of the army, navy and marine corps, who served as members of such organizations in the recent world war, to wear upon his or her person the recognized emblem of the American Legion, or to use the said emblem for advertising purposes, or to commercialize the same in any way whatsoever; or to use the said emblem in display upon his or her property or place of business, or at any place whatsoever. Any one violating the provisions of this section shall be guilty of a misdemeanor and fined not more than fifty dollars (\$50.00) or imprisoned not more than thirty days. (1923, c. 89; C. S. 4511(b).)

§ 14-396. Dogs on "Capitol Square" worrying squirrels.—It shall be unlawful for any owner or keeper of a dog to permit the same to run at large on the Capitol grounds known as "Capitol Square" or to be thereon unless on leash or otherwise in the immediate physical control of said owner or keeper, or to pursue, worry or harass any squirrel or other wild animal kept on said grounds. Any person violating the provisions of this section shall be guilty of a misdemeanor punishable by fine not exceeding fifty dollars or imprisonment not exceeding thirty days. (1925, c. 289.)

§ 14-397. Use of name of denominational college in connection with dance hall.—It shall be unlawful for any person, firm, corporation, club or society, by whatsoever name called, to use in connection with any dance, or dance hall, by advertisement, announcement, or otherwise, the name of any college, or any class or organization of any college operated and conducted by a religious denomination, unless the written permission of the Dean of such college is given, permitting and allowing the use of the name of such denominational college, or a class or organization of the same in connection with such dance, or dance hall. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and subject to a fine of not less than one hundred dollars (\$100) or imprisonment for not less than sixty days. (1927, c. 6.)

§ 14-398. Theft or destruction of property of public libraries, museums, etc.—Any person who shall steal or unlawfully take or detain, or wil-

fully or maliciously or wantonly write upon, cut, tear, deface, disfigure, soil, obliterate, break or destroy, or who shall sell or buy or receive, knowing the same to have been stolen, any book, document, newspaper, periodical, map, chart, picture, portrait, engraving, statue, coin, medal, apparatus, specimen, or other work of literature or object of art or curiosity deposited in a public library, gallery, museum, collection, fair or exhibition, or in any department or office of state or local government, or in a library, gallery, museum, collection, or exhibition, belonging to any incorporated college or university, or any incorporated institution devoted to educational, scientific, literary, artistic, historical or charitable purposes, shall, if the value of the property stolen, detained, sold, bought or received knowing same to have been stolen, or if the damage done by writing upon, cutting, tearing, defacing, disfiguring, soiling, obliterating, breaking or destroying any such property, shall not exceed fifty dollars (\$50.00), be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. If the value of the property stolen, detained, sold or received knowing same to have been stolen, or the amount of damage done in any of the ways or manners hereinabove set out, shall exceed the sum of fifty dollars (\$50.00), the person committing same shall be guilty of a felony, and shall upon conviction be punished in accordance with the laws applicable thereto. (1935, c. 300; 1943, c. 543.)

Editor's Note.—The 1943 amendment increased the amounts mentioned in this section from twenty to fifty dollars.

§ 14-399. Placing trash, refuse, et cetera, within one hundred and fifty yards of hard-surfaced highway.—It is unlawful for any person, firm, organization or private corporation, or for the governing body, agents or employees of any municipal corporation, to place or leave or cause to be placed or left, temporarily or permanently, any trash, refuse, garbage, scrapped automobile, truck or part thereof within one hundred and fifty yards of a hard-surfaced highway where the highway is outside of an incorporated town, unless the trash, refuse, garbage, scrapped automobile, truck or part thereof, is concealed from the view of persons on the highway.

This section does not apply to domestic trash or garbage placed for removal, nor to junk yards which are the property of bona fide junk dealers and which are properly screened or fenced from the view of persons on the highway.

The placing or leaving of the articles or matter forbidden by this section shall, for each day or portion thereof that the act is done, constitute a separate offense.

A violation of this section is punishable by a fine of not less than ten dollars (\$10.00) and not more than fifty dollars (\$50.00) for each offense.

This section shall not apply to the Counties of Alleghany, Ashe, Avery, Bertie, Brunswick, Buncombe, Cabarrus, Caswell, Columbus, Davidson, Duplin, Forsyth, Franklin, Gates, Granville, Guilford, Halifax, Hyde, Jackson, Lenoir, Lincoln, Macon, Madison, Martin, Mitchell, Montgomery, Moore, Person, Richmond, Rockingham, Rowan, Scotland, Stanly, Stokes, Surry, Swain, Transyl-

vania, Vance, Warren, Watauga, Wilson, and Yancey. (1935, c. 457; 1937, c. 446; 1943, c. 543.)

Editor's Note.—The 1937 amendment struck out "Anson" from the list of excepted counties. The 1943 amendment rewrote the section.

§ 14-400. Tattooing prohibited.—It shall be unlawful for any person or persons to tattoo the arm, limb, or any part of the body of any other person under twenty-one years of age. Any one violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1937, c. 112, ss. 1, 2.)

§ 14-401. Putting poisonous foodstuffs, etc., in certain public places, prohibited.—It shall be unlawful for any person, firm or corporation to put or place any strychnine, other poisonous compounds or ground glass on any beef or other foodstuffs of any kind in any public square, street, lane, alley or on any lot in any village, town or city or on any public road, open field or yard in the country. Any person, firm or corporation who violates the provisions of this section shall be liable in damages to the person injured thereby and also shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court. This section shall not apply to the poisoning of insects or worms for the purpose of protecting crops or gardens by spraying plants, crops or trees, nor to poisons used in rat extermination. (1941, c. 181.)

Editor's Note.—For comment on this enactment, see 19 N. C. Law Rev. 479.

§ 14-401.1. Misdemeanor to tamper with examination questions.—Any person who purloins, steals, buys, receives, or sells, gives or offers to buy, give, or sell any examination questions or copies thereof of any examination provided and prepared by law before the date of the examination for which they shall have been prepared, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1917, c. 146, s. 10; C. S. 5658.)

§ 14-401.2. Misdemeanor for detective to collect claims, accounts, etc.—It shall be unlawful for any person, firm, or corporation, who or which is engaged in business as a detective, detective agency, or what is ordinarily known as "secret service work," or conducts such business, to engage in the business of collecting claims, accounts, bills, notes, or other money obligations for others, or to engage in the business known as a collection agency. Violation of the provisions hereof shall be a misdemeanor, punishable by a fine or imprisonment, or both, in the discretion of the court. (1943, c. 383.)

Art. 53. Sale of Weapons.

§ 14-402. Sale of certain weapons without permit forbidden.—It shall be unlawful for any person, firm, or corporation in this state to sell, give away, or dispose of, or to purchase or receive, at any place within the state from any other place within or without the state, unless a license or permit therefor shall have first been obtained by such purchaser or receiver from the clerk of the superior court of the county in which such pur-

chase, sale, or transfer is intended to be made, any pistol, so-called pump-gun, bowie knife, dirk, dagger or metallic knucks.

It shall be unlawful for any person or persons to receive from any postmaster, postal clerk, employee in the parcel post department, rural mail carrier, express agent or employee, railroad agent or employee, within the state of North Carolina any pistol, so-called pump-gun, bowie knife, dirk, dagger or metallic knucks without having in his or their possession and without exhibiting at the time of the delivery of the same and to the person delivering the same, the permit from the clerk of the superior court as provided in section 14-403. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars nor more than two hundred dollars, or imprisoned not less than thirty days nor more than six months, or both, in the discretion of the court. (1919, c. 197, s. 1; 1923, c. 106; C. S. 5106.)

Editor's Note.—This section was amended and strengthened by Public Laws 1923, ch. 106, the second paragraph being a new provision added by that act.

"The amendment makes it a misdemeanor, not only to sell such deadly weapons without a license, but also to receive them, when sent by mail, express or freight, without exhibiting a permit or license." 1 N. C. Law Rev. 285.

§ 14-403. Permit issued by clerk of court; form of permit.—The clerks of the superior courts of any and all counties of this state are hereby authorized and directed to issue to any person, firm, or corporation in any such county a license or permit to purchase or receive any weapon mentioned in this article from any person, firm, or corporation offering to sell or dispose of the same, which said license or permit shall be in the following form, to wit:

North Carolina,
.....County.
I,....., clerk of the Superior Court of said county, do hereby certify that..... whose place of residence is..... Street, in (or) in Township.....County, North Carolina having this day satisfied me as to his, her (or) their good moral character, and that the possession of one of the weapons described is necessary for self-defense or the protection of the home, a license or permit is therefore hereby given said to purchase one pistol. (or if any other weapon is named strike out the word pistol).....from any person, firm or corporation authorized to dispose of the same.
This.....day of....., 19....
.....
Clerk Superior Court.
(1919, c. 197, s. 2; C. S. 5107.)

§ 14-404. Applicant must be of good moral character; weapon for defense of home; clerk's fee.—Before the clerk of the superior court shall issue any such license or permit he shall fully satisfy himself by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant therefor, and that such person, firm, or corporation requires the possession of the weapon mentioned for protection of the home. If said clerk shall not be so fully satisfied, he shall refuse to issue said license or permit: Provided, that nothing

in this article shall apply to officers authorized by law to carry firearms. The clerk shall charge for his services upon issuing such license or permit a fee of fifty cents. (1919, c. 197, s. 3; C. S. 5108.)

§ 14-405. Record of permits kept by clerk.—The clerk of the superior court shall keep a book, to be provided by the board of commissioners of each county, in which he shall keep a record of all licenses or permits issued under this article, including the name, date, place of residence, age, former place of residence, etc., of each such person, firm, or corporation to whom or which a license or permit is issued. (1919, c. 197, s. 4; C. S. 5109.)

§ 14-406. Dealer to keep record of sales.—Every dealer in pistols, pistol cartridges and other weapons mentioned in this article shall keep an accurate record of all sales thereof, including the name, place of residence, date of sale, etc., of each person, firm, or corporation to whom or which such sales are made, which record shall be open to the inspection of any duly constituted state, county or police officer, within this state. (1919, c. 197, s. 5; C. S. 5110.)

§ 14-407. Weapons to be listed for taxes.—During the period of listing taxes in each year the owner or person in possession or having the custody or care of any weapon mentioned in this article is required to list the same specifically, as is now required for listing personal property for taxes. Any person listing any such weapon for taxes shall be required to designate his place of residence, including local street address. (1919, c. 197, s. 6; C. S. 5111.)

§ 14-408. Violation of sections 14-406 or 14-407 a misdemeanor.—Any person, firm, or corporation violating any of the provisions of §§ 14-406 or 14-407 shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court. (1919, c. 197, s. 7; C. S. 5112.)

§ 14-409. Machine guns and other like weapons.—It shall be unlawful for any person, firm or corporation to manufacture, sell, give away, dispose of, use or possess machine guns, sub-machine guns, or other like weapons: Provided, however, that this section shall not apply to the following:

Banks, merchants, and recognized business establishments for use in their respective places of business, who shall first apply to and receive from the clerk of the superior court of the county in which said business is located, a permit to possess the said weapons for the purpose of defending the said business; officers and soldiers of the United States army, when in discharge of their official duties, officers and soldiers of the militia and the state guard when called into actual service, officers of the state, or of any county, city or town, charged with the execution of the laws of the state, when acting in the discharge of their official duties: Provided, further, that automatic shot-guns and pistols or other automatic weapons that shoot less than sixteen shots shall not be construed to be or mean a machine gun or sub-machine gun under this act; and that any bona fide resident of this state who now owns a machine gun used in former wars, as a relic or souvenir, may retain and keep same as his or her property without violating the provisions of this section up-

on his reporting said ownership to the clerk of the superior court of the county in which said person lives.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor and

shall be fined not less than five hundred (\$500.00) dollars, or imprisoned for not less than six months, or both, in the discretion of the court. (1933, c. 261, s. 1.)

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Art. 1. General Provisions.

§ 15-1. Statute of limitations for misdemeanors.

—The crimes of deceit and malicious mischief, and the crime of petit larceny where the value of the property does not exceed five dollars, and all misdemeanors except malicious misdemeanors, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards: Provided, that if any indictment found within that time shall be defective, so that no judgment can be given thereon, another prosecution may be instituted for the same offense, within one year after the first shall have been abandoned by the state. (Rev., s. 3147; Code, s. 1177; R. C., c. 35, s. 8; 1826, c. 11; 1907, c. 408; 1943, c. 543; C. S. 4512.)

Cross Reference.—As to what are misdemeanors, see §§ 14-1 and 14-3 and annotations thereto.

Editor's Note.—The 1943 amendment rewrote the part of this section appearing before the proviso.

General Consideration.—The time between the commission of the offense and the bringing into court of the presentment should be estimated in determining whether the prosecution is barred. *State v. Cooper*, 104 N. C. 890, 891, 10 S. E. 510. The time stated in the indictment does not govern, *State v. Newsom*, 47 N. C. 173. The state can go back two

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years prior thereto although the indictment marks the beginning of the prosecution. *State v. Williams*, 151 N. C. 660, 65 S. E. 908. The statute does not begin to run from an entry of nol. pros. "with leave." *Id.*

Meaning of Malicious Misdemeanors.—When, in the former wording of this section, the Legislature used the words "other malicious misdemeanors," which immediately followed the words "malicious mischief," it evidently intended to describe offenses of which malice was a necessary ingredient to constitute the criminal act, as in the case of malicious mischief, and it was not the purpose to include within the exception from the operation of that section such offenses as would be misdemeanors, even in the absence of malice, and when malice, if present, would be only a circumstance of aggravation, which the Court might consider in imposing the punishment. *State v. Frisbee*, 142 N. C. 671, 675, 55 S. E. 722.

Meaning of "Secret Manner."—For construction of former provision, see *State v. Crowell*, 116 N. C. 1052, 1057, 21 S. E. 502. See for example *State v. Watts*, 32 N. C. 369.

"Deceit" as Used in Former Section.—There has never been such an indictable offense as "deceit" but the meaning of this section has always been that misdemeanors, the gist of which was a malice or deceit, were within the exception of the section as formerly appearing. In *State v. Christianbury*, 44 N. C. 46, it was held that there being no such offense as "deceit" it would apply to "cheating by false token" of which deceit was the gist but would not include "conspiracy to cheat" the gist of which offense is the conspiracy and the cheating but an aggravation. That decision did not restrict deceit to "cheating by false token"

but instanced that as an offence coming within the general description of misdemeanors by deceit. *State v. Crowell*, 116 N. C. 1052, 1056, 21 S. E. 502.

What Offences Barred.—Slandering an innocent woman is not barred within two years. *State v. Claywell*, 98 N. C. 731, 3 S. E. 920. No length of possession can bar an action to abate a public nuisance. *State v. Holman*, 104 N. C. 861, 10 S. E. 758. Seduction is not barred. *State v. Crowell*, 116 N. C. 1052, 21 S. E. 502.

A malicious assault cannot be the basis of an action two years after commission. *State v. Frisbee*, 142 N. C. 671, 55 S. E. 722.

The section has no application to conspiracy which is a felony. *State v. Mallett*, 125 N. C. 718, 34 S. E. 651. Bastardy proceedings are not governed by this section. *State v. Perry*, 122 N. C. 1043, 30 S. E. 139.

What Constitutes a Presentment.—See *State v. Morris*, 104 N. C. 837, 10 S. E. 454.

Trial on Second Bill after Two Years Barred.—Even an indictment within the time will not uphold a trial and conviction on a second bill found after the statutory period. *State v. Tomlinson*, 25 N. C. 32; *State v. Hedden*, 187 N. C. 803, 805, 123 S. E. 65.

Where a warrant charging a misdemeanor is amended to charge a felony, defendant's plea of the statute of limitations on the misdemeanor count becomes immaterial. *State v. Sanderson*, 213 N. C. 381, 196 S. E. 324.

Preliminary Warrants Not Included.—There is no saving clause in this section as to the effect of preliminary warrants before a justice of the peace or other committing magistrate, and the law must be construed and applied as written. There must be a presentment or indictment within two years from the time of the offense committed and not afterwards. *State v. Hedden*, 187 N. C. 803, 805, 123 S. E. 65.

Necessity for Pleading Statute.—For a person charged with the commission of a criminal offense to avail himself of the alleged running of the statute of limitations, he must either specifically plead it or in apt time bring it to the attention of the court. *State v. Brinkley*, 193 N. C. 747, 138 S. E. 138.

Whether or not the court below will allow the statute of limitations as a defense to the action, where the same has not been pleaded or mentioned until the argument before the jury, is a matter of discretion. *Privett v. Callo-way*, 75 N. C. 23.

Upon a trial on indictment for the sale of intoxicants where there was evidence of sales at undisclosed times, it would not be presumed that such sales occurred more than two years next preceding the prosecution when defendant has not pleaded this section, or in apt time called it to the court's attention or offered evidence as to the dates of sale. *State v. Colson*, 222 N. C. 28, 21 S. E. (2d) 808.

Wrong Name in Bill of Indictment.—A bill of indictment against a person by a wrong name, which is pleaded to in abatement, and the plea found, is, nevertheless, the same cause of action, and the elapse of two years is no bar to prosecution. *State v. Hailey*, 51 N. C. 42.

§ 15-2. Issue and return of criminal process.—All process, warrants and precepts, issued by any judge or justice of the peace, or clerk of any court, on any criminal prosecution, may issue at any time, and be made returnable to any day of the term of the court, to which such warrant, process, or precept is returnable. (Rev., s. 3148; Code, s. 1178; R. C., c. 35, s. 9; 1777, c. 115, s. 15; C. S. 4513.)

§ 15-3. Date of receipt and service indorsed on process.—Every sheriff or other officer shall indorse on all process and subpoenas issuing in criminal cases, whether for the state or defendant, the day when such process and subpoenas came to hand, and also the day of their execution; and on failure of any sheriff or other officer to perform either of said duties he shall forfeit and pay the sum of ten dollars for every case of neglect, to be recovered for the use of the state, in the same manner as forfeitures are recovered against sheriffs by parties in civil suits for failure to make due return of process delivered to them. (Rev., s.

3149; Code, s. 1179; R. C., c. 35, s. 10; 1850-1, c. 57; C. S. 4514.)

Cross References.—As to forfeitures in civil actions, see §§ 162-14 and 2-41. As to criminal liability for failure to return process, see § 14-242.

§ 15-4. Accused entitled to counsel.—Every person, accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense. (Rev., s. 3150; Code, s. 1182; R. C., c. 35, s. 13; 1777, c. 115, s. 85; C. S. 4515.)

Cross References.—As to court's power to limit argument, see § 34-14. As to constitutional provisions for counsel, see the N. C. Constitution, Art. I, § 11, and the sixth amendment to the U. S. Constitution.

A Constitutional Right.—In all criminal prosecution every man has the right * * * to have counsel for his defence. Const. Art. I, sec. 11. *State v. Sykes*, 79 N. C. 618, 619; see also *State v. Hardy*, 189 N. C. 799, 128 S. E. 152.

Stated in Powell v. Alabama, 287 U. S. 45, 63, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527.

§ 15-5. Fees allowed counsel assigned to defend in capital case.—Whenever an attorney is appointed by the judge to defend a person charged with a capital crime, he shall receive such fee for performing this service as the judge may allow; but the judge shall not allow any fee until he is satisfied that the defendant charged with the capital crime is not able to employ counsel. The fees so allowed by the judge shall be paid by the county in which the indictment was found. (1917, c. 247; 1937, c. 226; C. S. 4516.)

Local Modification.—Buncombe: 1941, c. 206; Franklin: 1941, c. 211; Wayne: 1941, c. 33.

Editor's Note.—Prior to the 1937 amendment the fee allowed was not to exceed twenty-five dollars.

§ 15-6. Imprisonment to be in county jail.—No person shall be imprisoned by any judge, court, justice of the peace, or other peace officer except in the common jail of the county, unless otherwise provided by law: Provided, that whenever the sheriff of any county shall be imprisoned, he may be imprisoned in the jail of any adjoining county. (Rev., s. 3151; Code, s. 1174; R. C., c. 35, s. 6; 1797, c. 474, s. 3; 1879, c. 12; C. S. 4517.)

§ 15-7. Post-mortem examinations directed.—In all cases of homicide, any officer prosecuting for the state may, at any time, direct a post-mortem examination of the deceased to be made by one or more physicians to be summoned for the purpose; and the physicians shall be paid a reasonable compensation for such examination, the amount to be determined by the court and taxed in the costs, and if not collected out of the defendant the same shall be paid by the county. (Rev., s. 3152; Code, s. 1214; R. C., c. 35, s. 49; C. S. 4518.)

Cross Reference.—See also, §§ 90-217 and 152-7, paragraph 6.

Section Valid.—This section is a valid exercise of the police power of the state. *Withers v. Board*, 163 N. C. 341, 79 S. E. 615.

Left to Discretion of Trial Judge.—The board of commissioners of the county are not parties to a proceeding under this section, nor are they entitled to any notice before such orders are made. The matter is left to the sound discretion of the trial judge, and unless such discretion is grossly abused, the Supreme Court will not interfere. *Withers v. Board*, 163 N. C. 341, 345, 79 S. E. 615.

Coroner and physicians performing autopsy may be held liable by father of deceased for wrongful mutilation when the autopsy is ordered by the coroner on his own initiative solely to ascertain the cause of death without suspicion of foul play, since in such case the coroner is without authority to order the autopsy, and his direction therefor can

confer no immunity upon the physicians. *Gurganious v. Simpson*, 213 N. C. 613, 197 S. E. 163.

§ 15-8. Stolen property returned to owner.—Upon the conviction of any person for robbing or stealing any money, goods, chattels, or other estate of any description whatever, the person from whom such goods, money, chattels or other estate were robbed or stolen shall be entitled to restitution thereof; and the court may award restitution of the articles so robbed or stolen, and make all such orders and issue such writs of restitution or otherwise as may be necessary for that purpose. (Rev., s. 3153; Code, s. 1201; R. C., c. 35, s. 34; 21 Hen. VIII, c. 11; 1943, c. 543; C. S. 4519.)

Editor's Note.—The 1943 amendment substituted in the first line the word "person" for the word "felon."

§ 15-9. Magistrate may associate another with him.—Any magistrate, to whom any complaint may be made, or before whom any prisoner may be brought, as by law provided, may associate with himself any other magistrate of the same county; and the powers and duties herein mentioned may be executed by the two magistrates so associated. (Rev., s. 3154; Code, s. 1159; 1868-9, c. 178, subc. 3, s. 28; C. S. 4520.)

Section Constitutional.—This section is in harmony with the provision of the Constitution, Art. IV, sec. 12, conferring power upon the General Assembly to allot and distribute judicial powers. *State v. Flowers*, 109 N. C. 841, 13 S. E. 718.

§ 15-10. Speedy trial or discharge on commitment for felony.—When any person who has been committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer in open court to be brought to his trial, shall not be indicted some time in the next term of the superior or criminal court ensuing such commitment, the judge of the court, upon notice in open court on the last day of the term, shall set at liberty such prisoner upon bail, unless it appear upon oath that the witnesses for the state could not be produced at the same term; and if such prisoner, upon his prayer as aforesaid, shall not be indicted and tried at the second term of the court, he shall be discharged from his imprisonment: Provided, the judge presiding may, in his discretion, refuse to discharge such person if the time between the first and second terms of the court be less than four months. (Rev., s. 3155; Code, s. 1658; 1868-9, c. 116, s. 33; 1913, c. 2; C. S. 4521.)

Requirements Peremptory.—This section is peremptory in its requirements; and where one so committed has formally complied with the provisions of the statute, it is the duty of the court to discharge the prisoner. *State v. Webb*, 155 N. C. 426, 70 S. E. 1064.

Remedy Is by Certiorari.—A certiorari is the proper procedure to review the order of the lower court in refusing to discharge a prisoner from custody under the provisions of this section. *State v. Webb*, 155 N. C. 426, 427, 70 S. E. 1064.

Art. 2. Record and Disposition of Seized, etc., Articles.

§ 15-11. Sheriffs, etc., to maintain register of personal property confiscated, seized or found.—Each sheriff, police department and constable in this state is hereby required to keep and maintain a book or register, and it shall be the duty of each sheriff, police department and constable to keep a record therein of all articles of personal property which may be seized or confiscated by

him or it, or of which he or it may have become possessed in any way in the discharge of his duty. Said sheriffs, police departments and constables shall cause to be kept in said registers a description of such property, the name of the person from whom it was seized, if such name be known, the date and place of its seizure, and, where the article was not taken from the person of a suspect or prisoner, a brief recital of the place and circumstances concerning the possession thereof by such sheriff, police department, or constable. Such sheriff, police department and constable shall also keep in said register appropriate entries showing the manner, date, and to whom said articles are disposed of or delivered, and, if sold as hereinafter provided, a record showing the disposition of the proceeds arising from such sale. (1939, c. 195, s. 1.)

§ 15-12. Publication of notice of unclaimed property.—Unless otherwise provided herein, whenever such articles in the possession of any sheriff, police department or constable have remained unclaimed by the person who may be entitled thereto for a period of one hundred eighty (180) days after such seizure, confiscation, or receipt thereof in any other manner, by such sheriff, police department or constable, the said sheriff, police department or constable in whose possession said articles are may cause to be published one time in some newspaper published in said county a notice to the effect that such articles are in the custody of such officer or department, and requiring all persons who may have or claim any interest therein to make and establish such claim or interest not later than thirty (30) days from the date of the publication of such notice or in default thereof, such articles will be sold and disposed of. Such notice shall contain a brief description of the said articles and such other information as the said officer or department may consider necessary or advisable to reasonably inform the public as to the kind and nature of the article about which the notice relates. (1939, c. 195, s. 2.)

§ 15-13. Public sale thirty days after publication of notice.—If said articles shall remain unclaimed or satisfactory evidence of ownership thereof not be presented to the sheriff, police department or constable, as the case may be, for a period of thirty (30) days after the publication of the notice provided for in § 15-12, then the said sheriff, police department, or constable in whose custody such articles may be, is hereby authorized and empowered to sell the same at public auction for cash to the highest bidder, either at the courthouse door of the county, or at the police headquarters of the municipality in which the said articles of property are located, and at such sale to deliver the same to the purchaser or purchasers thereof. (1939, c. 195, s. 3.)

§ 15-14. Notice of sale.—Before any sale of said property is made under the provisions of this article, however, the said sheriff, police department, or constable making the same shall first advertise the sale by publishing a notice thereof in some newspaper published in the said county at least one time not less than ten days prior to the date of sale, and by posting a notice of the sale at the courthouse door and at three other public

places in the said county. Said notice shall specify the time and place of sale, and contain a sufficient description of the articles of property to be sold. It shall not be required that the sale lay open for increase bids or objections, but it may be deemed closed when the purchaser at the sale pays the amount of the accepted bid. (1939, c. 195, s. 4.)

§ 15-15. Disbursement of proceeds of sale.—From the proceeds realized from the sale of said property, the sheriff, police department, constable or other officer making the same shall first pay the costs and expenses of the sale, and all other necessary expenses incident to a compliance with this article, and any balance then remaining from the proceeds of said sale shall be paid within thirty days after the sale to the treasurer of the county board of education of the county in which such sale is made, for the benefit of the fund for maintaining the free public schools of such county. (1939, c. 195, s. 5.)

§ 15-16. Non-liability of officers.—No sheriff, police department, constable, or other officer, shall be liable for any damages or claims on account of any such sale or disposition of such property, as provided in this article. (1939, c. 195, s. 6.)

§ 15-17. Construction of article.—This article shall not be construed to apply to the seizure and disposition of whiskey distilleries, game birds, and other property or articles which have been or may be seized, where the existing law now provides the method, manner, and extent of the disposition of such articles or of the proceeds derived from the sale thereof. (1939, c. 195, s. 7.)

Cross References.—As to the disposition of liquor seized, see § 18-13. As to disposition of seized distilleries, see § 18-22.

Art. 3. Warrants.

§ 15-18. Who may issue warrant.—The following persons respectively have power to issue process for the apprehension of persons charged with any offense, and to execute the powers and duties conferred in this chapter, namely: The chief justice and the associate justices of the supreme court, the judges of the superior court, judges of criminal courts, presiding officers of inferior courts, justices of the peace, mayors of cities, or other chief officers of incorporated towns. (Rev., s. 3156; Code, s. 1132; 1868-9, c. 178, subc. 3, s. 1; C. S. 4522.)

Cross References.—As to coroner's power to issue warrants, see § 152-7 paragraph 4. As to warrant of arrest in cases of extradition, see § 15-61. As to power of hotel inspector to swear out warrants, see § 72-29. As to power of quarantine officer, see § 130-248.

Mayor Pro Tem. May Issue.—The power conferred upon a mayor pro tem. "to exercise the duties" of mayor during his absence includes that of issuing warrants in criminal actions. State v. Thomas, 141 N. C. 791, 53 S. E. 522.

§ 15-19. Complainant examined on oath.—Whenever complaint is made to any such magistrate that a criminal offense has been committed within this state, or without this state and within the United States, and that a person charged therewith is in this state, it shall be the duty of such magistrate to examine on oath the complainant and any witnesses who may be produced by him. (Rev., s. 3187; Code, s. 1133; 1868-9, c. 178, subc. 3, s. 2; C. S. 4523.)

Oath Essential.—This section requires the Justice, before

issuing a warrant to examine the complainant on oath. Merrimon v. Commissioners, 106 N. C. 369, 371, 11 S. E. 267.

Examination Must Show Commission of Offense.—It must appear by this examination that an offense has been committed before any warrant is issued. State v. Moore, 136 N. C. 581, 48 S. E. 573.

Sufficiency of Evidence.—It is the duty of a magistrate, before issuing a warrant on a criminal charge, except in cases super visum, to require evidence on oath amounting to a direct charge or creating a strong suspicion of guilt. Welch v. Scott, 27 N. C. 72.

Complaint Need Not Be Written.—In State v. Bryson, 84 N. C. 780, Ashe, J., in construing the provisions of the act which is now embodied in this and the next section says that no written affidavit or complaint is required. State v. Peters, 107 N. C. 876, 879, 12 S. E. 74.

Same—No Special Form Required.—It is not expected nor required, in the absence of special provision to the contrary, that an affidavit or complaint should be in any particular form, or should charge the crime with the fullness or particularity necessary in an information or indictment, 12 Cyc., 294. State v. Gupton, 166 N. C. 257, 262, 80 S. E. 989.

Appellate Court Cannot Look Behind Warrant.—The appellate court "can only look at the warrant, which is the complaint," and "cannot look behind the warrant for objections lying in the defects or irregularities of the preliminary evidence." State v. Peters, 107 N. C. 876, 879, 12 S. E. 74; State v. Bryson, 84 N. C. 780.

§ 15-20. Warrant issued; contents.—If it shall appear from such examination that any criminal offense has been committed, the magistrate shall issue a proper warrant under his hand, with or without seal, reciting the accusation, and commanding the officer to whom it is directed forthwith to take the person accused of having committed the offense, and bring him before a magistrate, to be dealt with according to law. A justice of the peace or a chief officer of a city or town shall direct his warrant to the sheriff or other lawful officer of his county. (Rev., s. 3158; Code, s. 1134; 1901, c. 668; 1868-9, c. 178, subc. 3, s. 3; C. S. 4524.)

Editor's Note.—For article discussing requisites of warrant, see 15 N. C. L. Rev. 101.

General Consideration.—It is not necessary that a warrant for assault should charge that it was issued upon a sworn complaint. State v. Price, 111 N. C. 703, 16 S. E. 414. The facts constituting the offense must be set out with certainty. State v. Jones, 88 N. C. 671. But the warrant may refer to the affidavit, State v. Yellowday, 152 N. C. 793, 67 S. E. 480, as they will be construed together. State v. Gupton, 166 N. C. 257, 80 S. E. 989.

Appearance waives a defect in a warrant. State v. Cole, 150 N. C. 805, 63 S. E. 958. A warrant need not negative an exception in a statute. State v. Moore, 166 N. C. 284, 81 S. E. 294.

Amendment of Warrant.—On appeal to the superior court from a conviction before a justice of the peace, the court can allow an amendment of the warrant. State v. Koonce, 108 N. C. 752, 12 S. E. 1032; State v. Carble, 70 N. C. 62. It is discretionary with the court whether it will exercise the power. State v. Vaughan, 91 N. C. 532; State v. Crook, 91 N. C. 536. But a warrant can not be amended so as to charge a different offense. State v. Taylor, 118 N. C. 1262, 24 S. E. 526; State v. Vaughan, 91 N. C. 532, 535; State v. Cook, 61 N. C. 535.

An order directing an amendment to a warrant by the insertion therein of certain words is self-executing, and the words need not be actually inserted in the complaint or warrant. State v. Yellowday, 152 N. C. 793, 67 S. E. 480; See also, State v. Winslow, 95 N. C. 649; State v. Davis, 111 N. C. 729, 16 S. E. 540; State v. Sharp, 125 N. C. 628, 634, 34 S. E. 264; State v. Yoder, 132 N. C. 1111, 1113, 44 S. E. 689.

Officer Protected when Warrant Defective.—See State v. Gupton, 166 N. C. 257, 262, 80 S. E. 989; State v. Jones, 88 N. C. 671.

§ 15-21. Where warrant may be executed.—Warrants issued by any justice of the supreme court, or by any judge of the superior court, or of a criminal court, may be executed in any part of this state; warrants issued by a justice of the

peace, or by the chief officer of any city or incorporated town, may be executed in any part of the county of such justice, or in which such city or town is situated, and on any river, bay or sound forming the boundary between that and some other county, and not elsewhere, unless indorsed as prescribed in § 15-22. (Rev., s. 3159; Code, s. 1135; 1868-9, c. 178, subc. 3, s. 4; C. S. 4525.)

§ 15-22. Warrant indorsed and served in another county.—If the person against whom any warrant is issued by a justice of the peace or chief officer of a city or town shall escape, or be in any other county out of the jurisdiction of such justice or chief officer, it shall be the duty of any justice of the peace, or any other magistrate within the county where such offender shall be, or shall be suspected to be, upon proof of the handwriting of the magistrate or chief officer issuing the warrant, to indorse his name on the same, and thereupon the person, or officer to whom the warrant was directed, may arrest the offender in that county: Provided, that an officer to whom a warrant charging the commission of a felony is directed, who is in the actual pursuit of a person known to him to be the one charged with the felony, may continue the pursuit without such indorsement. The justice of the peace or a chief officer of a city or town shall direct his warrant to the sheriff or other lawful officer of his county, and such warrant when so indorsed as herein prescribed shall authorize and compel the sheriff or other officer of any county in the state, in which such indorsement is made, to execute the same. (Rev., s. 3160; Code, s. 1136; 1917, c. 30; 1901, c. 668; 1868-9, c. 178, subc. 3, s. 5; C. S. 4526.)

Restricted to Criminal Cases.—The provision of this section is restricted to criminal cases. *Fisher v. Bullard*, 109 N. C. 574, 13 S. E. 799.

Justice in County of Service Must Endorse.—A warrant issued in one county to be served in another is not given extraterritorial efficacy unless it has the endorsement of a justice of the peace or other authorized officer in the latter county. *Stancill v. Underwood*, 188 N. C. 475, 476, 124 S. E. 845.

§ 15-23. Magistrate not liable for indorsing warrant.—No magistrate shall be liable to any indictment, action for trespass or other action for having indorsed any warrant pursuant to the provisions of § 15-22, although it should afterwards appear that such warrant was illegally or improperly issued. (Rev., s. 3161; Code, s. 1137; 1868-9, c. 178, subc. 3, s. 6; C. S. 4527.)

Endorsing Officer Fully Protected.—If a warrant issues from competent authority and the extraterritorial efficacy provided by section 15-22 is imparted to it in the county wherein the accused party was arrested, the justification is full to the officer and all who co-operated with him, and no inquiry is admissible into the circumstances under which it was issued. *State v. James*, 80 N. C. 370, 372.

§ 15-24. Before what magistrate a warrant returned.—Persons arrested under any warrant issued for any offense, where no provision is otherwise made, shall be brought before the magistrate who issued the warrant; or, if he be absent, or from any cause unable to try the case, before the nearest magistrate in the same county; and the warrant by virtue of which the arrest shall have been made, with a proper return indorsed thereon and signed by the officer or person making the arrest, shall be delivered to such magistrate. (Rev., s. 3162;

Code, s. 1143; 1868-9, c. 178, subc. 3, s. 12; C. S. 4528.)

Mayor Pro Tem.—A warrant may be returnable before a mayor pro tem. *State v. Thomas*, 141 N. C. 791, 53 S. E. 522.

Authority of Magistrate Issuing Warrant.—The magistrate who issues the warrant has the authority to make the warrant returnable before himself or before some officer having like jurisdiction, such a recorder to conduct the preliminary hearing. *State v. Lord*, 145 N. C. 479, 59 S. E. 656. Cited in *State v. James*, 78 N. C. 455, 457.

Art. 4. Search Warrants.

§ 15-25. In what cases issued, and where executed.—If any credible witness shall prove, upon oath, before any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, that there is a reasonable cause to suspect that any person has in his possession, or on his premises, any property stolen, or any and all personal property and all tickets, books, papers and documents used in connection with and operation of lotteries or any gaming or gambling, or any false or counterfeit coin resembling, or apparently intended to resemble, or pass for, any current coin of the United States, or of any other state, province or country, or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of any such coin; or any false and counterfeit notes, bills or bonds of the United States, or of the state of North Carolina, or of any other state or country, or of any county, city or incorporated town; or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of such note, bill or bond, it shall be lawful for such justice, mayor or chief magistrate of any incorporated town to grant a warrant, to be executed within the limits of his county or of the county in which such city or incorporated town is situated, to any proper officer, authorizing him to search for such property, and to seize the same, and to arrest the person having in possession or on whose premises may be found such stolen property, or any and all personal property and all tickets, books, papers and documents used in connection with and operation of lotteries or any gaming or gambling, counterfeit coin, counterfeit notes, bills or bonds, or the instruments, tools or engines for making the same, and to bring them before any magistrate of competent jurisdiction, to be dealt with according to law. (Rev., s. 3163; Code, s. 1171; 1868-9, c. 178, subc. 3, s. 38; 1941, c. 53; C. S. 4529.)

Cross Reference.—As to warrant authorizing search for liquor, see § 18-13.

Editor's Note.—The 1941 amendment inserted the provisions relating to lotteries, etc.

At Common Law.—Warrants to search for stolen goods are authorized by the principles of the common law. *State v. McDonald*, 14 N. C. 468, 470.

§ 15-26. Nature of warrant and procedure thereon.—Such search warrant shall describe the article to be searched for with reasonable certainty, and by whom the complaint is made, and in whose possession the article to be searched for is supposed to be; it shall be made returnable as other criminal process is by law required to be, and the proceedings thereupon shall be as required in other cases of criminal complaint. (Rev., s. 3164; Code, s. 1172; 1868-9, c. 178, subc. 3, s. 39; C. S. 4530.)

Cross References.—As to search warrants for deserting seamen, see § 14-351. As to constitutional prohibition against general warrants, see N. C. Constitution, Art. I, § 15.

§ 15-27. Warrant issued without affidavit and examination of complainant or other person; evidence discovered thereunder incompetent.—Any officer who shall sign and issue or cause to be signed and issued a search warrant without first requiring the complainant or other person to sign an affidavit under oath and examining said person or complainant in regard thereto shall be guilty of a misdemeanor; and no facts discovered by reason of the issuance of such illegal search warrant shall be competent as evidence in the trial of any action. (1937, c. 339, s. 1½.)

Editor's Note.—This section makes one important change in criminal procedure. Unlike the federal and the majority of state jurisdictions, North Carolina has always admitted evidence obtained by an illegal search. The new law provides that evidence obtained by a search made pursuant to an illegally issued search warrant cannot be admitted in evidence. This leaves open the question whether evidence obtained by an illegal search made without any search warrant would be admissible. 15 N. C. Law Rev., 343.

This section does not apply to evidence obtained by search without a warrant, the language of the statute being insufficient to require this conclusion, and the statute being in derogation of the common law rule. *State v. McGee*, 214 N. C. 184, 198 S. E. 616.

An affidavit for a search warrant signed by the chief of police is sufficient compliance with this section, since if the chief of police is not the informant he is "some other person," and the statute does not require that the informant should make the affidavit, or that the person signing the affidavit should state therein who his informant is, and evidence obtained on a search warrant issued on such affidavit is competent. *State v. Cradle*, 213 N. C. 217, 195 S. E. 392.

Officer Need Not Make the Affidavit.—It is not required that the officer using a search warrant make the affidavit. *State v. Shermer*, 216 N. C. 719, 6 S. E. (2d) 529.

Affidavit Based on Information.—Where the search warrant in question was issued upon the sworn affidavit of a police officer which stated that the basis of the oath was "information," the affidavit does not negative the assumption that the police officer was examined as to the particulars of his information, and it is not required that the affidavit give in detail the source and extent of the information, and evidence procured in a search under the warrant is competent. *State v. Elder*, 217 N. C. 111, 6 S. E. (2d) 840.

Art. 5. Peace Warrants.

§ 15-28. Officers authorized to issue peace warrants.—The following magistrates have power to cause to be kept all the laws made for the preservation of the public peace, and in execution of that power to require persons to give security to keep the peace, in the manner provided in this chapter, namely: The chief justice and associate justices of the supreme court, the judges of the superior courts, and of any special courts which may hereafter be created, the justices of the peace, the mayors or other chief officers of all cities and towns. (Rev., s. 3165; Code, s. 1216; 1868-9, c. 178, subc. 2, s. 1; C. S. 4531.)

A Criminal Action.—A peace warrant is a criminal action prosecuted by the state, at the instance of an individual, to prevent an apprehended crime against his person or property, and is within the exclusive jurisdiction of a justice of the peace. *State v. Oates*, 88 N. C. 668; *State v. Locust*, 53 N. C. 574.

§ 15-29. Complaint and examination.—Whenever complaint is made in writing, and upon oath, to any such magistrate that any person has threatened to commit any offense against the person or property of another, it shall be the duty of such magistrate to examine such complainant and any witnesses who may be produced on oath, to reduce such examination to writing, and to cause the same to be subscribed by the parties so examined. (Rev., s. 3166; Code, s. 1217; 1868-9, c. 178, subc. 2, s. 2; C. S. 4532.)

Applicant Should Not Be Bound Over.—It is error for a justice of the peace to bind to the superior court an applicant for a peace warrant against whom no charge is made. *State v. Bass*, 75 N. C. 139.

§ 15-30. Warrant issued.—If it shall appear from such examination that there is just reason to fear the commission of any such offense by the person complained of, it shall be the duty of the magistrate to issue a warrant under his hand, with or without a seal, reciting the complaint, and commanding the officer to whom it is directed forthwith to apprehend the person so complained of, and bring him before such magistrate or some other magistrate authorized to issue such warrant. (Rev., s. 3167; Code, s. 1218; 1868-9, c. 178, subc. 2, s. 3; C. S. 4533.)

Warrant Should Contain Allegations.—A peace warrant in which is alleged no threat, fact or circumstance from which the court can determine whether the fear of the prosecutor is well founded, should be quashed. *State v. Gorum*, 83 N. C. 664; *State v. Cooley*, 78 N. C. 538.

§ 15-31. To whom warrant directed.—The warrant shall be directed to the sheriff, coroner or any constable, each of whom shall have power to execute the same within his county; and if no sheriff, coroner or constable can conveniently be found, the warrant may be directed to any person whatever, who shall have power to execute the same within the county in which it is issued. No justice of the peace, or mayor, or other chief officer of any city or town shall direct his warrant to any officer outside the county of said justice or chief officer. (Rev., s. 3169; Code, s. 1219; 1868-9, c. 178, subc. 2, s. 4; C. S. 4534.)

Right of Private Person to Make Arrest.—A private person has no authority to make an arrest for a riot, rout, affray, or other breach of the peace, without warrant, except when such offenses are being committed in his presence; nor can a justice of the peace confer such authority by a mere verbal order or command. *State v. Campbell*, 107 N. C. 948, 12 S. E. 441.

Section Confers Extraordinary Power.—The power conferred by this section is the only extraordinary case in which a justice of the peace is authorized to depute one, who is not an officer, to execute process. *Marsh v. Williams*, 63 N. C. 371; *State v. Jones*, 48 N. C. 404; *McKee v. Angel*, 90 N. C. 60, 61, 62.

§ 15-32. Defendant recognized to keep the peace.—Whenever any person complained of on a peace warrant is brought before a justice of the peace, such person may be required to enter into a recognizance, payable to the state of North Carolina, in such sum, not exceeding one thousand dollars, as such justice shall direct, with one or more sufficient sureties, to appear before some justice of the peace within a period not exceeding six months, and not depart the court without leave, and in the meanwhile to keep the peace and be of good behavior towards all the people of the state, and particularly towards the person requiring such security. (Rev., s. 3170; Code, ss. 894, 1220; 1879, c. 92, s. 9; C. S. 4535.)

Jurisdiction Given to Justices.—This section gives to justices of the peace exclusive original jurisdiction of peace warrants and proceedings thereunder. *State v. Oates*, 88 N. C. 668, 670.

§ 15-33. Defendant discharged, or new recognizance required.—If the complainant does not appear, the party recognized shall be discharged, unless good cause be shown to the contrary. If the respective parties appear, the court shall hear their allegations and proofs, and may either discharge the recognizance taken or they may re-

quire a new recognizance, as the circumstances of the case may require, for such time as may appear necessary, not exceeding one year. (Rev., s. 3171; Code, s. 1226; 1868-9, c. 178, subc. 2, s. 12; C. S. 4536.)

§ 15-34. Defendant imprisoned for want of security.—If such recognizance is given, the party complained of shall be discharged; if such person fails to find such security, it shall be the duty of the magistrate to commit him to prison until he shall find the same, specifying in the mittimus the cause of commitment and the sum in which such security was required. (Rev., s. 3172; Code, s. 1221; 1868-9, c. 178, subc. 2, s. 6; C. S. 4537.)

Prisoner Worked on Roads.—One committed under this section may be worked upon the roads. *State v. Yandle*, 119 N. C. 874, 25 S. E. 796.

§ 15-35. How discharged from imprisonment.—Any person committed for not finding sureties of the peace as above provided, may be discharged by any magistrate upon giving such security as was originally required of such person, or by a justice of the supreme court, or judge of the superior or criminal court, by giving such other security as may seem sufficient. (Rev., s. 3174; Code, 1222; 1868-9, c. 178, subc. 2, s. 7; C. S. 4538.)

§ 15-36. Defendant may appeal.—In all proceedings on peace warrants the defendant may appeal from the decision of the justice of the peace to the superior court by giving the bond required by the justice of the peace to keep the peace, in addition to the appeal bond, when the case shall be heard by the judge holding the court in the county. (Rev., s. 3173; 1901, c. 66; C. S. 4539.)

Editor's Note.—Previous to the passage of this section it was several times held that there was no appeal in peace warrant proceedings from the justice of the peace to the superior court. See *State v. Gregory*, 118 N. C. 1199, 24 S. E. 712, citing *State v. Walker*, 94 N. C. 857 and *State v. Lyon*, 93 N. C. 575. This section makes these decisions obsolete.

§ 15-37. Breach of peace in presence of court.—Every person who in the presence of any magistrate specified in the first section of this article, or in the presence of any court of record, shall make any affray, or threaten to kill or beat another, or to commit any offense against his person or property; and all persons who, in the presence of such magistrate or court, shall contend with hot and angry words, may be ordered by such magistrate or court, without any other proof, to give such security as above specified, and in case of failure so to do, may be committed as above provided. (Rev., s. 3168; Code, s. 1224; 1868-9, c. 178, subc. 2, s. 9; C. S. 4540.)

§ 15-38. Recognizance returned to superior court.—Every recognizance taken pursuant to the provisions of this article shall be transmitted by the magistrate taking the same to the next term of the superior court for the county in which the offense is charged to have been committed. (Rev., s. 3175; Code, s. 1223; 1868-9, c. 178, subc. 2, s. 8; C. S. 4541.)

Art. 6. Arrest.

§ 15-39. Persons present may arrest for breach of peace.—Every person present at any riot, rout, affray or other breach of the peace, shall endeavor to suppress and prevent the same, and, if necessary for that purpose, shall arrest the offenders.

(Rev., s. 3176; Code, s. 1124; 1868-9, c. 178, subc. 1, s. 1; C. S. 4542.)

Cross References.—As to arrest in civil cases, see § 1-409 et seq. As to arrest of tramps by persons who are not officers, see § 14-341.

Editor's Note.—For an article on the law of arrest in North Carolina, see 15 N. C. Law Rev., 101.

Authority Strictly Limited.—The authority given by this section to private persons to make arrests without warrant only extends to the offenses therein mentioned and committed under the conditions therein prescribed. *State v. Campbell*, 197 N. C. 948, 12 S. E. 441.

Same—Breach of Town Ordinance.—The violation of a town ordinance, even in the presence of a policeman, does not necessarily give him a right to arrest the offender. *State v. Belk*, 76 N. C. 10.

Same—After Offense Committed.—After the offenses—misdemeanors—mentioned above have been committed, and the offenders have dispersed, a private person has no authority of himself to arrest the offenders without warrant nor can he go out to make such arrest by the mere order of justice of the peace or any officer. *State v. Campbell*, 107 N. C. 948, 954, 12 S. E. 441.

Liability When Authority Exceeded.—If a private person, of his own purpose, without warrant, undertakes to make arrest of a party guilty of only a misdemeanor otherwise than in the cases and in the way pointed out by the section he at once becomes a trespasser, and the party whom he so undertakes to deprive of his liberty may resist him by such force as may be necessary to defend himself successfully. *State v. Campbell*, 107 N. C. 948, 954, 12 S. E. 441.

§ 15-40. Arrest for felony, without warrant.—Every person in whose presence a felony has been committed may arrest the person whom he knows or has reasonable ground to believe to be guilty of such offense, and it shall be the duty of every sheriff, coroner, constable or officer of the police, upon information, to assist in such arrest. (Rev., s. 3177; Code, s. 1129; 1868-9, c. 178, subc. 1, s. 6; C. S. 4543.)

Right of Private Person to Arrest.—A private person may arrest the felon without a warrant, and it is his duty to do so if he is present at the time the felony is committed. *Martin v. Houck*, 141 N. C. 317, 321, 54 S. E. 291. In such case, he may and ought to arrest and, as soon as practicable, take him before a proper officer, to the end that he may be duly held to answer for the offense. In such case, the private person would not be justified unless a felony had actually been committed. It is better and safer to obtain a warrant when this may be promptly done. *State v. Roane*, 13 N. C. 58; *Brockway v. Crawford*, 48 N. C. 433; *State v. Bryant*, 65 N. C. 327; *State v. Shelton*, 79 N. C. 605; *Neal v. Joyner*, 89 N. C. 287; *State v. Campbell*, 107 N. C. 948, 953, 12 S. E. 441; *Martin v. Houck*, 141 N. C. 317, 322, 54 S. E. 291.

In *State v. Stancill*, 128 N. C. 606, 609, 38 S. E. 926, 928, the court says: "A private citizen has the right to arrest a felon, whether he is present when the felony is committed or not. When he is not present, it devolves on him to show that the felony, for which he arrested, had been committed." 15 N. C. Law Rev., 103.

As to what constitutes reasonable ground for believing that accused has committed a felony in the presence of the person making the arrest, see *State v. Blackwelder*, 182 N. C. 899, 109 S. E. 644.

Party Arresting Must State His Purpose.—A private citizen, attempting to arrest a felon without warrant, must make his purpose known, and for what offense he is attempting arrest. And unless he does so, the party attempted to be arrested has the right to resist the arrest. *Neal v. Joyner*, 89 N. C. 287, 289; *State v. Garrett*, 60 N. C. 144; *State v. Belk*, 76 N. C. 10; *State v. McNinch*, 90 N. C. 695; *State v. Stancill*, 128 N. C. 606, 610, 38 S. E. 926. And unless he notifies the felon of his purpose, he will be guilty of a trespass. *State v. Bryant*, 65 N. C. 327.

Force Permissible in Arrest.—Where a private person undertakes to arrest a felon or an escaped felon, and has made his purpose and reason for the arrest known, he must then proceed in a peaceable manner to make the arrest, and if he is resisted he may use such force as is necessary to overcome the resistance, if used for that purpose alone. 2 Am. and Eng. Enc., 906, note 2. But this is put upon the ground that the party attempting to make the arrest becomes personally involved, and he has the right to defend himself. *State v. Stancill*, 128 N. C. 606, 610, 38 S. E. 926.

No Right to Shoot Escaping Subject.—Where the attempted arrest is for a petty larceny, and the party runs off, the party attempting the arrest has no right to shoot and kill him. *State v. Bryant*, 65 N. C. 327; *State v. Stancill*, 128 N. C. 606, 610, 38 S. E. 926.

A Federal prohibition officer, acting under the National Prohibition Act, can derive no further authority to arrest an offender without a warrant than the federal statute itself provides; and no further power can be acquired by him by virtue of this section, permitting such to be done by a private person, in case of a felony, such as murder, rape, and the like, when the unlawful act has been committed in his presence. *State v. Burnett*, 183 N. C. 703, 110 S. E. 588.

§ 15-41. When officer may arrest without warrant.—Every sheriff, coroner, constable, officer of police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest. (Rev., s. 3178; Code, s. 1126; 1868-9, c. 178, subc. 1, s. 3; C. S. 4544.)

Cross References.—As to power of bank examiner to arrest, see § 53-121. As to state forest wardens, see § 113-49. As to arrest of persons escaped from penal and correctional institutions, see § 153-184. As to arrest for violations of the fishery laws, see § 113-141. As to arrest by appointees of superintendents of the state hospitals for the insane, see § 122-33. As to arrest of persons violating the laws regulating intoxicating liquors, see §§ 18-6 and 18-23. As to arrest by the commanding officer of militia, see § 127-106. As to arrest of parolee from the state prison whose parole has been revoked, see § 148-63. As to arrest of parolee or escapee from a reformatory, see § 134-31. As to arrest of a probationer, see §§ 15-200 and 15-205. As to arrest for violation of the weights and measures laws, see § 81-12.

Editor's Note.—For a discussion of arrest without warrant, see 15 N. C. Law Rev., 101.

Common Law Provisions.—At common law there is this distinction between a private individual and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that an actual felony has been committed. Whereas, a constable having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until an inquiry shall be made by the proper authorities. *Neal v. Joyner*, 89 N. C. 287, 290.

An Emergency Measure—The arrest of a person by an officer without a warrant is allowed upon emergency. *Hobbs v. Washington*, 168 N. C. 293, 84 S. E. 391.

Powers of Police Officer.—A police officer was not known to the common law, and therefore he can exercise powers only within the town limits. *Martin v. Houck*, 141 N. C. 317, 321, 54 S. E. 291. And is guilty of assault when he arrests without a warrant outside such limits. *Sossamon v. Cruse*, 133 N. C. 470, 45 S. E. 757. Nor can a police officer recover under the Workmen's Compensation Act for injuries sustained in pursuing misdemeanor if the accident occurs outside town limits. *Wilson v. Mooresville*, 222 N. C. 283, 22 S. E. (2d) 907.

The superintendent of a convict gang is not such an officer as contemplated by this section. *State v. Stancill*, 128 N. C. 606, 38 S. E. 926.

Rearrest of Escaped Convict.—An escaped convict may be rearrested in any county of the State without new process, by the officer in charge of him, to compel him to complete the service of the sentence imposed by the court. *State v. Finch*, 177 N. C. 599, 99 S. E. 409.

Reasonable Ground for Belief Excuses Officer.—In making an arrest upon personal observation and without a warrant an officer will be excused, though no offense was perpetrated, if the circumstances are such as to reasonably warrant the belief that it had been. *State v. Campbell*, 182 N. C. 911, 914, 110 S. E. 86; *State v. McNinch*, 90 N. C. 695, 699. As to what constitutes reasonable ground see *State v. Blackwelder*, 182 N. C. 899, 109 S. E. 644.

Same—What Must Be Shown.—A peace officer may jus-

tify an arrest without a warrant, when he shows satisfactory reasons for his belief of the fact and the guilt of the suspected party, and that delay in procuring a warrant might enable the party to escape. In such case, proof of actual commission of the crime is not necessary. *Neal v. Joyner*, 89 N. C. 287.

Arrest of Participants in Indecent Show.—See *Brewer v. Wynne*, 163 N. C. 319, 322, 79 S. E. 629.

Officer Cannot Shoot at Fleeing Misdemeanant.—Where a person is fleeing from arrest, charged with a misdemeanor, and is out of the control of the officer, such officer is guilty of an assault if he shoots at the said person. *Sossamon v. Cruse*, 133 N. C. 470, 45 S. E. 757. And indeed the use of a pistol in attempting to arrest for a misdemeanor is excessive force. *Id.*

This section applies only to peace officers of the State and in the enforcement of the State law, and does not affect the conduct or powers of Federal officers unless the principles therein are extended to such officers by a Federal statute, when in the enforcement of a valid Federal law. *State v. Burnett*, 183 N. C. 703, 110 S. E. 588.

Admissible Evidence in Action for Unlawful Arrest.—An officer may make an arrest without a warrant when he acts in good faith and has reasonable grounds to believe that a felony has been committed, and that a particular person is guilty thereof and might escape unless arrested, and in an action against an officer for malicious and unlawful arrest, evidence that a robbery had been committed is held competent upon the issue, and defendant's evidence tending to show good faith and that he was acting within the provisions of the statute in arresting plaintiffs was properly submitted to the jury. *Hicks v. Nivens*, 210 N. C. 44, 185 S. E. 469.

Jailer as other officer, see *Gowens v. Alamance County*, 216 N. C. 107, 3 S. E. (2d) 339 (dissenting opinion).

Cited in *State v. Macon*, 198 N. C. 483, 487, 152 S. E. 407.

§ 15-42. Sheriffs and deputies granted power to arrest felons anywhere in state.—When a felony is committed in any county in this State, and upon the commission of the felony, the person or persons charged therewith flees or flee the county, the sheriff of the county in which the crime was committed, and/or his bonded deputy or deputies, either with or without process, is hereby given authority to pursue the person or persons so charged, whether in sight or not, and apprehend and arrest him or them anywhere in the State. (1935, c. 204.)

Stated in *Wilson v. Mooresville*, 222 N. C. 283, 22 S. E. (2d) 907.

§ 15-43. House broken open to prevent felony.—All persons are authorized to break open and enter a house to prevent a felony about to be committed therein. (Rev., s. 3179; Code, s. 1127; 1868-9, c. 178, subc. 1, s. 4; C. S. 4545.)

§ 15-44. When officer may break and enter houses.—If a felony or other infamous crime has been committed, or a dangerous wound has been given and there is reasonable ground to believe that the guilty person is concealed in a house, it shall be lawful for any sheriff, coroner, constable, or police officer, admittance having been demanded and denied, to break open the door and enter the house and arrest the person against whom there shall be such ground of belief. (Rev., s. 3180; Code, s. 1128; 1868-9, c. 178, subc. 1, s. 5; C. S. 4546.)

Where an officer comes armed with process founded on a breach of the peace, he may, after demand of admittance for the purpose of making the arrest, and refusal of the occupant to open the doors of a house, lawfully break them in order to effect an entrance and if he act in good faith in doing so, both he and his posse comitatus will be protected. 15 N. C. Law Rev., 125, citing *State v. Mooring*, 115 N. C. 709, 20 S. E. 182.

§ 15-45. Persons summoned to assist in arrest.—Every person summoned by a judge, justice, mayor, intendant, chief officer of any incorporated

town, sheriff, coroner or constable, to aid in suppressing any riot, rout, unlawful assembly, affray or other breach of the peace, or to arrest the persons engaged in the commission of such offenses, or to prevent the commission of any felony or larceny which may be threatened or begun, shall do so. (Rev., s. 3181; Code, s. 1125; 1868-9, c. 178, subc. 1, s. 2; C. S. 4547.)

Cross Reference.—As to liability for failure to aid police officers, see § 14-224.

Protection of Persons Assisting.—This section makes it imperative on the person so summoned to aid, whether he be present at the perpetration of the offense when summoned, or not. *State v. Campbell*, 107 N. C. 948, 953, 12 S. E. 441. The protection extends to persons aiding. *State v. McMahan*, 103 N. C. 379, 382, 9 S. E. 48.

Limits Imposed by Section.—The power conferred upon officers by this section is limited to the cases mentioned in the section, and while they are actually being perpetrated, or are imminent. It does not go to the extent of authorizing the persons thus summoned to make arrests, without warrant, where the offense has been accomplished and the offenders have dispersed. *State v. Campbell*, 107 N. C. 948, 12 S. E. 441.

Policeman Given Same Authority as Sheriff within Town Limits.—A policeman has the authority under general statute to depute a citizen to aid him in serving a warrant for breach of the peace, a policeman being given the same authority, within the town limits, in making arrests as a sheriff. *Tomlinson v. Norwood*, 208 N. C. 716, 182 S. E. 659.

§ 15-46. Procedure on arrest without warrant.—Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law. (Rev., s. 3182; Code, s. 1130; 1868-9, c. 178, subc. 1, s. 7; C. S. 4548.)

Proper Compliance Protects Justice.—If the justice shall comply with this section by carefully examining the complainant, on oath, before issuing his warrant, few cases would arise in which he would not have judgment for his fees. *Merrimon v. Commissioners*, 106 N. C. 369, 371, 11 S. E. 267.

Liability of Officer for Wrongful Delay.—A warrant must be procured as soon after the arrest as possible and, where it appears that this was not done, the officer responsible for the arrest is personally answerable in damages. *Hobbs v. Washington*, 168 N. C. 293, 84 S. E. 391.

Custody of Prisoner.—If offender is arrested at a time and under such circumstances as he cannot be carried immediately before a justice, the officer may keep him in custody, commit him to jail or the lock-up, or even tie him, according to the nature of the offence and the necessity of the case. 15 N. C. Law Rev., 127, citing *State v. Freeman*, 86 N. C. 683.

§ 15-47. Arresting officer to inform offender of charge, allow bail except in capital cases, and permit communication with counsel or friends.—Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this state, with or without warrant, it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him, and it shall further be the duty of the officer making said arrest, except in capital cases, to have bail fixed in a reasonable sum, and the person so arrested shall be permitted to give bail bond; and it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied.

Any officer who shall violate the provisions of

this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court. (1937, c. 257, ss. 1, 2.)

Cross Reference.—As to bail generally, see § 15-102 et seq.

The violation of this section, in regard to bail and the manner of detention of defendant under arrest, would not render defendant's voluntary confession incompetent. *State v. Exum*, 213 N. C. 16, 195 S. E. 7.

When the defendant, upon his arrest, is informed of the charge against him, and "there is no evidence in the record tending to show that after his arrest and while he was in the custody of the sheriff the defendant demanded of the sheriff that he be permitted to communicate with friends or with counsel", the provisions of this section are not applicable. *State v. Exum*, 213 N. C. 16, 195 S. E. 7.

Art. 7. Fugitives from Justice.

§ 15-48. Outlawry for felony.—In all cases where any two justices of the peace, or any judge of the supreme, superior, or criminal courts shall, on written affidavit, filed and retained by such justice or judge, receive information that a felony has been committed by any person, and that such person flees from justice, conceals himself and evades arrest and service of the usual process of the law, the judge, or the two justices, being justices of the county wherein such person is supposed to lurk or conceal himself, are hereby empowered and required to issue proclamation against him reciting his name, if known, and thereby requiring him forthwith to surrender himself; and also, when issued by any judge, empowering and requiring the sheriff of any county in the state in which such fugitive shall be, and when issued by two justices, empowering and requiring the sheriff of the county of the justices, to take such power with him as he shall think fit and necessary for the going in search and pursuit of, and effectually apprehending, such fugitive from justice, which proclamation shall be published at the door of the courthouse of any county in which such fugitive is supposed to lurk or conceal himself, and at such other places as the judge or justices shall direct; and if any person against whom proclamation has been thus issued, continue to stay out, lurk and conceal himself, and do not immediately surrender himself, any citizen of the state may capture, arrest and bring him to justice, and in case of flight or resistance by him, after being called on and warned to surrender, may slay him without accusation or impeachment of any crime. (Rev., s. 3183; Code, s. 1131; 1868-9, c. 178, subc. 1, s. 8; 1866, c. 62; C. S. 4549.)

Cross Reference.—As to extradition, see § 15-55 et seq. and Appendix VI.

Fugitive from Justice.—A fugitive from justice is one who, having committed a crime in one jurisdiction, flees therefrom in order to evade the law and escape punishment. *State v. Hall*, 115 N. C. 811, 20 S. E. 729.

Outlaws Must Be Warned.—“So careful is the law to protect those who have not been tried and convicted, that the ‘outlaws’ are entitled to be ‘called upon and warned to surrender’ before they are allowed to be slain.” *State v. Stancill*, 128 N. C. 606, 611, 38 S. E. 926, in dissenting opinion by Cook, J.

§ 15-49. Fugitives from another state arrested.—Any justice of the supreme court, or any judge of the superior court or of any criminal court, or any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, on satisfactory information laid before him that any fugitive or other person in the state has committed, out of the state and within the United States,

any offense which, by law of the state in which the offense was committed, is punishable either capitally or by imprisonment for one year or upwards in any state prison, has full power and authority, and is hereby required, to issue a warrant for such fugitive or other person and commit him to any jail within the state for the space of six months, unless sooner demanded by the public authorities of the state wherein the offense may have been committed, pursuant to the act of congress in that case made and provided. If no demand be made within that time the fugitive or other person shall be liberated, unless sufficient cause be shown to the contrary. (Rev., s. 3184; Code, s. 1165; 1895, c. 103; 1868-9, c. 178, subc. 3, s. 34; C. S. 4550.)

Editor's Note.—See Editor's Note under § 15-132. The same defendants, who were freed in the case discussed in that note were rearrested and held under the provisions of this section which then provided for the arrest of "any fugitive in the state" etc. Upon a petition by the defendants for habeas corpus it was decided in *State v. Hall*, 115 N. C. 811, 20 S. E. 729, that they were not fugitives and hence could not be held for extradition. This section has since been amended by adding after the words "any fugitive" the words "or other person" which seem to make the statute broad enough to cover a case like that above.

For a discussion of this and pertinent sections in connection with the law of arrest in this state, see 15 N. C. Law Rev., 101.

In General.—This section prescribes the manner in which criminals escaping from other States may be restored to that having jurisdiction of the offense, and its directions can not be disregarded. It provides fully a method by which the crime may be punished, and at the same time guards and preserves the personal security of the citizen from lawless invasion. *State v. Shelton*, 79 N. C. 605, 608.

Process Necessary.—No one has authority, without process legally issued in this State, to arrest a person charged with crime in another state and fleeing here for refuge. Such an arrest makes the parties engaged in it guilty of an assault and battery. *State v. Shelton*, 79 N. C. 605.

Departure after Crime Is Flight from Justice.—Departure from a jurisdiction after the commission of the act, in furtherance of the crime subsequently consummated, is a flight from justice, within the meaning of the law. *In re Sultan*, 115 N. C. 57, 20 S. E. 375.

Cited in *In Re Veasey*, 196 N. C. 662, 663, 146 S. E. 599.

§ 15-50. Record kept, and copy sent to governor.—Every magistrate committing any person under section 15-49, shall keep a record of the whole proceedings before him, and immediately transmit a copy thereof to the governor for such action as he may deem fit therein under the law. (Rev., s. 3185; Code, s. 1166; 1868-9, c. 178, subc. 3, s. 35; C. S. 4551.)

§ 15-51. Duty of governor.—The governor shall immediately inform the governor of the state or territory in which the crime is alleged to have been committed, or the president of the United States, if it be alleged to have been committed within the District of Columbia, of the proceedings had in such case. (Rev., s. 3186; Code, s. 1167; 1868-9, c. 178, subc. 3, s. 36; C. S. 4552.)

§ 15-52. Person surrendered on order of governor.—Every sheriff or jailer in whose custody any person so committed shall be, upon the order of the governor, shall surrender him to the person named in such order. (Rev., s. 3187; Code, s. 1168; 1868-9, c. 178, subc. 3, s. 37; C. S. 4553.)

§ 15-53. Governor may employ agents, and offer rewards.—The governor, on information made to him of any person, whether the name of such person be known or unknown, having committed a

felony or other infamous crime within the state, and of having fled out of the jurisdiction thereof, or who conceals himself within the state to avoid arrest, or who, having been convicted, has escaped and cannot otherwise be apprehended, may either employ a special agent, with a sufficient escort, to pursue and apprehend such fugitive, or issue his proclamation, and therein offer a reward, not exceeding four hundred dollars, according to the nature of the case, as in his opinion may be sufficient for the purpose, to be paid to him who shall apprehend and deliver the fugitive to such person and at such place as in the proclamation shall be directed. (Rev., s. 3188; Code, s. 1169; 1891, c. 421; R. C., c. 35, s. 4; 1800, c. 561; 1866, c. 28; 1868-9, c. 52; 1870-1, c. 15; 1871-2, c. 29; 1925, c. 275, s. 6; C. S. 4554.)

Editor's Note.—This section formerly contained at the end a clause authorizing the governor to issue warrants on the state treasurer for sufficient money to carry out the provisions of the section. This clause made the section an exception to section 147-68 which provides that "no monies shall be paid out of the treasury except on the warrant of the auditor."

By sec. 6, ch. 275, Public Laws 1925 the provision authorizing warrants by the governor was stricken out. By the same act C. S. § 4556, which contained a similar provision was repealed. See *Burton v. Furman*, 115 N. C. 166, 171, 20 S. E. 443.

Cited in *Madry v. Scotland Neck*, 214 N. C. 461, 199 S. E. 618.

§ 15-54. Officer entitled to reward.—Any sheriff or other officer who shall make an arrest of any person charged with crime for whose apprehension a reward has been offered, is entitled to such reward, and may sue for and recover the same in any court in this state having jurisdiction: Provided, that no reward shall be paid to any sheriff or other officer for any arrest made for a crime committed within the county of such sheriff or officer making such arrest. (1913, c. 132; 1917, c. 8; C. S. 4555.)

Local Modification.—Wake: C. S. 4555.

Editor's Note.—See 13 N. C. Law Rev., 15, as to whom an offer may be made.

Law Giving Reward to Sheriff Valid.—In view of this and the preceding section, Public Local Laws of 1925, ch. 312, s. 2, providing that the board of commissioners should pay a reward to the sheriff or other police officers for arresting violators of the prohibition law, is a valid exercise of the police power of the State and not contrary to public policy. *Hutchins v. Commissioners*, 193 N. C. 659, 137 S. E. 711.

Art. 8. Extradition.

§ 15-55. Definitions.—Where appearing in this article the term "governor" includes any person performing the functions of governor by authority of the law of this state. The term "executive authority" includes the governor, and any person performing the functions of governor in a state other than this state. The term "state," referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States of America. (1937, c. 273, s. 1.)

Cross Reference.—As to rules of practice of the executive department of North Carolina in making requisitions, see Appendix VI.

Editor's Note.—The former extradition law, Public Laws 1931, c. 124, was repealed by Public Laws 1937, c. 273, s. 29, a part of the present extradition statute. The repealed law seemed to provide for extradition proceedings only when the crime with which the accused was charged was punishable—in the state where committed—by death or imprisonment for more than one year in the state's prison,

or where the crime consisted of abandonment of wife or children. However, the supreme court indicated in the case of *In re Hubbard*, 201 N. C. 472, 160 S. E. 569, 81 A. L. R. 547, that a person could be extradited for any crime. The new extradition law is in accord with *In re Hubbard*, specifically providing for the extradition of a person accused of any crime, whether felony or misdemeanor. Furthermore, provision is made for return to a demanding state of a person who intentionally commits an act outside of the demanding state resulting in a crime in the demanding state. At last the extradition laws cover a situation such as existed in *State v. Hall*, 115 N. C. 811, 20 S. E. 729, 44 Am. St. Rep. 501, 28 L. R. A. 289, where a man standing in North Carolina shot and killed a man in Tennessee, and North Carolina refused to return the murderer because he had never been in Tennessee. In other respects the new extradition law is substantially the same as the 1931 law. 15 N. C. Law Rev., 343, 344.

§ 15-56. Duty of governor as to fugitives from justice of other states.—Subject to the provisions of this article, the provisions of the constitution of the United States controlling, and any and all acts of congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony or other crime, who has fled from justice and is found in this state. (1937, c. 273, s. 2.)

Cross Reference.—See also, U. S. Constitution, Art. IV, § 2, cl. 1.

§ 15-57. Form of demand for extradition.—No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging, except in cases arising under section 15-60, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand. (1937, c. 273, s. 3.)

§ 15-58. Governor may cause investigation to be made.—When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered. (1937, c. 273, s. 4.)

§ 15-59. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.—When it is desired to have returned to this state a person

charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

The governor of this state may also surrender on demand of the executive authority of any other state any person in this state who is charged in the manner provided in section 15-77 with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily. (1937, c. 273, s. 5.)

§ 15-60. Extradition of persons not present in demanding state at time of commission of crime.—The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 15-57 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this article not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom. (1937, c. 273, s. 6.)

Cross Reference.—As to criminal liability in this state for act injuring one in another, see § 15-132.

§ 15-61. Issue of governor's warrant of arrest; its recitals.—If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance. (1937, c. 273, s. 7.)

§ 15-62. Manner and place of execution of warrant.—Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the state, and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this article to the duly authorized agent of the demanding state. (1937, c. 273, s. 8.)

§ 15-63. Authority of arresting officer.—Every such peace officer or other person empowered to make the arrest shall have the same authority, in arresting the accused, to command assistance therein as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance. (1937, c. 273, s. 9.)

Cross Reference.—As to liability for refusing to assist, see § 14-224.

§ 15-64. Rights of accused person; application for writ of habeas corpus.—No person arrested upon such warrant shall be delivered over

to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state. (1937, c. 273, s. 10.)

Cross Reference.—As to application for writ of habeas corpus, see § 17-3 et seq.

§ 15-65. Penalty for non-compliance with preceding section.—Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the governor's warrant, in wilful disobedience to § 15-64, shall be guilty of a misdemeanor and, on conviction, shall be fined not more than one thousand dollars (\$1,000.00) or be imprisoned not more than six months, or both. (1937, c. 273, s. 11.)

§ 15-66. Confinement in jail when necessary.—The officer or person executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered, may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person being chargeable with the expense of keeping.

The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this state with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping: Provided, however, that such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the executive authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this state. (1937, c. 273, s. 12.)

§ 15-67. Arrest prior to requisition.—Whenever any person within this state shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state and, except

in cases arising under section 15-60, with having fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any judge or magistrate in this state, setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state, and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under § 15-60, has fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, and is believed to be in this state, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant. (1937, c. 273, s. 13.)

Where a justice of the peace of this State issues a warrant for the arrest of a person based upon an affidavit that such person was a fugitive from justice from another state, and the warrant is regular and valid, as provided by this section, in habeas corpus proceedings instituted prior to a hearing upon the warrant before the justice of the peace, an order remanding the petitioner to the custody of the sheriff who had arrested petitioner is not error, but petitioner is entitled to a hearing before the justice of the peace before he is committed to await the issuance of an extradition warrant. *In re Mitchell*, 205 N. C. 788, 172 S. E. 350.

A person arrested upon a warrant of a justice of the peace of this state, issued upon an affidavit that such person was a fugitive from justice from another state, as provided by this section, may not be lawfully delivered to the authorities of such other state until the Governor of this State has honored a requisition for such person from the Governor of such other state. *Id.*

§ 15-68. Arrest without a warrant.—The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant, upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed, and complaint must be made against him under oath setting forth the ground for the arrest as in § 15-67; and thereafter his answer shall be heard as if he had been arrested on a warrant. (1937, c. 273, s. 14.)

§ 15-69. Commitment to await requisition; bail.—If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under § 15-60, that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time not exceeding thirty days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state hav-

ing jurisdiction of the offense, unless the accused give bail as provided in § 15-70, or until he shall be legally discharged. (1937, c. 273, s. 15.)

§ 15-70. Bail in certain cases; conditions of bond.—Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond, and for his surrender, to be arrested upon the warrant of the governor of this state. (1937, c. 273, s. 16.)

§ 15-71. Extension of time of commitment; adjournment.—If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed sixty days, or a judge or magistrate may again take bail for his appearance and surrender, as provided in § 15-70, but within a period not to exceed sixty days after the date of such new bond. (1937, c. 273, s. 17.)

§ 15-72. Forfeiture of bail.—If the prisoner is admitted to bail and fails to appear and surrender himself according to the conditions of his bond, the judge, or magistrate by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he be within this state. Recovery may be had on such bond in the name of the state as in the case of other bonds given by the accused in criminal proceedings within this state. (1937, c. 273, s. 18.)

§ 15-73. Persons under criminal prosecution in this state at time of requisition.—If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state. (1937, c. 273, s. 19.)

§ 15-74. Guilt or innocence of accused, when inquired into.—The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime. (1937, c. 273, s. 20.)

§ 15-75. Governor may recall warrant or issue alias.—The governor may recall his warrant of arrest or may issue another warrant whenever he deems proper. (1937, c. 273, s. 21.)

§ 15-76. Fugitives from this state; duty of governors.—Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state from the executive authority of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia author-

ized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed. (1937, c. 273, s. 22.)

§ 15-77. Application for issuance of requisition; by whom made; contents.—I. When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein, at the time the application is made and certifying that, in the opinion of the said prosecuting attorney, the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

II. When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county, from which escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

III. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information and affidavits, or of the judgment of conviction or of the sentence shall be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition. (1937, c. 273, s. 23.)

§ 15-78. Costs and expenses.—When the crime shall be a felony, the expenses shall be paid out of the state treasury, on the certificate of the governor and warrant of the auditor; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. The expenses shall

be the actual traveling and subsistence costs of the agent of the demanding state, together with such legal fees as were paid to the officers of the state on whose governor the requisition is made. In every case the officer entitled to these expenses shall itemize the same and verify them by his oath for presentation, either to the governor of the state, in proper cases, or to the board of county commissioners, in cases in which the county pays such expenses. (1937, c. 273, s. 24.)

§ 15-79. Immunity from service of process in certain civil actions.—A person brought into this state by, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceedings to answer which he is being or has been returned until he has been convicted in the criminal proceeding or, if acquitted until he has had reasonable opportunity to return to the state from which he was extradited. (1937, c. 273, s. 25.)

§ 15-80. Written waiver of extradition proceedings.—Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in §§ 15-61 and 15-62 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state: Provided, however, that before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in § 15-64.

If and when such consent has been duly executed it shall forthwith be forwarded to the office of the governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent: Provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this state. (1937, c. 273, s. 25a.)

§ 15-81. Non-waiver by this state.—Nothing in this article contained shall be deemed to constitute a waiver by this state of its right, power or privilege to try such demanded person for crime committed within this state, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any crime committed within this state, nor shall any proceedings had under this article which result in, or fail to result in, extradition be deemed a waiver by this state of any of its rights, privileges or jurisdiction in any way whatsoever. (1937, c. 273, s. 25b.)

§ 15-82. No right of asylum; no immunity from other criminal prosecution while in this state.—After a person has been brought back to this state by, or after waiver of extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition. (1937, c. 273, s. 26.)

§ 15-83. Interpretation.—The provisions of this article shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it. (1937, c. 273, s. 27.)

§ 15-84. Short title.—This article may be cited as the Uniform Criminal Extradition Act. (1937, c. 273, s. 30.)

Art. 9. Preliminary Examination.

§ 15-85. Waiver of examination.—If any person arrested desires to waive examination and give bail, it is the duty of the officer making the arrest to take him before any magistrate of the county in which the offense is charged to have been committed, or before any judge of the supreme or superior court. (Rev., s. 2190; Code, ss. 1138, 1139; 1868-9, c. 178, subc. 3, ss. 7, 8; C. S. 4557.)

Cross References.—As to bail in criminal proceedings, see § 15-102 et seq. As to hearing by the coroner in lieu of other preliminary hearings, see § 152-10.

§ 15-86. Procedure, when justice has not final jurisdiction.—In all cases where a justice of the peace has not final jurisdiction of the offense, he shall desist from any final determination of the action or complaint, and proceed as hereinafter provided. (Rev., s. 3191; Code, s. 896; 1868-9, c. 178, subc. 4, s. 7; 1879, c. 302, s. 2; C. S. 4558.)

Cross Reference.—As to jurisdiction of a justice in criminal actions, see § 7-129 and notes.

When Jurisdiction of Justice Ends.—The justice has no jurisdiction of a case after he has bound the defendant to court and taken his recognizance. *State v. Lucas*, 139 N. C. 567, 51 S. E. 1021.

§ 15-87. Duty of examining magistrate.—The magistrate before whom any such person shall be brought shall proceed, as soon as may be, to examine the complainant and the witnesses produced in support of the prosecution on oath, in the presence of the prisoner, in regard to the offense charged, and in regard to any other matters connected with such charge which such magistrate may deem pertinent. The defendant shall be allowed a reasonable time before the hearing begins in which to send for and advise with counsel. (Rev., s. 3192; Code, ss. 1144, 1145; 1868-9, c. 178, subc. 3, s. 13; C. S. 4559.)

Person Charged Must Be Present.—There can be no examination in the absence of the person charged. *Lovick v. Atlantic Coast Line R. Co.*, 129 N. C. 427, 434, 40 S. E. 191.

Rights of Accused.—The present wise and beneficent policy of the law allows a prisoner under arrest time for deliberation and an opportunity to obtain correct legal advice, so that the statements which he may make on an examination are made of his own free will and with full knowledge of the nature and consequences of his confessions. *State v. Matthews*, 66 N. C. 106, 111.

§ 15-88. Testimony reduced to writing; right to counsel.—The evidence given by the several witnesses examined shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively. If desired by the person arrested, his counsel shall be

present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner; and the prisoner or his counsel shall be allowed to cross-examine the complainant and the witnesses for the prosecution. (Rev., s. 3193; Code, ss. 1146, 1150; 1868-9, c. 178, subc. 3, ss. 14, 19; C. S. 4560.)

Cross Reference.—As to the testimony being used as evidence, see § 15-100 and notes.

Exact Words Not Required to Be Written.—The magistrate is not required to write down the very words of the witness as they are uttered. It is sufficient if he puts down fully and accurately the testimony of the witness as he intends it upon the subject matter of inquiry. *State v. Bridgers*, 87 N. C. 562, 564.

Notes Not Conclusive.—The notes of evidence made by a committing magistrate upon the hearing are not conclusive as to the testimony of witnesses examined. *State v. Hooper*, 151 N. C. 646, 65 S. E. 613.

Magistrate Can Give Parol Testimony.—It is competent for a magistrate to state what a witness swore before him in regard to a homicide, although he afterwards committed the statement to writing. *State v. Adair*, 66 N. C. 298.

Use of Written Statement on Trial.—The written statement can only be referred to, to refresh his memory, and is properly treated as a memorandum, *State v. Adair*, 66 N. C. 298, unless the witness is dead, or too ill to be present, or insane, or has removed from the State at the instigation or connivance of the defendant or prosecutor. *State v. King*, 96 N. C. 603, 605.

§ 15-89. Prisoner examined; advised of rights.—The magistrate shall then proceed to examine the prisoner in relation to the offense charged. Such examination shall not be on oath; and before it is commenced, the prisoner shall be informed by the magistrate of the charge made against him, and that he is at liberty to refuse to answer any question that may be put to him, and that his refusal to answer shall not be used to his prejudice in any stage of the proceedings. (Rev., s. 3194; Code, ss. 1145, 1146; 1868-9, c. 178, subc. 3, ss. 14, 15; C. S. 4561.)

Cross Reference.—As to the right of a prisoner to testify as a witness, see § 8-54.

Purpose of Section.—It was intended by this section to safeguard the rights of the prisoner as guaranteed by the law, and to afford him every protection against imposition, oppression, or undue influence, so that what he may say in any investigation in regard to the accusation against him may be entirely voluntary. *State v. Parker*, 132 N. C. 1014, 1017, 43 S. E. 830. For the accused, without the caution, might, before the magistrate, feel compelled to answer questions put to him, and such answers as he might make, might not be voluntary. *State v. Conrad*, 95 N. C. 666, 670.

Prisoner Must Not Be Sworn.—It was the purpose and intent that the person under examination, who is accused of crime, should feel free to admit or deny his guilt, and the oath which is forbidden by statute deprives him of this perfect freedom. *State v. Parker*, 132 N. C. 1014, 1018, 43 S. E. 830.

Section Extends to Coroner's Inquest.—The reason of the section extends to an inquisition by a coroner. In this respect he is an examining magistrate. *State v. Matthews*, 66 N. C. 106.

Caution to Prisoner Is Essential.—This caution is not a mere matter of form: it is a substantial right, necessary for the protection of prisoners who are too poor to employ counsel and too ignorant to conduct their own defense. *State v. Rorie*, 74 N. C. 148, 150.

And in the opinion of the Court in *State v. Matthews*, 66 N. C. 106, "this caution is an essential part of the proceedings, and must be given to the prisoner under arrest to make his examination admissible in evidence." *State v. Rorie*, 74 N. C. 148, 150. Thus where a confession is made before the cautions required by the section were given it is inadmissible as evidence. *State v. Matthews*, 66 N. C. 106, 113.

Caution Applies to Whole Examination.—The purpose of the section is, that the prisoner shall be advised by the magistrate of his right to refuse to answer all questions that may be put to him as to the charge made against him, without prejudice, during the whole examination, and not sim-

ply so much of it as applies to him personally. *State v. Conrad*, 95 N. C. 666, 670.

When Caution to Be Given.—The commencement of the examination is properly, when, after the warrant of arrest is returned executed, the accused is present before the magistrate, and the latter having called and noticed the matter of the charge, proceeds to read the warrant or state the substance of the charge orally. It is then the caution to the accused is due, and ought to be given, because, then, the magistrate has taken official notice of the charge and the accused, and what he does and says, and then the latter must take notice of the magistrate and be under his jurisdiction and control; then he is before the court and his examination is begun. *State v. Conrad*, 95 N. C. 666, 669.

It is not necessary to competency of an extra judicial confession to a police officer that defendant be warned he is not compelled to answer. *State v. Grier*, 203 N. C. 586, 166 S. E. 595.

Exact Words of Section Not Required.—It is not necessary that a committing magistrate at the commencement of the examination of a prisoner shall use the precise words of the section in giving the caution therein prescribed, but it is sufficient if there be a substantial compliance with the requirement of the section. *State v. Rogers*, 112 N. C. 874, 17 S. E. 297; *State v. DeGraff*, 113 N. C. 688, 18 S. E. 507; *State v. King*, 162 N. C. 580, 581, 77 S. E. 301.

Same—What Is Sufficient.—Both the letter and spirit of the statute require that the defendant should be advised of his rights by the justice, to the effect that he is not required to testify; that he is at liberty to refuse to answer any question put to him, and that his refusal to answer shall not be used to his prejudice. *State v. Parker*, 132 N. C. 1014, 43 S. E. 830; *State v. Simpson*, 133 N. C. 676, 45 S. E. 567; *State v. Vaughan*, 156 N. C. 615, 71 S. E. 1089.

Same—Insufficient Compliance.—Where the prisoner was brought before the magistrate and he was told by that official that "he was charged with selling stolen corn, and that if he wanted to tell anything he could do so; but it was just as he chose." This was not sufficient compliance. *State v. Rorie*, 74 N. C. 148, 150.

Trial Judge Must Find Proper Caution.—Where the record of a committing magistrate merely states that the prisoner was cautioned and the trial court holds such admission competent, with no other evidence before him except this statement, it is error, as the trial judge should have found as a fact whether the proper caution was given to the prisoner. *State v. Parker*, 132 N. C. 1014, 43 S. E. 830.

Where Prisoner Examined as Witness at Own Request.—Testimony given by a defendant when examined as a witness at his own request is admissible against him on another hearing or trial for the same or any other offense, for such admissions and declarations do not come within either the language or the reason of this section. *State v. Ellis*, 97 N. C. 447, 2 S. E. 525; *State v. Simpson*, 133 N. C. 676, 45 S. E. 567, 568; *State v. Hawkins*, 115 N. C. 712, 20 S. E. 623.

Cited in *State v. Dixon*, 215 N. C. 438, 2 S. E. (2d) 371.

§ 15-90. Exclusion of witnesses at examination.—The witnesses produced on the part either of the prisoner or of the prosecution shall not be present at the examination of the prisoner; and while any witness is under examination the magistrate may exclude from the place in which such examination is had all witnesses who have not been examined, and may cause the witnesses to be kept separate and prevented from conversing with each other until they shall have been examined. (Rev., s. 3195; Code, s. 1149; 1868-9, c. 178, subc. 3, s. 18; C. S. 4562.)

Cross Reference.—As to exclusion of bystanders in trials for rape, see § 15-166.

Judge Has Discretion to Exclude.—Exclusion is a matter of which the presiding judge must judge, and except in cases of abuse of his discretion, such order is not reviewable. *Lee v. Thornton*, 174 N. C. 288, 289, 93 S. E. 788; *State v. Hodge*, 142 N. C. 676, 682, 55 S. E. 791; *State v. Lowry*, 170 N. C. 730, 734, 87 S. E. 62; *State v. Davis*, 175 N. C. 723, 95 S. E. 48.

§ 15-91. Answers in writing, read to prisoner, signed by magistrate.—The answer of the prisoner to the several interrogatories shall be reduced to writing by the magistrate, or under his direction. They shall be read to the prisoner, who may correct or add to them; and when made

conformable to what he declares is the truth, shall be certified and signed by the magistrate. (Rev., s. 3196; Code, s. 1147; 1868-9, c. 178, subc. 3, s. 16; C. S. 4563.)

Seal Not Necessary.—This section does not require the examination of a committing magistrate to be certified under seal. *State v. Pressley*, 90 N. C. 730.

§ 15-92. Witnesses for defendant examined.—After the examination of the prisoner is complete, his witnesses, if he have any, shall be sworn and examined, and he may have the assistance of counsel in such examination. (Rev., s. 3197; Code, s. 1148; 1868-9, c. 178, subc. 3, s. 17; C. S. 4564.)

§ 15-93. Examination of prisoner not required in misdemeanors.—Nothing contained in the preceding sections shall be construed to require any magistrate, before whom a prisoner charged with a misdemeanor shall be brought, to take the examination of such prisoner, except where such magistrate shall deem it material so to do, or where such examination shall be required by the prisoner. (Rev., s. 3198; Code, s. 1153; 1868-9, c. 178, subc. 3, s. 22; C. S. 4565.)

Cross Reference.—As to the right of the prisoner to be examined as a witness, see § 8-54.

§ 15-94. When prisoner discharged.—If, upon examination of the whole matter, it shall appear to the magistrate either that no offense has been committed by any person or that there is no probable cause for charging the prisoner therewith, he shall discharge such prisoner. (Rev., s. 3199; Code, s. 1151; 1868-9, c. 178, subc. 3, s. 20; C. S. 4566.)

§ 15-95. When prisoner held to answer charge.—If it shall appear that an offense has been committed, and that there is probable cause to believe the prisoner to be guilty thereof, if the offense be bailable, and the prisoner offers sufficient bail, such bail shall be taken and the prisoner discharged; if no bail be offered, or the offense be not bailable, the prisoner shall be committed to prison. (Rev., s. 3202; Code, ss. 1152, 1156; 1868-9, c. 178, subc. 3, ss. 21, 25; C. S. 4567.)

Cross References.—As to bail generally, see § 15-102 et seq. As to commitment, see § 15-125 et seq.

When Jurisdiction of Justice Ends.—Where a justice of the peace heard a warrant charging the defendant with an assault, with serious damage, and adjudged that the accused give bond for his appearance, and his bond was executed and accepted by the justice, the latter's power and jurisdiction ceased and his attempt to reverse his decision the next day and fine the defendant was a nullity. *State v. Lucas*, 139 N. C. 567, 51 S. E. 1021.

It was intended most surely that when the justice had fully performed the duties required of him, his jurisdiction as to the case should be at an end. If he makes a mistake, it must be corrected elsewhere—not in his court. *State v. Lucas*, 139 N. C. 567, 569, 51 S. E. 1021.

§ 15-96. Witnesses against prisoner recognized.—The magistrate shall bind by recognizances the prosecutor and all the material witnesses against such prisoner to appear and testify at the next term of the court having jurisdiction for the county in which the offense is alleged to have been committed. (Rev., s. 3203; Code, s. 1152; 1868-9, c. 178, subc. 3, s. 21; C. S. 4568.)

§ 15-97. Witnesses required to give security for appearance.—Whenever the magistrate is satisfied by the proof that there is good reason to believe that any such witness will not fulfill the conditions of the recognizance unless security be required, he may order the witness to enter into a recognizance

with such sureties as he shall deem meet for his appearance at such court. (Rev., s. 3204; Code, s. 1154; 1868-9, c. 178, subc. 3, s. 23; C. S. 4569.)

Bond for Appearance before Justice Not Permitted.—There is no statute which authorizes a Justice of the Peace or magistrate to require of a witness to give bond for his appearance before such Justice or magistrate. *Lovick v. Atlantic Coast Line R. Co.*, 129 N. C. 427, 434, 40 S. E. 191.

And a Justice of the Peace, together with those advising him, who orders a witness to give a bond to appear before a Justice, thereby are guilty of falsely imprisoning the witness. *Lovick v. Atlantic Coast Line R. Co.*, 129 N. C. 427, 40 S. E. 191.

§ 15-98. Investigation in case of lynching.—Whenever the solicitor of any judicial district ascertains that the crime of lynching has been committed in any county in his judicial district, it is his duty to go to such county at the earliest possible moment, and at once institute proceedings for the investigation of the crime before the coroner of the county, some judge of the superior court, or justice of the peace, and for the apprehension of the offender. In the performance of this duty he shall cause to be issued subpoenas or other process to compel the attendance of witnesses and examine such witnesses on oath as to their knowledge or information touching the crime being investigated. In all cases where, upon preliminary investigation, it appears probable that any person is guilty of the crime charged, it shall be the duty of the coroner, judge or justice before whom the case is heard to bind such person, with good security, for his appearance at the next ensuing term of the superior or criminal court of some county adjoining the county in which the crime was committed for trial, and in default of bail to commit him to the jail of such adjoining county for safekeeping, and all necessary witnesses shall be recognized to appear at such term as witnesses for the state. (Rev., s. 3200; 1893, c. 461, s. 2; C. S. 4570.)

Cross References.—As to venue in case of lynching, see § 15-128. As to cost of investigating lynchings, see § 6-43.

Editor's Note.—Venue in case of lynching is discussed in *State v. Lewis*, 142 N. C. 626, 55 S. E. 600. See also section 15-128.

§ 15-99. Witnesses in lynching not privileged.—In all investigations before a justice of the peace, coroner, judge, grand jury, or courts and jury, on the trial of the cause, as authorized by § 15-98 or under existing law, no person shall be excused from testifying touching his knowledge or information in regard to the offense being investigated, upon the ground that his answer might tend to subject him to prosecution, pains or penalties, or that his evidence might tend to criminate himself; but no discovery made by such witness upon any such examination shall be used against him in any court or in any penal or criminal prosecution, and he shall, when so examined as a witness for the state, be altogether pardoned of any and all participation in any crime arising under the provisions of § 15-98, or under existing law, concerning which he is required to testify. (Rev., ss. 1638, 3201; 1893, c. 461, s. 5; C. S. 4571.)

Editor's Note.—Section 8-55 provides for compelling witnesses to testify in certain criminal investigations and extends immunity to those thus testifying. As those provisions are analogous to the provisions of this section many of the notes thereunder will be useful in considering this section.

For a general discussion of the limits to self-incrimination, see 15 N. C. Law Rev., 229.

Witness Pardoned Though Testimony Does Not Incriminate.

note.—Legislation in “abolition or oblivion of the offense” specified, applicable to all in a given class, is valid and therefore, when under this section, the defendant was summoned, sworn, and examined by and for the State touching an alleged lynching under investigation by the court, he shall be altogether pardoned of any and all participation therein under the statute or existing law, whether the evidence elicited from him tends to incriminate him or not. *State v. Bowman*, 145 N. C. 452, 59 S. E. 74.

Plea of Pardon as Motion to Quash.—It seems that for the purpose of an appeal, the plea of pardon may be considered and treated as a motion to quash, and so be brought within the direct provisions of section 15-179. *State v. Bowman*, 145 N. C. 452, 455, 59 S. E. 74.

§ 15-100. Proceedings certified to court; used as evidence.—All examinations and recognizances taken pursuant to the provisions of this chapter shall be certified by the magistrate taking the same to the court at which the witnesses are bound to appear, within twenty days after the taking of such examinations and recognizances: Provided, that any criminal case tried within twenty days before the sitting of criminal court shall be returned on Saturdays before the court convenes. The examinations taken and subscribed as herein prescribed may be used as evidence before the grand jury, and on the trial of the accused, provided he was present at the taking thereof and had an opportunity to hear the same and to cross-examine the disposing witness, if such witness be dead or so ill as not to be able to travel, or by procurement or connivance of the defendant has removed from the state, or is of unsound mind. (Rev., s. 3205; Code, s. 1157; 1913, c. 24; 1868-9, c. 178, subc. 3, s. 26; C. S. 4572.)

In General.—Our various statutes relating to the introduction of testimony at the second trial of evidence introduced in the preliminary hearing of a criminal action do not affect the common-law rule, but they are extensions of its principle, making it only necessary when the statutory provisions as to the making of the written record, its correction, signature by the witness, etc., have been complied with, to sufficiently identify the record for its admission as evidence upon the second trial. *State v. Maynard*, 184 N. C. 653, 113 S. E. 682.

Examinations Must Accord with Preceding Sections.—Where the examinations are offered as substantive evidence bearing upon the criminal charge, they are only admissible under this section, when taken according to the requirements of the preceding sections. *State v. Pierce*, 91 N. C. 606, 610; *State v. Jordan*, 110 N. C. 491, 495, 14 S. E. 752.

Reason for Witness' Absence Must Appear.—In order to use the examination as substantive evidence it must be shown that witness is absent because of one of reasons given in this section. *State v. Pierce*, 91 N. C. 606, 610.

No foundation has been laid for the introduction of the evidence of a witness who merely does not respond to the obligations of the subpoena, and is simply proved to have “run away,” and not that any effort has been made to secure his presence. *State v. King*, 86 N. C. 603, 605.

When Parol Evidence Admissible.—On the trial in the superior court it is competent for purposes of contradiction, to offer parol evidence as to what a witness testified to upon such preliminary examination. *State v. Hooper*, 151 N. C. 646, 65 S. E. 613; *State v. Wright*, 75 N. C. 439; *State v. Roberts*, 81 N. C. 605; *State v. Lyon*, 81 N. C. 600.

To authorize the introduction of parol evidence as to the confession of a prisoner before an examining magistrate, it must appear affirmatively that there was no examination recorded as required by law. *State v. Parish*, 44 N. C. 239; *State v. Matthews*, 66 N. C. 106, 110.

§ 15-101. Penalty for failing to return.—If any magistrate shall refuse or neglect to return to the proper court any such examination or recognizance by him taken, he may be compelled by rule of court forthwith to return the same, and in case of disobedience of such rule, may be proceeded against by attachment as for contempt of court as provided by law. (Rev., s. 3206; Code, s. 1158; 1868-9, c. 178, subc. 3, s. 27; C. S. 4573.)

Art. 10. Bail.

§ 15-102. Officers authorized to take bail, before imprisonment.—Officers before whom persons charged with crime, but who have not been committed to prison by an authorized magistrate, may be brought, have power to take bail as follows:

1. Any justice of the supreme court, or a judge of a superior court, in all cases.

2. Any justice of the peace or chief magistrate of any incorporated city or town, in all cases of misdemeanor, and in all cases of felony not capital. (Rev., s. 3209; Code, s. 1160; 1868-9, c. 178, subc. 3, s. 29; 1871-2, c. 37; C. S. 4574.)

Cross References.—As to constitutional provisions against excessive bail, see N. C. Const., Art. I, § 14 and U. S. Const., Amend. VIII. As to authority of the arresting officer to allow bail, see § 15-47. As to arrest and bail in civil cases, see § 1-409 et seq. As to bail after habeas corpus proceeding, see §§ 17-35 and 17-36.

Editor's Note.—In *State v. Herndon*, 107 N. C. 934, 12 S. E. 268, the meaning and effect of this and the following section are discussed at pages 939-944 by Merrimon, C. J., in a dissenting opinion.

§ 15-103. Officers authorized to take bail, after imprisonment.—Any justice of the supreme court or any judge of a superior court has power to bail persons committed to prison charged with crime in all cases; any justice of the peace or chief magistrate of any incorporated city or town has the same power in all cases where the punishment is not capital. (Rev., s. 3210; Code, s. 1161; 1868-9, c. 178, subc. 3, s. 30; C. S. 4575.)

§ 15-104. Recognizance filed with the clerk.—Whenver a prisoner is bailed by any officer under § 15-103, such officer shall immediately cause the recognizance taken by him to be filed with the clerk of the superior court of the county to which the prisoner is recognized. (Rev., s. 3211; Code, s. 1162; 1868-9, c. 178, subc. 3, s. 31; C. S. 4576.)

§ 15-105. Bail allowed on preliminary examination.—If the offense charged in the warrant be not punishable with death, the magistrate may take from the person so arrested a recognizance with sufficient sureties for his appearance at the next term of the court having jurisdiction, to be held in the county where the offense is alleged to have been committed. (Rev., s. 3207; Code, s. 1139; 1868-9, c. 178, subc. 3, s. 8; 1871-2, c. 37, s. 1; C. S. 4577.)

Cross References.—As to bail for persons arrested for extradition, see § 15-76. As to bail upon appeal from a superior to the supreme court, see §§ 15-182 and 15-183.

Recognizance Explained.—The taking of a recognizance consists in making and attesting a memorandum of the acknowledgment of a debt due the State, and of the conditions on which it is to be defeated. *State v. Edney*, 60 N. C. 463; *State v. Houston*, 74 N. C. 549, 550.

A recognizance is a debt of record acknowledged before a court of competent jurisdiction, with condition to do some particular act. *State v. Smith*, 66 N. C. 620; *State v. White*, 164 N. C. 408, 410, 79 S. E. 297.

Same—A Matter of Record.—A recognizance is a matter of record, and can only be discharged by a record or something of equal solemnity. *State v. Moody*, 69 N. C. 529.

Same—Need Not Be Executed by Parties.—A recognizance need not be executed by the parties, but is simply acknowledged by them, and a minute of the acknowledgment is entered by the court. *State v. Edney*, 60 N. C. 463, 471; *State v. White*, 164 N. C. 408, 410, 79 S. E. 297.

Effect of a Recognizance.—A recognizance binds the sureties for the continued appearance of their principal, from day to day, during the term and at all stages of the proceeding, until he is finally discharged by the court, either for term or without day. He must answer its calls at all times and submit to its judgment. *State v. Schenck*, 138 N. C. 560, 565, 49 S. E. 917.

Bond with Conditions Is Satisfactory.—A bond with conditions, signed and sealed by the parties, is good as a recognizance. *State v. Jones*, 100 N. C. 438, 6 S. E. 655.

§ 15-106. Duty of magistrate granting bail.—Any magistrate taking bail shall certify on the warrant the fact of his having let the defendant to bail, and shall deliver the same, together with the recognizance taken by him, to the officer or other person having charge of the prisoner, who shall deliver the same without unnecessary delay to the clerk of the court in which the prisoner has been recognized to appear. (Rev., s. 3212; Code, s. 1140; 1868-9, c. 178, subc. 3, s. 9; C. S. 4578.)

§ 15-107. Sheriff or deputy may take bail.—When any sheriff or his deputy arrests the body of any person, in consequence of the writ of *capias* issued to him by the clerk of a court of record on an indictment found, the sheriff or deputy, if the crime is bailable, shall recognize the offender, and take sufficient bail in the nature of a recognizance for his appearing at the next succeeding court of the county where he ought to answer, which recognizance shall be returned with the *capias*; and the sheriff shall in no case become bail himself.

No sheriff, deputy sheriff, constable, jailer or assistant jailer or the wife of any sheriff, deputy sheriff, constable, jailer or assistant jailer shall in any case become bail for any prisoner for money or property; nor shall any sheriff, deputy sheriff, constable, jailer or assistant jailer, or their wives become bail as agents for any bonding company or professional bondsmen. Any violation of this paragraph shall constitute a misdemeanor punishable by a fine or by imprisonment in the discretion of the court, or by both such fine and imprisonment; provided that the provisions of this paragraph shall not apply to Caswell, Currituck, Dare, Granville, Greene, Hertford, Hyde, Lenoir, Martin, Moore, Nash, Pamlico, Perquimans, Person, Pitt, Rockingham, Stokes, Transylvania and Warren counties. (Rev., s. 3208; Code, s. 1180; R. C., c. 35, s. 11; 1797, c. 474, s. 4; 1939, c. 47; C. S. 4579.)

Cross Reference.—As to attorney becoming bail, see Appx. VIII, Part II, § 2.

Editor's Note.—The 1939 amendment added the second paragraph.

§ 15-108. Sheriff may take bail of prisoner in custody.—If any person for want of bail shall be lawfully committed to jail at any time before final judgment, the sheriff, or other officer having him in custody, may take sufficient justified bail and discharge him; and the bail bond shall be regarded, in every respect, as other bail bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken. (Rev., s. 3228; Code, s. 1232; R. C., c. 11, s. 8; C. S. 4580.)

§ 15-109. Bail on continuance before a justice.—Upon the continuance of any criminal action returned before any justice of the peace for trial, in which the justice is authorized to take bail on a finding of probable cause or in which he has final jurisdiction, it is the duty of the justice of the peace to take bond for his appearance, payable to the state, on the same being tendered by the accused, with such surety as in his opinion will be sufficient to insure the appearance of the ac-

cused for trial at a time and place mentioned in the bond. (Rev., s. 3213; 1889, c. 133; C. S. 4581.)

Cross Reference.—As to mortgage in lieu of security for appearance, see § 109-25.

Section Gives a New Remedy.—Before this section was passed a justice of the peace had no power to allow a party accused of an offense of which he had not final jurisdiction to give bail during the postponement of the examination. If any delay in the examination was necessary, the accused was to be kept in the custody of the sheriff or other officer of the law until the examination was resumed. *State v. Jones*, 100 N. C. 438, 6 S. E. 655; *State v. Jenkins*, 121 N. C. 637, 641, 28 S. E. 413.

Art. 11. Forfeiture of Bail.

§ 15-110. In recognizance to keep the peace.—Every person who shall have entered into a recognizance to keep the peace shall appear according to the obligation thereof; and if he fail to appear the court shall forfeit his recognizance and order it to be prosecuted, in the manner provided by law, unless reasonable excuse for his default be given. (Rev., s. 3214; Code, s. 1225; 1868-9, c. 178, subc. 2, s. 10; C. S. 4582.)

Cross Reference.—As to recognizance, see also notes under § 15-105.

Recognizance Binds to Three Things.—It is said by the highest authority that a recognizance (or bail bond) in general binds to three things: (1) to appear and answer either to a specified charge or to such matters as may be objected; (2) to stand and abide the judgment of the court; and (3) not to depart without leave of the court; and that each of these particulars are distinct and independent. *State v. Schenck*, 138 N. C. 560, 562, 49 S. E. 917; *State v. Eure*, 172 N. C. 874, 875, 89 S. E. 788.

When Time and Place Specified.—If the recognizance specify time and place the defendant cannot be held to be in default for not appearing at some other time or place. *State v. Houston*, 74 N. C. 174, 176.

Thus a recognizance, conditioned that the defendant appear at the court-house in C, on the eighth Monday after the fourth Monday in March, is not forfeited by the defendant's failure to appear on 22 February. *State v. Houston*, 74 N. C. 174.

Same—Effect of Subsequent Law.—A recognizance conditioned for the appearance of a party at one day, is not forfeited by his failure to appear at another day, to which the holding of the Court was changed by a law passed after the taking of the recognizance, the law containing no provision that recognizances should be returned and parties appear on that day. *State v. Melton*, 44 N. C. 426.

When Appearance at Next Term Specified.—A recognizance for the appearance of the defendant at the next term of the Court to be held for a given county is valid and binds the defendant to appear at the next term and at the court-house, although neither time nor place be specifically named; because every one knows, or is presumed to know, the time and place of holding the court. *State v. Houston*, 74 N. C. 176.

Same—If Term Not Held.—A defendant bound over to answer a criminal charge at a regular term of the Superior Court, which term is not held in consequence of the absence of the Judge, is required to attend at an intervening special term subsequently appointed and held. *State v. Horton*, 123 N. C. 695, 31 S. E. 218.

Continuance Does Not Release.—The continuance of a criminal case does not release the recognizance given for the appearance of the defendant. *State v. Morgan*, 136 N. C. 593, 48 S. E. 604.

Proceedings When Recognizance Broken.—Where the condition of a recognizance is broken it is competent for the justice to declare the same to be forfeited and order it to be prosecuted in the court having jurisdiction of the penal sum. *State v. Oates*, 88 N. C. 668.

Defendant Must Appear Until Discharged.—An appearance bond by its terms, and under the uniform ruling of the Court, requires that the defendant appear term after term until he is discharged on a verdict of acquittal or by order of the court. An appearance bond is in lieu of custody in jail, in which case the defendant could not be released until discharged by order of the court. *State v. Eure*, 172 N. C. 874, 89 S. E. 788.

Agreement by Solicitor Will Not Relieve.—An agreement by a solicitor for the state to discharge a defendant if he would become a state's witness against codefendant, will

not relieve such defendant from a forfeited recognizance. *State v. Moody*, 69 N. C. 529.

Failure to Sign Warrant.—It is immaterial to the validity of an appearance bond given by defendant before the court and in custodia legis that the warrant for his arrest, in due form, was, inadvertently, not signed by the recorder. *State v. Mitchell*, 151 N. C. 716, 66 S. E. 202.

§ 15-111. When recognizance deemed broken.—No recognizance taken under this chapter shall be deemed to be broken except in the failure of the principal in such recognizance to appear and answer according to the obligation thereof, unless such principal be convicted of some offense amounting in judgment of law to a breach of such recognizance. (Rev., s. 3215; Code, s. 1227; 1868-9, c. 178, subc. 2, s. 12; C. S. 4583.)

Surety Not Relieved.—The liability of a surety upon an appearance bond is a continuing one until discharged by renewal of bond or production and surrender of principal. (See sections 15-122, 15-123.) He is not released by the principal being drunk and under arrest when his case was called in court and continued, and by the principal having since become a fugitive from justice under charge of a different offense. *State v. Holt*, 145 N. C. 450, 59 S. E. 64.

§ 15-112. Recognizance prosecuted.—Whenever evidence of such conviction shall be produced in the court in which the recognizance is filed, it shall be the duty of such court to order the recognizance to be prosecuted, and the solicitor shall cause the proper proceedings to be thereupon taken. (Rev., s. 3216; Code, s. 1228; 1868-9, c. 178, subc. 2, s. 13; C. S. 4584.)

Independent Proceeding Unnecessary.—The judgment that the recognizance has been forfeited must be entered in the court, and in the cause, in which said recognizance was filed and it is not required that the prosecution for the forfeiture of such recognizance shall be taken by an independent proceeding. *State v. Sanders*, 153 N. C. 624, 627, 69 S. E. 272.

Proceedings When Forfeiture Is Moved for.—When the forfeiture of a recognizance is moved for, if all the matters are of record, the judge decides without the intervention of a jury. But when the answer raises an issue of fact, the defendant is entitled to have the matter passed upon by a jury. *State v. Sanders*, 153 N. C. 624, 626, 69 S. E. 272, and cases cited.

Entry of Forfeiture Not Traversed by Answer to Scire Facias.—The entry of the forfeiture of a recognizance in a criminal case cannot be contradicted or traversed by an answer or a plea to a scire facias issued to enforce the forfeiture. *State v. Morgan*, 136 N. C. 593, 48 S. E. 604.

Effect of Answer to Scire Facias.—Where the recognizance in a criminal case is entered on the records of the court as forfeited, and scire facias is issued to enforce the forfeiture, an answer denying the truth of the record, though informal, is equivalent to a motion to set aside the entry, when that appears to have been the intention of the defendants. *State v. Morgan*, 136 N. C. 593, 48 S. E. 604.

§ 15-113. Notice of judgment nisi before execution.—No execution shall issue upon a forfeited recognizance, or to collect a fine imposed nisi, until a notice has issued against the person who has forfeited his recognizance or upon whom the fine has been imposed, and his sureties. (Rev., s. 3217; Code, s. 1208; R. C., c. 35, s. 43; 1777, c. 115, s. 48; C. S. 4585.)

Local Modification.—Forsyth: 1935, c. 83.

Notice Must Be Given.—This section has made it imperative, that before suing out execution on a forfeited recognizance, a scire facias shall issue, and judgment be had thereon. *State v. Mills*, 19 N. C. 552, 554.

Object of Notice.—The object of a scire facias is to notify the cognizor to show cause, if any he have, wherefore the cognizee should not have execution of the same thereby acknowledged. *State v. Mills*, 19 N. C. 552, 554.

Judgment against Surety on Appearance Bond.—An appearance bond is a debt of record conditioned to be void upon the appearance of defendant, and while judgment absolute may not be entered upon a forfeited recognizance except upon a sci. fa., the object of the sci. fa. is merely to give notice of an opportunity to show cause why the

cognizee should not have execution acknowledged, and the surety being a party to the recognizance and his liability being primary, direct and equal with that of the principal, judgment absolute may be had against the surety on the sci. fa. before service of the sci. fa. upon the principal. *Tar Heel Bond Co. v. Krider*, 218 N. C. 361, 11 S. E. (2d) 291, followed in *State v. Brown*, 218 N. C. 368, 11 S. E. (2d) 294.

§ 15-114. What notice must contain.—When any recognizance, acknowledged by a principal and sureties, shall be forfeited by two or more of the recognizors, the notice issued thereon shall be jointly against them all, designating which of them are principals and which sureties, and when they are bound in different sums, stating the amount forfeited by each one, and the clerk shall have no greater fee on such notice than is due when it is issued against one defendant. (Rev., s. 3218; Code, s. 1209; R. C., c. 35, s. 44; 1812, c. 836, s. 1; C. S. 4586.)

§ 15-115. Service of notice.—All notices issuing upon forfeited recognizances shall be executed by leaving a copy with each of the defendants, or at his present place of abode. And in case he cannot be found, and has no known place of abode, and the matter be returned, then a notice shall issue, and on the like return the same shall be deemed duly served. (Rev., s. 3219; Code, s. 1210; R. C., c. 35, s. 45; 1812, c. 836, s. 2; C. S. 4587.)

Cited in *Tar Heel Bond Co. v. Krider*, 218 N. C. 361, 11 S. E. (2d) 291.

§ 15-116. Judges may remit forfeited recognizances.—The judges of the superior courts may hear and determine the petition of all persons who shall conceive they merit relief on their recognizances forfeited; and may lessen, or absolutely remit, the same, and do all and anything therein as they shall deem just and right and consistent with the welfare of the state and the persons praying such relief, as well before as after final judgment entered and execution awarded. (Rev., s. 3220; Code, s. 1205; R. C., c. 35, s. 38; 1788, c. 292, s. 1; C. S. 4588.)

Trial Judge Has Discretion.—The power given by this section is a matter of judicial discretion in the judges below, which cannot be reviewed except for some error in a matter of law or legal inference. *State v. Moody*, 74 N. C. 73, 75; *State v. Morgan*, 136 N. C. 593, 48 S. E. 604.

Whether a judgment nisi will be made absolute, or whether it will be stricken out, either upon condition or otherwise, rests in the discretion of the judge of the superior court. *State v. Clarke*, 222 N. C. 744, 24 S. E. (2d) 619.

Court May Remit Penalty without Setting Aside Forfeiture.—Where a motion is made to set aside the entry of forfeiture of a recognizance, its refusal does not prevent the court from reducing or remitting the penalty. *State v. Morgan*, 136 N. C. 593, 48 S. E. 604.

Petition after Final Judgment.—A surety on a bail bond may, under this section, present a petition for relief to the judge of the superior court, notwithstanding that a final judgment has been rendered. *State v. Bradsher*, 189 N. C. 401, 127 S. E. 349.

The Superior Courts have authority, under this section, to lessen or remit forfeited recognizances, upon the petition of the party aggrieved, either before or after final judgment. *State v. Moody*, 74 N. C. 73.

Solicitor Has No Vested Right to Fee.—Under this section the solicitor has no vested right to his fee under an absolute judgment upon a forfeited recognizance which was subsequently set aside by the court in the exercise of his discretionary power. *State v. King*, 143 N. C. 677, 57 S. E. 516.

Injunction to Restrain Enforcement of Execution.—A motion by the surety asking that the forfeiture theretofore entered upon the appearance bond be stricken out for that defendant had been subsequently arrested under a capias is addressed to the sound discretion of the court in the exercise of its power to remit the forfeiture, and does not serve

to stay execution on the judgment entered against the surety upon the sci. fa., and therefore the court, while the motion is pending, may hear and determine the surety's application for injunction to restrain enforcement of the execution issued on the judgment. The remedy for a reduction or remission of the forfeiture is by application under this section. *Tar Heel Bond Co. v. Krider*, 218 N. C. 361, 11 S. E. (2d) 291, followed in *State v. Brown*, 218 N. C. 368, 11 S. E. (2d) 294.

Arrest Does Not Discharge Forfeiture of Appearance Bond.—The arrest of defendant in a criminal proceeding upon a capias and his trial and conviction does not discharge the original forfeiture of his appearance bond, and judgment absolute against the surety may be entered upon the sci. fa. after defendant has been arrested under the capias. Section 15-122 has no application, since in such case the defendant is not arrested and surrendered by the surety, and further, even if the statute were applicable, it provides that surrender by the bail after recognizance is forfeited does not discharge the bail, but is merely addressed to the discretionary power of the court to reduce or remit the forfeiture. *Tar Heel Bond Co. v. Krider*, 218 N. C. 361, 11 S. E. (2d) 291, followed in *State v. Brown*, 218 N. C. 368, 11 S. E. (2d) 294.

§ 15-117. Money refunded by clerk.—The clerk of the superior court, on the remission of any forfeited recognizance which has been paid into his office, shall refund the same, or so much thereof as shall be remitted. (Rev., s. 3221; Code, s. 1206; R. C., c. 35, s. 39; 1795, c. 442, s. 1; C. S. 4589.)

§ 15-118. Money refunded by treasurer.—If the money has been paid to the county treasurer, he shall refund it to the person entitled, on his producing an attested copy of the record from the clerk of the court, certifying that such recognizance has been remitted or lessened, signed with his own proper name, with the seal of the court affixed thereto. (Rev., s. 3222; Code, s. 1207; R. C., c. 35, s. 40; 1795, c. 442, s. 2; C. S. 4590.)

§ 15-119. Forfeiture of bond before justice.—On the failure of the accused to appear at the time and place mentioned in any bond taken by any justice of the peace for a continuance of any cause pending before him, and answer the charge, or, having appeared, on his departing the court without leave thereof first had and obtained, it shall be the duty of the justice of the peace then presiding to enter judgment nisi against the principal and his sureties in the bond for the amount mentioned therein, if the sum does not exceed the sum of two hundred dollars; and immediately issue notice to the principal and the sureties in the bond, giving ten days time, specifying time and place, to appear and show cause, if any they have, why the judgment nisi shall not be made final. (Rev., s. 3223; 1889, c. 133, s. 2; C. S. 4591.)

§ 15-120. Judgment final, rendered and enforced.—If the defendant shall fail to appear and show satisfactory reasons for not complying with the provisions of the bond, it shall then be the duty of the justice of the peace to render a final judgment thereon for the amount of the same, and immediately make and transmit to the clerk of the superior court a transcript thereof, which shall be entered upon the judgment docket of the court, and the clerk shall issue execution on the final judgment against the principal and his sureties for the collection of the amount thereof as in other judgments in behalf of the state. (Rev., s. 3224; 1889, c. 133, s. 3; C. S. 4592.)

§ 15-121. Forfeiture over two hundred dollars before justice.—If the bond shall exceed the sum of two hundred dollars, and the accused shall fail to

appear as therein provided to answer the charge, or, having appeared, shall depart the court without leave first had and obtained, it shall be the duty of the justice to have the accused called, and enter upon the bond that the defendant was called and failed to answer, and immediately return the original papers in the case, together with the bond, to the clerk of the court having jurisdiction to try such action, who shall immediately enter the case upon the criminal docket of his court and enter judgment nisi for the amount of the bond, and issue notice to the accused and his sureties to appear at the next term to show cause why the judgment should not be made final and proceeded in as other cases of forfeited bonds in behalf of the state in such court. The entry on the bond by the justice of the peace shall be prima facie evidence that the principal therein had been called and failed to answer. Nothing in this section shall be so construed as to prevent justices of the peace from remitting the penalty of the bond or the right of appeal from the justice of the peace to the superior court by the defendant or his surety. (Rev., s. 3225; 1889, c. 133, s. 4; C. S. 4593.)

§ 15-122. Right of bail to surrender principal.—The bail shall have liberty, at any time before execution awarded against him, to surrender to the court from which the process issued, or to the sheriff having such process to return, during the session, or in the recess of such court, the principal, in discharge of himself; and such bail shall, at any time before such execution awarded, have full power and authority to arrest the body of his principal, and secure him until he shall have an opportunity to surrender him to the sheriff or court as aforesaid; and the sheriff is hereby required to receive such surrender, and hold the body of the defendant in custody as if bail had never been given: Provided, that in criminal proceedings the surrender by the bail, after the recognizance has been forfeited, shall not have the effect to discharge the bail, but the forfeiture may be remitted in the manner provided for. (Rev., s. 3226; Code, s. 1230; R. C., c. 11, s. 5; 1777, c. 115, s. 20; 1848, c. 7; C. S. 4594.)

In General.—The conviction does not, by virtue of its own force, put the defendant in the custody of the court or of the sheriff. This is done, in our practice at least, by an order from the court, given of its own motion or on application of the solicitor, and the court, when it passes judgment upon a defendant and he appeals, can direct that he be not taken into custody immediately, but be permitted to find security for the costs of his appeal and for his appearance at the next term, and if he fails afterwards to appear, when called during the term, and perfect his appeal and give the necessary security for his appearance, or in default thereof to surrender himself in execution of the judgment, he may be called and his forfeiture entered. *State v. Schenck*, 138 N. C. 560, 564, 49 S. E. 917.

Compliance with Section Protects Surety.—Where a defendant surrenders his principal in open court in discharge of himself as bail, he is acting in the clear exercise of an undoubted legal right. Under this section the entry of the fact made upon the records of the Court was therefore proper, and the court could not by their subsequent action, deprive the defendant of the benefit of it. *Underwood v. McLaurin*, 49 N. C. 17, 18.

When Condition of Bond Performed.—The condition of a bail bond is not performed by the appearance, conviction, and sentence of the defendant. The conviction does not, by virtue of its own force, put the defendant in the custody of the court or of the sheriff, but to exonerate the surety the defendant must submit to such punishment as shall be adjudged. *State v. Schenck*, 138 N. C. 560, 49 S. E. 917.

Discharge of Bail.—The arrest of defendant in a criminal

proceeding upon a *capias* and his trial and conviction does not discharge the original forfeiture of his appearance bond, and judgment absolute against the surety may be entered upon the *sci. fa.* after defendant has been arrested under the *capias*. This section has no application, since in such case the defendant is not arrested and surrendered by the surety, and further, even if the statute were applicable, it provides that surrender by the bail after recognizance is forfeited does not discharge the bail, but is merely addressed to the discretionary power of the court to reduce or remit the forfeiture. *Tar Heel Bond Co. v. Krider*, 218 N. C. 361, 11 S. E. (2d) 291, followed in *State v. Brown*, 218 N. C. 368, 11 S. E. (2d) 294.

Bail Not Exonerated During Defendant's Detention in Prison on Other Charges.—Upon the failure of defendant to appear when his case was called, judgment *nisi* was entered and *sci. fa.* and *capias* issued. Upon the hearing of the *sci. fa.*, the surety showed that at the time of the call of the case defendant was incarcerated in another county of this state on other charges, that upon the subsequent trial in such other county defendant was sentenced to imprisonment, and that the surety had secured *capias* and filed same with the officials of the state's prison so that defendant would be surrendered to the court to stand trial upon the expiration of his sentence. Held: Notwithstanding that § 1-433 relates only to bonds executed in arrest and bail proceedings, the bail will not be exonerated during defendant's detention, since only the state and not the surety can produce the body of defendant, and judgment absolute against the surety should be stricken out and hearing on the *sci. fa.* continued until the surety has had opportunity to produce defendant after his release from prison. *State v. Elser*, 218 N. C. 365, 11 S. E. (2d) 295.

§ 15-123. New bail given upon surrender; liability of sheriff.—Any person surrendered in the manner specified in § 15-122, shall have liberty, at any time before final judgment against him, to give bail; and in case of such surrender, the sheriff shall take the bail bond or recognizance to the succeeding court; and in case the sheriff shall release such person without bail, or the bail returned be held insufficient, on exception taken, the same term to which such bail bond shall be returned, and allowed by the court, the sheriff, having due notice thereof in criminal cases, shall forfeit to the state the sum of one hundred dollars, to be recovered on motion in like manner as forfeitures for not returning process, and be subject to be indicted for misdemeanor in office; and it shall be the duty of the prosecuting officer to collect the forfeiture; and, in case of a release, the sheriff shall be liable for an escape, and may be prosecuted and punished as provided for in the chapter entitled Criminal Law. (Rev., s. 3227; Code, s. 1231; R. C., c. 11, s. 6; 1827, c. 40; C. S. 4595.)

Cross References.—As to criminal liability for an escape, see § 14-239. As to recovery of the penalty, see § 162-14 and annotation thereto.

§ 15-124. Defenses open to bail.—Every matter which would entitle the principal to be discharged from arrest may be pleaded by the bail in exoneration of his liability. (Rev., s. 3229; Code, s. 1233; R. C., c. 11, s. 9; C. S. 4596.)

Art. 12. Commitment to Prison.

§ 15-125. Order of commitment.—Every commitment to prison of a person charged with crime shall state:

1. The name of the person charged.
2. The character of the offense with which he is charged.
3. The name and office of the magistrate committing him.
4. The manner in which he may be discharged; if upon giving recognizance or bail, the amount of the recognizance, the condition on the performance

of which it shall be discharged, and the persons or magistrate before whom the bail may justify.

5. The court before which the prisoner shall be sent for trial. (Rev., s. 3230; Code, s. 1163; 1868-9, c. 178, subc. 3, s. 32; C. S. 4597.)

Cross Reference.—As to order of commitment after judgment by a justice, see § 15-159.

Verbal Order Invalid.—A verbal order of a justice of the peace sending a prisoner to jail, whether made before or after the examination on the warrant, is not a sufficient authority for the officer to whom the order is given. *State v. James*, 78 N. C. 455.

§ 15-126. Commitment to county jail.—All persons committed to prison before conviction shall be committed to the jail of the county in which the examination is had, or to that of the county in which the offense is charged to have been committed: Provided, if the jails of these counties are unsafe, or injurious to the health of prisoners, the committing magistrate may commit to the jail of any other convenient county. And every sheriff or jailer to whose jail any person shall be committed by any court or magistrate of competent jurisdiction shall receive such prisoner and give a receipt for him, and be bound for his safe-keeping as prescribed by law. (Rev., s. 3231; Code, s. 1164; 1868-9, c. 178, subc. 2, s. 33; C. S. 4598.)

§ 15-127. Commitment of witnesses.—If any witness required to enter into a recognizance, either with or without sureties, shall refuse to comply with such order, it shall be the duty of such magistrate to commit him to prison until he shall comply with such order, or be otherwise discharged according to law. (Rev., s. 3232; Code, s. 1155; 1868-9, c. 178, subc. 3, s. 24; C. S. 4599.)

Cross Reference.—As to when witnesses are required to give security for appearance, see § 15-97.

Art. 13. Venue.

§ 15-128. In case of lynching.—The superior court of any county which adjoins the county in which the crime of lynching shall be committed shall have full and complete jurisdiction over the crime and the offender to the same extent as if the crime had been committed in the bounds of such adjoining county; and whenever the solicitor of the district has information of the commission of such a crime, it shall be his duty to furnish such information to the grand juries of all adjoining counties to the one in which the crime was committed from time to time until the offenders are brought to justice. (Rev., s. 3233; 1893, c. 461, s. 4; C. S. 4600.)

Cross References.—As to venue in civil cases, see § 1-76 et seq. As to removal for fair trial, see § 1-84 et seq.

Section Constitutional.—This section is a constitutional exercise of legislative power. *State v. Lewis*, 142 N. C. 626, 55 S. E. 600; *State v. Rumble*, 178 N. C. 717, 100 S. E. 622.

Purpose of Section.—Owing to the prejudice or sympathy which in cases of lynching usually and naturally pervades the county where that offense is committed, the General Assembly, upon grounds of public policy, deemed it wise to transfer the investigation of the charge to the grand jury of an adjoining county. *State v. Lewis*, 142 N. C. 626, 55 S. E. 600.

Bill Need Not Be Found In County Where Offense Committed.—In an indictment for lynching it was error to quash the bill on the ground that it appeared on the face of the bill that the offense charged was not committed in the county in which the bill was found, but in an adjoining county. *State v. Lewis*, 142 N. C. 626, 55 S. E. 600.

§ 15-129. In offenses on waters dividing counties.—When any offense is committed on any wa-

ter, or water-course, whether at high or low water, which water or water-course, or the sides or shores thereof, divides counties, such offense may be dealt with, inquired of, tried and determined, and punished at the discretion of the court, in either of the two counties which may be nearest to the place where the offense was committed. (Rev., s. 3234; Code, s. 1193; R. C., c. 35, s. 24; C. S. 4601.)

Cross Reference.—As to venue of civil offenses committed on waters, see § 1-77.

§ 15-130. Assault in one county, death in another.—In all cases of felonious homicide when the assault has been made in one county within the state, and the person assaulted dies in any other county thereof, the offender shall be indicted and punished for the crime in the county wherein the assault was made. (Rev., s. 3235; Code, s. 1196; R. C., c. 35, s. 27; 1831, c. 22, s. 1; C. S. 4602.)

No New Offense Created by Section.—This section received a judicial construction in *S. v. Dunkley*, 25 N. C. 116, and it was held that it did not create any new offense, but merely removed a difficulty which existed as to the place of the trial. *State v. Hall*, 114 N. C. 909, 19 S. E. 602.

This section and the following were part of chapter 22 of the Public Laws 1831 and hence this construction applies equally to the following section.—Ed. Note.

For meaning of "assault," see note under following section.

§ 15-131. Assault in this state, death in another.—In all cases of felonious homicide, when the assault has been made within this state, and the person assaulted dies without the limits thereof, the offender shall be indicted and punished for the crime in the county where the assault was made, in the same manner, to all intents and purposes, as if the person assaulted had died within the limits of this state. (Rev., s. 3236; Code, s. 1197; R. C., c. 35, s. 28; 1831, c. 22, s. 2; C. S. 4603.)

Section Is Valid.—The validity of sections similar to this seems to be undisputed, and indeed it has been held in many jurisdictions that such legislation is but in affirmance of the common law. *State v. Hall*, 114 N. C. 909, 19 S. E. 602.

No new offense created by section, see note to preceding section.

Meaning of "Assault."—The assault mentioned in this section and the preceding section evidently means not a mere attempt, but such an injury inflicted in this State as results in death in another State. *State v. Hall*, 114 N. C. 909, 19 S. E. 602.

Acts Causing Death Must Take Place in State.—This section plainly contemplates that every part of the offense, except the death, must have occurred in this State. *State v. Hall*, 114 N. C. 909, 19 S. E. 602.

Shooting Person in Adjoining State.—See section 15-132 and note thereto.

§ 15-132. Person in this state injuring one in another.—If any person, being in this state, unlawfully and willfully puts in motion a force from the effect of which any person is injured while in another state, the person so setting such force in motion shall be guilty of the same offense in this state as he would be if the effect had taken place within this state. (Rev., s. 3237; 1895, c. 169; C. S. 4604.)

Editor's Note.—This section was passed in 1895 as a result of the decision in *State v. Hall*, 114 N. C. 809, 19 S. E. 602. In that case, decided in 1894, the defendants while in North Carolina shot across the State line and killed a person in Tennessee and being indicted for murder in North Carolina it was held that they were not guilty of the crime charged in the absence of a statute like the present. Section 15-131 was discussed and held not applicable since the stroke producing death was given not in North Carolina but in Tennessee.

§ 15-133. In county where death occurs.—If a mortal wound is given or other violence or injury inflicted or poison is administered on the high seas or land, either within or without the limits of this state, by means whereof death ensues in any county thereof, the offense may be prosecuted and punished in the county where the death happens. (Rev., s. 3238; 1891, c. 68; C. S. 4605.)

Section Constitutional.—This section is constitutional and applies to foreigners as well as to citizens of this State who have inflicted mortal wounds elsewhere. *State v. Caldwell*, 115 N. C. 794, 20 S. E. 523.

§ 15-134. Improper venue met by plea in abatement; procedure.—Because the boundaries of many counties are either undetermined or unknown, by reason whereof high offenses go unpunished; therefore, for the more effectual prosecution of offenses committed on land near the boundaries of counties, in the prosecution of all offenses it shall be deemed and taken as true that the offense was committed in the county in which by the indictment it is alleged to have taken place, unless the defendant shall deny the same by plea in abatement, the truth whereof shall be duly verified on oath or otherwise both as to substance and fact, wherein shall be set forth the proper county in which the supposed offense, if any, was committed; whereupon the court may, on motion of the state, commit the defendant, who may enter into recognizance, as in other cases, to answer the offense in the county averred by his plea to be the proper county; and, on his prosecution in that county, it shall be deemed, conclusively, to be the proper county. But if the state, upon the plea aforesaid, will join issue, and the matter be found for the defendant, he shall be required to enter into recognizance as in other cases to answer the offense in the county averred by his plea to be the proper county, provided the offense be bailable; and, if not bailable, he shall be committed for trial in the county; and, if it be found for the state, the court in all offenses or misdemeanors shall proceed to pronounce judgment against the defendant, as upon conviction; and, in all cases of felony, the defendant shall be at liberty to plead to the indictment, and be tried on his plea of not guilty. (Rev., s. 3239; Code, s. 1194; R. C., c. 35, s. 25; C. S. 4606.)

Cross References.—As to venue in indictment for stealing rides on trains, see § 60-104. As to venue in indictment for receiving stolen goods, see § 14-71. As to venue in case of discrimination against the Atlantic and North Carolina Railroad, see § 60-8. As to venue in case of bribery of baseball players, see § 14-378. As to venue in trial of an accessory, see §§ 14-5 and 14-7. As to venue in cases of bigamy, see § 14-183. As to sale and delivery of intoxicating liquors, see § 18-9. As to offenses by officers of state institutions, see § 143-116. As to venue in cases of bastardy, see § 49-5.

Purpose of Section.—This section was evidently intended to provide relief in difficulties originating in doubt entertained in good faith as to the county in which the offense was committed, and should not be construed to modify the common law beyond the reasonable scope of its manifest purpose. *State v. Mitchell*, 202 N. C. 439, 445, 163 S. E. 581.

Power of Legislature.—Venue is under the control of the Legislature. *State v. Woodward*, 123 N. C. 710, 31 S. E. 219. **Broad Terms.**—This section is very broad in its terms. *State v. Outerbridge*, 82 N. C. 618, 622.

Old Rule Reversed.—It reverses the rule which seems to have obtained on the trial of criminal cases before its enactment. *State v. Lytle*, 117 N. C. 799, 801, 23 S. E. 476.

Applies to All Crimes.—In felonies, as in misdemeanors, the objection can only be taken by plea in abatement. *State v. Outerbridge*, 82 N. C. 618, 622.

Same—Committed Within State.—The offenses referred to in this section are those committed within the borders of the State, in violation of the laws of the State, for our courts cannot take cognizance of the violation of the criminal laws of other States; and would have no right to recognize offenders to appear before their judicial tribunals. *State v. Mitchell*, 83 N. C. 674, 676.

Laws Regulating Jurisdiction Not a Part of Offense.—Laws conferring, withdrawing or limiting jurisdiction over pre-existing common law offenses do not become a constituent part of the offenses to which they apply. *State v. Lewis*, 142 N. C. 626, 630, 55 S. E. 600; *State v. Williamson*, 81 N. C. 540.

Crime Where Alleged.—Under this section, a criminal offense is deemed to have taken place in the county in which the indictment charges it had occurred, unless the defendant deny the same by the plea in abatement. *State v. Oliver*, 186 N. C. 329, 119 S. E. 370; *State v. Allen*, 107 N. C. 805, 11 S. E. 1016.

Averment of Venue in Indictment.—In an indictment for murder, the offence must be charged in the body of the bill, to have been committed within the district, over which the court has jurisdiction; it is not sufficient that the caption names the district. *State v. Adams*, 1 N. C. 56.

But the want of an averment of a proper and perfect venue is not fatal to a bill of indictment. *State v. Williamson*, 81 N. C. 540, 541.

The crime of offering a bribe to a juror is committed in the county where the offer is communicated to the juror, and the proper venue is the county in which the juror was serving and in which the defendant's offer was communicated to him by his wife, although defendant communicated with the juror's kinsmen and wife in the county of their residence. *State v. Noland*, 204 N. C. 329, 168 S. E. 412.

Objection to Venue Waived.—Objection to venue is waived unless objection is taken in apt time by plea in abatement. *State v. Lytle*, 117 N. C. 799, 23 S. E. 476; *State v. Woodward*, 123 N. C. 710, 31 S. E. 219; *State v. Holder*, 133 N. C. 709, 711, 45 S. E. 862.

Thus where a prisoner is charged with killing the deceased in the county in which the indictment is found, the State need not prove that the offense was committed in that county. Such allegation is to be taken as true unless the prisoner denies the same by plea in abatement. *State v. Outerbridge*, 82 N. C. 618.

Demurrer to Evidence Improper Remedy.—Under this section, an objection to venue must be taken by plea in abatement, and a demurrer to the evidence on this ground was properly overruled. *State v. Burton*, 138 N. C. 575, 576, 50 S. E. 214.

Plea in Abatement.—An indictment charging that defendant did feloniously embezzle certain certificates of deposit in the county in which the prosecution is instituted, held not subject to defendant's plea in abatement on the ground that the certificates of deposit were issued by a bank in another county and that such other county was the proper venue of the prosecution, since the indictment charges the embezzlement of the certificates of deposit and not the proceeds of the certificates. *State v. Shore*, 206 N. C. 743, 175 S. E. 116.

What Must Be Stated in Plea in Abatement.—In pleas in abatement the facts upon which the plea rests must be stated, and present matters which will defeat the further prosecution of the present action, if proven or admitted. *Emry v. Chappell*, 148 N. C. 327, 62 S. E. 411.

Jurisdiction of Person Acquired by Consent.—While the court's jurisdiction of the subject-matter of a criminal offense may not be acquired with the defendant's consent, it is otherwise as to the jurisdiction of his person; and where he asks and obtains a continuance of the action against him, he waives the court's want of jurisdiction of his person, and thereafter a plea in abatement comes too late. *State v. Oliver*, 186 N. C. 329, 119 S. E. 370.

Where Motion to Quash Indictment Was Correctly Denied.—Defendant moved to quash the indictment for receiving stolen goods on the ground that the evidence showed that the property, if stolen, was stolen in another county, and, if received by defendant, was received by him in a third county. It was held that the motion to quash was correctly denied since, under this section, the crime is presumed to have been committed in the county laid in the bill of indictment unless defendant aptly enters a plea in abatement. *State v. Ray*, 209 N. C. 772, 184 S. E. 836.

Cited in *State v. Ritter*, 199 N. C. 116, 117, 154 S. E. 62.

§ 15-135. Removal of indictment with consent of defendant; pleas.—Whenever an indictment, charging the commission of a capital or other felony, is returned a true bill, the judge holding

the court in which such indictment is found shall have the power, with the written consent of the defendant or defendants charged in said bill, to remove such indictment for trial to some adjacent county prior to the arraignment or plea of the defendant or defendants in such indictment, without the presence in person of the defendant or defendants, and upon such removal the pleas of the defendant or defendants may be entered in such adjacent county. (1921, c. 12, s. 1; C. S. 4606(a).)

§ 15-136. Jurisdiction of grand jury.—Upon the removal of any indictment under section 15-135, if it shall be found that there is any defect in such indictment, the grand jury of the county to which the same is removed for trial shall have as full and ample jurisdiction and power to find another indictment for the same offense as would the grand jury of the county from which the indictment was removed. (1921, c. 12, s. 2; C. S. 4606(b).)

Art. 14. Presentment.

§ 15-137. No arrest nor trial on presentment.—No person shall be arrested on a presentment of the grand jury, or put on trial before any court, but on indictment found by the grand jury, unless otherwise provided by law. (Rev., s. 3240; Code, s. 1175; R. C., c. 35, s. 6; 1797, c. 474, s. 3; 1879, c. 12; C. S. 4607.)

Cross References.—As to exception to grand jurors, see § 9-26 and notes. As to the indictment, see § 15-140 et seq. As to constitutional provisions, see N. C. Const., Art. I, § 12 and U. S. Const., Amend. V.

Original and Derivative Jurisdiction Distinguished.—On appeal from the superior court of Craven county, from conviction of the unlawful possession of intoxicants, where the record showed that defendant was bound over to the county court of Craven county with no record of his having been tried in that court or that there was any appeal therefrom, the superior court was without jurisdiction, and upon motion of the attorney-general, the appeal was properly dismissed. *State v. Patterson*, 222 N. C. 179, 22 S. E. (2d) 267.

Objections to Grand Jury.—In *State v. Sharp*, 110 N. C. 604, 14 S. E. 504, where there is a full discussion of objections to the competency of a grand jury, it is held that the fact that a son of the prosecutor was a member of the grand jury did not vitiate the indictment, though he had actively participated in finding the bill. *State v. Pitt*, 166 N. C. 268, 269, 80 S. E. 1060.

Where Foreman Interested in Prosecution.—A motion to quash a bill of indictment on the ground that the foreman of the grand jury was interested in the prosecution will be denied when it appears that the foreman took no part in passing upon the indictment and signed the bill under the direction of the grand jury and returned it in open court. *State v. Pitt*, 166 N. C. 268, 80 S. E. 1060.

Remedy When Grand Jury Defective.—If there be a defect in the accusing body, it is the right of the party indicted, by plea of abatement or by motion to quash, to avail himself of such defect; but it is required to be exercised at the earliest opportunity after bill found, which must be upon the arraignment when the party is first called upon to answer. *State v. Griffice*, 74 N. C. 316; *State v. Haywood*, 73 N. C. 437; *State v. Baldwin*, 80 N. C. 390, 391.

§ 15-138. Names of witnesses indorsed on presentment.—When a presentment shall be made of any offense by a grand jury, upon the knowledge of any of their body, or upon the testimony of witnesses, the names of such grand jurors and witnesses shall be indorsed thereon. (Rev., s. 3241; Code, s. 1176; R. C., c. 35, s. 7; 1797, c. 474, s. 2; C. S. 4608.)

Failure to Mark Names of Witnesses on Bill.—Section 9-27 providing that the foreman of the grand jury shall mark on the indictment the names of the witnesses sworn

and examined before the jury is directory merely, and the omission of the foreman to comply therewith is no ground for quashing the bill, where the proof is that the witnesses were sworn. *State v. Hines*, 84 N. C. 810.

§ 15-139. Subpoena for witnesses on presentment.—In issuing subpoenas for witnesses whose names are indorsed on presentments made by the grand jury, the clerk of the court shall name therein the first Tuesday of the term of court as the time for such witnesses to appear and give evidence. And no clerk shall issue a subpoena for any such witness to appear on Monday, except upon written order of the solicitor of the district. (1913, c. 168; C. S. 4609.)

Art. 15. Indictment.

§ 15-140. Waiver of bill of indictment.—No waiver of the finding and return into court of a bill of indictment in any criminal action shall be allowed in the superior courts of this state except in cases wherein the offense charged is a misdemeanor which does not include or contain the element of fraud, deceit or malice; nor shall such waiver be made in any such action except upon a plea of guilty, or a submission, or a plea of nolo contendere by the defendant in the same. No such waiver of a bill of indictment shall be allowed by the court unless by the consent of the defendant's counsel in such action, who shall be one either employed by the defendant to defend him in the action or one appointed by the court to examine into the defendant's case and report as to the same to the court; which service by an attorney so appointed by the court shall be rendered without fee or reward. (1907, c. 71; C. S. 4610.)

Section Constitutional.—This section, authorizing the waiver of an indictment in the Superior Court by the defendant bound over from an inferior court, is constitutional and valid. *Constitution*, Art. IV, sec. 13. *State v. Jones*, 181 N. C. 543, 106 S. E. 827.

Cited in *State v. Finch*, 218 N. C. 511, 11 S. E. (2d) 547.

§ 15-141. Bills returned by foreman except in capital cases.—Grand juries shall return all bills of indictment in open court through their acting foreman, except in capital felonies, when it shall be necessary for the entire grand jury, or a majority of them, to return their bills of indictment in open court in a body. (Rev., s. 3242; 1889, c. 29; C. S. 4611.)

Indictment to Be Returned in Open Court.—It is the returning of the bill or indictment, publicly, in open court and its being there recorded, that makes it effectual. *State v. Cox*, 28 N. C. 440.

Indictment Need Not Be Signed.—It has been often held that an indictment need not necessarily be signed by any one. *State v. Mace*, 86 N. C. 668; *State v. Pitt*, 166 N. C. 268, 269, 80 S. E. 1060; *State v. Cox*, 28 N. C. 440, 446.

No endorsement by the foreman or otherwise is essential to the validity of an indictment, which has been duly returned into court by the grand jury under this section, and entered upon its records. *State v. Avant*, 202 N. C. 680, 683, 163 S. E. 806.

§ 15-142. Substance of judicial proceedings set forth.—In every indictment, information, or impeachment in which, by the common law, it may be necessary to set forth at length the judicial proceedings had in any case then or formerly pending in any court, civil or military, or before any justice of the peace, it is sufficient to set forth the substance only of the proceedings, or the substance of such part thereof as makes, or helps to make, the offense prosecuted. (Rev., s. 3243; Code, s. 1184; R. C., c. 35, s. 15; C. S. 4612.)

Power of Legislature.—The legislature has the undoubted right to modify old forms of bills of indictment, or establish new ones, provided the form established is sufficient to apprise the defendant with reasonable certainty of the nature of the crime of which he stands charged. *State v. Harris*, 145 N. C. 456, 458, 59 S. E. 115.

Purpose of Section.—The purpose of this section and section 15-153 is to render unnecessary merely useless refinements and technicalities in pleading that once prevailed. *State v. Murphy*, 101 N. C. 697, 701, 8 S. E. 142.

Object of an Indictment.—The office of an indictment is to inform the defendant with sufficient certainty of the charge against him to enable him to prepare his defense. *State v. Gates*, 107 N. C. 832, 834, 12 S. E. 319.

Refinements Abolished.—The technical and useless refinements of the common law, formerly required in drawing bills of indictment in criminal cases, have been all abolished by statute. *State v. Hawley*, 186 N. C. 433, 119 S. E. 888. See also *State v. Morrison*, 202 N. C. 60, 161 S. E. 725.

Statement Required.—In every indictment, the facts and circumstances must be stated with such certainty that the defendant may judge whether they constitute an indictable offense or not. *State v. Lewis*, 93 N. C. 581. And thus where an indictment sets forth the substance of the offense charged "in a plain, intelligible and explicit manner," with such fullness as that the court could see that it was charged, and it gave the defendant such information as was necessary to enable him to make defence on the trial and in case of a subsequent prosecution, it is sufficient under this section and section 15-153. *State v. Murphy*, 101 N. C. 697, 701, 8 S. E. 142.

Omission of Caption Does Not Vitiates.—While every indictment properly should have a caption, it is no part of the indictment, and its omission is no ground for arresting judgment. *State v. Wasden*, 4 N. C. 596; *State v. Brickell*, 8 N. C. 354; *State v. Lane*, 26 N. C. 113; *State v. Dula*, 61 N. C. 437; *State v. Arnold*, 107 N. C. 861, 864, 11 S. E. 990.

Mistake in Caption.—A misrecital of the county in the caption is not ground for arrest of judgment. *State v. Sprinkle*, 65 N. C. 463; *State v. Arnold*, 107 N. C. 861, 864, 11 S. E. 990.

Signature of Solicitor Not Requisite.—It is regular and orderly for the bill to be signed by the solicitor, but such signing is not essential to its validity. *State v. Mace*, 86 N. C. 668; *State v. Cox*, 28 N. C. 440; *State v. Arnold*, 107 N. C. 861, 864, 11 S. E. 990.

§ 15-143. Bill of particulars.—In all indictments when further information not required to be set out therein is desirable for the better defense of the accused, the court, upon motion, may, in its discretion, require the solicitor to furnish a bill of particulars of such matters. (Rev., s. 3244; C. S. 4613.)

In General.—This provision as to a bill of particulars had prevailed previously as to civil proceedings, section 1-150, and was by this section made expressly applicable to criminal cases, to which the court had applied it in *State v. Brady*, 107 N. C. 822, 12 S. E. 325. *State v. Stephens*, 170 N. C. 745, 748, 87 S. E. 131.

Purpose of Section.—This section intended to make all indictments alike in regard to dispensing with the insertion of the means and methods by which any offense was committed. *State v. Stephens*, 170 N. C. 745, 748, 87 S. E. 131.

Object of Bill of Particulars.—The whole object of a bill of particulars is to enable the defendant to properly prepare his defense in cases where the bill of indictment, though correct in form and sufficient to apprise the defendant, in general terms, of the "accusation" against him, is yet so indefinite in its statements, as to the particular charge or occurrence referred to, that it does not afford defendant a fair opportunity to procure his witnesses or prepare his defense. *State v. Seaboard Air Line R. Co.*, 149 N. C. 508, 511, 62 S. E. 1088.

State Confined to Particulars Stated.—The granting of a bill of particulars on an indictment for a criminal offense is primarily to inform the accused of the charges against him, and secondarily to inform the court, and while this is not strictly a part of the indictment, its effect is to confine the State in its evidence to the particulars stated, and it is reversible error to the prejudice of the defendant's rights for the court to admit, over his objection, evidence as to other criminal offenses not included in the bill to show the scienter or quo animo in relation to the particulars enumerated and coming within the scope of those generally charged in the indictment. *State v. Wadford*, 194 N. C. 336, 139 S. E. 608.

Former Details Not Now Charged in Indictment.—It is no longer charged whether a murder was committed with a knife or a pistol, nor the length and breadth and depth of a wound, and the same is true as to all other offenses. In lieu of this, we have adopted this section which provides for a bill of particulars. *State v. Stephens*, 170 N. C. 745, 747, 87 S. E. 131.

What Bill Will Not Supply.—A bill of particulars will not supply any matter required to be charged in the indictment, as an ingredient of the offense. *State v. Long*, 143 N. C. 670, 671, 676, 57 S. E. 349. See also, *State v. Johnson*, 220 N. C. 773, 782, 18 S. E. (2d) 358 (dis. op.).

The provisions of this section cannot supply a deficiency in an indictment when the language of the indictment fails to adequately charge the essential concomitants of the offense. *State v. Cole*, 202 N. C. 592, 163 S. E. 594. See also, *State v. Wilson*, 218 N. C. 769, 12 S. E. (2d) 654.

Granting Order Is within Court's Discretion.—The granting of an order for a bill of particulars is in the discretion of the court, and the question of sufficient compliance is likewise in the sound legal discretion of the trial judge. *State v. Seaboard Air Line R. Co.*, 149 N. C. 508, 62 S. E. 1088.

Same—Amendment of Bill.—A bill of particulars, being no part of the indictment, is not subject to demurrer, and may be amended at any time, with permission of the court, on such terms or under such conditions as are just. *Townsend v. Williams*, 117 N. C. 330, 23 S. E. 461; *State v. Wadford*, 194 N. C. 336, 338, 139 S. E. 608.

A bill of particulars filed by order of court in a criminal action is not regarded as a part of the indictment, and with the court's permission may be amended at any time, and is not subject to demurrer, the office of such bill being to advise the court and the accused of specific occurrences for investigation. *State v. Beal*, 199 N. C. 278, 279, 154 S. E. 604.

Meaning of "Discretion."—The term "discretion," as used and contemplated in the statute, should be construed to mean the sound legal discretion of the trial court; it is well understood that the action of the lower court will not be reviewed or disturbed on appeal, unless there has been manifest abuse in the respect to defendant's prejudice. *State v. Dewey*, 139 N. C. 556, 51 S. E. 937; *State v. Seaboard Air Line R. Co.*, 149 N. C. 508, 511, 62 S. E. 1088.

When Applied for.—Where the defendant thinks that an indictment, otherwise objectionable in form, fails to impart information sufficiently specific as to the nature of the charge, he may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal. *State v. Corbin*, 157 N. C. 619, 621, 72 S. E. 1071; *State v. Shade*, 115 N. C. 757, 20 S. E. 537.

Indictment for Perjury.—Where the defendant in an action for perjury is in ignorance of the particulars of the offense charged, his remedy is by application to the court for a bill of particulars under this section if the indictment is in the form prescribed by section 15-145. *State v. Hawley*, 186 N. C. 433, 119 S. E. 888.

Indictment for Malfeasance of Bank Officer.—It is within the sound discretion of the trial judge to try, separately or collectively, the defendant, indicted under the provisions of section 14-254, for some or all offenses committed by a series of checks on the bank, whereby he had unlawfully "abstracted" the funds of the bank; and where the indictment is sufficient for conviction, the defendant's remedy is by requesting a bill of particulars when he reasonably so desires. *State v. Switzer*, 187 N. C. 88, 121 S. E. 143.

What Constitutes Waiver of Right.—Where a bank employee is charged with the indictable offense of making false entries upon the books of the bank in fraud or deceit of "other persons to the jurors unknown," the defendant should make his motion to the discretion of the trial judge for a bill of particulars requiring the name of these unknown persons, and his failure to do so will be deemed a waiver of his right. *State v. Hedgecock*, 185 N. C. 714, 117 S. E. 47.

Motion to Quash Not Proper Remedy.—Where the criminal indictment sufficiently charges all the elements of the offense but is not as definite as the defendant may desire the defendant's remedy is by a motion for a bill of particulars, and not by a motion to quash. *State v. Everhardt*, 203 N. C. 610, 166 S. E. 738.

Where Motion in Arrest of Judgment Properly Denied.—An indictment charging defendant disjunctively with murder committed with malice, premeditation, and deliberation and with murder committed in the perpetration of a robbery, is not void for uncertainty, since either charge constitutes murder in the first degree, and defendant's remedy, if he desires more specific information is by motion for

a bill of particulars under this section, but a motion in arrest of judgment after a verdict of guilty of murder in the first degree, is properly denied. *State v. Puckett*, 211 N. C. 66, 189 S. E. 183.

Cited in *State v. Suncrest Lumber Co.*, 199 N. C. 199, 201, 154 S. E. 72.

§ 15-144. Essentials of bill for homicide.—In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment "with force and arms," and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; and it is sufficient in describing manslaughter to allege that the accused feloniously and willfully did kill and slay (naming the person killed), and concluding as aforesaid; and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be. (Rev., s. 3245; 1887, c. 58; C. S. 4614.)

Cross Reference.—As to homicide generally, see §§ 14-17, 14-18 and notes thereto.

Section Constitutional.—The power of the Legislature to prescribe the form of indictment for murder is upheld in *State v. Moore*, 104 N. C. 743, 10 S. E. 183; *State v. Brown*, 106 N. C. 645, 10 S. E. 870; *State v. Arnold*, 107 N. C. 861, 864, 11 S. E. 990.

This section is an abbreviated form for a bill of indictment for murder. *State v. Puckett*, 211 N. C. 66, 73, 189 S. E. 183.

Willfully Not Necessary in Indictment for Murder.—The word "willfully" is not essential to the validity of an indictment for murder, neither at common law nor under this section. *State v. Arnold*, 107 N. C. 861, 11 S. E. 990; *State v. Kirkman*, 104 N. C. 911, 10 S. E. 812; *State v. Harris*, 106 N. C. 682, 11 S. E. 377, cited and approved.

What Is Sufficient under Section.—This section declares an indictment containing certain words "sufficient," but it does not make those words essential, nor by any reasonable construction can it be held to make technical and "sacramental" words which were not theretofore necessary in indictments for murder. *State v. Arnold*, 107 N. C. 861, 863, 11 S. E. 990.

Same—Form of Indictment Set Out.—The following is full and sufficient in the body of an indictment for murder: "The jurors for the State on their oaths present that A. B., in the county of E., did feloniously, and of malice aforethought, kill and murder C. D." And it is sufficient in an indictment for manslaughter to follow the same form, omitting the words "and with malice aforethought" and substituting "slay" in the stead of the word "murder." These forms contain, in the words of the statute, "every averment necessary to be proved." *State v. Arnold*, 107 N. C. 861, 863, 11 S. E. 990. This form also approved in *State v. Sou. Ry. Co.*, 125 N. C. 666, 671, 34 S. E. 527.

An indictment charging the essential facts of murder as required by this section, is sufficient to sustain the court's charge based upon the evidence in the case relative to murder committed in the perpetration of robbery or other felony. *State v. Fogleman*, 204 N. C. 401, 168 S. E. 536.

Statements Not Necessary.—An indictment is not defective for failure to allege whether the person killed was a man or woman, or whether the mortal wound was inflicted by stabbing, shooting or killing. *State v. Pate*, 121 N. C. 659, 28 S. E. 354.

It is not necessary that an indictment for murder committed in the attempt to perpetrate larceny should contain a specific allegation of the attempted larceny, such allegation not having been necessary in indictments prior to the adoption of the section. *State v. Covington*, 117 N. C. 834, 23 S. E. 337.

The omission of the word "wound" in an indictment for murder was held not fatal, long before the adoption of the present short form of indictment for murder under this section. *State v. Rinehart*, 75 N. C. 58; *State v. Ratliff*, 170 N. C. 707, 709, 86 S. E. 997.

Variance in Time Not Fatal.—Where an indictment for murder charged the killing to have taken place December fifth and the evidence showed that, while the deceased was wounded on that day, he died three days thereafter, and before the bill of indictment was found. Held, that the variance was not fatal. *State v. Pate*, 121 N. C. 659, 28 S. E. 354.

Indictment under Section Held to Give Full Information of Crime.—Where an indictment was drawn according to this section the defendant was given full information of the crime on which he was being tried. There was nothing indefinite or uncertain about the bill of indictment. It was in the alternative, but this was merely two counts in one bill of indictment. *State v. Puckett*, 211 N. C. 66, 73, 189 S. E. 183.

Applied in *State v. Kirkman*, 208 N. C. 719, 182 S. E. 498; *State v. Dills*, 210 N. C. 178, 185 S. E. 677; *State v. Hudson*, 218 N. C. 219, 10 S. E. (2d) 730.

Cited, in *State v. Thornton*, 211 N. C. 413, 190 S. E. 758; *State v. Godwin*, 211 N. C. 419, 190 S. E. 761; *State v. Smith*, 221 N. C. 278, 20 S. E. (2d) 313.

§ 15-145. Form of bill for perjury.—In every indictment for willful and corrupt perjury it is sufficient to set forth the substance of the offense charged upon the defendant, and by what court, or before whom, the oath was taken (averring such court or person to have competent authority to administer the same), together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceedings, either in law or equity, other than aforesaid, and without setting forth the commission or authority of the court or person before whom the perjury was committed. In indictments for perjury the following form shall be sufficient, to wit:

The jurors for the state, on their oath, present, that A. B., ofCounty, did unlawfully commit perjury upon the trial of an action incourt, inCounty, whereinwas plaintiff and.....was defendant, by falsely asserting, on oath (or solemn affirmation) (here set out the statement or statements alleged to be false), knowing the said statement, or statements, to be false, or being ignorant whether or not said statement was true. (Rev., ss. 3246, 3247; Code, s. 1185; R. C., c. 35, s. 16; 1842, c. 49, s. 1; 1889, c. 83; C. S. 4615.)

Cross Reference.—As to perjury generally, see § 14-209 et seq.

In General.—A person charged with perjury must be indicted by the grand jury as the offense is a felony. A trial without an indictment is contrary to the Constitution, Art. 1, sec. 12. *State v. Hyman*, 164 N. C. 411, 79 S. E. 284.

But a defendant certainly can derive no just benefit from the insertion in the charge of the minutiae of what would constitute perjury. The use of such phraseology was indeed always illogical, and the experience of ages has been that it served not so much to enlighten the defendant as to the charge he was to meet, as to present a network of technicalities which hindered the trial of the cause upon its merits and very often caused a miscarriage of justice. *State v. Gates*, 107 N. C. 832, 834, 12 S. E. 319.

And thus the purpose of this section is to render unnecessary useless details and niceties, in charging the offense of perjury, that one time prevailed to the prejudice of the administration of criminal justice. *State v. Robertson*, 98 N. C. 751, 752, 4 S. E. 511.

This section dispenses with the necessity of setting forth the record of the indictment, on the trial of which the false oath is alleged to have been taken, and only requires that the substance would be set forth, but it did not dispense with the necessity of making all the averments in an indictment for perjury which were all necessary to be proved, and it is necessary to prove in what court, or before whom, the oath was taken. *State v. Lewis*, 93 N. C. 581, 583.

Section Constitutional.—The form of indictment for perjury prescribed by this section is sufficient and legal. *State*

v. Peters, 107 N. C. 876, 12 S. E. 74; *State v. Hawley*, 186 N. C. 433, 119 S. E. 888 overruling *State v. Cline*, 150 N. C. 854, 64 S. E. 591; *State v. Gates*, 107 N. C. 832, 12 S. E. 319.

Word "Feliciously" Not Necessary.—In the cases of *State v. Bunting*, 118 N. C. 1200, 24 S. E. 118 and *State v. Shaw*, 117 N. C. 764, 23 S. E. 246, which were indictments for perjury, it was expressly held that the term "feliciously" was required to make a good bill of indictment for this offense. Both of them, too, were on indictments instituted after the adoption of this section which established the form for indictment for perjury. The court, however, in rendering these decisions, was evidently not advertent to the statute above referred to, for the reason probably that it does not appear in the general Code of 1883, and was, therefore, not called to its attention; the statute having been enacted at a subsequent session and being chapter 83, Laws of 1889. *State v. Harris*, 145 N. C. 456, 458, 59 S. E. 115.

But this section does not make the word "feliciously" a part of the bill, and it does not appear in the form set out, and the same is, therefore, no longer required. *State v. Harris*, 145 N. C. 456, 457, 59 S. E. 115; *State v. Holder*, 153 N. C. 606, 609, 69 S. E. 66.

Sufficient Averment of Jurisdiction.—The jurisdiction of the justice of the peace of the complaint upon the examination whereof the alleged perjury was committed is sufficiently averred where it is averred, that the justice had power to administer the oath. *State v. Davis*, 69 N. C. 495.

Style of the Court.—The style of the court before which the perjury is alleged to have been committed must be legally set forth. *State v. Street*, 5 N. C. 156, 3 Am. Dec. 682.

Proceedings Not Set Out.—Where an indictment for perjury alleges that the false oath was taken before a justice of the peace upon the trial of a warrant, etc., it is not necessary to set forth the proceedings in which the false oath was alleged to have been made. *State v. Roberson*, 98 N. C. 751, 4 S. E. 511.

Indictment Need Not Charge Materiality of False Testimony.—Prior to the adoption of this section it was settled that in indictments for perjury the indictment must charge that the alleged false testimony was material to the issue. See *State v. Davis*, 69 N. C. 495; *State v. Mumford*, 12 N. C. 519. Since this section was passed however it has been repeatedly held that this need not appear in the indictment. See *State v. Hawley*, 186 N. C. 433, 435, 119 S. E. 888 and cases cited. The case of *State v. Cline*, 150 N. C. 854, 64 S. E. 591, though decided in 1909 evidently overlooked the provisions of this section as well as the cases previously construing it and held in accordance with the former view that the materiality of the false testimony must be charged in the indictment. This case was expressly overruled by the court in *State v. Hawley*, supra.

But the averment in a bill that defendant committed perjury includes the necessity for proving that the false testimony was material to the issue. *State v. Cline*, 146 N. C. 640, 61 S. E. 522.

Variance Held Fatal.—Where an indictment for perjury charged that the false oath was taken at one term of a court in a trial between A and B and the records of that court showed that at that term there was no trial between these parties, but the record showed that at a term other than the one alleged in the indictment there was such a trial, and the judge allowed this record to be introduced: Held, error, and that the variance was fatal. *State v. Lewis*, 93 N. C. 581.

Not Quashed for Omissions.—Although an indictment for perjury, which fails to allege that the defendant "knew the said statement to be false," or that "he was ignorant whether or not said statement was false," is defective, the court should not quash it, but the defendant should be held until a proper indictment is had. *State v. Flowers*, 109 N. C. 841, 13 S. E. 718.

Surplusage.—Where perjury was alleged to have been committed in the trial of a "suit, controversy, or investigation," without a definite statement of the nature of the proceeding, the words, "suit, controversy, or investigation," under this section, may be regarded as surplusage in a bill of indictment charging perjury, and a motion to quash upon the ground that there was indefiniteness of statement of the nature of the proceeding will not be sustained. *State v. Hawley*, 186 N. C. 433, 119 S. E. 888.

An indictment for perjury, alleged to have been committed upon a trial in the court of a justice of the peace, is not defective because it sets out the name of the Justice before whom the case was tried. *State v. Flowers*, 109 N. C. 841, 13 S. E. 718.

No Change In Proof Required.—This section has merely simplified the form of the indictment for perjury, and the constituent elements of the offense remain unchanged and require the same proof to establish the commission of the

crime. *State v. Peters*, 107 N. C. 876, 12 S. E. 74; *State v. Cline*, 146 N. C. 640, 642, 61 S. E. 522.

Applied in *State v. Rhinehart*, 209 N. C. 150, 183 S. E. 388.

§ 15-146. Bill for subornation of perjury.—In every indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit willful and corrupt perjury, it is sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration or any part of any record or proceedings, and without setting forth the commission or authority of the court or person before whom the perjury was committed or was agreed or promised to be committed. (Rev., s. 3248; Code, s. 1186; R. C., c. 35, s. 17; 1842, c. 49; s. 2; C. S. 4616.)

§ 15-147. Former conviction alleged in bill for second offense.—In any indictment for an offense which, on the second conviction thereof, is punished with other or greater punishment than on the first conviction, it is sufficient to state that the offender was, at a certain time and place, convicted thereof, without otherwise describing the previous offense; and a transcript of the record of the first conviction, duly certified, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction. (Rev., s. 3249; Code, s. 1187; R. C., c. 35, s. 18; C. S. 4617.)

In General.—When a second conviction is punished with other or greater punishment than for a first conviction, the first conviction shall be charged as required by this section. *State v. Davidson*, 124 N. C. 839, 32 S. E. 957.

No Presumption of Second Conviction.—The first conviction of manufacturing or aiding and abetting in the manufacture of spirituous, etc., liquors is a misdemeanor, and the second is a felony; and where the indictment does not charge a previous conviction it will be presumed that the defendant has not heretofore been convicted of the offense charged. *State v. Clark*, 183 N. C. 733, 110 S. E. 641.

§ 15-148. Manner of alleging joint ownership of property.—In any indictment wherein it is necessary to state the ownership of any property whatsoever, whether real or personal, which belongs to, or is in the possession of, more than one person, whether such persons be partners in trade, joint tenants or tenants in common, it is sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others as the case may be; and whenever, in any such indictment, it is necessary to mention, for any purpose whatsoever, any partners, joint tenants or tenants in common, it is sufficient to describe them in the manner aforesaid; and this provision shall extend to all joint-stock companies and trustees. (Rev., s. 3250; Code, s. 1188; R. C., c. 35, s. 19; C. S. 4618.)

Apparent Variance Cured.—Where property is charged in an indictment for larceny as belonging to A and another, and it is proved on the trial to be the property of A and B, a firm well known in the community, the apparent variance is cured by this section. *State v. Capps*, 71 N. C. 93.

Where A makes a crop of cotton on the plantation of B, under a verbal agreement that B is to have half of it, it was held, that in an indictment for larceny the cotton was properly charged to be the property of A and another. *State v. Patterson*, 68 N. C. 292.

Variance Not Cured.—Upon the trial of an indictment for injury to livestock, it was held, to be a variance where the property was laid in "L. S. and others," and the proof was that L. S. was the exclusive owner. *State v. Hill*, 79 N. C. 657.

Words "And Another or Others" Invalidates.—An in-

dictment for larceny, which charges the thing taken to be the property of J. R. D. "and another or others" is fatally defective under this section. *State v. Harper*, 64 N. C. 129.

§ 15-149. Description in bill for larceny of money.—In every indictment in which it is necessary to make any averment as to the larceny of any money, or United States treasury note, or any note of any bank whatsoever, it is sufficient to describe such money, or treasury note, or bank note, simply as money, without specifying any particular coin, or treasury note, or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or treasury note, or bank note, although the particular species of coin, of which such amount was composed, or the particular nature of the treasury note, or bank note, shall not be proven. (Rev., s. 3251; Code, s. 1190; 1876-7, c. 68; C. S. 4619.)

Purpose of Section.—An indictment, before 1877, for stealing "money" without further description could not have been sustained, and the Legislature, to remedy the difficulty of describing and identifying bank bills, treasury notes, etc., which may be stolen, passed this section. *State v. Reese*, 83 N. C. 637, 639.

Amount Should Be Charged.—The term "money," without anything added to make it more definite, is too loose in indictments, and it should be described at least by the amount, as to how many dollars and cents. *State v. Reese*, 83 N. C. 637, 640.

Charge Sufficient.—The charge of the theft of "\$5 in money of the value of \$5" is good under this section and is sustained by the proof of the theft of any kind of coin or treasury or bank notes without proof of the particular kind of coin or treasury or bank note. *State v. Carter*, 113 N. C. 639, 18 S. E. 517.

Inasmuch as money is the measure of values a charge in an indictment of taking "ten dollars in money" is an allegation of taking "the value of ten dollars." *State v. Brown*, 113 N. C. 645, 18 S. E. 51.

Variance Allowed.—Where an indictment charged the larceny of "thirty dollars in money," and the proof was that defendant stole "three ten dollar bills" it was held, no variance. *State v. Freeman*, 89 N. C. 469.

§ 15-150. Description in bill for embezzlement.—In indictments for embezzlement, except when the offense relates to a chattel, it is sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved. (Rev., s. 3252; Code, s. 1020; 1871-2, c. 145, s. 2; C. S. 4620.)

Cross Reference.—As to embezzlement in general, see § 14-90 et seq.

Sufficient Description of Property.—The description of the property embezzled, as "one note for five dollars in money of the value of five dollars," is sufficiently specific. *State v. Fain*, 106 N. C. 760, 11 S. E. 593.

Surplusage Which Does Not Vitiate.—An allegation in an indictment for embezzlement that the defendant "did steal, take, carry away" the property alleged to have been embezzled, is surplusage, and will not vitiate an indictment otherwise sufficient. *State v. Fain*, 106 N. C. 760, 11 S. E. 593.

Variance.—In a prosecution for embezzlement the failure of proof of embezzlement of the whole sum charged in the bill of indictment does not constitute a fatal variance between allegation and proof where there is proof of embezzlement of a sum less than that charged in the indictment. *State v. Dula*, 206 N. C. 745, 175 S. E. 80.

§ 15-151. Intent to defraud; larceny and receiving.—In any case where an intent to defraud is required to constitute the offense of forgery, or any other offense whatever, it is sufficient to allege

in the indictment an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment, it shall be sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any state, county, city, town, or parish, or body corporate, or any public officer in his official capacity, or any copartnership or member thereof, or any particular person. The defendant may be charged in the same indictment in several counts with the separate offenses of receiving stolen goods, knowing them to be stolen, and larceny. (Rev., s. 3253; Code, s. 1191; R. C., c. 35, ss. 21, 23; 1852, c. 87, s. 2; 1874-5, c. 62; C. S. 4621.)

Cross Reference.—As to larceny and receiving stolen goods generally, see § 14-70 et seq., and § 53-129.

In General.—An indictment charging the employee with the indictable offense of making a false entry on the books of a bank in which he was employed need not necessarily specify all those whom he has thereby intended to defraud; and where it has named the officers of the bank and a depositor, "and other persons to the jurors unknown," it is sufficient to show that the false entry was entered to deceive the bank examiners in concealing his defalcation, who were present making an examination of his books, both under the common law and the statute. *State v. Hedgecock*, 185 N. C. 714, 117 S. E. 47.

Solicitor Need Not Elect Count.—On trial of an indictment for larceny and receiving, etc., the two counts relating to the same transaction and varied to meet the probable proofs, the court will not order the Solicitor to elect upon which count he will proceed. *State v. Morrison*, 85 N. C. 561.

General Verdict Correct.—A general verdict of guilty upon an indictment of two counts—one for stealing and the other for receiving stolen goods of a value less than five dollars—is correct and if one count is defective the verdict will be taken upon the good count, and there may be judgment. *State v. Bailey*, 73 N. C. 70; *State v. Leak*, 80 N. C. 403.

§ 15-152. Separate counts; consolidation.—When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated: Provided, that in such consolidating cases the defendant shall be taxed the solicitor's full fee for the first count, and a half fee for only one subsequent count upon which conviction is had or plea of guilty entered: Provided, this section shall not be construed to reduce the punishment or penalty for such offense or offenses. (1917, c. 168; 1921, c. 100; C. S. 4622.)

Cross References.—As to the amount of solicitors' fees, see § 6-12. As to writing separate counts in violation of laws regulating intoxicating liquors, see § 18-10.

Editor's Note.—By ch. 100, Public Laws of 1921 the first proviso to this section, regarding the fees of the solicitor, was amended. The former wording provided that the defendant should be taxed half fees for each subsequent count upon which conviction was had. The amendment in addition to allowing the half fee on but one subsequent count added at the end of the proviso the words "or plea of guilty entered."

General Verdict Covers Several Counts.—Where there are several counts in a criminal complaint (called indictment in this case), and each is for a distinct offense, a general verdict of guilty will apply to each, and a judgment rendered as to each count will be sustained for the separate offenses. *State v. Mills*, 181 N. C. 530, 106 S. E. 677.

Offenses of Same Class.—An indictment charging the defendant with "receiving stolen goods," etc., with evidence tending to show the receiving on several occasions,

does not require the solicitor to select the count on which he would proceed, on defendant's motion, each offense being of the same class of crime. *State v. Charles*, 195 N. C. 868, 142 S. E. 486.

Entering Judgment on Each Offense upon General Verdict of Guilty.—Where the trial of two separate criminal indictments are consolidated by the judge and tried together as authorized by this section and a general verdict of guilty is returned by the jury, the verdict will apply to each indictment, and judgment pronounced on one of them, but execution suspended on terms agreed upon, and judgment and sentence entered as to the other, is not objectionable on the ground that only one judgment should have been entered, and held further, the sentences being concurrent, the defendant was not prejudiced. *State v. Harvell*, 199 N. C. 599, 600, 155 S. E. 257.

Obstructing Highway and Injury to Property.—It is not only proper but it is the duty of the court to consolidate cases where defendant is charged with obstructing a highway and with wanton injury to personal property by placing nails in the highway. *State v. Malpass*, 189 N. C. 349, 127 S. E. 248.

Delivering Liquor and Keeping for Sale.—Under this section consolidation of charges of delivering and keeping for sale under the Turlington Act is proper. *State v. Jarrett*, 189 N. C. 516, 127 S. E. 590.

Arson and House Burning.—Where the grand jury has found two separate indictments, one charging arson and the other the less offense of house burning, both arising from the same transaction, the two may be consolidated and a conviction of the less offense will be sustained on appeal. *State v. Brown*, 182 N. C. 761, 108 S. E. 349.

Housebreaking and Larceny.—When not subject to legal objection, a motion by the solicitor to consolidate two criminal actions for trial is addressed to the discretion of the trial judge, and where prosecutions for housebreaking and larceny on two occasions during the same night against two defendants are consolidated without objection, and the charges are so connected in time and place that evidence of guilt in one action is competent in the other, the order of the trial judge consolidating the actions will not be held for error on appeal. *State v. Combs*, 200 N. C. 671, 158 S. E. 252.

Murder of One Person and Assault upon Another.—Upon the trial under an indictment charging the prisoner with murder of M., it is reversible error to the defendant's prejudice for the trial court upon his own motion, after a substantial part of the evidence had been introduced to consolidate the action with another action under a separate indictment charging the prisoner with an assault with a deadly weapon upon D., the prisoner being afforded no opportunity to pass upon the impartiality of the jury upon the assault charge or an opportunity to plead to the charge. *State v. Rice*, 202 N. C. 411, 163 S. E. 112.

Separate Acts of Rape.—Where the evidence tended to show that defendant, a negro, was walking through woods with a negro girl and forced her to have sexual intercourse with him against her will, that on the same night, while defendant was still in company with the colored girl, he met a white girl in the company of two white boys, and that after an altercation with the white boys, they and the colored girl left the white girl with defendant and that he forced her to have sexual intercourse with him against her will, the consolidation of the prosecutions for the purpose of trial was not error. *State v. Chapman*, 221 N. C. 157, 19 S. E. (2d) 250.

Rape and Carnal Knowledge of Female.—A charge of rape and that of carnally knowing a female person between the ages of twelve and sixteen years, under § 14-26, were properly joined in separate counts in one indictment under this section, since they are related in character and grow out of the same transaction. *State v. Hall*, 214 N. C. 639, 200 S. E. 375.

Burglary and Rape.—A motion, made before the introduction of any evidence, to require the State to elect between two separate counts in the bill of indictment, one charging burglary in the first degree and the other rape, is properly denied, the two offenses being of the same class, which under this section may be joined in one indictment in separate counts, and it being within the sound discretion of the trial court as to whether he should compel an election between the counts and, if so, at what stage of the trial. *State v. Smith*, 201 N. C. 494, 160 S. E. 577.

Offenses Related to Operation of Automobile.—A charge of reckless driving, of operating an automobile on the highway while under the influence of intoxicating liquor and of assault with an automobile may be properly joined in one indictment as separate counts charging distinct offenses of the same class growing out of the same transaction, and separate judgments may be entered upon the

jury's verdict of guilty of reckless driving and assault. *State v. Fields*, 221 N. C. 182, 19 S. E. (2d) 486.

Reckless Driving and Passing Standing School Bus.—Indictments charging defendant with reckless driving and with passing a standing school bus on the highway may be consolidated for trial as provided in this section. *State v. Webb*, 210 N. C. 350, 186 S. E. 241.

It is permissible to join counts charging conspiracy and successive steps thereafter taken by the respective conspirators in executing the common design. *State v. Anderson*, 208 N. C. 771, 182 S. E. 643.

It is not error, under this section, for the trial court to refuse a separate trial on each two counts in an indictment charging defendants with conspiracy to rob and with murder committed in the attempt to perpetrate the robbery. *State v. Green*, 207 N. C. 369, 177 S. E. 120.

Consolidation Is within Discretionary Power of Trial Court.—Defendant was tried separately in municipal court on two warrants, each charging assault with a deadly weapon, but upon different persons on separate occasions about fifteen days apart. On appeal to the Superior Court, the court, upon motion of the solicitor, consolidated the cases for trial. Under the provisions of this section, the order of consolidation was within the discretionary power of the trial court. *State v. Waters*, 208 N. C. 769, 182 S. E. 483. See also, *State v. McLean*, 209 N. C. 38, 182 S. E. 700, wherein indictments charging embezzlement were consolidated.

The court is authorized by this section to order the consolidation for trial of two or more indictments, in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. *State v. Norton*, 222 N. C. 418, 23 S. E. (2d) 301.

Applied in *State v. Lancaster*, 210 N. C. 584, 187 S. E. 802.

Cited in *State v. Alridge*, 206 N. C. 850, 852, 175 S. E. 191; *State v. Wells*, 219 N. C. 354, 13 S. E. (2d) 613; *State v. Calcutt*, 219 N. C. 545, 559, 15 S. E. (2d) 9 (dis. op.).

§ 15-153. Bill or warrant not quashed for informality.—Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment. (Rev., s. 3254; Code, s. 1183; R. C., c. 35, s. 14; 37 Hen. VIII, c. 8; 1784, c. 210, s. 2; 1811, c. 809; C. S. 4623.)

I. Nature and Purpose.

II. General Effect.

III. Defects Cured.

A. In General.

B. Omissions and Mistakes.

C. Allegations Differing from Proof.

Cross References.

As to particular defects which do not vitiate, see § 15-155. For examples of sufficient indictments see the notes under the various sections dealing with particular crimes.

I. NATURE AND PURPOSE.

Purpose of Section.—As far back as *State v. Moses*, 13 N. C. 452, (at p. 464), Ruffin, C. J., speaking of this section says: "This law was certainly designed to uphold the execution of public justice, by freeing the courts from those fetters of form, technicality, and refinement, which do not concern the substance of the charge, and the proof to support it. Many of the sages of the law had before called nice objections of this sort a disease of the law, and a reproach to the bench, and lamented that they were bound down to strict and precise precedents. . . . We think the legislature meant to disallow the whole of them, and only require the substance, that is a direct averment of those facts and circumstances which constitute the crime, to be set forth. It is to be remarked that the act directs the Court to proceed to judgment, without regard to two things—one the form, the other refinement." *State v. Hester*, 122 N. C. 1047, 1048, 29 S. E. 380. See *State v. Barnes*, 122 N. C. 1031, 29 S. E. 381, which uses the same language. See also, *State v. Hedgecock*, 185 N. C. 714, 720, 117 S. E. 47; *State v. Switzer*, 187 N. C. 88, 96, 121 S. E. 43; *Ryals v.*

Carolina Contracting Co., 219 N. C. 479, 496, 14 S. E. (2d) 531 (dis. op.).

This section and section 15-155 were passed to forbid refinements and technicalities which, without being any aid to the innocent, brought the administration of justice into disrepute. *State v. Leeper*, 146 N. C. 65, 658, 61 S. E. 585.

The whole purpose of the law is to administer justice and that law and order and orderly government may at all times be maintained. *State v. Walls*, 211 N. C. 487, 498, 191 S. E. 232.

Quashing Indictments Not Favored.—Quashing indictments is not favored. It releases recognizances and sets the defendant at large where, it may be, he ought to be held to answer upon a better indictment, though allowable, where it will put an end to the prosecution altogether, and advisable where it appears that the court has no jurisdiction, or where the matter charged is not indictable in any form. * * * It is, therefore, a general rule that no indictment which charges the higher offenses, as treason or felony or those crimes which immediately affect the public at large, as perjury, forgery, etc., will be thus summarily dealt with. * * * The example is a bad one, and the effect upon the public injurious, to allow the defendant to escape upon matters of form. *State v. Flowers*, 109 N. C. 841, 844, 13 S. E. 718. See *State v. Colbert*, 75 N. C. 368.

Approved Forms Should Be Followed.—This section was enacted to prevent miscarriage of justice, but not to encourage prosecuting officers to try experiments with new forms, or to excuse them from the duty of ascertaining and following those which have been approved by long use or by statute. The object of the statute in disregarding refinements and informalities is to secure trials upon the merits, and solicitors will best serve that end by observing approved forms so as not to raise unnecessary questions as to what are refinements and informalities and what are indispensable allegations. *State v. Barnes*, 122 N. C. 1031, 1038, 29 S. E. 381; *State v. Marsh*, 132 N. C. 1000, 1003, 43 S. E. 828.

II. GENERAL EFFECT.

Liberal Construction.—This section has received a very liberal construction, and its efficacy has reached and healed numerous defects in the substance as well as in form of indictment. *State v. Carpenter*, 173 N. C. 767, 770, 92 S. E. 373; *State v. Smith*, 63 N. C. 234, 236.

Under this section bills and warrants are no longer subject to quashal "by reason of any informality or refinement." *State v. Anderson*, 208 N. C. 771, 782, 182 S. E. 643; *State v. Dale*, 218 N. C. 625, 12 S. E. (2d) 556.

Plain, Intelligible and Explicit Charge Sufficient.—The current is all one way, sweeping away by degrees "informalities and refinements," until a plain, intelligible and explicit charge is all that is now required in any criminal proceeding. *State v. Caylor*, 178 N. C. 807, 809, 101 S. E. 627; *State v. Smith*, 63 N. C. 234. See also *State v. Everhardt*, 203 N. C. 610, 166 S. E. 738; *State v. Howley*, 220 N. C. 113, 16 S. E. (2d) 705.

A joint indictment of two defendants for murder charged that defendants "of his malice aforethought" committed the act. Held: The use of the word "his" instead of "their" is insufficient ground for arresting the judgment, informalities and refinements being disregarded if the indictment is sufficient to inform defendants of the charge against them and to enable them to prepare their defense, and to protect them from another prosecution. *State v. Linney*, 212 N. C. 739, 194 S. E. 470.

A charge of the receipt by defendant of official ballots, knowing that he had no legal right to them, amounts to a charge of interference with the duty of the county board of elections to safely keep the ballots until time for delivery to the registrars, within the provisions of this section, and the bill of indictment should not have been quashed because it failed to charge the manner in which the election officials were interfered with. *State v. Abernethy*, 220 N. C. 226, 229, 17 S. E. (2d) 25.

Same—Describing Property.—The description in an indictment must be in the common and ordinary acceptance of property and with certainty sufficient to enable the jury to say that the article proved to be stolen is the same, and to enable the court to see that it is the subject of larceny and also to protect the defendant in any subsequent prosecution for the same offense. *State v. Campbell*, 76 N. C. 261; *State v. Nipper*, 95 N. C. 653; *State v. Martin*, 82 N. C. 672; *State v. Caylor*, 178 N. C. 807, 808, 101 S. E. 627.

Following Words of Statute.—Where an indictment follows the words of a statute it is sufficient under this section. *State v. Leeper*, 146 N. C. 655, 658, 61 S. E. 585; *State v. Harrison*, 145 N. C. 408, 417, 59 S. E. 867. See also *State v. Davis*, 203 N. C. 47, 164 S. E. 732.

Rule Also Applied in Defendant's Favor.—Although the

rule prohibiting reliance upon technicalities applies only against defendants, it is in accordance with the spirit of the section that it should be invoked in their favor also, for example as to the form of defendant's objection to the indictment. *State v. Wood*, 175 N. C. 809, 820, 95 S. E. 1050.

Motion in Arrest of Judgment.—A motion in arrest of judgment after conviction, on the ground that the bill of indictment is defective, will not be granted unless it appears that the bill is so defective that judgment cannot be pronounced upon it. *State v. Francis*, 157 N. C. 612, 72 S. E. 1041; *State v. Ratliff*, 170 N. C. 707, 709, 86 S. E. 997; *State v. Sauls*, 190 N. C. 810, 130 S. E. 848.

And where sufficient matter appears on the face of a bill of indictment to enable the court to proceed to judgment, an arrest of judgment is forbidden by this section. *State v. Darden*, 117 N. C. 697, 23 S. E. 106.

Indictment under Private Law.—Upon an indictment under a private statute, it is sufficient if the same is set forth by chapter and date and its material provisions incorporated in the indictment. *State v. Heaton*, 77 N. C. 505.

Does Not Supply Essential Averments.—By the many adjudications construing this section it has been definitely settled that the section neither supplies nor remedies the omission of any distinct averment of any fact or circumstance which is an essential constituent of the offense charged. *State v. Cole*, 202 N. C. 592, 598, 163 S. E. 594. See *State v. Tarlton*, 208 N. C. 734, 182 S. E. 481; *State v. Johnson*, 220 N. C. 773, 781, 18 S. E. (2d) 358 (dis. op.).

Where the indictment contains sufficient matter to enable the court to proceed to judgment a motion to quash for duplicity or indefiniteness is properly refused, and a motion to quash for redundancy or inartificiality is addressed to the sound discretion of the trial court. *State v. Davis*, 203 N. C. 13, 14, 164 S. E. 737.

Prisoner Is Held Although Indictment Is Defective.—Where the indictment should have been quashed because it was defective in form, the prisoner could still be held for a proper bill under this section. *State v. Callett*, 211 N. C. 563, 191 S. E. 27.

Quoted in *State v. Wilson*, 218 N. C. 769, 12 S. E. (2d) 654.

Cited in *State v. Beal*, 199 N. C. 278, 294, 154 S. E. 604; *State v. Puckett*, 211 N. C. 66, 189 S. E. 183.

III. DEFECTS CURED.

A. In General.

Superfluous Words Disregarded.—The use of superfluous words in a bill of indictment will be disregarded. *State v. Guest*, 100 N. C. 410, 411, 6 S. E. 253; *State v. Arnold*, 107 N. C. 861, 11 S. E. 990; *State v. Darden*, 117 N. C. 697, 23 S. E. 106; *State v. Piner*, 141 N. C. 760, 53 S. E. 305; *State v. Wynne*, 151 N. C. 644, 645, 65 S. E. 452.

Variance Must Be Material to Vitiate.—A variance now, since this section was passed, to be fatal must be substantial and material. *State v. Ridge*, 125 N. C. 655, 34 S. E. 439.

Immaterial Words May Be Omitted.—The inadvertent omission of words not affecting the substances of the charge or prejudicing the defendant is not fatal. *State v. Burke*, 108 N. C. 750, 12 S. E. 1000, and cases there cited. *State v. Ratliff*, 170 N. C. 707, 86 S. E. 997.

Endorsement by Grand Jury Unnecessary.—No endorsement on a bill of indictment by the grand jury is necessary. The record that it was presented by the grand jury is sufficient in the absence of evidence to impeach it. *State v. McBroom*, 127 N. C. 528, 37 S. E. 193, overruled. *State v. Sultan*, 142 N. C. 569, 54 S. E. 841; *State v. Long*, 143 N. C. 670, 671, 57 S. E. 349.

B. Omissions and Mistakes.

In the Complaint.—The omission of the name of the party in the complaint, against whom a criminal offense is charged, will not of itself invalidate the indictment, when the warrant of arrest thereto attached and referred to contains his name and clearly indicates him as the person charged, the complaint and warrant being read together, and in this way they are sufficient in form to proceed to judgment upon conviction. *State v. Poythress*, 174 N. C. 809, 93 S. E. 919.

In Describing a Lease.—In describing a lease the omission of the word "year" after the word "one", is one of the informalities cured by this section. *State v. Walker*, 87 N. C. 541, 543.

Incorrect Spelling.—Charging that one committed a crime in the "count aforesaid" instead of county aforesaid is an informality which is cured by this section. *State v. Smith*, 63 N. C. 234; *State v. Evans*, 69 N. C. 40, 42.

Wrong County in Caption.—A misrecital of the proper county in the caption of an indictment furnishes no ground

for arrest of judgment, and it seems that such an indictment would have been sufficient even before this section was adopted. *State v. Sprinkle*, 65 N. C. 463.

Name of Court Incorrect.—Describing the court in which the false oath is alleged to have been taken as "before Joseph Z. Pratt, a justice of the peace, in and for said county," instead of as "a court of a justice of the peace for township A, of Chowan County," is not a substantial variance from the true description, and is cured by this section. *State v. Davis*, 69 N. C. 495.

Failure to Repeat Names in Charging Scientist.—Where defendants contended that a count in the indictment charging receiving stolen goods was fatally defective in that the names of defendants were not repeated in charging scienter, it was held that the defect was merely an informality or refinement not sufficient to support a quashal of the indictment, the charge being plain, explicit and sufficient to enable the court to proceed to judgment. *State v. Whitley*, 208 N. C. 661, 182 S. E. 338.

Ownership of Property in Arson.—In a prosecution under §§ 14-5, 14-65, an indictment stating that the defendant procured another to burn a certain house owned by the defendant and another as tenants in common is sufficient, and the fact that the same parties owned other houses in like capacity is not ground for demurrer or quashal. *State v. McKeithan*, 203 N. C. 494, 166 S. E. 336.

C. Allegations Differing from Proof.

Names of Parties.—Where the indictment charged an assault, etc., upon "Lila" Hatcher, and the evidence tended to show that it was made upon "Liza" Hatcher, the variance is immaterial. *State v. Drakeford*, 162 N. C. 667, 78 S. E. 308.

Where indictment alleged that Thomas R. Robertson was defendant, and the proof was that "Thomas Robertson" was the defendant in said action and there was evidence of the identity of Thomas Robertson and Thomas R. Robertson, this is an informality cured by the section. *State v. Hester*, 122 N. C. 1047, 29 S. E. 380.

In an indictment for murder, the assault is charged to have been made on one "N. S. Jarrett," and in subsequent parts of the indictment he is described as "Nimrod S. Jarrett," Held, to be no variance. *State v. Henderson*, 68 N. C. 348.

Name of Article Stolen.—In an indictment for larceny, when the article stolen is described as a "calf" skin and is proven on the trial to be a "kip" skin: Held, no variance between the allegation and the proof. *State v. Campbell*, 76 N. C. 261.

Object Used in Commission of Assault.—Evidence that defendant committed the assault with a "brick or a rock or what" was not fatal variance with a warrant charging that the assault was committed with a brick, the evidence being sufficient to justify the jury in inferring that the assault was committed with a brick as charged, and there being no element of surprise in the evidence, especially since defendant's defense was that of an alibi. *State v. Hobbs*, 216 N. C. 14, 3 S. E. (2d) 431.

§ 15-154. No quashal for grand juror's failure to pay taxes or being party to suit.—No indictment shall be quashed nor shall judgment thereon be arrested by reason of the fact that any member of the grand jury finding such bills of indictment had not paid his taxes for the preceding year, or was a party to any suit pending and at issue. (1907, c. 36; C. S. 4624.)

Cross Reference.—As to when exceptions for disqualification of grand jurors should be made, see § 9-26.

§ 15-155. Defects which do not vitiate.—No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved, nor for omission of the words "as appears by the record," or of the words "with force and arms," nor for the insertion of the words "against the form of the statutes" instead of the words "against the form of the statute," or vice versa; nor for omission of the words "against the form of the statute" or "against the form of the statutes," nor for omitting to state the time at which the offense was committed in any case

where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper and perfect venue, when the court shall appear by the indictment to have had jurisdiction of the offense. (Rev., s. 3255; Code, s. 1189; R. C., c. 35, s. 20; 7 Hen. VIII, c. 8; C. S. 1625.)

Cross Reference.—As to other defects which do not vitiate an indictment, see the notes under § 15-153 and under the various sections dealing with the particular crimes.

In General.—The refined technicalities of the procedure at common law, in both civil and criminal cases, have almost entirely, if not quite, been abolished by our statute. *State v. Hedgecock*, 185 N. C. 714, 117 S. E. 47.

The modern tendency is against technical objections which do not affect the merits of the case. Hence judgments are not to be stayed or reversed for nonessential or minor defects. *State v. Anderson*, 208 N. C. 771, 782, 182 S. E. 643.

Section Cures Formal Defects.—This section is intended to cure only formal defects in the indictment after judgment, and not omissions of averments necessary to enable the court to give judgment intelligently. *State v. Wise*, 66 N. C. 120.

Locality May Be Omitted.—Formerly failure to allege and prove the locality, appropriate to the forum, was fatal, because essential to the jurisdiction, both in civil and criminal actions, but this has been wisely reversed by this section. *State v. Long*, 143 N. C. 670, 671, 675, 57 S. E. 349.

Other Expressions Omitted.—Omitting the statement, that the "prisoner, not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil," and the further omission of an averment that the "deceased was in the peace of God and the State," are not fatal defects. *State v. Howard*, 92 N. C. 772, 778.

When Time Need Not Be Charged.—Where time is not of the essence of a crime, "the omission to charge any date" is immaterial by this section, though the allegation of time can do no harm. *State v. Arnold*, 107 N. C. 861, 864, 11 S. E. 990; *State v. Peters*, 107 N. C. 876, 883, 12 S. E. 74; *State v. Taylor*, 83 N. C. 602, 603; *State v. Williams*, 117 N. C. 753, 23 S. E. 250.

Thus time is not of the essence of carrying a concealed weapon, and it may be shown at a previous time to that alleged in the bill. *State v. Spencer*, 185 N. C. 765, 117 S. E. 803.

Failure to specify a particular day in an indictment for abandonment is not fatal especially in view of an instruction that the jury should consider only such evidence as tends to show that the defendant violated the statute after a particular date. *State v. Jones*, 201 N. C. 424, 160 S. E. 468.

Time of Birth in Bastardy Proceeding.—Indictment, in a bastardy proceeding, which states that the child was born on August 13, 1941, whereas the evidence was that the birth occurred on November 13, 1940, is not fatally defective. *State v. Moore*, 222 N. C. 356, 23 S. E. (2d) 31.

Conclusion Simplified.—The formal conclusion, "against the peace and dignity of the State," and "against the form of the statute," etc., are not necessary in an indictment for any offense whatever, but are mere surplusage. *State v. Kirkman*, 104 N. C. 911, 10 S. E. 312, overruling *State v. Joyner*, 81 N. C. 534; *State v. Peters*, 107 N. C. 876, 12 S. E. 74; *State v. Sykes*, 104 N. C. 694, 10 S. E. 191; *State v. Dudley*, 182 N. C. 822, 109 S. E. 63.

That an indictment concludes against the form of the statute instead of statute, is no ground for an arrest of judgment. *State v. Smith*, 63 N. C. 234.

An indictment concluding against the "force" instead of the "form" of the statute is sufficient under this section. *State v. Davis*, 80 N. C. 385.

Variance.—In a prosecution of defendant for being an accessory before the fact of murder, variance of a few days between the indictment and proof as to the day the murder was committed is not fatal under this section. *State v. Gore*, 207 N. C. 618, 178 S. E. 209.

It is to the girl's first act of intercourse with a man, when she is under sixteen years of age, that the law attaches criminality on the part of the man, and a variance between allegation and proof as to time is not material where no statute of limitations is involved. *State v. Trippe*, 222 N. C. 600, 24 S. E. (2d) 340.

Jurisdiction.—Where the jurisdiction of the court is not ousted on the face of the indictment the position that the

court does not have jurisdiction is not available on a plea in abatement. *State v. Davis*, 203 N. C. 13, 14, 164 S. E. 737.

A charge in a murder prosecution in the alternative was not a vitiating defect, and the motion in arrest after verdict was properly denied, such motion being available only for vitiating defects upon the record proper. *State v. Puckett*, 211 N. C. 66, 189 S. E. 183.

Cited in *State v. Wilson*, 218 N. C. 769, 12 S. E. (2d) 654; *State v. Dale*, 218 N. C. 625, 12 S. E. (2d) 556; *Whichard v. Lipe*, 221 N. C. 53, 19 S. E. (2d) 14, 139 A. L. R. 1147 (dis. op.).

Art. 16. Trial before Justice.

§ 15-156. In cases of final jurisdiction.—When the justice is satisfied that he has jurisdiction, if no jury is asked for, he shall proceed to determine the case, and shall either acquit the accused or find him guilty, and sentence him to such punishment as the case may require, not to exceed in any case a fine of fifty dollars or imprisonment in the county jail for thirty days. (Rev., s. 3256; Code, s. 897; 1868-9, c. 178, subc. 4, s. 8; C. S. 4626.)

Cross References.—As to jurisdiction of justice in criminal actions, see § 7-129 and notes. As to divesting inferior courts of exclusive original jurisdiction in certain criminal actions, see § 7-64.

An Adversary Proceeding Intended.—It was contemplated there should be an adversary proceeding in all trials of criminal cases before a justice of the peace, especially when the justice assumes final jurisdiction. It was never intended that the accused should be also the accuser and the sole witness against himself. Such a proceeding would not conduce to the discovery of truth, and the detection and punishment of crime, which is the real object to be obtained, and would oftener than otherwise defeat the very ends of justice. *State v. Moore*, 136 N. C. 581, 582, 48 S. E. 573.

§ 15-157. Trial by jury, if demanded.—If either the complainant or the accused shall ask for it, the justice shall allow a trial by jury, as is provided in civil actions before justices of the peace. (Rev., s. 3257; Code, s. 898; 1868-9, c. 178, subc. 4, s. 9; C. S. 4627.)

Cross References.—As to constitutional provisions, see N. C. Constitution, Art. I, § 13, and U. S. Constitution, Art. III, § 2, cl. 3. As to trial by jury before a justice, see § 7-150 et seq. See annotations under § 15-177.

§ 15-158. What submitted to jury.—In case a trial by jury is had, the justice shall submit to the jury in each case simply the question of the guilt or innocence of the accused of the offense charged, and shall enter the verdict on his docket, and adjudge accordingly. (Rev., s. 3258; Code, s. 899; 1868-9, c. 178, subc. 4, s. 10; C. S. 4628.)

§ 15-159. Commitment after judgment.—The commitment to the county prison shall set forth—

1. The name of the guilty person.
2. The nature of the offense of which he is convicted and the date of the trial.
3. The period of his imprisonment.
4. It shall be directed to the sheriff of the county, or to the keeper of the county jail, and shall direct him to keep the prisoner for the time stated, or until discharged by law.
5. The name of the constable or other officer required to execute it.
6. It shall be signed by the justice and be dated. (Rev. s. 3259; Code, s. 1238; 1868-9, c. 178, subc. 4, s. 17; C. S. 4629.)

Cross Reference.—As to commitment of person charged with a crime, see § 15-125.

Legality of Custody.—When a prisoner, legally sentenced, is placed in charge of a special officer to convey to jail, the legality of his custody by the officer depends upon the validity of the special deputation of the officer, and not upon

the sufficiency of the mittimus, which is to terminate his duties. *State v. Armistead*, 106 N. C. 639, 10 S. E. 872.

Same—Where Prisoner Taken from Officer.—It is a criminal offense to take, by force, from the custody of an officer a prisoner legally committed to his charge to convey to jail, and it is no defense that the mittimus does not comply, in all respects, with the requirements of this section. *State v. Armistead*, 106 N. C. 639, 10 S. E. 872.

§ 15-160. Parties entitled to copy of papers; bar to indictment.—The justice shall give to either party on request, and on payment of his lawful fee, a copy of the complaint and of his finding and sentence. Such finding and sentence may be pleaded in bar of any indictment subsequently found for the same offense. (Rev., s. 3260; Code, ss. 902, 903; 1868-9, c. 178, subc. 4, ss. 13, 14; C. S. 4630.)

Collusive Conviction Not a Bar.—The conviction of a person before a justice of the peace which is collusive and not adversary is not sufficient to sustain a plea of former conviction. *State v. Moore*, 136 N. C. 581, 48 S. E. 573.

§ 15-161. Justice to make return of cases to superior court.—It is the duty of each justice of the peace on or before Monday of every term of the superior court of his county, to furnish the clerk of the court with a list of the names and offenses of all parties tried and finally disposed of by such justice of the peace, together with the papers in each case, in all criminal actions, since the last term of the superior court. The clerk of the court shall hand a copy of such list to the solicitor and to the grand jury at each term of court; and no indictment shall be found against any party whose case has been so finally disposed of by any justice of the peace: Provided, that this section shall not be deemed to extend or enlarge or otherwise affect the jurisdiction of justices of the peace, except as provided by law. (Rev., s. 3261; Code, s. 906; 1869-70, c. 110; C. S. 4631.)

Cross Reference.—As to liability for failure to make return of cases to superior court, see § 14-231.

When Report Unnecessary.—A justice of the peace is not guilty of a violation of this section by failing to make report to the clerk of the superior court when there have been no criminal cases disposed of by him within the time therein prescribed. *State v. Latham*, 110 N. C. 490, 14 S. E. 390.

Art. 17. Trial in Superior Court.

§ 15-162. Prisoner standing mute, plea "not guilty" entered.—If any person, being arraigned upon or charged in any indictment for any crime, shall stand mute of malice or will not answer directly to the indictment, the court shall order the plea of "not guilty" to be entered on behalf of such person; and the plea so entered shall have the same force and effect as if such person had pleaded the same. (Rev., s. 3262; Code, s. 1198; R. C., c. 35, s. 29; R. S., c. 35, s. 16; C. S. 4632.)

Deaf Mutes.—Where, upon the arraignment of one for murder, it was suggested that the accused was a deaf mute, and was incapable of understanding the nature of a trial, and its incidents and his rights under it, it was held proper for a jury to be empanelled to try the truth of these suggestions, for the court to decline putting the prisoner on his trial. *State v. Harris*, 53 N. C. 136.

In *State v. Early*, 211 N. C. 189, 189 S. E. 668, the court, upon finding that defendant was a deaf mute, subpoenaed an interpreter, who after being duly sworn and after the reading of the indictment, interpreted and explained the indictment to defendant. After defendant had indicated to the interpreter that he understood the indictment, the interpreter translated the solicitor's question of whether defendant was guilty or not guilty, and upon a negative reply given through the interpreter, a plea of not guilty was entered. It was held that there was no error on the arraignment of defendant or in the acceptance of his negative answer as a plea of not guilty.

Changing Plea.—Whether a prisoner may retract a plea of guilty and enter a plea of not guilty, or vice versa, is a matter for the sound legal discretion of the trial court. *State v. Branner*, 149 N. C. 559, 63 S. E. 169.

Entry after Verdict.—It is no error in the court below, on a trial of a defendant for larceny, "as upon a plea of not guilty," and after a verdict of guilty, to amend the record by inserting the plea of "not guilty." *State v. McMillan*, 68 N. C. 440.

§ 15-163. Peremptory challenges of jurors by defendant.—Every person on joint or several trial for his life may make a peremptory challenge of fourteen jurors and no more; and in all joint or several trials for crimes and misdemeanors, other than capital, every person on trial shall have the right of challenging peremptorily, and without showing cause, six jurors and no more. And to enable defendants to exercise this right, the clerk in all such trials shall read over the names of the jurors on the panel, in the presence and hearing of the defendants and their counsel, before the jury shall be impaneled to try the issue; and the judge or other presiding officer of the court shall decide all questions as to the competency of jurors. (Rev., s. 3263; Code, s. 1199; 1913, c. 31, s. 3; 1887, c. 53; R. C., c. 35, s. 32; 1871-2, c. 39; R. S., c. 35, ss. 19, 21; 1777, c. 115, s. 85; 1812, c. 833; 1801, c. 592, s. 1; 1826, c. 9; 22 Hen. VIII, c. 11, s. 6; 1935, c. 475, s. 2; C. S. 4633.)

Cross References.—As to challenge for cause, see § 9-14 and notes, et seq. As to peremptory challenges in civil cases, see § 9-22.

Editor's Note.—The number of jurors that may be challenged was increased from twelve and four to fourteen and six, respectively, by the Public Laws of 1935.

In General.—Every criminal, charged with a crime affecting his life, has a right to challenge a certain number of jurors, without assigning any cause, and as many more as he can assign a good cause for. *State v. Patrick*, 48 N. C. 443, 446.

A Right to Exclude.—The right of peremptory challenge is not a right to select but to exclude. *State v. Smith*, 24 N. C. 402; *State v. Banner*, 149 N. C. 519, 63 S. E. 84.

Purpose.—The legislative intent in the enactment of this section is to secure a reasonable and impartial verdict. *State v. Ashburn*, 187 N. C. 717, 122 S. E. 833. See note of this case under section 15-164.

When Challenge Should Be Made.—"The time for a prisoner to make his challenge, is when the juror is tendered, and before the juror is sworn, or the oath is commenced." *Joy on Jurors*, 219. *State v. Patrick*, 48 N. C. 443, 447.

Peremptory Challenges Limited to Four.—A defendant, in an indictment for an offense other than capital, having only four peremptory challenges to jurors, cannot challenge a fifth juror peremptorily although he had first challenged one of the four for cause, which was properly disallowed. *State v. Hargrave*, 100 N. C. 484, 6 S. E. 185. This case was decided prior to the 1935 amendment. A defendant is now allowed six peremptory challenges.—Ed. Note.

Same—When Verdict of Manslaughter Asked.—Where, upon the trial of an indictment for murder, the solicitor states that he should ask only for a verdict of manslaughter, no special venire was necessary, and the defendant is not entitled to more than four peremptory challenges. *State v. Hunt*, 128 N. C. 584, 38 S. E. 473; *State v. Caldwell*, 129 N. C. 682, 40 S. E. 85. See Ed. Note in preceding paragraph.

Judge Determines Competency.—Triers are now dispensed with, and the judge determines the facts as well as the legal sufficiency of the challenge based upon them. *State v. Kilgore*, 93 N. C. 533, 534.

Waiver of Objection by Not Using Challenges.—If a juror is rejected upon an improper ground of challenge, made by the State, the prisoner cannot assign it for error, if a jury is obtained before he has exhausted his peremptory challenges. *State v. Potts*, 100 N. C. 457, 458, 6 S. E. 657; *State v. Sultan*, 142 N. C. 569, 54 S. E. 841.

Where several defendants are tried together for a crime other than a capital felony each is entitled to four (now six) peremptory challenges to the jury, and where the court has ruled that the defense was a joint defense and has al-

lowed but four (now six) peremptory challenges for all the defendants, a new trial will be granted upon appeal. *State v. Burleson*, 203 N. C. 779, 166 S. E. 905.

Challenges Where Bills of Indictment Are Consolidated.—Where several bills of indictment against a defendant are consolidated for trial, the defendant is entitled to but four (now six) peremptory challenges to the jury as provided by this section and not to four (now six) peremptory challenges for each bill, the consolidated bills being treated as separate counts of the same bill. *State v. Alridge*, 206 N. C. 850, 175 S. E. 19.

§ 15-164. Peremptory challenges by the state.—

In all capital cases the prosecuting officer on behalf of the state shall have the right to challenge peremptorily six jurors for each defendant, but shall not have the right to stand any jurors at the foot of the panel. The challenge must be made before the juror is tendered to the prisoner, and if he will challenge more than six jurors he shall assign for his challenge a cause certain; and in all other cases of a criminal nature a challenge of four jurors shall be allowed in behalf of the state for each defendant, and challenge also for a cause certain, and in all cases of challenge for cause certain the same shall be inquired of according to the custom of the court. (Rev., s. 3264; Code, s. 1200; 1913, c. 31, s. 4; 1907, c. 415; 1887, c. 53; R. C., c. 35, s. 33; 1827, c. 10; 33 Edw. I, c. 4; 1935, c. 475, s. 3; C. S. 4634.)

Cross Reference.—See notes under § 15-164.

Editor's Note.—The number of challenges was increased in capital cases from four to six, and in other cases from two to four by the Public Laws of 1935.

Construed with Section 9-15.—The effect of section 9-15, to permit a party to a criminal action to make inquiry as to the fitness and competency of a juror before the adverse party would be permitted to admit the cause and have him stood aside therefor, and this course cannot now be pursued, except where the challenging party, after making such inquiry, states that the juror is challenged for cause; and this section, abolishing the established practice permitting the solicitor to place jurors, upon the trial of capital felony, at the foot of the panel, does not affect the application of section 9-15, to the trial of such felonies. *State v. Ashburn*, 187 N. C. 717, 122 S. E. 833.

Judge Cannot Extend Time.—The discretionary power of the trial Judge in respect to challenges is confined to challenges for cause, and he has no more authority to extend the time for making peremptory challenges beyond the limit fixed by this section than he has to allow more than four (now six) of such challenges. *State v. Fuller*, 114 N. C. 885, 19 S. E. 797.

§ 15-165. Challenge to special venire same as to tales jurors.—In the trial of all criminal cases, where a special venire shall be ordered, the same causes of challenge to the jurors summoned on the special venire shall be allowed as exist to tales jurors. (Rev., s. 3265; 1887, c. 53; C. S. 4635.)

Cross References.—As to grounds for challenging tales jurors, see § 9-11. As to special venire in general, see § 9-29 et seq.

Editor's Note.—See 11 N. C. Law Rev., 219.

§ 15-166. Exclusion of bystanders in trials for rape.—In the trial of cases for rape and of assault with the intent to commit rape, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the court-room all persons except the officers of the court, the defendant and those engaged in the trial of the case; and upon the preliminary hearing before a justice of the peace of the offenses above named, that officer may adopt a like course. (1907, c. 21; C. S. 4636.)

§ 15-167. Term expiring during trial extended.—In case the term of a court shall expire while a trial for felony shall be in progress, and before

judgment shall be given therein, the judge shall continue the term as long as in his opinion it shall be necessary for the purposes of the case; and he may in his discretion exercise the same power in the trial of any other cause under the same circumstances, except civil actions begun after Thursday of the last week. (Rev., s. 3266; Code, s. 1229; 1893, c. 226; C. C. P., s. 397; R. C., c. 31, s. 16; 1830, c. 22; C. S. 4637.)

Section Constitutional.—This section is constitutional. *State v. Monroe*, 80 N. C. 373; *State v. Jefferson*, 66 N. C. 309; *State v. Taylor*, 76 N. C. 64; *State v. Adair*, 66 N. C. 298. See also *Natl. Bank v. Gilmer*, 116 N. C. 684, 700, 22 S. E. 2.

Expiration of Term No Ground for Discharging Jury.—The expiration of a term of court is no ground for discharging a jury before verdict, for the term may be continued for the purposes of the trial. *State v. McGimsey*, 80 N. C. 377.

Special Term Extended.—Where a trial began on Wednesday of the last week of a special term and the jury had not agreed upon a verdict on Saturday night, it was not improper for the trial judge to open and conduct the regular term on Monday following and to continue the special term into that week for the purpose of receiving the verdict of the jury, since the rights of the parties were not prejudiced thereby. *National Bank v. Gilmer*, 116 N. C. 684, 22 S. E. 2.

Daily entries on the journal during the trial of a felony, stating the name of the case and that the court takes a recess "until 9:30 a. m. tomorrow," and the entry next day "court convened at 9:30 a. m. pursuant to recess," etc., in regular form, constitutes a sufficient compliance with this section. *State v. Harris*, 181 N. C. 600, 107 S. E. 466.

§ 15-168. Justification as defense to libel.—Every defendant who is charged by indictment with the publication of a libel may prove on the trial for the same the truth of the facts alleged in the indictment; and if it shall appear to the satisfaction of the jury that the facts are true, the defendant shall be acquitted of the charge. (Rev., s. 3267; Code, s. 1195; R. C., c. 35, s. 26; C. S. 4638.)

Cross Reference.—As to effect of publication in good faith and retraction by a newspaper, see § 99-2.

Truth of Entire Charge Must Be Proved.—Where the matter set out in the indictment is libellous, in order for the defendant to justify he must show that the entire charge imputed to the prosecutor is true. *State v. Lyon*, 89 N. C. 568.

General Report Insufficient.—In an indictment for a libel, it is not competent for the defendant to justify by proving that there was, and long had been, a general report in the neighborhood, of the truth of his charge. *State v. White*, 29 N. C. 180.

Proof of Specific Charge Necessary.—Proof of the general bad character of an officer in other matters of which he had taken cognizance, will not be received to establish the truth of libellous charge in reference to a particular matter. *State v. Lyon*, 89 N. C. 568.

§ 15-169. Conviction of assault, when included in charge.—On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character. (Rev., s. 3268; 1885, c. 68; C. S. 4639.)

Section Refers to Assault Generally.—This section does not describe the kind of assault, but refers to an assault generally and without regard to its degree of punishment under the law. *State v. Smith*, 157 N. C. 578, 584, 72 S. E. 853.

When Section Applicable.—This section and § 15-170 are applicable only where there is evidence tending to show that defendant is guilty of a crime of lesser degree than that charged in the indictment. *State v. Jackson*, 199 N. C. 321, 325, 154 S. E. 402.

What Indictment Includes.—An indictment for any offense

against the criminal law includes all lesser degrees of the same crime, known to the law; and conviction may be had of the lesser offense when the charge is inclusive of both. *State v. Williams*, 185 N. C. 685, 116 S. E. 736.

Same—Murder.—Under an indictment for murder, the defendant may be convicted either of murder in the first degree, murder in the second degree, or manslaughter, and even of assault with a deadly weapon, or simple assault, "if the evidence shall warrant such finding" when he is not acquitted entirely. *State v. Williams*, 185 N. C. 685, 688, 116 S. E. 736.

Same—Assault with Intent to Rape.—Under a bill of indictment charging an assault with an intent to commit rape, the lesser offense of assault and battery may be found to have been committed, and in such instance a special issue may be submitted to the jury, if necessary, so that, in accordance with the jury's finding, the court may determine the grade of the punishment. *State v. Smith*, 157 N. C. 578, 72 S. E. 853.

Upon an indictment charging an assault with intent to commit rape, defendant may be convicted of an assault upon a female as though separately charged, and motion to dismiss under § 15-173 was properly refused where there was sufficient evidence to convict of an assault. *State v. Jones*, 222 N. C. 37, 21 S. E. (2d) 812.

Duty of Judge.—Upon the trial under an indictment for murder it is the duty of the trial judge, under supporting evidence, to declare and explain the law upon the less offense of manslaughter, with the burden of proof on defendant, and a statement of the contentions of the parties, etc., with a mere announcement of the principle is insufficient. *State v. Hardee*, 192 N. C. 533, 135 S. E. 345.

Same—Failure to Charge Upon Lesser Degree.—The error of the judge in failing to charge on the supporting evidence, upon the lesser degree of the crime of rape, under a charge thereof in the indictment, is not cured by the verdict finding that the defendant was guilty of the greater degree of the crime charged in the indictment. *State v. Williams*, 185 N. C. 685, 116 S. E. 736.

Where the indictment is sufficient and the evidence is conflicting as to whether the defendant committed highway robbery or an assault with a deadly weapon, the jury may find for the lesser offense, and it is the duty of the trial judge to so instruct the jury, though a special request therefor has not been aptly tendered in writing. *State v. Holt*, 192 N. C. 490, 135 S. E. 324.

Effect of Simple Verdict of Guilty.—While this section permits a verdict for an assault when it is embraced in the charge of a greater offense, as rape or other felony, a verdict simply of "guilty," and not specifying a lower offense, is a verdict of guilty of the offense charged in the indictment. *State v. Barnes*, 122 N. C. 1031, 29 S. E. 381; *State v. Lee*, 192 N. C. 225, 227, 134 S. E. 458.

Cited in *State v. Hairston*, 222 N. C. 455, 23 S. E. (2d) 885.

§ 15-170. Conviction for a less degree or an attempt.—Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime. (Rev., s. 3269; 1891, c. 205, s. 2; C. S. 4640.)

Application of Section.—Where there are several counts in a bill, if the jury find the defendant guilty on one count and say nothing in their verdict concerning the other counts, it will be equivalent to a verdict of not guilty as to them. This principle should not be confused with the practice, authorized by this section, which permits the conviction of a "lesser degree of the same crime" when included in a single count. *State v. Hampton*, 210 N. C. 283, 284, 186 S. E. 251.

The state's evidence tended to show that defendant broke and entered the dwelling house in question at night while same was occupied as a sleeping apartment, stole some money and ran when the female occupant discovered him and screamed. Defendant contended, upon supporting evidence, that at the time he was too drunk to know where he was or what he was doing. The court instructed the jury that defendant might be convicted of burglary in the first degree, or of burglary in the second degree, if they found that the room was unoccupied, but if they found defendant was too drunk to form felonious intent they should return a verdict of not guilty. Held: The instruction required the jury to find the defendant guilty of burglary in the first degree or not guilty, since there was no evidence that the room was unoccupied, and defendant is entitled to a new

trial for error of the court in failing to instruct that defendant might be found guilty of breaking and entering otherwise than burglariously, or of an attempt to commit the offense. *State v. Feyd*, 213 N. C. 617, 197 S. E. 171.

Crime of Accessory Included.—The crime of accessory before the fact is included in the charge of the principal crime within the meaning of this section. *State v. Simons*, 179 N. C. 700, 703, 103 S. E. 5; *State v. Bryson*, 173 N. C. 803, 806, 92 S. E. 698, discussing and, it seems, overruling *State v. Green*, 119 N. C. 899, 26 S. E. 112.

Joinder Mere Surplusage.—Since this section was adopted the joinder in an indictment of a count for a lesser offense, or for an attempt to commit the same, is mere surplusage. *State v. Brown*, 113 N. C. 645, 18 S. E. 51.

Indictment for Attempt or Complete Offense.—An attempt to commit a crime is an indictable offense, and on proper evidence, a conviction may be sustained on a bill of indictment making a specific and sufficient charge thereof, or one which charges a complete offense. *State v. Addor*, 183 N. C. 678, 110 S. E. 650.

Intent Alone Not Sufficient.—The intent, though connected with preparations to commit a criminal offense, is not alone sufficient for a conviction of the attempt, unless connected with some overt act or acts toward the end in view that will, in the judgment of the one charged, and as matters appeared to him, result in the consummation of the contemplated purpose. *State v. Addor*, 183 N. C. 687, 110 S. E. 650.

Defendant Entitled to Complete Charge.—Under the provisions of this section when the bill of indictment is sufficient with the supporting evidence upon the trial, the defendant may be convicted of the criminal offense charged or of a lesser degree thereof, and he is entitled to a charge from the court on all degrees of the crime thus encompassed by the indictment; and an error in failing to charge upon the lesser degrees of the crime is not cured by a verdict of conviction upon one of a greater degree. *State v. Robinson*, 188 N. C. 784, 125 S. E. 617. See also *State v. Keaton*, 206 N. C. 682, 175 S. E. 296.

When there is evidence tending to support a milder verdict than the one charged in the bill of indictment the defendant is entitled to have the different views presented to the jury under a proper charge, and an error in this respect is not cured by a verdict convicting him of the crime as charged in the bill of indictment, for in such case it cannot be known whether the jury would have convicted of a less degree if the different views, arising on the evidence, had been correctly presented by the trial court. *State v. Burnette*, 213 N. C. 153, 155, 195 S. E. 356. See also, *State v. Chambers*, 218 N. C. 442, 11 S. E. (2d) 280.

Evidence Must Justify Conviction in Lesser Degree.—The principle upon which a defendant may be convicted upon a less degree of the same crime charged in the bill of indictment applies only where there is evidence of guilt of the less degree, and where burglary in the first and second degree is charged in the indictment, and the question as to guilt on the first count is withdrawn, and the evidence does not support the charge of second degree burglary, the defendant cannot be convicted of the lesser offense. *State v. Spain*, 201 N. C. 571, 160 S. E. 825.

The provisions of this section in regard to conviction of a less degree of the crime charged in a bill of indictment applies only where there is some evidence that a less degree of the crime had been committed, and where the State's uncontradicted evidence is to the effect that the crime of rape had been committed and the defendant relies solely upon an alibi, the refusal of the court to charge upon the lesser degrees of the crime or of an attempt is not error. *State v. Smith*, 201 N. C. 494, 160 S. E. 577.

Where all the evidence at the trial of a criminal action, if believed by the jury, tends to show that the crime charged in the indictment was committed as alleged therein, and there is no evidence tending to show the commission of a crime of less degree, it is not error for the court to fail to instruct the jury that they may acquit the defendant of the crime charged in the indictment and convict him of a crime of less degree. *State v. Cox*, 201 N. C. 357, 361, 160 S. E. 358; *State v. Manning*, 221 N. C. 70, 18 S. E. (2d) 821.

Instruction Limiting Verdict to Less Degree.—Where, in an indictment charging an assault with intent to commit rape, the evidence shows an assault but fails to show an intent to commit rape, at all events and notwithstanding any resistance on the part of the intended victim, the court would err in refusing to give an instruction to limit the verdict to a less degree of the same crime. *State v. Jones*, 222 N. C. 37, 21 S. E. (2d) 812.

Charge as to Assault Unnecessary Where Homicide Admitted.—While under the provisions of this section the trial judge is required to charge upon evidence on the less degrees of the same crime concerning which the prisoner was

being tried, it is not required that he charge upon the principles of an assault with a deadly weapon, where the prisoner is charged with murder, and the killing of the deceased by him has been admitted, and the judge has correctly charged upon the crime of manslaughter, the lowest degree of an unlawful killing of human being. *State v. Luterloh*, 188 N. C. 412, 124 S. E. 752.

Instructions as to Second Degree Murder Where Evidence Shows First Degree.—Where upon the trial for murder all the evidence tends to show that if the defendant is guilty, he is guilty of the crime of murder in the first degree, the failure of the trial court to charge upon the law of murder in the second degree or manslaughter is not error under this section. *State v. Ferrell*, 205 N. C. 640, 172 S. E. 186.

Same—Assault.—Where the evidence tended to show a simple assault by defendant on prosecuting witness and a later encounter between the parties in which defendant was armed with a deadly weapon, it was error, under this section, for the court to charge the jury that they could convict defendant of assault with the intent to kill, or assault with a deadly weapon or not guilty, and refuse to charge the jury that they might convict defendant of simple assault. *State v. Lee*, 206 N. C. 472, 174 S. E. 288.

In prosecution for assault with a deadly weapon with intent to kill, the court's instruction that the jury might find defendant guilty of a less degree of the crime, including assault with a deadly weapon, if they so found beyond a reasonable doubt, is held without error. *State v. Elmore*, 212 N. C. 531, 193 S. E. 713.

Rape and carnally knowing a female between the age of twelve and sixteen years are of such a nature as to come within the provisions of this section, permitting the jury to find the defendants guilty of the lesser crime, if they do not deem the evidence sufficient to warrant a conviction on the first. *State v. Hall*, 214 N. C. 639, 643, 200 S. E. 375.

An attempt to commit barratry is an offense in this state and a defendant may be convicted of an attempt to commit the offense upon an indictment charging the common-law offense of barratry. *State v. Batson*, 220 N. C. 411, 17 S. E. (2d) 511, 139 A. L. R. 614.

New Trial Must Be on Full Charge.—Upon an appeal from a conviction for a lesser offense than that charged in the indictment, a new trial, if granted, must be upon the full charge in the bill. *State v. Matthews*, 142 N. C. 621, 55 S. E. 342.

Quoted in *State v. Hairston*, 222 N. C. 455, 23 S. E. (2d) 885.

Stated in dissenting opinion in *State v. Beard*, 207 N. C. 673, 681, 178 S. E. 242.

Cited in *State v. Colson*, 194 N. C. 206, 139 S. E. 230; *State v. Ratcliff*, 199 N. C. 9, 153 S. E. 605; *State v. Palmer*, 212 N. C. 10, 192 S. E. 896; *State v. Hobbs*, 216 N. C. 14, 3 S. E. (2d) 431; *State v. Johnson*, 218 N. C. 604, 12 S. E. (2d) 278.

§ 15-171. Burglary in the first degree charged, verdict for second degree.—When the crime charged in the bill of indictment is burglary in the first degree the jury, upon the finding of facts sufficient to constitute burglary in the first degree as defined by statute, may elect to render a verdict of guilty of burglary in the second degree if they deem it proper so to do. The judge in his charge shall so instruct the jury. (Rev., s. 3270; 1889, c. 434, s. 3; 1941, c. 7, s. 1; C. S. 4641.)

Editor's Note.—For comment on the 1941 amendment to this section, see 19 N. C. L. Rev. 476.

All of the following cases were decided prior to the 1941 amendment.

Conviction in Second Degree Unauthorized.—Where, in the trial of an indictment for burglary, the evidence showed that the house in which the crime was committed was actually occupied at the time, a conviction of burglary in the second degree is not authorized by this section, since a felonious entry under such circumstances is by section 14-51 made burglary in the first degree. *State v. Johnston*, 119 N. C. 883, 26 S. E. 163. See also, *State v. Morris*, 215 N. C. 552, 2 S. E. (2d) 554; *State v. Fain*, 216 N. C. 157, 4 S. E. (2d) 319; *State v. Johnson*, 218 N. C. 604, 12 S. E. (2d) 278.

Cited in *State v. Ratcliff*, 199 N. C. 9, 11, 153 S. E. 605.

§ 15-172. Verdict for murder in first or second degree.—Nothing contained in the statute law dividing murder into degrees shall be construed to

require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree. (Rev., s. 3271; 1893, c. 85, s. 3; C. S. 4642.)

Object of Section.—The object of this section is, of course, to place it beyond doubt in what degree of murder the prisoner was convicted. *State v. Wiggins*, 171 N. C. 813, 817, 89 S. E. 58.

Applies to All Indictments for Murder.—This section applies to all indictments for murder, whether perpetrated by means of poisoning, lying in wait, imprisonment, starving, torture, or otherwise. *State v. Matthews*, 142 N. C. 621, 55 S. E. 342.

Jury Must Determine Degree.—For a conviction of murder in the first degree under this section and section 14-17, the jury must find specially under the evidence that this degree of crime has been committed by the defendant, and the verdict must be received in open court in the presence of the presiding judge under Constitutional Mandate, Const., Art. I, sections 13, 17, which right may not be waived. *State v. Bazemore*, 193 N. C. 336, 137 N. C. 172.

By this section it is made the duty of the jury alone to determine in their verdict whether the crime is murder in the first or second degree. *State v. Gadberry*, 117 N. C. 811, 23 S. E. 477; *State v. Bagley*, 158 N. C. 608, 73 S. E. 995; *State v. Murphy*, 157 N. C. 614, 72 S. E. 1075. And the record must show that they have so done, in order that there may be a proper judgment. *State v. Lucas*, 124 N. C. 825, 827, 32 S. E. 962; *State v. Truesdale*, 125 N. C. 696, 34 S. E. 646.

Failure To Determine Degree.—Where the degree of murder is not expressed in the verdict, the judge should tell the jury to reconsider their finding, for the purpose of specifying the crime, and upon response being made by them of murder in the first degree, the verdict is properly recorded accordingly. *State v. Bagley*, 158 N. C. 608, 73 S. E. 995.

Judge May Exclude Second Degree in Charge.—When the entire evidence shows, and no other reasonable inference can be fairly drawn therefrom, that the murder was committed either by lying in wait or in an attempt to perpetrate a felony, and the controverted question is the identity of prisoner as the murderer, the trial judge does not commit error in charging the jury to render a verdict of guilty of murder in the first degree or not guilty. *State v. Wiggins*, 171 N. C. 813, 817, 89 S. E. 58; *State v. Spevey*, 151 N. C. 676, 65 S. E. 995.

In prosecution for murder, defendant's premeditation and deliberation are questions of fact, to be determined by jury under this section and section 14-17, and not questions of law for judge, and must be proved beyond a reasonable doubt. *State v. Newsome*, 195 N. C. 552, 143 S. E. 187.

Verdict Construed According to Charge.—The verdict must be construed according to the charge and the evidence and when these make it certain beyond question, the law has been complied with. *State v. Gilchrist*, 113 N. C. 673, 18 S. E. 319. *State v. Wiggins*, 171 N. C. 813, 817, 89 S. E. 58.

Mere Killing Presumes Second Degree Murder.—Since the Act of 1893, the killing being proved, and nothing else appearing, the law presumes malice, but not premeditation and deliberation, and the killing is murder in the second degree. *State v. Hicks*, 125 N. C. 636, 639, 43 S. E. 247.

"In all indictments for homicide, when the intentional killing is established or admitted, the law presumes malice from the use of a deadly weapon, and the defendant is guilty of murder (now in the second degree) unless he can satisfy the jury of the truth of facts which justify or excuse his act, or mitigate it to less than manslaughter." *State v. Lane*, 166 N. C. 333, 339, 81 S. E. 620.

But a conviction of murder in the first degree may be had upon sufficient circumstantial evidence. *State v. Bazemore*, 193 N. C. 336, 137 S. E. 172; *State v. Melton*, 187 N. C. 481, 122 S. E. 17; *State v. Matthews*, 66 N. C. 106.

When First Degree Presumed.—A homicide committed in the perpetration of, or in an attempt to perpetrate, a robbery will be deemed murder in the first degree, the jury being governed by the evidence under proper instructions in finding that or a less offense. *State v. Lane*, 166 N. C. 333, 334, 81 S. E. 620.

In an indictment for murder, when the homicide is shown or admitted to have been intentionally committed by lying in wait, poisoning, starvation, imprisonment, or torture, the law raises the presumption of murder in the first degree, but none the less if the jury convict of a less offense, it is within their power so to do under the statute,

and the prisoner has no cause to complain that he was not convicted of the higher offense. *State v. Matthews*, 142 N. C. 621, 55 S. E. 342.

A defendant will not be permitted to plead guilty to murder in the first degree under this section, and this rule applies to all indictments for murder, including murder perpetrated by means of poison, lying in wait, imprisonment, starving, torture or otherwise. *State v. Blue*, 219 N. C. 612, 14 S. E. (2d) 635.

Evidence.—Where all the evidence at a trial for murder tends to show murder in the first degree in that the murder was committed by poisoning, starvation, lying in wait, imprisonment, torture, or in the perpetration or attempt to perpetrate a felony, the trial court may instruct the jury that they may render only one of two verdicts, murder in the first degree, or not guilty. But where the evidence tends to show that the killing was with a deadly weapon, and the State in one phase of its case relies on premeditation and deliberation, the presumption is that the murder was in the second degree, with the burden of proving premeditation beyond a reasonable doubt on the State, in order to constitute it murder in the first degree, and under these circumstances it is error for the trial court to fail to charge the jury that they might find the prisoner guilty of murder in the second degree. *State v. Newsome*, 195 N. C. 552, 143 S. E. 187.

Quoted in *State v. Puckett*, 211 N. C. 66, 189 S. E. 183.

Cited in *State v. Thornton*, 211 N. C. 413, 190 S. E. 758; *State v. Goodwin*, 211 N. C. 419, 190 S. E. 761; *State v. Gooding*, 196 N. C. 710, 146 S. E. 806.

§ 15-173. Demurrer to the evidence.—When on the trial of any criminal action in the superior court, or in any criminal court, the state has produced its evidence and rested its case, the defendant may move to dismiss the action or for judgment of nonsuit. If the motion is allowed, judgment shall be entered accordingly; and such judgment shall have the force and effect of a verdict of “not guilty” as to such defendant. If the motion is refused, the defendant may except; and if the defendant introduces no evidence, the case shall be submitted to the jury as in other cases, and the defendant shall have the benefit of his exception on appeal to the supreme court.

Nothing in this section shall prevent the defendant from introducing evidence after his motion for nonsuit has been overruled; and he may again move for judgment of nonsuit after all of the evidence in the case is concluded. If the motion is then refused, upon consideration of all of the evidence, the defendant may except; and, after the jury has rendered its verdict, he shall have the benefit of such latter exception on appeal to the supreme court. If defendant's motion for judgment of nonsuit be granted, or be sustained on appeal to the supreme court, it shall in all cases have the force and effect of a verdict of “not guilty.” (1913, c. 73; Ex. Sess. 1913, c. 32; C. S. 4643.)

Cross References.—As to demurrer to the evidence in civil cases, see § 1-183. As to motions in civil actions heard at criminal term, see § 7-72.

Compared with Section 1-183.—This section serves, and was intended to serve, the same purpose in criminal prosecutions as is accomplished by section 1-183, in civil actions. *State v. Fulcher*, 184 N. C. 663, 665, 113 S. E. 769; *State v. Sigmon*, 190 N. C. 687, 130 S. E. 854; *State v. Ormond*, 211 N. C. 437, 191 S. E. 22; *State v. Norris*, 206 N. C. 191, 173 S. E. 14.

On motion to nonsuit, the court is required merely to ascertain whether there is any competent evidence to sustain the allegations of the indictment. *State v. Landin*, 209 N. C. 20, 182 S. E. 689. See also, *State v. Lefevers*, 216 N. C. 494, 5 S. E. (2d) 552.

A motion for judgment as of nonsuit should be denied if there is any evidence tending to prove the fact in issue, or which reasonably conduces the conclusion of guilt as a fairly logical and legitimate deduction, but evidence which merely raises a suspicion or conjecture of the fact of guilt

is insufficient to be submitted to the jury. *State v. Stephenson*, 218 N. C. 258, 10 S. E. (2d) 819.

Sufficiency of Evidence May Be Challenged if Motion Timely Made.—If the defendant, on trial for murder, wishes to challenge the sufficiency of the evidence to show premeditation and deliberation beyond a reasonable doubt, motion to nonsuit under this section, on the capital charge, should be lodged at the close of the State's case, exception noted, if overruled, and the motion renewed at the close of all the evidence, and exception again noted, if overruled. *State v. Bittings*, 206 N. C. 798, 802, 175 S. E. 299.

A motion for judgment of nonsuit, under this section, must be made at the close of the state's evidence in order for a motion thereunder made at the close of all the evidence to be considered. *State v. Ormond*, 211 N. C. 437, 191 S. E. 22.

Motion Must Be Renewed.—A motion as of nonsuit upon the evidence will not be considered when it is not renewed after the conclusion of all the evidence as this section requires. *State v. Helms*, 181 N. C. 566, 107 S. E. 228. See also, *State v. Kiziah*, 217 N. C. 399, 8 S. E. (2d) 474.

Same—Waiver.—Where the defendant in a criminal action moves for the dismissal or for judgment as of nonsuit after the close of the State's evidence, and thereafter elects to introduce his own evidence, his failure to renew his motion after the whole evidence has been introduced is a waiver of his right to insist upon his first exception, and it is not subject to review in the Supreme Court on appeal. *State v. Hayes*, 187 N. C. 490, 122 S. E. 13.

See also, *State v. Hargett*, 156 N. C. 692, 146 S. E. 801; *State v. Chapman*, 221 N. C. 157, 19 S. E. (2d) 250.

Only incriminating evidence need be considered upon defendant's motion as of nonsuit under this section, and contradictions in the inculpatory testimony and equivocations of some of the State's witnesses, which affects the weight or credibility of the evidence but not its competency, need not be taken into account in determining whether there is any competent evidence to sustain the allegations of the indictment. *State v. Satterfield*, 207 N. C. 118, 176 S. E. 466. See also, *State v. Moses*, 207 N. C. 139, 176 S. E. 267.

When Motion Denied.—A motion to dismiss or as of nonsuit upon the evidence in a criminal case, will be denied if the evidence is sufficient, considered in the light most favorable to the State, to prove guilt of the defendant beyond a reasonable doubt. *State v. Sigmon*, 190 N. C. 684, 130 S. E. 854.

Where evidence is conflicting in a criminal case and where, considering the evidence in the light most favorable to the State, the jury might find the defendant guilty, a motion as of nonsuit is properly denied. *State v. Carr*, 196 N. C. 129, 130, 144 S. E. 698.

Excepting to Entire Evidence.—Where a defendant in a criminal action desires to except to the sufficiency to the evidence to convict him, his excepting, under this section, at the close of the State's evidence, and upon the overruling of his motion to nonsuit, excepting at the close of all the evidence, brings his exception to the Supreme Court on appeal upon the sufficiency of the entire evidence to convict, and is the proper procedure for that purpose. *State v. Kelly*, 186 N. C. 365, 119 S. E. 755.

Consideration of Entire Evidence on Appeal.—In *State v. Pasour*, 183 N. C. 793, 794, 111 S. E. 779, the court said: “Both before and after he had introduced evidence, the defendant moved to dismiss the prosecution as in case of nonsuit, and duly excepted to the court's denial of his motion. The exceptions, therefore, require a consideration of the entire evidence.”

An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the introduction of his own evidence, does not confine the appeal to the State's evidence alone, and a conviction will be sustained under the second exception if there is any sufficient evidence on the whole record of the defendant's guilt. *State v. Brinkley*, 183 N. C. 720, 110 S. E. 783.

Upon appeal from the denial of a motion as of nonsuit in a criminal action, review of the evidence is not confined to the State's evidence alone, but all the evidence in the State's favor, taken in the light most favorable to the State and giving it every reasonable intendment therefrom, will be considered, and where there is sufficient evidence of the defendant's guilt upon the whole record, the action of the trial judge in denying the motion of nonsuit will be upheld. *State v. Lawrence*, 195 N. C. 552, 146 S. E. 395.

A motion as of nonsuit in a criminal case at the close of the State's evidence, renewed after all the evidence has been introduced, does not confine its sufficiency to

the time of the first motion, and will be denied if there is sufficient evidence in the State's behalf viewing all the evidence in its entirety. *State v. Earp*, 196 N. C. 164, 145 S. E. 23.

When upon the trial of a criminal action, the state produces its evidence and rests, and the defendant preserves his exception to the refusal of his motion for judgment as of nonsuit, and, after offering evidence and the case closed, defendant renews his motion for judgment as of nonsuit, the court must act, not only in the light of the evidence of the state, but of all the evidence; and, in such case, the defendant is entitled to the benefit only of his exception to the refusal of the latter motion. *State v. Norton*, 222 N. C. 418, 23 S. E. (2d) 301.

Same—Supreme Court Not to Weigh Evidence.—This section provides that if on the motion the judgment of nonsuit is allowed on appeal, "It shall, in all cases, have the force and effect of a verdict of not guilty." This is not, therefore, the case of a new trial for some error of the judge, but is a verdict by the court of not guilty, which theretofore was without precedent. But the statute certainly did not intend that the Supreme Court should weigh the evidence and render a verdict. *State v. Cooke*, 176 N. C. 731, 735, 97 S. E. 171.

Sufficiency of Evidence.—Upon a motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State and the court will not pass upon its weight or the credibility of the witnesses. *State v. Rountree*, 181 N. C. 535, 106 S. E. 669; *State v. Atlantic Ice, etc., Co.*, 210 N. C. 742, 188 S. E. 412. See *State v. Eubanks*, 209 N. C. 758, 763, 184 S. E. 839. See also, *State v. Mann*, 219 N. C. 212, 13 S. E. (2d) 247.

A demurrer to the evidence presents only the question of the sufficiency of the evidence to carry the case to the jury, the weight and credibility of the evidence being for the jury and not the court. *State v. Smith*, 221 N. C. 400, 20 S. E. (2d) 360; *State v. Johnson*, 220 N. C. 773, 18 S. E. (2d) 358.

The requirement that the evidence must be sufficient to convict beyond a reasonable doubt in criminal actions, is for the benefit of the defendant; and it requires the State to satisfy a jury to a moral certainty of the truth of the charge. *State v. Sigmon*, 190 N. C. 684, 130 S. E. 854.

On a motion for nonsuit in a criminal action, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. *State v. Fleming*, 194 N. C. 42, 138 S. E. 342. See also *State v. Lawrence*, 196 N. C. 562, 146 S. E. 395; *State v. Durham*, 201 N. C. 724, 161 S. E. 398; *State v. Smoak*, 213 N. C. 79, 195 S. E. 72; *State v. Adams*, 213 N. C. 243, 195 S. E. 822; *State v. Hammonds*, 216 N. C. 67, 3 S. E. (2d) 439; *State v. Brown*, 218 N. C. 415, 11 S. E. (2d) 321.

"In considering a motion to dismiss the action under the statute, we are merely to ascertain whether there is any evidence to sustain the indictment; and in deciding the question we must not forget that the State is entitled to the most favorable interpretation of the circumstances and all inferences that may fairly be drawn from them. *S. v. Carlson*, 171 N. C., 818, 89 S. E. 30; *S. v. Rountree*, 181 N. C. 535, 106 S. E. 669;" *State v. Carr*, 195 N. C. 129, 133, 144 S. E. 698.

Upon motion to dismiss under this section, it is required that the court ascertain merely whether there is any sufficient evidence to sustain the allegations of the indictment and not whether it be true nor whether the jury should believe it. *State v. McLeod*, 196 N. C. 542, 146 S. E. 409.

Where the evidence for the state where the defendants are charged with fornication and adultery, shows no more than that the defendants had opportunities to commit the crime, on motion of the defendants, the action should be dismissed, and a verdict of not guilty, entered under this section. *State v. Woodell*, 211 N. C. 635, 636, 191 S. E. 334.

Evidence that the defendants had assisted a prisoner to escape is held insufficient in *State v. Pace*, 192 N. C. 780, 136 S. E. 11 and the motion for judgment of nonsuit as provided in this section should have been granted.

The court said in *State v. Woodell*, 211 N. C. 635, 636, 191 S. E. 334, citing *State v. Prince*, 182 N. C. 788, 108 S. E. 330, that when it is said that there is no evidence to go to the jury, it does not mean that there is literally and absolutely none, for as to this there could be no room for any controversy, but there is none which ought reasonably to satisfy the jury that the fact sought to be proved is established.

On a trial for the destruction of certain pages of a book in the office of the register of deeds, wherein

the defendant's interest in so doing has been shown, it is required of the State to show that the offense was committed on the day the defendant had an opportunity to commit the offense, and a margin of several weeks, in which the offense might have been committed, during which time the books were open to the public generally, is insufficient evidence to be submitted to the jury, and defendant's motion as of nonsuit should have been allowed. *State v. Swinson*, 196 N. C. 100, 144 S. E. 555.

Upon a motion as of nonsuit in a criminal action, made at the close of the State's evidence and renewed at the close of all of the evidence, all the evidence, whether offered by the State or elicited from defendant's witnesses, will be considered in the light most favorable to the State, and it is entitled to every reasonable intendment thereon and every reasonable inference therefrom, and only evidence favorable to the State will be considered, the weight and credibility of the evidence being for the jury. *State v. Ammons*, 204 N. C. 753, 169 S. E. 631; *State v. Shipman*, 202 N. C. 518, 163 S. E. 657; *State v. Mann*, 219 N. C. 212, 13 S. E. (2d) 247, 132 A. L. R. 1309.

Upon motion as of nonsuit in a criminal action, under this section, the evidence is to be considered in the light most favorable to the State, and if there is any evidence tending to prove the fact of guilt or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not such as merely raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt. *State v. Marion*, 200 N. C. 715, 158 S. E. 406.

Same—Accident Rather than Homicide.—Evidence tending only to show, upon a trial for wife murder, that the prisoner unintentionally in his sleep, as a result of a bad dream, inflicted upon his wife a wound too slight to have caused her death, except that from its neglect of treatment it may have been possible for blood poisoning to have set in therefrom that caused her death, is insufficient in law to sustain a conviction of manslaughter, and defendant's motion as of nonsuit, should have been sustained, under this section. *State v. Everett*, 194 N. C. 442, 140 S. E. 22. See also, *State v. Tankersley*, 172 N. C. 955, 90 S. E. 781.

Same—Rape.—Evidence tending to show that the deceased was ravished by a person suffering from gonorrhea, and that she died from the assault and choking, with further evidence that the defendant had the disease and that his shoes fitted the tracks made at the time of the crime around the house of the deceased and at the place of the crime, is sufficient, taken with other evidence of guilt, to be submitted to the jury and to sustain their verdict thereon of murder in the first degree. *State v. McLeod*, 196 N. C. 542, 146 S. E. 409.

Same—Tending Only to Exculpate.—Where the State's evidence and that of the defendant are substantially to the same effect, in an action for an assault, and tend only to exculpate the defendant, his motion as of non-suit after all the evidence has been introduced, considering it as a whole, should be sustained. *State v. Fulcher*, 184 N. C. 663, 113 S. E. 769.

Same—Father Shielding Child.—The father may shield his child from assault of another to the extent necessary for the purpose without himself being guilty of an assault; and where he has done so, without the use of excessive force, as appears from all the evidence in the case, his motion as of nonsuit at the close of his evidence should be granted. *State v. Fulcher*, 184 N. C. 663, 11 S. E. 769.

Same—Personal Presence of Defendant.—In a criminal prosecution for felonious breaking and entering, larceny and receiving against several defendants, resulting in conviction of one of them of larceny only, a motion for nonsuit under this section, was properly denied, where the state's evidence tended to show that this defendant and one of the other defendants planned the theft and this defendant advised, aided and abetted his codefendant therein, though not personally present when the theft occurred. *State v. King*, 222 N. C. 239, 22 S. E. (2d) 445.

Same—Recent Possession of Stolen Goods.—Evidence that a cotton mill had been broken into and that goods taken therefrom had been found in defendant's possession within an hour or two thereafter, with further evidence of his unlawful possession, is sufficient for conviction, under the provisions of section 14-54, and defendant's demurrer to the State's evidence or motion for dismissal thereon, is properly overruled. *State v. Williams*, 187 N. C. 492, 122 S. E. 13.

Evidence from which the jury might infer that stolen goods were thereafter in the constructive possession of defendant will not justify an inference that at such time defendant knew the goods to have been stolen, and where the evidence is sufficient to support only the first inference

the defendant's motion as of nonsuit should be allowed under this section. *State v. Anthony*, 206 N. C. 120, 173 S. E. 47.

Same—Evidence Raising Suspicion Only.—Evidence that does no more than raise a suspicion, somewhat strong perhaps, of a homicide and the defendant's guilt, is not enough on a prosecution for murder and demurrer to the evidence will be sustained. *State v. Carter*, 204 N. C. 304, 305, 168 S. E. 204.

Same—Malicious Castration.—The direct evidence of the guilt of one of the defendants in a prosecution for malicious castration, and the circumstantial evidence as to the other's participation and guilt is held sufficient to overrule their motions as of nonsuit. *State v. Ammons*, 204 N. C. 753, 169 S. E. 631.

Same—Identity.—In a prosecution for homicide the evidence of the defendant's identity as the perpetrator of the crime is sufficient to be submitted to the jury, the weight and credibility of the wife's identification of the defendant being for their determination, and defendant's motion as of nonsuit on the ground that her testimony was based upon imagination and auto-suggestion was properly refused. *State v. Fogleman*, 204 N. C. 401, 168 S. E. 536.

Same—Conspiracy.—Where the direct circumstantial evidence in this case tends to show that defendant had quarreled with deceased and had entered into a conspiracy to kill him, that deceased was murdered and that all the conspirators, including the appealing defendant, were present, aiding and abetting in the commission of the crime, the evidence is sufficient to be submitted to the jury and motion for non-suit was properly overruled. *State v. Brown*, 204 N. C. 392, 168 S. E. 532.

Same—Assault with Intent to Kill.—In a prosecution, for a secret assault and battery with a deadly weapon with malice and intent to kill, evidence that there had been ill-feeling between the prosecuting witness and the defendant, that the prosecuting witness had seen and recognized the defendant standing outside a window in the witness's home, that the defendant appeared there suddenly at night and shot the prosecuting witness before he could do anything, and seriously wounded him, is sufficient to overrule defendant's motion as of nonsuit, and to show that the assault was done in a secret manner. *State v. McLamb*, 203 N. C. 442, 166 S. E. 507.

Same—Assault with Intent to Rape.—Upon an indictment charging an assault with intent to commit rape, defendant may be convicted of an assault upon a female as though separately charged, and motion to dismiss under this section was properly refused where there was sufficient evidence to convict of an assault. *State v. Jones*, 222 N. C. 37, 21 S. E. (2d) 812.

Same—Operation of Prohibited Mechanical Device.—Evidence tending to show that defendant was the owner of an automobile, and had been seen in same prior to its capture, and that when the automobile was subsequently captured it was being driven by others and had attached thereto a mechanical device for the emission of excessive smoke or gas, is insufficient to resist defendant's motion as of nonsuit under this section, in a prosecution under § 4506(b). *State v. Yates*, 208 N. C. 194, 179 S. E. 756. [Section 4506(b) has been superseded by section 2621(285), now G. S. § 20-136].

Conflicting Evidence.—Where the prosecutor's goods have been stolen two days before and they are found in the defendant's possession, with conflicting evidence upon the question of his having stolen them, the cases can only be determined by the jury, and the defendant's motion under this section to dismiss must be denied. *State v. Jenkins*, 182 N. C. 818, 108 S. E. 767.

When the defendant is on trial under a criminal indictment for recklessly driving his car and colliding with another car in which deceased was riding, on a public highway, causing her death, and there is both direct and circumstantial evidence that the defendant was driving the car at the time, which his own testimony and evidence of his witnesses contradicts, his motion for judgment as in case of nonsuit, made at the close of the State's evidence and renewed after all the evidence, is properly denied. *State v. Leonard*, 195 N. C. 242, 141 S. E. 736.

Variance.—The defendant in a criminal action may raise the question of a variance between the indictment and the proof by a motion to dismiss the prosecution as in case of nonsuit. This is clearly set forth in *S. v. Gibson*, 170 N. C. 697, 86 S. E. 774; *S. v. Harbert*, 185 N. C. 760, 118 S. E. 6; *S. v. Harris*, 195 N. C. 306, 141 S. E. 883; *State v. Grace*, 196 N. C. 280, 281, 145 S. E. 399.

Where there is a fatal variance between the indictment and the proof, it is proper to sustain the demurrer to the

evidence, or to dismiss the action as in case of nonsuit. *State v. Franklin*, 204 N. C. 157, 158, 167 S. E. 569. See also, *State v. Martin*, 199 N. C. 636, 155 S. E. 447.

Effect of Reversal of Judgment of Guilty.—Under the provisions of this section the reversal of a "judgment of guilty" has the force and effect of a verdict of "not guilty." *State v. Corey*, 199 N. C. 209, 153 S. E. 923.

Motion will not lie for failure of the state to offer evidence of a nonessential averment in the indictment, when each essential element of the offense is supported by competent evidence. *State v. Atkinson*, 210 N. C. 661, 188 S. E. 73.

Demurrer to the Evidence Properly Sustained.—See *State v. Sims*, 208 N. C. 459, 460, 181 S. E. 269, wherein defendant's identity was not established; *State v. White*, 208 N. C. 537, 181 S. E. 558, wherein defendant's identity was not established; *State v. Landin*, 209 N. C. 20, 22, 182 S. E. 689, wherein defendant's negligence was held harmless; *State v. Creech*, 210 N. C. 700, 188 S. E. 316, wherein owner of car did not know driver was intoxicated.

Demurrer to the Evidence Properly Denied.—See *State v. Webber*, 210 N. C. 137, 185 S. E. 659, wherein evidence showed defendant was driving at fifty miles an hour before collision; *State v. Smith*, 211 N. C. 93, 189 S. E. 175, wherein evidence showed felonious intent to commit rape; *State v. Vincent*, 222 N. C. 543, 23 S. E. (2d) 832, evidence showing identity in rape; *State v. Reynolds*, 222 N. C. 40, 21 S. E. (2d) 813, evidence showing felonious breaking and entry and showing identity.

Applied in *State v. Callett*, 211 N. C. 563, 191 S. E. 27; *State v. McDonald*, 211 N. C. 672, 191 S. E. 733; *State v. Brewington*, 212 N. C. 244, 193 S. E. 24; *State v. Delk*, 212 N. C. 631, 194 S. E. 94; *State v. Lockey*, 214 N. C. 525, 199 S. E. 715; *State v. Myers*, 214 N. C. 652, 200 S. E. 443; *State v. Forte*, 222 N. C. 537, 23 S. E. (2d) 842; *State v. Johnson*, 220 N. C. 252, 17 S. E. (2d) 7; *State v. Todd*, 222 N. C. 346, 23 S. E. (2d) 47; *State v. Goodman*, 220 N. C. 250, 17 S. E. (2d) 8.

Cited in *State v. Pridgen*, 194 N. C. 795, 139 S. E. 601; *State v. Mickle*, 194 N. C. 808, 140 S. E. 150; *State v. Eubanks*, 194 N. C. 319, 320, 139 S. E. 451; *State v. Dowell*, 195 N. C. 523, 524, 143 S. E. 13; *State v. Golden*, 196 N. C. 246, 247, 145 S. E. 236; *State v. Weston*, 197 N. C. 25, 26, 147 S. E. 618; *State v. McKinnon*, 197 N. C. 576, 150 S. E. 25; *State v. Hickey*, 198 N. C. 45, 47, 150 S. E. 615; *State v. Burleson*, 198 N. C. 61, 62, 150 S. E. 628; *State v. McLeod*, 198 N. C. 649, 152 S. E. 895; *State v. Spivey*, 198 N. C. 655, 153 S. E. 255; *State v. Ritter*, 199 N. C. 116, 119, 154 S. E. 62; *State v. Beal*, 199 N. C. 278, 287, 154 S. E. 604; *State v. Johnson*, 199 N. C. 429, 430, 154 S. E. 730; *State v. Sizemore*, 199 N. C. 687, 688, 155 S. E. 724; *State v. Baker*, 199 N. C. 578, 155 S. E. 249; *State v. Fletcher*, 199 N. C. 815, 816, 155 S. E. 927; *State v. Wrenn*, 198 N. C. 260, 151 S. E. 261; *State v. Newton*, 207 N. C. 323, 325, 177 S. E. 184; *State v. Mansfield*, 207 N. C. 233, 234, 176 S. E. 761; *State v. Mazingo*, 207 N. C. 247, 249, 176 S. E. 582; *State v. Wilson*, 205 N. C. 376, 377, 171 S. E. 338; *State v. Davidson*, 205 N. C. 735, 738, 172 S. E. 489; *State v. Anderson*, 208 N. C. 771, 182 S. E. 643; *State v. Jones*, 209 N. C. 49, 182 S. E. 699; *State v. Camby*, 209 N. C. 50, 182 S. E. 715; *State v. Langley*, 209 N. C. 178, 183 S. E. 526; *State v. Hinson*, 209 N. C. 187, 183 S. E. 397; *State v. Lewis*, 209 N. C. 191, 183 S. E. 357; *State v. Oakley*, 210 N. C. 206, 186 S. E. 244; *State v. Gallman*, 210 N. C. 288, 186 S. E. 236; *State v. Evans*, 211 N. C. 458, 190 S. E. 724; *State v. Hawkins*, 214 N. C. 326, 199 S. E. 284; *State v. Caldwell*, 212 N. C. 484, 193 S. E. 716; *State v. Perry*, 212 N. C. 533, 193 S. E. 727; *State v. Hanford*, 212 N. C. 746, 194 S. E. 481; *State v. Libby*, 213 N. C. 662, 197 S. E. 154; *State v. Epps*, 213 N. C. 709, 197 S. E. 580; *State v. Stiers*, 214 N. C. 126, 198 S. E. 601; *State v. Bowser*, 214 N. C. 249, 199 S. E. 31; *State v. Hudson*, 218 N. C. 219, 10 S. E. (2d) 730; *State v. Wilson*, 218 N. C. 769, 12 S. E. (2d) 654; *State v. Jones*, 215 N. C. 660, 2 S. E. (2d) 867.

§ 15-174. New trial to defendant.—The courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases. (Rev., s. 3272; Code, s. 1202; R. C., c. 35, s. 35; 1815, c. 895; C. S. 4644.)

Cross Reference.—As to new trial in civil cases, see § 1-207 and notes thereto.

Rule Similar at Common Law.—Independent of this section, the rule of the common law was the same and in Wharton's Criminal Law, sec. 3391, it is laid down that "at common law the court trying the case, is the sole tribunal by whom a new trial can be granted, and its refusal so to

do being matter of discretion is no ground for a writ of error." *State v. Bennett*, 93 N. C. 503, 506.

New Trial Not Granted After Acquittal.—After a verdict of acquittal on a State prosecution, a new trial is not allowed by this section. *State v. Taylor*, 8 N. C. 462.

Newly Discovered Evidence.—A motion for new trial for newly discovered evidence will not be granted even in a civil case, where the evidence is merely cumulative or where it was withheld by the party moving. *State v. Lilliston*, 141 N. C. 857, 54 S. E. 427.

Motions for new trials for newly discovered evidence cannot be entertained in the Supreme Court in criminal cases. *State v. Lilliston*, 141 N. C. 857, 54 S. E. 427.

Disqualification of Jurors and Newly Discovered Evidence.—Where a judgment of the Supreme Court in a criminal case has been certified to the Clerk of the Superior Court, the case is in the latter court for execution of the sentence, and a motion for a new trial may be there entertained for disqualification of jurors and for newly discovered evidence. *State v. Casey*, 201 N. C. 620, 161 S. E. 81.

When Judgment Set Aside.—A judgment regularly entered at one term of the court, cannot be set aside at a subsequent term, except in cases of surprise, mistake or excusable neglect. *State v. Bennett*, 93 N. C. 503.

§ 15-175. Nolle pros. after two terms; when capias and subpoenas to issue.—A nolle prosequi "with leave" shall be entered in all criminal actions in which the indictment has been pending for two terms of court and the defendant has not been apprehended and in which a nolle prosequi has not been entered, unless the judge for good cause shown shall order otherwise. The clerk of the superior court shall issue a capias for the arrest of any defendant named in any criminal action in which a nolle prosequi has been entered when he has reasonable ground for believing that such defendant may be arrested or upon the application of the solicitor of the district. When any defendant shall be arrested it shall be the duty of the clerk to issue a subpoena for the witnesses for the state indorsed on the indictment. (Rev., s. 3273; 1905, c. 360, ss. 1, 3, 4; C. S. 4645.)

Cross Reference.—As to clerk's record of nolle prosequi with leave cases, see § 2-42, paragraph 34.

In General.—A nolle prosequi is merely a declaration on the part of the solicitor that he will not then prosecute the suit further, and is not an acquittal, although its effect is to discharge the defendant without delay. *Wilkinson v. Wilkinson*, 159 N. C. 265, 74 S. E. 740.

Effect of Nolle Pros.—A nolle pros. in criminal proceedings does not amount to an acquittal, and the defendant may be arrested again upon the same bill and put to trial. *State v. Thornton*, 35 N. C. 256; *State v. Faggart*, 170 N. C. 737, 744, 87 S. E. 31; *State v. Smith*, 129 N. C. 546, 40 S. E. 1.

Discretion of Attorney General.—The attorney general has a discretionary power to enter a nolle prosequi, and the court will not interfere, unless the power be oppressively used. *State v. Thompson*, 10 N. C. 613; *State v. Buchanan*, 23 N. C. 59.

Permission of Court for New Capias.—Where a nolle prosequi has been entered in a criminal case, a capias will not issue as a matter of course upon the will of the prosecuting officer, but only upon permission of the court first obtained. *State v. Thornton*, 35 N. C. 256.

Same—When Unnecessary.—Where a "nolle prosequi with leave," is entered, it authorizes the clerk, at the request of the solicitor, to issue another capias. *State v. Smith*, 129 N. C. 546, 40 S. E. 1.

§ 15-176. Prisoner not to be tried in prison uniform.—It shall be unlawful for any sheriff, jailer or other officer to require any person imprisoned in jail to appear in any court for trial dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with shaven or clipped head. And no person charged with a criminal offense shall be tried in any court while dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress,

or with head shaven or clipped by or under the direction and requirement of any sheriff, jailer or other officer, unless the head was shaven or clipped while such person was serving a term of imprisonment for the commission of a crime.

Any sheriff, jailer or other officer who violates the provisions of this section shall be guilty of a misdemeanor. (1915, c. 124; C. S. 4646.)

Art. 18. Appeal.

§ 15-177. Appeal from justice, trial de novo.—The accused may appeal from the sentence of the justice to the superior court of the county. On such appeal being prayed, the justice shall recognize both the prosecutor and the accused, and all the material witnesses, to appear at the next term of the court, in such sums as he shall think proper; and he may require the accused to give sureties for his appearance as aforesaid. In all cases of appeal, the trial shall be anew, without prejudice from the former proceedings. (Rev., s. 3274; Code, s. 900; 1868-9, c. 178, subc. 4, s. 11; 1879, c. 92, s. 10; C. S. 4647.)

Cross References.—As to appeal in civil cases, see § 1-299 and notes thereto. As to appeal by state, see § 15-179. As to recordari as substitute for appeal, see § 1-269.

In General.—These provisions have reference to criminal cases wherein the magistrate gives judgment against a party charged with a criminal offense, and imposes on him a punishment by fine or imprisonment. This is apparent from the nature of the matter, and as well from the language employed. They refer to the conviction and sentence of defendants. *State v. Lyon*, 93 N. C. 575, 577.

Right of Appeal Has Been Modified.—The right of appeal to the Superior Court from conviction in a justice's court of a misdemeanor within the justice's jurisdiction, as provided by this section, has been modified by the statutes establishing and expanding the uniform system of recorders' courts, and under the general provisions of § 7-243, an appeal from a conviction of simple assault in a justice's court must first be taken to the recorder's court and not the Superior Court in the counties affected by the act. *State v. Baldwin*, 205 N. C. 174, 170 S. E. 645.

Judgment Must Be Final in Nature.—The appeal must be from a final judgment. *State v. Seaboard Air Line R. R.*, 169 N. C. 295, 84 S. E. 283; *State v. Bailey*, 65 N. C. 426; *State v. Pollard*, 83 N. C. 598.

Appeal as Matter of Right.—Under this section, a defendant found guilty of an offense of which the justice of the peace has final jurisdiction and an order is made without defendant's consent that judgment be suspended upon payment of costs, need not resort to the circuitous remedy of a recordari but is entitled to an appeal to the superior court as a matter of right. *State v. Griffin*, 117 N. C. 709, 23 S. E. 164.

Right of Appeal Personal to Accused.—The right of appeal provided for by this section is for the benefit only of the person accused, *State v. Powell*, 86 N. C. 640; but so much of the judgment as is personal to the prosecutor and taxes him with the costs, may be appealed from.

Appeal under Section Presents Trial de novo.—Where the defendant after trial and conviction before a justice of the peace, moved in arrest of judgment, which motion was refused, and he appealed to the superior court, it was held, that the appeal brought up the whole case, and the defendant under this section was entitled to a trial de novo. *State v. Koonce*, 108 N. C. 752, 12 S. E. 1032. But where the defendant restricts himself by a plea of guilty then there can be no acts left open for consideration by a jury and the case on appeal does not concern the whole case. *State v. Warren*, 113 N. C. 683, 684, 686, 18 S. E. 498.

After an appeal from a recorder's court to a Superior Court has been effected and appeal bond given, the recorder's court has no further jurisdiction over the case, the procedure being the same as under this section, and defendant appellant may not thereafter withdraw the appeal by notice given in the recorder's court. *State v. Goff*, 205 N. C. 545, 172 S. E. 407.

Bill of Indictment Unnecessary.—Upon an appeal from an inferior court to the superior court from a conviction of a petty misdemeanor, the necessity of a bill of indictment in the latter court is dispensed with, *State v. Jones*, 181 N.

C. 543, 106 S. E. 827; *State v. Quick*, 72 N. C. 241, 242; but where the case is beyond the jurisdiction of the inferior court then an indictment is necessary. *State v. McAden*, 162 N. C. 575, 77 S. E. 298.

Amendment to Complaint.—Where the defendant has been separately tried before a justice of the peace for several indictable offenses, it is permissible for the superior court, on appeal, to allow an amendment to the complaint or warrant so as to make one complaint include the several offenses under different counts. *State v. Mills*, 181 N. C. 530, 106 S. E. 677.

Excessive Punishment by Public Justice.—A defendant is not entitled to a new trial because the punishment imposed by a police justice was excessive; the case should be remanded for sentence in conformity to law. *State v. Black*, 150 N. C. 866, 64 S. E. 778.

Due Process Where Justice Paid by Fee upon Conviction.—Since a defendant in a criminal prosecution before a justice of the peace has a right to demand a jury trial as provided in § 15-157, and the right to appeal to the superior court and have the whole matter heard therein de novo, under this section, the fact that a justice's compensation is fixed upon a fee basis, which he will receive only in the event of conviction, does not result in depriving the defendant of trial under due process of law. *In re Steele*, 220 N. C. 685, 18 S. E. (2d) 132.

Cited in *State v. Boykin*, 211 N. C. 407, 191 S. E. 18.

§ 15-178. Justice to return papers and findings to superior court.—In every case in which an appeal shall be prayed the justice shall forthwith transmit to the clerk of the superior court of the county all papers in the case, together with a copy of the verdict, if any, of his determination of the facts if there shall have been no trial by jury, and of the sentence, in which shall be set forth all the facts found by him, as well as his finding of those which were alleged in the complaint and which were found by him not to be proved. (Rev., s. 3275; Code, s. 901; 1868-9, c. 178, subc. 4, s. 12; C. S. 4648.)

Cited in *State v. Goff*, 205 N. C. 545, 549, 172 S. E. 407; *State v. Boykin*, 211 N. C. 407, 191 S. E. 18.

§ 15-179. When state may appeal.—An appeal to the supreme court may be taken by the state in the following cases, and no other. Where judgment has been given for the defendant—

1. Upon a special verdict.
2. Upon a demurrer.
3. Upon a motion to quash.
4. Upon arrest of judgment. (Rev., s. 3276; Code, s. 1237; C. S. 4649.)

Cross Reference.—As to distinction between general and special verdicts, see § 1-201 et seq.

Editor's Note.—See 13 N. C. Law Rev., 321, for note on "Special Verdicts."

Judgments Rendered in Superior Court.—The right of the state to appeal upon a special verdict, a demurrer, a motion to quash, or a motion in arrest of judgment, as provided by this section, applies only to judgments rendered in the superior court. *State v. Nichols*, 215 N. C. 80, 200 S. E. 926.

Right Is Statutory.—The right of the state to appeal is statutory, which right may not be enlarged by the superior court, and when the superior court remands a cause to the county court with provision that the state may appeal from any judgment thereafter rendered by the county court, the provision giving the state the right to appeal is void. *State v. Cox*, 216 N. C. 424, 5 S. E. (2d) 125.

Bond Not Essential.—A bond, in the case of an appeal on the part of the state, is not necessary, a recognizance being sufficient. *State v. M'Lelland*, 1 N. C. 632; as to necessity of bond on appeal by defendant see *State v. Patrick*, 72 N. C. 217.

The word "demurrer" is used in this section in its usual and ordinary significance, as understood and defined in criminal pleading, and is not used in the sense of embracing "demurrer to evidence." *State v. Moody*, 150 N. C. 847, 64 S. E. 431.

Upon a demurrer to an indictment the state is allowed to appeal because it has the effect, in criminal cases, of opening the whole record to the court and, under it, the juris-

diction of the court may be challenged, as well as the sufficiency of the subject-matter of the indictment itself. *State v. Moody*, 150 N. C. 847, 64 S. E. 431; *State v. McDowell*, 84 N. C. 799, 802.

No Right of Appeal from Procedural Error.—The state has no right of appeal from the action of the trial judge in striking out a plea of guilty and entering erroneously a plea of not guilty and discharging the prisoner, upon a trial for an indictable offense. *State v. Branner*, 149 N. C. 559, 63 S. E. 169.

Overruling Motion to Amend Record.—No appeal lies by the state from an order overruling a motion to amend the record. *State v. Swenson*, 82 N. C. 541.

Taxing Prosecutor with Costs.—An appeal lies from the judgment of a justice of the peace taxing the prosecutor with costs, such taxing being in the nature of a civil judgment. *State v. Morgan*, 120 N. C. 564, 26 S. E. 634. See also note of *State v. Powell*, 86 N. C. 640, under section 15-177.

The refusal of the court to mark one as prosecutor of record is not one of the cases enumerated in this section in which the state may appeal. *State v. Moore*, 84 N. C. 724.

General Verdict of Not Guilty.—In a criminal prosecution where there is a plea and general verdict of not guilty, the state has no right of appeal; such verdict ends the case. *State v. Savery*, 126 N. C. 1083, 36 S. E. 22 and cases cited; but under this section the state may appeal from a judgment for defendant on a special verdict. *State v. Monger*, 107 N. C. 771, 12 S. E. 250; *State v. Lane*, 78 N. C. 547; *State v. Winston*, 194 N. C. 243, 139 S. E. 240.

Judgment Non Obstante Verdicto.—Where there is a verdict convicting a defendant of a misdemeanor under the provisions of a statute prohibiting the drawing of a worthless check on a bank under certain conditions, and a judgment has been rendered in favor of the defendant non obstante verdicto, the State may appeal under the provisions of this section. *State v. Yarbboro*, 194 N. C. 498, 140 S. E. 216.

Acquittal in Consequence of Erroneous Charge.—When a defendant has once been tried and acquitted upon an indictment good in form, no appeal lies even though the acquittal is in consequence of the erroneous charge of the presiding judge. *State v. West*, 71 N. C. 263.

Arrest of Judgment.—In a prosecution for manslaughter, judgment was entered providing that prayer for judgment and sentence be continued and that the defendant be placed on probation for a period of five years, with further order that as a special condition of probation the defendant should pay a designated sum weekly into the office of the clerk for a period of five years for the use of the mother of the deceased. Upon defendant's petition filed after the death of the mother within the five-year period, the court adjudged that the requirement for the payment of the sum had terminated and abated on her death. Held: The state may not appeal from the order, as the ruling is not equivalent to the allowance of a motion in arrest of judgment. *State v. McCollum*, 216 N. C. 737, 6 S. E. (2d) 503.

Arrest of Judgment as to One of Two Defendants.—Where in a prosecution for murder two defendants were convicted of manslaughter, the state under sub-division 4 of this section, has a right to appeal from an arrest of judgment as to one of them. *State v. Hall*, 183 N. C. 806, 112 S. E. 431.

Remanding Case for Lighter Sentence.—This section does not include a ruling of the superior court remanding a case for the imposition of a lesser sentence. *State v. Davidson*, 124 N. C. 839, 32 S. E. 957.

If a warrant charges simple assault, the State has no right of appeal from a judgment of a justice of the peace acquitting the defendant, the justice having, in such cases, exclusive original jurisdiction. *State v. Myrick*, 202 N. C. 688, 163 S. E. 803.

The State may appeal from acquittal of defendant upon a special verdict, although the verdict is fatally defective in that it fails to find facts essential to an adjudication of defendant's guilt or innocence. *State v. Guledge*, 207 N. C. 374, 177 S. E. 128.

Applied to an order quashing a bill of indictment in *State v. Lancaster*, 169 N. C. 284, 84 S. E. 529. See *State v. Parker*, 209 N. C. 32, 182 S. E. 723.

Stated in *State v. Hinson*, 123 N. C. 765, 31 S. E. 854; *State v. Davidson*, 124 N. C. 839, 32 S. E. 957; *State v. Bowman*, 145 N. C. 452, 59 S. E. 74; *State v. Morris*, 208 N. C. 44, 179 S. E. 19.

Cited in *State v. Lawrence*, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366; *State v. Dixon*, 215 N. C. 161, 163, 1 S. E. (2d) 521; *State v. Thomas*, 215 N. C. 181, 1 S. E. (2d) 533.

§ 15-180. Appeal by defendant to supreme court.—In all cases of conviction in the superior court

for any criminal offense, the defendant shall have the right to appeal, on giving adequate security to abide the sentence, judgment or decree of the supreme court; and the appeal shall be perfected and the case for the supreme court settled, as provided in civil actions. (Rev., s. 3277; Code, s. 1234; R. C., c. 4, s. 21; 1818, c. 962, s. 4; C. S. 4650.)

Cross References.—As to perfection of appeal, see § 1-282 and notes. As to essentials of transcript, see § 1-284 and notes. As to undertaking on appeal in civil cases, see § 1-285 and notes.

Editor's Note.—The manner of perfecting appeals in criminal cases is precisely the same as that in civil cases.

Appeals in criminal cases are controlled by this section, and a defendant is entitled to appeal only from conviction in the Superior Court or some final judgment thereof, and an appeal from an order of the Superior Court remanding the case to the recorder's court will be dismissed. *State v. Rooks*, 207 N. C. 275, 176 S. E. 752.

Appeal or Substitute for Writ of Error.—At common law there was no appeal from the decision of any of the courts, high or low, and these decisions could only be reviewed by writ of error or writ of false judgment. In North Carolina appeals are used as a substitute for those writs. *State v. Bailey*, 65 N. C. 426, 428; *State v. Webb*, 155 N. C. 426, 70 S. E. 1064.

Bond Necessary.—An appeal by the defendant to the supreme Court will be dismissed where no appeal bond is filed, if there is no order allowing the appeal without such bond. *State v. Patrick*, 72 N. C. 217; *State v. Spurtin*, 30 N. C. 362. See section 15-181.

Where the defendant appealed in three cases without giving appeal bond, and it appeared that he had obtained leave to appeal without bond in one case only, it was held that the other cases would be dismissed. *State v. Hamby*, 126 N. C. 1066, 35 S. E. 614.

Appeal "By Consent."—Where an appeal without bond or affidavit was allowed by consent it was held not to be in compliance with the section. *State v. Kerns*, 90 N. C. 650.

Appeal Lies Only from Final Judgment.—The right to appeal is wholly statutory, and a defendant may appeal only from a conviction or from some judgment that is final in its nature. Thus an appeal from the denial of defendant's plea in abatement will be dismissed as being an appeal from an interlocutory judgment. *State v. Blades*, 209 N. C. 56, 182 S. E. 714.

Defendant was not convicted, but was acquitted. There was no judgment on conviction, or judgment prejudicial to the defendant in its nature final. The defendant therefore had no right to appeal to the supreme court and it is without jurisdiction to entertain the appeal, or to decide the questions presented by defendant's assignment of error. *State v. Hiatt*, 211 N. C. 116, 117, 189 S. E. 124.

Exercise of Right Should Not Prejudice Defendant.—While the trial judge has the discretionary power to change the sentence during the term, where it appears of record that after prayer for judgment was continued, with defendant's consent, upon specified terms, the court, upon learning of defendant's intention to appeal, struck that judgment out and imposed a jail sentence, the cause will be remanded for resentencing, since defendant's exercise of his right to appeal under this section should not prejudice him in any manner. *State v. Patton*, 221 N. C. 117, 19 S. E. (2d) 142.

Where defendant could not meet the conditions upon which execution of the judgment was suspended if he exercised his right to appeal, under this section, the judgment on this count is erroneous, and the cause remanded for proper judgment thereon. *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9.

Cited in *Current v. Church*, 207 N. C. 658, 178 S. E. 82.

§ 15-181. Defendant may appeal without security for costs.—In all cases of conviction in the superior courts, the defendant shall have the right to appeal without giving security for costs, upon filing an affidavit that he is wholly unable to give security for the costs, and is advised by counsel that he has reasonable cause for the appeal prayed, and that the application is in good faith.

And where it shall appear to the presiding judge that a defendant who has been convicted of a capital felony, or having been tried upon a bill of indictment charging a capital felony, has been

convicted of a less offense, and who has prayed an appeal to the supreme court from the sentence of death or other sentence pronounced against him upon such conviction, is unable to defray the cost of perfecting his appeal on account of his poverty, it shall be the duty of the county in which the alleged capital felony was committed, upon the order of such judge, to pay the necessary cost of obtaining a transcript of the proceedings had and the evidence offered on the trial from the court reporter for the use of the defendant and the necessary cost of preparing the requisite copies of the record and briefs which the defendant is required to file in the supreme court under the rules of said court.

The judge may fix the reasonable value of the services rendered in furnishing such transcript and preparing such copies of the record and briefs, and said copies of the record and briefs shall be prepared in the manner prescribed by the rules of the supreme court in pauper appeals. Provided, that this paragraph shall apply only to those cases in which counsel has been assigned by the court. (Rev., s. 3278; Code, s. 1235; 1869-70, c. 196, s. 1; 1933, c. 197; 1937, c. 330; C. S. 4651.)

Cross Reference.—As to appeals in forma pauperis in civil cases, see § 1-288 and notes thereunder.

Editor's Note.—Public Laws of 1933, c. 197, added the last two paragraphs of this section relating to appeals in capital felony cases to the Supreme Court.

The 1937 amendment extends the 1933 law to include defendants who have been tried on an indictment for a capital felony and convicted of a lesser offense. Again the statute would apply only in cases where counsel had been assigned by the court. See 15 N. C. Law Rev., 347.

The requirements of this section are mandatory and jurisdictional, "and unless the statute is complied with, the appeal is not in this Court, and we can take no cognizance of the case, except to dismiss it from our docket." *State v. Holland*, 211 N. C. 284, 285, 189 S. E. 761, citing *Honeycutt v. Watkins*, 151 N. C. 652, 65 S. E. 762. See *State v. Robinson*, 214 N. C. 365, 366, 199 S. E. 270. And are not subject to indulgences or waiver. *State v. Holland*, 211 N. C. 284, 286, 189 S. E. 761.

The requirements of the statute are mandatory, not directory, and unless complied with the appeal will be dismissed, not as a matter of discretion, but for want of jurisdiction. *State v. Mitchell*, 221 N. C. 460, 462, 20 S. E. (2d) 292.

There is no authority for granting an appeal in forma pauperis without a proper supporting affidavit. *State v. Holland*, 211 N. C. 284, 285, 189 S. E. 761.

Essentials of Affidavit Cannot Be Waived.—The court has no authority to dispense with, or the prosecutor to waive the requirements of this section in respect to the affidavit which the defendant must file. *State v. Moore*, 93 N. C. 500.

In *State v. Duncan*, 107 N. C. 818, 819, 12 S. E. 382, it is said: "It is not a matter of discretion with the court, but it is the right of the state to have an appeal dismissed where there is a failure to comply with either of the three essential requirements" of this section; as to dismissal of appeal where no bond given or order allowing appeal without security, see *State v. Patrick*, 72 N. C. 217.

The affidavit is jurisdictional and may not be waived by the solicitor. *State v. Stafford*, 203 N. C. 601, 166 S. E. 734.

In order that the Supreme Court may have jurisdiction of an appeal in forma pauperis in a criminal action it is required that the application for leave to appeal be supported by an affidavit of the appellant showing that he is wholly unable to give the security required; that he is advised by counsel that he has reasonable cause for appeal, and that the application is made in good faith; and where any of these three statutory requirements have not been complied with the appeal will be dismissed. *State v. Marion*, 200 N. C. 715, 158 S. E. 406.

Compared with Security in Civil Actions.—The requirements of this section for prosecuting an appeal without making deposit or giving security for costs in a criminal prosecution, are different from those in a civil action, but the requirements of both statutes, are jurisdictional, and unless complied with in all respects, the appeal is not properly in

this Court. *Powell v. Moore*, 204 N. C. 654, 655, 169 S. E. 281.

Time of Perfecting Appeal.—Appeals under this section can be allowed only during term of court and by the judge. *State v. Gatewood*, 125 N. C. 694, 695, 34 S. E. 543, and if not perfected at this time the appeal is a nullity. *State v. Dixon*, 71 N. C. 204.

The affidavit is to be filed during the trial term or within ten days from the adjournment thereof. *State v. Mitchell*, 221 N. C. 460, 20 S. E. (2d) 292. See § 15-182.

Proper Form Presumed.—If an order is made allowing a defendant to appeal as a pauper, and the affidavit and certificate of counsel are not in the record sent to the Supreme Court, it will be presumed that they were in due form. *State v. Low*, 103 N. C. 350, 351, 9 S. E. 411.

Signature of Judge Essential.—Where the order allowing an appeal in forma pauperis in criminal cases is not signed by the judge but by the clerk, the defect is jurisdictional, without power of the appellate court to allow amendment, and the appeal will be dismissed. *State v. Parish*, 151 N. C. 659, 65 S. E. 762.

Name of Advising Counsel Need Not Appear.—It is not necessary that an affidavit, filed under this section, should state the name of the counsel by whom the applicant is advised that he has reasonable grounds for appeal. *State v. Perkins*, 117 N. C. 697, 699, 23 S. E. 274. But it has been suggested that it would be proper to state the name of such counsel. *State v. Divine*, 69 N. C. 390.

Motion to Reinstate Appeal.—Where one of the essential elements has been omitted from the affidavit, a motion to reinstate the appeal by offering to file a bond or make a deposit should be made when the motion to dismiss was before the court, and after the case has been regularly dismissed, it is too late. *State v. Martin*, 172 N. C. 977, 90 S. E. 502.

Failure to Prosecute According to Rules of Court.—See *State v. Holland*, 211 N. C. 284, 189 S. E. 761, where it was held that the affidavit not containing the assertion that "the application is in good faith," prevented the court having jurisdiction. See also, *State v. Bynum*, 199 N. C. 376, 154 S. E. 918.

Applied in *State v. Starnes*, 94 N. C. 973; *State v. Wyld*, 110 N. C. 500, 15 S. E. 5; *State v. Atkinson*, 141 N. C. 734, 53 S. E. 228.

Cited in *State v. Brumfield*, 198 N. C. 613, 152 S. E. 926.

§ 15-182. Appeal granted; bail for appearance.

—The affidavit required in the preceding section may be filed at any time during the term or within ten days from the adjournment of the term either with the Judge or the clerk, and it shall be the duty of the Judge or the Clerk on filing the affidavit to grant the appeal without security for costs, and for any bailable offense the judge shall require the defendant to enter into recognizance in a reasonable sum to make his appearance at the first term of the Superior Court to be held in the county and to further answer the charge preferred. (Rev., s. 3279; Code, s. 1236; 1869-70, c. 196, s. 2; 1929, c. 236, s. 1; C. S. 4652.)

Editor's Note.—The amendment of 1929 added the first provision of this section; namely, "the affidavit required in the preceding section may be filed at any time during the term or within ten days from the adjournment of the term either with the Judge or the Clerk."

Correction of Errors Allowed by Section 1-288 Applies to Civil Cases Only.—The amendment to section 1-288 permitting correction of errors or omissions in the affidavit or certificate of counsel in pauper appeals at any time prior to the hearing of the argument of the case, applies only to appeals in civil actions and not to appeals in criminal prosecutions under this and the preceding section. *State v. Mitchell*, 221 N. C. 460, 20 S. E. (2d) 292.

§ 15-183. Bail pending appeal.—When any person convicted of a misdemeanor and sentenced by the court, shall appeal, the court shall allow such person to give bail pending appeal. (Rev., s. 3280; Code, s. 1181; R. C., c. 35, s. 12; 1850-1, c. 2; C. S. 4653.)

Cross Reference.—As to right of bail to surrender principal, see § 15-122.

In General.—But for this section an accused would have

no right to bail pending an appeal. *State v. Bradsher*, 189 N. C. 401, 127 S. E. 349.

Amount of Bail.—The question of the amount to be fixed for bond pending appeal is largely in the discretion of the court below. *State v. Parker*, 220 N. C. 416, 17 S. E. (2d) 475.

§ 15-184. Appeal not to vacate judgment; stay of execution.—In criminal cases an appeal to the supreme court shall not have the effect of vacating the judgment appealed from, but upon perfecting the appeal as now required by law, either by giving bond or in forma pauperis, there shall be a stay of execution during the pendency of the appeal. The clerk of the superior court shall, as soon as may be after execution is stayed, as provided in this section, notify the attorney-general thereof. Said notice shall give the name of defendant, the crime of which he was convicted, and, if the statutory time for perfecting the appeal has been extended by agreement, the time of such extension. If for any reason the defendant should wish to withdraw his appeal before the same is docketed in the supreme court, he may go, or be taken, before the clerk of the superior court in which he was convicted, and said clerk shall enter such withdrawal upon the record of the case, and notify the sheriff, who shall proceed forthwith to execute the sentence. (Rev., s. 3281; 1887, c. 191, s. 1; 1887, c. 192, s. 4; 1919, c. 5; C. S. 4654.)

The effect of an appeal is to stay all proceedings in the lower court pending the disposition of the appeal, and where, after appeal bond has been given, the defendant makes motions before the Superior Court judge for a mistrial for prejudice of jurors and for a new trial for newly discovered evidence, the motions are coram non judge. *State v. Casey*, 201 N. C. 185, 187, 159 S. E. 337.

Clerk to Notify Attorney General of Appeal.—Where an appeal is taken in a criminal case and the execution of the judgment stayed under this section, the clerk of the Superior Court is required to notify the Attorney General of the appeal, and, if the statutory time for perfecting the appeal is extended, he should notify him of such extension. *State v. Watson*, 208 N. C. 70, 179 S. E. 455; *State v. Etheridge*, 207 N. C. 801, 178 S. E. 556.

Effect of Failure to Serve Statement of Case within Time Fixed.—Where defendants fail to make out and serve their statement of case on appeal within the time fixed, they lose their right to prosecute the appeal, and the motion of the attorney-general to docket and dismiss will be allowed, but where defendants have been convicted of a capital felony, this will be done only after an inspection of the record for errors appearing upon its face. *State v. Allen*, 208 N. C. 672, 182 S. E. 140. See also, *State v. McLeod*, 209 N. C. 54, 182 S. E. 713.

Conditions on Suspension of Execution.—Suspension of execution of judgment must not be so conditioned as to interfere with right of appeal. *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9.

Applied in *State v. Casey*, 201 N. C. 620, 161 S. E. 81; *Current v. Church*, 207 N. C. 658, 178 S. E. 82.

§ 15-185. Judgment for fines docketed; lien and execution.—When the sentence in whole or in part directs the payment of a fine, the judgment shall be docketed by the clerk and be a lien on the real estate of the defendant in the same manner as judgments in civil actions, and executions thereon shall only be stayed, upon an appeal taken, by security being given in like manner as is required in civil cases. Should the judgment be affirmed upon appeal to the supreme court, the clerk of the superior court, on receipt of the certificate from the supreme court, shall issue execution on such judgment. (Rev., s. 3282; 1887, c. 191, s. 3; C. S. 4655.)

Cross Reference.—As to stay of execution upon appeal in civil cases, see § 1-289 et seq.

Time Lien Attaches.—A judgment for a fine, duly dock-

eted, constitutes a lien on the real estate of defendant, under this section, which lien attaches immediately upon the docketing of the judgment. *Osborne v. Board of Education*, 207 N. C. 503, 177 S. E. 642.

Cited in *Current v. Church*, 207 N. C. 658, 178 S. E. 82.

§ 15-186. Procedure upon receipt of certificate of supreme court.—The clerk of the superior court, in all cases where the judgment has been affirmed (except where the conviction is a capital felony), shall forthwith on receipt of the certificate of the opinion of the supreme court notify the sheriff, who shall proceed to execute the sentence which was appealed from. In criminal cases where the judgment is not affirmed the cases shall be placed upon the docket for trial at the first ensuing term of the court after the receipt of such certificate. (Rev., s. 3283; 1887, c. 192, s. 3; C. S. 4656.)

Art. 19. Execution.

§ 15-187. Death by administration of lethal gas.—Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor. (1909, c. 443, s. 1; 1935, c. 294, s. 1; C. S. 4657.)

Cross Reference.—As to punishment for capital crimes committed before July 1, 1935, see § 15-191.

Editor's Note.—Prior to the amendment of 1935, this section provided for electrocution.

This section applies only to crimes committed after the effective date of the statute, 1 July, 1935, and it will not support a sentence of death by lethal gas imposed for a capital crime committed prior to the effective date of the statute although defendant was tried and convicted after the effective date thereof. *State v. Hester*, 209 N. C. 99, 182 S. E. 738. See also, *State v. Dingle*, 209 N. C. 293, 183 S. E. 376; *State v. McNeill*, 211 N. C. 286, 287, 189 S. E. 872. Cited in *State v. Jackson*, 199 N. C. 321, 323, 154 S. E. 402; *State v. Baxter*, 208 N. C. 90, 93, 179 S. E. 450; *State v. Ferrell*, 205 N. C. 640, 641, 172 S. E. 186; *State v. Wall*, 205 N. C. 657, 658, 172 S. E. 216; *State v. Horne*, 209 N. C. 725, 184 S. E. 470; *State v. Brice*, 214 N. C. 34, 197 S. E. 690.

§ 15-188. Manner and place of execution.—The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the state having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the state penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the state penitentiary shall also cause to be provided, in conformity with this article and approved by the governor and council of state, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article. 1909, c. 443, s. 2; 1935, c. 294, s. 2; C. S. 4658.)

Cited in *State v. Brooks*, 206 N. C. 113, 172 S. E. 879; *State v. Exum*, 213 N. C. 16, 195 S. E. 7.

§ 15-189. Sentence of death; prisoner taken to penitentiary.—Upon the sentence of death being pronounced against any person in the state of North Carolina convicted of a crime punishable by death it shall be the duty of the judge pronouncing such death sentence to make the same in writing, which shall be filed in the papers in the case against such convicted person, and a certified copy

thereof shall be transmitted by the clerk of the superior court in which such sentence is pronounced to the warden of the state penitentiary at Raleigh, North Carolina, not more than twenty nor less than ten days before the time fixed in the judgment of the court for the execution of the sentence; and in all cases where there is no appeal from the sentence of death and in all cases where the sentence is pronounced against a prisoner convicted of the crime of rape it shall be the duty of the sheriff, together with at least one deputy, to convey to the penitentiary at Raleigh such condemned felon or convict forthwith upon the adjournment of the court in which the felon was tried, and deliver the convict or felon to the warden of the penitentiary: Provided, that in all cases where an appeal is taken from the death sentence by any person convicted of a crime punishable by death, except the crime of rape, such convicted felon or convict shall not be taken or conveyed to the penitentiary unless, in the judgment of the sheriff of the county in which the felon was tried and the solicitor prosecuting the felon, it shall be deemed necessary for the safety and safekeeping of the convicted person or felon during the pendency of the appeal. (1909, c. 443, s. 3; C. S. 4659.)

Judgment Must Be Written and Signed by Trial Judge.—The entry of judgment of the court on the verdict of guilty of a capital felony by the clerk of the court on its minutes and signed by the judge is not a sufficient compliance with the provisions of this section, its mandatory provisions requiring the judgment to be written and signed by the judge, and where it appears of record that he has failed so to do the case will be remanded. *State v. Jackson*, 199 N. C. 321, 322, 154 S. E. 402.

Death Sentence without Reference to Crime.—A judgment sentencing defendant to death for the commission of a capital felony, though making no reference to the trial or the crime of which the defendant was convicted, while not commended is held sufficient. *State v. Taylor*, 194 N. C. 738, 140 S. E. 728.

Where in a prosecution for murder the jury returns a verdict of guilty of murder in the first degree, the judgment of the court, which alone is certified to the warden of the State prison, under this section and §§ 15-188, 15-190, must recite that the defendant had been convicted of murder in the first degree, and where it recites that the prisoner had been convicted of murder, and sentences the prisoner to death by electrocution, the case will be remanded. *State v. Langley*, 204 N. C. 687, 169 S. E. 705.

When No Reference to Trial or Crime Is Made.—A judgment, while somewhat informal, because it made no reference to the trial or the crime of which the prisoner was convicted, is, nevertheless, sufficient to meet the requirements of this section. *State v. Edney*, 202 N. C. 706, 707, 164 S. E. 23.

§ 15-190. A guard or guards or other person to be named and designated by the warden to execute sentence.—Some guard or guards or other reliable person or persons to be named and designated by the warden from time to time shall cause the person, convict or felon against whom the death sentence has been so pronounced to be asphyxiated as provided by this article and all amendments thereto. The asphyxiation shall be under the general supervision and control of the warden of the penitentiary, who shall from time to time, in writing, name and designate the guard or guards or other reliable person or persons who shall cause the person, convict or felon against whom the death sentence has been pronounced to be asphyxiated as provided by this article and all amendments thereto. At such execution there shall be present the warden or deputy warden or some person designated by the warden in his stead; the surgeon or

physician of the penitentiary and six respectable citizens, the counsel and any relatives of such person, convict or felon and a minister or ministers of the gospel may be present if they so desire, and the board of directors of the penitentiary may provide for and pay the fee for each execution not to exceed thirty-five dollars (\$35.00). (1909, c. 443, s. 4; 1925, c. 123; 1935, c. 294, s. 3; C. S. 4660.)

§ 15-191. Pending sentences unaffected.—Nothing in §§ 15-187, 15-188, and 15-190 shall be construed to alter in any manner the execution of the sentence of death imposed on account of any crime or crimes committed before July 1, 1935. (1935, c. 294, s. 4.)

Editor's Note.—The act from which this section was codified changed the mode of executing a death sentence from electrocution to the administration of lethal gas.

§ 15-192. Certificate filed with clerk.—The warden, together with the surgeon or physician of the penitentiary, shall certify the fact of the execution of the condemned person, convict or felon to the clerk of the superior court in which such sentence was pronounced, and the clerk shall file such certificate with the papers of the case and enter the same upon the records thereof. (1909, c. 443, s. 5; C. S. 4661.)

§ 15-193. Notice of reprieve or new trial.—Should the condemned person, convict or felon be granted a reprieve by the governor or obtain a writ of error, or a new trial be granted by the supreme court of the state of North Carolina, or should the execution of the sentence be stayed by any competent judicial tribunal or proceeding, notice of such reprieve, new trial, appeal, writ of error or stay of execution shall be served upon the warden or deputy warden of the penitentiary by the sheriff of Wake County, in case such condemned person is confined in the penitentiary, or upon any sheriff having the custody of any such condemned person, also upon the condemned person himself. (1909, c. 443, s. 6; C. S. 4662.)

§ 15-194. Judgment sustained on appeal, reprieve, time for execution.—In case of an appeal, should the Supreme Court find no error in the trial, or should the stay of execution granted by any competent judicial tribunal or proceeding, or reprieve by the Governor, have expired or terminated, such condemned person, convict or felon shall be executed, in the manner heretofore provided in this article, upon the third Friday after the filing of the opinion or order of the Supreme Court or other competent judicial tribunal as aforesaid, or, in case of a reprieve by the Governor, such condemned person, convict or felon shall be executed in the manner heretofore provided in this article upon the third Friday after the expiration or termination of such reprieve; and it shall be the duty of the clerk of the Supreme Court, and of any other competent tribunal, as aforesaid, or the clerk thereof, to notify the warden of the penitentiary of the date of the filing of the opinion or order of such court or other judicial tribunal, and in case of a reprieve by the Governor, it shall be the duty of the Governor to give notice to the warden of the State Penitentiary of the date of the expiration of such reprieve. (1909, c. 443, s. 6; 1925, c. 55; C. S. 4663.)

Cited in *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9.

§ 15-195. New trial granted, prisoner taken to

place of trial.—Should a new trial be granted the condemned person, convict or felon against whom sentence of death has been pronounced, after he has been conveyed to the penitentiary, he shall be conveyed back to the place of trial by such guard or guards as the warden of the penitentiary shall direct, their expenses to be paid as is now provided by law for the conveyance of convicts to the penitentiary. (1909, c. 443, s. 7; C. S. 4664.)

§ 15-196. Disposition of body.—Upon application, written or verbal, of any relative as near as the degree of fourth cousin of the person executed, made at any time prior to the execution or on the morning thereof, the body, after execution, shall be prepared for burial under the supervision of the warden or deputy warden and shall be returned to the nearest railroad station of the relative or relatives asking for such body. In the event that no relative asks for the body of such executed person, convict or felon, the same shall be disposed of as other bodies of convicts dying in the penitentiary. (1909, c. 443, s. 9; 1925, c. 275, s. 6; C. S. 4665.)

Cross Reference.—As to disposition of other bodies of convicts, see § 90-212.

ART. 20. Suspension of Sentence and Probation.

§ 15-197. Suspension of sentence and probation.—After conviction or plea of guilty or nolo contendere for any offense, except a crime punishable by death or life imprisonment, the judge of any court of record with criminal jurisdiction may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation. (1937, c. 132, s. 1.)

Cross References.—As to suspension of sentence in hasty proceedings, see § 49-8. As to probation in cases of prostitution, see § 14-208. As to restoration of citizenship in case of pardon or suspension of judgment, see § 13-6.

Editor's Note.—For a discussion of the act from which this article was codified, see 15 N. C. Law Rev. p. 345.

For comment on 1939 amendatory act, see 17 N. C. Law Rev. 350.

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

History.—For nearly half a century prior to 1937, the trial judges in North Carolina operated a system of probation on their own initiative, permitted convicted criminals to go at large on specified conditions, and arrested them upon bench warrants if the terms of probation were violated. Either the sentence of imprisonment would be formally entered and execution suspended on conditions, or prayer for judgment would be continued in like manner. Since 1937 this power has been expressly continued by this article as a part of the state's probation system. *Pelley v. Colpoys*, 122 F. (2d) 12, 13.

Probation Must Be Consistent with Right of Appeal.—Where the privilege of probation, granted by this article, is so conditioned as to be inconsistent with a defendant's right of appeal, the judgment is erroneous. *State v. Calcutt*, 219 N. C. 545, 548, 15 S. E. (2d) 9.

Cited in *State v. Ward*, 222 N. C. 316, 22 S. E. (2d) 922.

§ 15-198. Investigation by probation officer.—When directed by the court the probation officer shall fully investigate and report to the court in writing the circumstances of the offense and the criminal record, social history, and present condition of the defendant, including, whenever practicable, the findings of a physical and mental examination of the defendant. When the services of a probation officer are available to the court, no defendant charged with a felony, and, unless the court shall direct otherwise in individual cases, no other defendant shall be placed on probation or released under suspension of sentence until the

report of such investigation shall have been presented to and considered by the court. (1937, c. 132, s. 2.)

§ 15-199. Conditions of probation.—The court shall determine and may impose, by order duly entered, and may at any time modify the conditions of probation and may include among them the following, or any other: That the probationer shall:

- (a) Avoid injurious or vicious habits;
- (b) Avoid persons or places of disreputable or harmful character;
- (c) Report to the probation officer as directed;
- (d) Permit the probation officer to visit at his home or elsewhere;
- (e) Work faithfully at suitable employment as far as possible;
- (f) Remain within a specified area;
- (g) Pay a fine in one or several sums as directed by the court;
- (h) Make reparation or restitution to the aggrieved party for the damage or loss caused by his offense, in an amount to be determined by the court;
- (i) Support his dependents. (1937, c. 132, s. 3.)

To Remain Law-Abiding.—Upon conviction of a misdemeanor, judgment was entered that defendant be imprisoned in the county jail for a term of eight months, with further provision that execution of the judgment should be suspended upon the payment of a fine and upon further condition that defendant remain law-abiding for a period of five years. Held: The condition upon which execution was suspended was twofold; first, the payment of the fine and, second, that defendant remain law-abiding for a term of five years; and upon conviction of defendant of a subsequent violation of the criminal law within the period of five years, the order of the court putting into effect the suspended execution is proper, notwithstanding defendant had paid the fine, defendant's contention that judgment suspending execution did not contemplate imprisonment if the fine should be paid, being untenable. *State v. Wilson*, 216 N. C. 130, 4 S. E. (2d) 440.

Cited in *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9 (dis. op.).

§ 15-200. Termination of probation, arrest, subsequent disposition.—The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended, terminated or suspended by the court at any time, within the above limit. Upon the satisfactory fulfillment of the conditions of probation or suspension of sentence the court shall by order duly entered discharge the defendant. At any time during the period of probation or suspension of sentence, the court may issue a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence. Any police officer, or other officer with power of arrest, upon the request of the probation officer, may arrest a probationer without a warrant. In case of an arrest without a warrant the arresting officer shall have a written statement signed by said probation officer setting forth that the probationer has, in his judgment, violated the conditions of probation; and said statement shall be sufficient warrant for the detention of said probationer in the county jail, or other appropriate place of detention, until said probationer shall be brought before the judge of the court. Such probation officer shall forthwith report such arrest and detention to the judge of the court, or in su-

perior court cases to the judge holding the courts of the district, or the resident judge, or any judge commissioned at the time to hold court in said district, and submit in writing a report showing in what manner the probationer has violated probation. Upon such arrest, with or without warrant, the court shall cause the defendant to be brought before it in or out of term and may revoke the probation or suspension of sentence, and shall proceed to deal with the case as if there had been no probation or suspension of sentence. (1937, c. 132, s. 4; 1939, c. 373.)

Editor's Note.—The 1939 amendment inserted in the first sentence the words "terminated or suspended by the court at any time". It also inserted in the sixth sentence the provision as to superior court cases, and in the last sentence the words "in or out of term".

Common-Law System.—Under the North Carolina law the trial court had authority to issue its capias for petitioner's arrest on the suspended sentence either under the common-law system which prevailed in 1935 or under the provisions of this article. *Pelley v. Colpoys*, 122 F. (2d) 12, 13.

Suspension May Be for Five Years Although Maximum Imprisonment Is Two Years.—The superior court has the power to suspend execution of a sentence in a criminal prosecution for a period of five years, notwithstanding that the maximum imprisonment authorized for the offense of which defendant is convicted is two years. *State v. Wilson*, 216 N. C. 130, 4 S. E. (2d) 440.

Absence from State after Service of Capias.—Defendant was convicted upon an indictment containing two counts. Execution of sentence on one count was suspended upon specified conditions for a period of five years and prayer for judgment was continued on the other count for a like period. Thereafter, upon alleged violation of conditions of probation, capias was issued under this section, and alias capias subsequently served upon defendant out of the state before the expiration of the period of probation. Defendant refused to appear, and by habeas corpus and numerous appeals in his fight against extradition, delayed his appearance in court for hearing upon the alleged violation of conditions of probation beyond the period of probation. It was held that upon issuance of notice or service of capias the defendant was under duty to respond and appear and time ceased to run against the period of probation during the period defendant absented himself from the state and was a fugitive from justice. *State v. Pelley*, 221 N. C. 487, 20 S. E. (2d) 850.

Cited in *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9 (dis. op.).

§ 15-201. Establishment and organization of a state probation commission.—There is hereby established a state probation commission to be composed of five members, who shall be appointed by the governor and shall serve without a salary as members of such commission, but shall receive their actual traveling expenses while in the performance of their official duties. The first appointments shall be made within thirty days after March 13, 1937, and shall be made in such manner that the term of one member of the state probation commission shall expire each year. Their successors shall be appointed by the governor within thirty days thereafter for terms of five years each. All vacancies occurring among the members shall be filled as soon as practicable thereafter by the governor for the unexpired terms. This commission shall be deemed a "commission for special purpose" within the meaning of the language of section seven of Article XIV of the Constitution, and the membership thereof may be composed of persons holding other official positions in the state, if the governor shall so elect.

The state probation commission shall organize immediately after the appointment of the first members thereof, and elect a chairman from its members. Thereafter a chairman shall be elected

annually between January fifteenth and January thirtieth of each year. (1937, c. 132, s. 5.)

§ 15-202. Duties and powers of the commission; meetings; appointment of director of probation; qualifications.—With respect to the administration of probation in the state, except cases within the jurisdiction of the juvenile courts, the state probation commission shall exercise general supervision; formulate policies; adopt general rules, not inconsistent with law, to regulate methods of procedure; and set standards for personnel. It shall meet at stated times to be fixed by it not less often than once every three months, and on call of its chairman, to consider any matters relating to probation in the state.

The state probation commission, with the approval of the governor, shall appoint a director of probation, who shall serve as its executive secretary, and shall receive a salary to be fixed by the governor and the council of state and who shall give his entire time to the work. When the necessity of the service requires, it shall appoint one or more assistants and fix their salaries.

The person appointed as director of probation shall be qualified by education, training, experience and temperament for the duties of the office. (1937, c. 132, s. 6; 1943, c. 638.)

Cross Reference.—As to administration of probation with respect to cases within the jurisdiction of juvenile courts, see § 110-31 et seq.

Editor's Note.—Prior to the 1943 amendment this section provided a minimum salary of \$3,600 and a maximum salary of \$4,500 for the director.

§ 15-203. Duties of the director of probation; appointment of probation officers; reports.—The director of probation shall appoint, subject to the approval of the state probation commission, such probation officers as are required for service in the state and such clerical assistance as may be necessary: Provided, that before any persons other than the director of probation shall be appointed, the state probation commission shall make up and submit to the governor a budget covering its proposed organization and expenditures, and no fund shall be available to carry out the purpose of this article except to the extent that said budget is approved first by the state highway and public works commission, and then by the director of the budget.

The director of probation shall direct the work of the probation officers appointed under this article. He shall consult and cooperate with the courts and institutions in the development of methods and procedure in the administration of probation, and shall arrange conferences of probation officers and judges. He shall make an annual written report with statistical and other information to the probation commission and the governor. (1937, c. 132, s. 7.)

§ 15-204. Assignment and compensation and oath of probation officers.—Probation officers appointed under this article shall be assigned to serve in such courts or districts or otherwise as the director of probation may determine. They shall be paid annual salaries to be fixed by the probation commission, and shall also be paid traveling and other necessary expenses incurred in the performance of their official duties as probation officers when such expense accounts have

been authorized and approved by the director of probation.

Each person appointed as a probation officer shall take an oath of office before the judge of the court or courts in which he is to serve, which oath shall be as follows:

"I,, do solemnly and sincerely swear that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain, and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me God."

and shall be noted of record by the clerk of the court. (1937, c. 132, s. 8.)

Cited in State v. Calcutt, 219 N. C. 545, 15 S. E. (2d) 9 (dis. op.).

§ 15-205. Duties and powers of the probation officers.—A probation officer shall investigate all cases referred to him for investigation by the judges of the courts or by the director of probation, and shall report in writing thereon. He shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision by visiting, requiring reports, and in other ways, and shall report thereon in writing as often as the court or the director of probation may require. Such officer shall use all practicable and suitable methods, not inconsistent with the conditions imposed by the court, or the director of probation, to aid and encourage persons on probation to bring about improvement in their conduct and condition. Such officer shall keep detailed records of his work; shall make such reports in writing to the director of probation as he may require; and shall perform such other duties as the director of probation may require. A probation officer shall have, in the execution of his duties, the powers of arrest and, to the extent necessary for the performance of his duties, the same right to execute process as is now given, or that may hereafter be given by law, to the sheriffs of this state. (1937, c. 132, s. 9.)

§ 15-206. Co-operation with commissioner of parole and officials of local units.—It shall be the duty of the director of probation and the commissioner of parole to co-operate with each other to the end that the purposes of probation and parole may be more effectively carried out. When requested, each shall make available to the other case records in his possession, and in cases of emergency, where time and expense can be saved, shall provide investigation service.

It is hereby made the duty of every city, county, or state official or department to render all assistance and co-operation within his or its fundamental power which may further the objects of this article. The state probation commission, the director of probation, and the probation officers are authorized to seek the co-operation of such officials and departments, and especially of the county superintendents of public welfare and of the state board of charities and public welfare. (1937, c. 132, s. 10.)

§ 15-207. Records treated as privileged information.—All information and data obtained in the discharge of official duty by any probation officer shall be privileged information, shall not be receivable as evidence in any court, and shall not be disclosed directly or indirectly to any other than the judge or to others entitled under this article to receive reports, unless and until otherwise ordered by a judge of the court or the director of probation. (1937, c. 132, s. 11.)

§ 15-208. Payment of salaries and expenses.—All salaries and expenses necessary for carrying

out the provisions of this article shall be fixed in accordance with the Executive Budget Act and the Personnel Act, and shall be paid by the state highway and public works commission out of the state highway funds, under direction of the director of the budget. (1937, c. 132, s. 12.)

§ 15-209. Accommodations for probation officers.—The county commissioners in each county in which a probation officer serves shall provide, in or near the courthouse, suitable office space for such officer. (1937, c. 132, s. 13.)

Chapter 16. Gaming Contracts and Futures.

Art. 1. Gaming Contracts.

- Sec.
16-1. Gaming and betting contracts void.
16-2. Players and betters competent witnesses.

Art. 2. Contracts for "Futures."

- 16-3. Certain contracts as to "futures" void.

Sec.

- 16-4. Entering into or aiding contract for "futures" misdemeanor.
16-5. Opening office for sales of "futures" misdemeanor.
16-6. Evidence in prosecutions under this article.

Art. 1. Gaming Contracts.

§ 16-1. Gaming and betting contracts void.—All wagers, bets or stakes made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event whatever, shall be unlawful; and all contracts, judgments, conveyances and assurances for and on account of any money or property, or thing in action, so wagered, bet or staked, or to repay, or to secure any money, or property, or thing in action, lent or advanced for the purpose of such wagering, betting, or staking as aforesaid, shall be void. (Rev., s. 1687; Code, ss. 2841, 2842; R. C., c. 51, ss. 1, 2; 1810, c. 796; C. S. 2142.)

Cross Reference.—As to criminal laws regarding gambling, see § 14-289 et seq.

In General.—A gaming contract or wager is a contract by which two parties or more agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event. Bouv. Law Dict.

At common law all gambling contracts were void. And generally in this country, all wagering contracts are held to be illegal and void as against public policy. *Irwin v. Williar*, 110 U. S. 499, 510, 4 S. Ct. 160, 28 L. Ed. 225.

Liberal Construction.—This section is construed liberally. *Turner v. Peacock*, 13 N. C. 303.

Gambling contracts are void, because they are so declared by this section. *Morehead Banking Co. v. Tate*, 122 N. C. 313, 317, 30 S. E. 341.

Judgments in Invitum Not Included.—This section does not include judgments taken in invitum, but only such as are confessed or taken by consent. *Teague v. Perry*, 64 N. C. 39.

No Recovery Where Game Fair.—It is settled that money, or a horse, or a judgment, won at cards and actually paid and delivered, can not be recovered back, the game being fairly played. *Teague v. Perry*, 64 N. C. 39, 41; *Hudspeth v. Wilson*, 13 N. C. 372; *Warden v. Plummer*, 49 N. C. 524; *Hodges v. Pitman*, 4 N. C. 276.

Unfair Gaming Always Illegal.—Unfair gaming was not only illegal by force of the statute against gaming, but was unlawful at common law, so that the money, or thing won, if it had been paid, might be recovered back in an action at law. *Warden v. Plummer*, 49 N. C. 524, 526; *Webb v. Fulchire*, 25 N. C. 485.

Same—Recovery.—Where a man is cheated out of his money, though it is in playing at a game forbidden by law, he may recover back what he has paid from the person who practiced the fraud upon him. *Webb v. Fulchire*, 25 N. C. 485, cited in note in 5 L. R. A., N. S., 907.

No Recovery on Bond Unfairly Won.—Where A., at a game of cards unfairly played, won a justice's judgment from B., and took from the defendants in the judgment a bond payable to himself for the amount, on which he brought suit, to which the statute against gaming was pleaded, it was held that he could not recover. *Warden v. Plummer*, 49 N. C. 524.

Subsequent Note Valid.—A note given subsequently, in purchase of a magistrate's judgment which had been won at cards by the payee from the maker, is not void under this section against gaming. *Teague v. Perry*, 64 N. C. 39.

Rights of Innocent Holder of Gambling Note.—This section applicable to a note originally given for a gambling debt, renders this and all notes and contracts in like cases void, this being true, no action thereon can be sustained. The position as stated is undoubtedly the law in this jurisdiction, and is in accord with well considered authorities elsewhere. This principle, however, is allowed to prevail only where the action is on the note to enforce its obligations, and does not affect or extend to suits by an innocent endorsee for value, and holder in due course, against the endorser on his contract of endorsement. *Wachovia Bank, etc., Co. v. Crafton*, 181 N. C. 404, 405, 107 S. E. 316.

Intent of Parties.—Where the transaction is legitimate on its face, one party cannot avoid it by claiming that it was a gambling contract where the proof shows that the other party did not so understand it, but believed it to be a valid agreement. *Bibb v. Allen*, 149 U. S. 481, 492, 13 S. Ct. 950, 37 L. Ed. 817.

Money Loaned for Gaming.—Money lent to play with at gaming, or to play at the time of loss, is not recoverable. *Mooring v. Stanton*, 1 N. C. 70.

When Stakeholder Liable.—Where money is deposited with a stakeholder, to be delivered to the winner, and the stakeholder pays over the money, after notice from the loser not to do so, the loser may recover the money from the stakeholder. *Wood v. Wood*, 7 N. C. 172; *Forrest v. Hart*, 7 N. C. 458.

Note Given in Foreign State Unenforceable.—A note given in consideration of a bet won on a horse race cannot be enforced in this State although given in a state where wagering contracts are not invalid. *Gooch v. Faucett*, 122 N. C. 270, 29 S. E. 362. See *Burrus v. Witcover*, 158 N. C. 384, 74 S. E. 11.

Cards a Game of Chance.—It is a matter of common knowledge that a game of cards is a game of chance. *State v. Taylor*, 111 N. C. 680, 16 S. E. 168.

Betting on Horse Race.—It was the intention of this section to make betting on horse races a criminal offense, since such wagering contracts had already been outlawed and the denouncement of the wager as unlawful came in by amendment at a later time. *State v. Brown*, 221 N. C. 301, 304, 20 S. E. (2d) 286.

The game of tenpins is not a "game of chance." *State v. Gupton*, 30 N. C. 271; *State v. King*, 113 N. C. 631, 18 S. E. 169.

"Shuffleboard."—The keeping of a gaming table called "a shuffleboard" is not indictable, as the game is not one of chance, but of skill. *State v. Bishop*, 30 N. C. 266.

"Shooting for Beef" and other similar trials of skill, for which the participants pay for the "chance" or privilege of shooting, is not a game of chance there being no "chance" in the sense of the acts against gambling. *State v. De-Boy*, 117 N. C. 702, 23 S. E. 167.

Cited in *Moore v. Schwartz*, 195 N. C. 549, 550, 142 S. E. 772.

§ 16-2. Players and betters competent witnesses. — No person shall be excused or incapacitated from confessing or testifying touching any money or property, or thing in action, so wagered, bet or staked, or lent for such purpose, by reason of his having won, played, bet or staked upon any game, lot or chance, casualty, or unknown or contingent event aforesaid; but the confession or testimony of such person shall not be used against him, in any criminal prosecution, on account of such betting, wagering or staking. (Rev., s. 1638; Code, s. 2843; R. C., c. 51, s. 3; C. S. 2143.)

Cross References.—As to rule of evidence generally that defendant is not compellable to testify, see § 8-54. As to exception with reference to testimony as to gambling, etc., see also, § 8-55.

Stated in *State v. Brown*, 221 N. C. 301, 20 S. E. (2d) 286.

Art. 2. Contracts for "Futures."

§ 16-3. Certain contracts as to "futures" void. —Every contract, whether in writing or not, whereby any person shall agree to sell and deliver any cotton, indian corn, wheat, rye, oats, tobacco, meal, lard, bacon, salt pork, salt fish, beef, cattle, sugar, coffee, stocks, bonds, and choses in action, at a place and at a time specified and agreed upon therein, to any other person, whether the person to whom such article is so agreed to be sold and delivered shall be a party to such contract or not, when, in fact, and notwithstanding the terms expressed of such contract, it is not intended by the parties thereto that the articles or things so agreed to be sold and delivered shall be actually delivered, or the value thereof paid, but it is intended and understood by them that money or other thing of value shall be paid to the one party by the other, or to a third party, the party to whom such payment of money or other thing of value shall be made to depend, and the amount of such money or other thing of value so to be paid to depend upon whether the market price or value of the article so agreed to be sold and delivered is greater or less at the time and place so specified than the price stipulated to be paid and received for the articles so to be sold and delivered, and every contract commonly called "futures" as to the several articles and things hereinbefore specified, or any of them, by whatever other name called, and every contract as to the said several articles and things, or any of them, whereby the parties thereto contemplate and intend no real transaction as to the article or thing agreed to be delivered, but only the payment of a sum of money or other thing of value, such payment and the amount thereof and the person to whom the same is to be paid to depend on whether or not the market price or value is greater or less than the price so agreed to be paid for the said article or thing at the time and place specified in such contract, shall be utterly null and void; and no

action shall be maintained in any court to enforce any such contract, whether the same was made in or out of the state, or partly in and partly out of this state, and whether made by the parties thereto by themselves or by or through their agents, immediately or mediately; nor shall any party to any such contract, or any agent of any such party, directly or remotely connected with any such contract in any way whatever, have or maintain any action or cause of action on account of any money or other thing of value paid or advanced or hypothecated by him or them in connection with or on account of such contract and agency; nor shall the courts of this state have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract. This section shall not be construed so as to apply to any person, firm or corporation, or his or their agents, engaged in the business of manufacturing or wholesale merchandising in the purchase and/or sale of the necessary commodities required in the ordinary course of their business; nor shall this section be construed so as to apply to any contract with respect to the purchase and/or sale for future delivery of any of the articles or things mentioned and referred to in this section, where such purchase and/or sale is made on any exchange on which any such article or things are regularly bought and sold, or contracts therefor regularly entered into, and the rules and regulations of such exchange are such that either party to such contract may require delivery thereof: Provided, such contract is made in accordance with such rules and regulations. (Rev., s. 1689; 1889, c. 221, s. 1; 1905, c. 538, s. 7; 1909, c. 853, s. 1; 1931, c. 236, s. 1; C. S. 2144.)

Editor's Note.—On examination of the original statute, it appears that the Act, defining and declaring contracts in "futures" unlawful, was passed in 1889, chapter 221. In 1905, chapter 538, the Legislature enacted a law to suppress what is known, in popular phrase, as "bucket shops," and, having provided for this in sections 1 and 2, the statute contains several additional sections relating to the statute of 1889 and all of them having reference to the mode or quantum of proof which should be required in enforcement of that act. The Law of 1905 then, in its closing section, provided: "That this act shall not be construed so as to apply to any person, firm, or corporation, etc." This is the first time these words appear in our legislation on this subject, and, so far as they had reference to the law of 1889, it is clear that the Legislature, in the original statutes, only intended that they should affect questions of proof. See *Rodgers, etc., Co. v. Bell*, 156 N. C. 378, 384, 72 S. E. 817.

From these considerations, it seems clear that the last sentence of this section was inserted "unnecessarily and out of abundance of caution"—and it does not confer any exclusive right or privilege upon manufacturers or wholesale merchants; nor does it authorize them to engage in any business prohibited by the section. It simply provides that the courts shall not construe the section to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business. See *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50; *State v. Clayton*, 138 N. C. 732, 50 S. E. 866; *Rodgers, etc., Co. v. Bell*, 156 N. C. 378, 385, 72 S. E. 817.

The 1931 act amended the "Bucket Shop Act" of 1889, now this section, so as to exempt contracts with respect to purchase or sale where they are made in accordance with the regulations of any exchange, and where the rules of the exchange permit either party to require delivery. It was intended to remove the ban of illegality from transactions on legitimate exchanges, as distinguished from "an establishment nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of lots or wagers, usually for small amounts, on the rise or fall of stock, grain, etc., there being no

transfer or delivery of the stocks or things dealt with." *Gatewood v. North Carolina*, 203 U. S. 431, 27 S. Ct. 167, 51 L. Ed. 305. See 9 N. C. Law Rev. 358, 359.

Section Constitutional.—This section is in furtherance of our declared public policy, and is constitutional and valid. *Randolph v. Heath*, 171 N. C. 383, 88 S. E. 731; *S. v. McGinnis*, 138 N. C. 724, 51 S. E. 50; *S. v. Clayton*, 138 N. C. 732, 50 S. E. 866; *Garseed v. Sternberger*, 135 N. C. 501, 47 S. E. 603; *Rankin v. Mitchem*, 141 N. C. 277, 53 S. E. 854.

The Legislature can, in the exercise of the police power, prescribe when and under what circumstances and as to what offenses a certain act shall be *prima facie* evidence. Therefore, a provision that the purchase of commodities upon margin under certain circumstances shall raise a *prima facie* case that such purchases were void, and other circumstances shall not constitute such *prima facie* evidence, is not a discrimination forbidden by the Fourteenth Amendment. *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50. This case was decided under what formerly constituted § 2145 of the Consolidated Statutes, which section was repealed by P. L. 1931, c. 236.

Within Police Power.—This section forbidding the business of running a "bucket shop," is clearly within the police power of the State. *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50.

Defines Illegal Contract.—This section clearly defines what is an illegal contract where there is no real sale, but merely an agreement for an adjustment upon the basis of the differences in the prices of the commodity at the time fixed. *Ovis Bros. & Co. v. Holt-Morgan Mills*, 173 N. C. 231, 233, 91 S. E. 948.

Not Contrary to Federal Constitution.—When, in an action pending in the courts of this State to recover on a judgment in a sister state, the Legislature amended this section by adding thereto: "Nor shall the courts of this State have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract," there can be no valid objection to such legislation on the ground that it impairs the obligation of contracts, and it would seem that no such objection can be made under Art. IV, secs. 1 and 2 of the Federal Constitution, "the full faith and credit clause," if it is admitted or clearly appears that the judgment sued on was rendered on a transaction expressly forbidden by our statute on gaming, and that the question was not raised, investigated or determined in the courts of the State in which the judgment was originally rendered. *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969.

The North Carolina statutes prohibiting gambling in futures and denying jurisdiction of the courts to suits on judgments based upon such contracts have been upheld as constituting an exception to the application of the full faith and credit clause of the constitution, on the ground that the state had not provided a court with jurisdiction to entertain suit on such a judgment though properly rendered in another state. *Lockman v. Lockman*, 220 N. C. 95, 105, 16 S. E. (2d) 670.

In an action on a judgment of the state of New York, defendant moved for leave to amend his answer to allege that the judgment was based on a gaming contract, and that therefore our court was without jurisdiction of the action. The trial court, in its discretion, denied the motion to amend, and, there being no valid defense set up in the answer as constituted, entered judgment on the pleadings. It was held that the denial of the motion to amend was affirmed, but the cause was remanded in order that the court find facts determinative of whether the question of the invalidity of the contract was concluded by the New York judgment, and if not, whether the contract constituting the basis of the judgment was one condemned by this section, since the court cannot render final judgment until it has determined the jurisdictional question. *Cody v. Hovey*, 219 N. C. 369, 14 S. E. (2d) 30.

Example of "Margin."—A payment made on account by a customer to a stockbroker, under an agreement between the customer and the stockbroker in which the stockbroker agreed either to sell or to buy from the customer a certain number of shares of stock, but under which, in fact, no delivery or transfer of shares was contemplated, is known in stockbroker's parlance as a "margin." *McClain v. Fleshman*, 106 Fed. 880, 882. *Welles & Co. v. Satterfield*, 190 N. C. 89, 94, 129 S. E. 177. This case was decided under what formerly constituted § 2145 of the Consolidated Statutes which section was repealed by P. L. 1931, c. 236.

Contract Made in Foreign State.—An action upon a wagering or "future contract" in cotton cannot be maintained in this State, though entered into in another State where it is lawful. *Burrus v. Witcover*, 158 N. C. 384, 74 S. E. 11.

Action upon judgment obtained in foreign state. See *Cody v. Hovey*, 217 N. C. 407, 8 S. E. (2d) 479. For note on this case, see 18 N. C. Law Rev. 224.

Bucket Shop.—A "bucket shop" has been defined as "an establishment nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of lots or wagers, usually for small amounts, on the rise or fall of stock, grain, etc., there being no transfer or delivery of the stocks or things dealt with." *Gatewood v. North Carolina*, 203 U. S. 531, 27 S. Ct. 167, 51 L. Ed. 305. For other definitions, see *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50.

Contracts for Future Delivery.—It is well settled that contracts for the future delivery of merchandise or tangible property are not void, whether such property is in existence in the hands of the seller, or to be subsequently acquired. *Bibb v. Allen*, 149 U. S. 481, 493, 13 S. Ct. 950, 37 L. Ed. 817.

And the fact that it is the practice of persons making sales for future delivery to settle the same by setting off one sale against another, will not render it invalid. *Board v. Christie Grain, etc., Co.*, 198 U. S. 236, 247, 25 S. Ct. 637, 49 L. Ed. 1031.

Test of Validity under Section.—The test of the validity of a contract for "future" which this section requires is the "intention not to actually deliver" the articles bought or sold for future delivery. No matter how explicit the words in any contract which may require a delivery, if in fact there is no intention to deliver, but the real understanding is that on the stipulated date the losing party shall pay to the other the difference between the market price and the contract price, this is a gambling contract. *Rodgers, etc., & Co. v. Bell*, 156 N. C. 378, 383, 72 S. E. 817. *State v. Clayton*, 138 N. C. 732, 50 S. E. 866.

When there is no real transaction, no real contract for purchase or sale, but only a wager upon the rise or fall of the price of stock, or an article of merchandise in the exchange or market, one party agreeing to pay, if there is a rise, and the other party agreeing to pay if there is a fall in price, the agreement is a pure wager. No business is done—nothing is bought or sold or contracted for, there is only a bet. *Ovis Bros. & Co. v. Holt-Morgan Mills*, 173 N. C. 231, 233, 91 S. E. 948.

This section does not render void a contract for the purchase and sale of stocks on margin when actual delivery of the stocks is made to the purchaser or to his agent, and the stocks are paid for in whole or in part. *Cody v. Hovey*, 216 N. C. 391, 5 S. E. (2d) 165.

Same—Intention of Parties.—The true test of validity of a contract for future delivery is whether it can be settled only in money and in no other way, or whether the party selling can tender and compel acceptance of the particular commodity sold or the party buying can compel the delivery of the commodity purchased. The essential inquiry in every case is as to the necessary effect of the contract and the real intention of the parties. *Williams v. Carr*, 80 N. C. 295; *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50; *State v. Clayton*, 138 N. C. 732, 50 S. E. 866; *Welles & Co. v. Satterfield*, 190 N. C. 89, 95, 129 S. E. 177.

The contract, by its terms, not disclosing any gambling element, the matter is to be settled by ascertaining the true underlying purpose of the parties. Was it in the intention of both parties that the cotton should not be delivered, and did they conceal in the deceptive terms of a fair and lawful contract, a gambling agreement, by which they contemplated no real transaction as to the article contracted to be delivered? *Edgerton & Son v. Edgerton & Bro.*, 153 N. C. 167, 69 S. E. 53; *Harvey & Son v. Pettaway*, 156 N. C. 375, 72 S. E. 364; *Rodgers, etc., Co. v. Bell*, 156 N. C. 378, 72 S. E. 817; *Burns v. Tomlinson*, 147 N. C. 645, 61 S. E. 614; *Rankin v. Mitchem*, 141 N. C. 277, 53 S. E. 854; *Hold v. Wellons*, 163 N. C. 124, 129, 79 S. E. 450.

The intent of the parties that the merchandise contracted for should not be actually delivered is the cardinal element of a "futures" contract made illegal by this section and the courts will disregard the form and ascertain whether the intent of the parties was to speculate in the rise and fall of the price of the commodity. *Fenner v. Tucker*, 213 N. C. 419, 196 S. E. 357.

Same—Same—Parol Evidence.—This section rendering void and unenforceable in our courts a contract for the sale of futures upon margin covered by the purchaser, that does not contemplate the delivery of the thing bargained for, but only a payment to be made for the loss incurred or a profit to be received in accordance with the fall or rise of the market, looks to the substance of the contract and not to its form, and parol evidence is competent to show the intention of the parties entering therein. *Welles & Co. v. Satterfield*, 190 N. C. 89, 129 S. E. 177.

Contracts to Which This Section Applies.—Where the defendant has induced the plaintiff to purchase certain shares of stock, through himself, from his own broker, upon margin, the broker to carry the stock upon its hypothecation with him as collateral, and thereafter the defendant has his broker, unknown to the plaintiff, to sell the stock and place the proceeds to his own account, and uses the same and other moneys upon margin advanced from time to time by the plaintiff upon his representation that the price of this stock had decreased, it was held, that the plaintiff may recover of the defendant in his action the moneys the defendant had thus converted to his own use; and this section, relating to gambling, etc., is not available to the defendant as a defense. *Gladstone v. Swain*, 187 N. C. 712, 122 S. E. 755.

A note given for margins upon an illegal contract for cotton futures, without intention of delivery of the cotton, cannot be collected by suit in our courts, and the promisor's repeated promise to pay it cannot impart any validity to it. *Orvis Bros. & Co. v. Holt-Morgan Mills*, 173 N. C. 231, 91 S. E. 948. *Cobb Bros. & Co. v. Guthrie*, 160 N. C. 313, 76 S. E. 81; *Garseed v. Sternberger*, 135 N. C. 501, 47 S. E. 603; *Burns v. Tomlinson*, 147 N. C. 645, 61 S. E. 614; *Burrus v. Witcover*, 158 N. C. 384, 74 S. E. 11; 39 L. R. A. (N. S.) 1005.

Where there is evidence that contracts set up by certain defendants in an action by the receiver of a brokerage business were founded upon speculation and based upon "margins," and that no actual delivery of the stock was intended by the parties, the evidence is sufficient to support a finding that the contracts were void under this section and the finding is as conclusive as the verdict of a jury, and the judgment that such contracts were absolutely void will be sustained. *Martin v. Bush*, 199 N. C. 93, 154 S. E. 43.

A contract for "cotton futures" in which no actual delivery is intended or contemplated is void and no action may be maintained thereon. *Bodie v. Horn*, 211 N. C. 397, 190 S. E. 236.

Both Parties Must Have Intent.—It was never held that when an innocent party had made a contract valid in its terms, his rights acquired thereunder should be denied him by reason of an undisclosed purpose or intent of the other. To avoid the contract the vitiating purpose or understanding must be shared in by both. *Rodgers, etc., Co. v. Bell*, 156 N. C. 378, 383, 72 S. E. 817.

Parties Included.—The owner of a draft which he knows to have been given in the unlawful purchase of cotton futures, or in maintaining or purchasing margins in contracts of that character, is a party to the prohibited contract, the consideration is illegal and he cannot recover from the payee in his action on the draft. *Burrus v. Witcover*, 158 N. C. 384, 74 S. E. 11.

Subsequent Promise Void.—A subsequent promise made by one of the contracting parties to the other to repay him for loss arising from a contract for "futures" is void. *Burns v. Tomlinson*, 147 N. C. 645, 61 S. E. 614.

Unauthorized Act of Agent.—A bona fide wholesale dealer who sues upon a contract for the future delivery of cotton, which is resisted on the ground that the contract was a wagering one and void under the provisions of this section, is bound by the acts and statements of his agents in negotiating and closing the trade, to the effect that actual delivery was not contemplated or required; and the plaintiff may not recover on the contract merely because he was a bona fide wholesale dealer in cotton and only authorized his agent to make a contract for actual delivery, if the agent at the time entered into a contract with the vendor which was condemned by the statute as being a wagering one. *Alex., etc., & Sons v. May*, 156 N. C. 388, 72 S. E. 821.

Agents Right to Recover.—An agent for a principal to a contract made in violation of this section, as to "futures," cannot recover for any loss he may have sustained on account thereof, as such act of agency would be in violation of section 16-4, making it a misdemeanor. *Burns v. Tomlinson*, 147 N. C. 645, 61 S. E. 614.

If agents have no knowledge that it was the intention of their principals to enter into a wagering or gambling contract, they are entitled to recover, not only their commissions, but any sums of money which they have advanced to carry out purposes for their principals. *Embrey v. Jemison*, 131 U. S. 336, 346, 9 S. Ct. 776, 33 L. Ed. 172.

Burden of Proof.—Where in an action by an assignee and trustees under §§ 23-1, et seq., it is alleged that one of the defendants was a partner in the business of the assignor and liable for the debts of the firm, and the other defendants admit this allegation and set up and seek to recover of the plaintiff and the alleged partner on contract with the assignor, the alleged partner is a defendant in the action on the contracts and her answer setting up the de-

fense that the contracts were void under this section, as gambling contracts, places the burden on the other defendants to prove that the contracts were lawful. *Martin v. Bush*, 199 N. C. 93, 154 S. E. 43.

When the defendant pleads in a verified answer that a contract, the subject of suit, for buying and selling cotton was void for being one for "futures," the burden of proof is upon the plaintiff to show that it was a lawful one, i. e., that actual delivery was intended by the parties, and not merely that either had the privilege of calling therefor. *Burns v. Tomlinson*, 147 N. C. 645, 61 S. E. 614. This case was decided under what formerly constituted § 2146 of the Consolidated Statutes, which section was repealed by P. L. 1931, c. 236.

Burden Not upon Administrator.—Where an administrator paid certain notes and it was later alleged by the legatees that the notes were given for a gambling contract which should not have been paid, it was held that former § 2146 did not apply so as to put the burden of proving that the notes were given for a valid contract upon the administrator. *Overman v. Lanier*, 157 N. C. 544, 73 S. E. 192. This case was decided under what formerly constituted § 2146 of the Consolidated Statutes, which section was repealed by P. L. 1931, c. 236.

Evidence Sufficient.—The purchaser makes out a prima facie case upon evidence that the contract was founded upon a gambling or wagering consideration in violation of this section. *Welles & Co. v. Satterfield*, 190 N. C. 89, 129 S. E. 177. This case was decided under what formerly constituted § 2145 of the Consolidated Statutes, which section was repealed by P. L. 1931, c. 236.

Where the plaintiff himself testified that he did not buy certain cotton in the ordinary course of his business as a cotton manufacturer for use in his mill, this was prima facie a "future contract." *Burns v. Tomlinson*, 147 N. C. 634, 636, 61 S. E. 615. This case was decided under what formerly constituted § 2145 of the Consolidated Statutes, which section was repealed by P. L. 1931, c. 236.

When Question for Jury.—Where the contract is not a gambling one on its face the underlying purpose and intent of the parties should be left to the jury. *Harvey v. Pettaway*, 156 N. C. 375, 377, 72 S. E. 364.

Upon conflicting evidence as to whether or not the contract is a gambling contract, it becomes a question for the jury under proper instructions from the court. *Welles & Co. v. Satterfield*, 190 N. C. 89, 129 S. E. 177. This case was decided under what formerly constituted § 2146 of the Consolidated Statutes, which section was repealed by P. L. 1931, c. 236.

Same—Example.—Where there was evidence offered by the plaintiffs tending to show that they were wholesale dealers in cotton as a commodity, and that they purchased certain cotton as a commodity and sold it to manufacturers and exporters, and dealt in actual spot cotton and were in no wise dealers in futures, they were entitled to have this issue submitted to a jury. *Eure v. Sabiston*, 195 Fed. 721, 724.

Judgment by Default Void.—A judgment rendered by default of an answer upon notes regular and valid upon their face, but growing out of transactions in cotton futures made void by our statute, which also declares that actions thereon may not be maintained in the courts of our State, will be set aside as utterly void, irrespective of whether it was obtained through excusable neglect, etc. *Randolph v. Heath*, 171 N. C. 383, 88 S. E. 731.

Cited in *Meyer v. Fenner*, 196 N. C. 476, 146 S. E. 82.

§ 16-4. Entering into or aiding contract for "futures" misdemeanor.—If any person shall become a party to any contract declared void in this article; or if any person shall be the agent, directly or indirectly, of any party in making or furthering or effectuating the same; or if any agent or officer of a corporation shall in any manner knowingly aid in making or furthering any such contract to which the corporation is a party, he shall be guilty of a misdemeanor, and on conviction shall be fined not less than one hundred dollars nor more than five hundred dollars, and may be imprisoned in the discretion of the court.

If any person shall, while in this state, consent to become a party to any such contract made in another state, and if any person shall, as agent of any person or corporation, become a party to any

such contract made in another state, or in this state do any act or in any way aid in the making or furthering of any such contract so made in another state, he shall be guilty of a misdemeanor, and on conviction shall be fined not less than fifty nor more than two hundred dollars, and may be imprisoned in the discretion of the court. (Rev., ss. 3823, 3824; 1889, c. 221, ss. 3, 4; C. S. 2147.)

This Section Is Constitutional.—*State v. McGinnis*, 138 N. C. 724, 51 S. E. 50; *State v. Clayton*, 138 N. C. 732, 50 S. E. 866; *Garseed v. Sternberger*, 135 N. C. 501, 47 S. E. 603; *Rankin v. Mitchem*, 141 N. C. 277, 53 S. E. 854; *Randolph v. Heath*, 171 N. C. 383, 88 S. E. 731.

§ 16-5. Opening office for sales of "futures" misdemeanor.—If any person, corporation or other association of persons, either as principal or agent, shall establish or open an office or place of business in this state for the purpose of carrying on or engaging in making such contracts as are forbidden in this article, he shall be guilty of a misdemeanor, and shall on conviction be fined and imprisoned in the discretion of the court. (Rev., s. 3825; 1905, c. 538, ss. 1, 2; C. S. 2148.)

§ 16-6. Evidence in prosecutions under this article.—No person shall be excused on any prosecution under the provisions of this article from testifying touching anything done by himself or others contrary to the provisions thereof, but no

discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him. In all such prosecutions proof that the defendant was a party to a contract, as agent or principal, to sell and deliver any article, thing or property specified or named in this article, or that he was the agent, directly or indirectly, of any party in making, furthering or effectuating the same, or that he was the agent or officer of any corporation or association or person in making, furthering or effectuating the same, and that the article, thing or property agreed to be sold and delivered was not actually delivered, and that settlement was made or agreed to be made upon the difference in value of said article, thing or property, shall constitute against such defendant prima facie evidence of guilt. Proof that any person, corporation or other association of persons, either as principal or agent, has established an office or place where are posted or published from information received the fluctuating prices of grain, cotton, provisions, stocks, bonds and other commodities, or of any one or more of the same, shall constitute prima facie evidence of being guilty of violating the provisions of this article. (Rev., s. 3826; 1905, ss. 3, 4, 5; C. S. 2149.)

Chapter 17. Habeas Corpus.

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Art. 1. Constitutional Provisions.

§ 17-1. Remedy without delay for restraint of liberty.—Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed. (Rev., s. 1819; Const., Art. I, s. 18; C. S. 2203.)

Cross Reference.—As to costs in habeas corpus, see § 6-21, subsec. 3.

Editor's Note.—"By the Habeas Corpus Act passed in 1679 the liberty of every Englishman was made as certain as law could make it; it being guaranteed to him that if accused of crime, he, instead of languishing in prison, as had often been the case, should be brought to a fair and speedy trial." Buckle, *History of Civilization In England*, Vol. I, p. 385.

Macaulay in speaking of the prorogation of the Parliament of 1679 says: "The day of that prorogation, the twenty-six of May, 1679, is a great era in our history. For on that day the Habeas Corpus Act received the royal assent. From the time of the Great Charter, the substantive law respecting the personal liberty of Englishmen had been nearly the same as at present; but it had been inefficacious for want of a stringent system of procedure. What was needed was not a new right but a prompt and searching remedy; and such a remedy the Habeas Corpus Act supplied." See Macaulay's *History of England*, Vol. I, Popular Edition, p. 122.

Definition.—The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. In pursuance to its command, the body of the petitioner is brought before the court, that it may inquire into the legality of his detention. *United States v. Ju Toy*, 198 U. S. 253, 272, 49 L. Ed. 1040, 25 S. Ct. 644.

Nature.—The writ of habeas corpus is a high prerogative writ, known to the common law, similar in nature to the writs of quo warranto, mandamus, certiorari and prohibition, and the proceedings thereunder are regarded as appellate in character, but it cannot be made to perform the office of a writ of error on appeal. *Ex Parte Virginia*, 100 U. S. 339, 350, 25 L. Ed. 676.

The proceeding is, in its nature, civil rather than criminal, legal rather than equitable, appellate rather than original, collateral rather than direct, and summary rather than cumbersome. *Perrine v. Slack*, 164 U. S. 452, 41 L. Ed. 510, 17 S. Ct. 79.

Object.—The object of the proceeding by a writ of habeas corpus is to inquire into the legality of the detention of the petitioner. *United States v. McBratney*, 104 U. S. 621, 624, 26 L. Ed. 869.

§ 17-2. Habeas corpus not to be suspended.—The privileges of the writ of habeas corpus shall not be suspended. (Rev., s. 1820; Const., Art. I, s. 21; C. S. 2204.)

Cross Reference.—As to constitutional provision, see the North Carolina Constitution, Art. I, § 21.

Can Not Be Abrogated.—This section is an express provision, and there is no rule of construction or principle of constitutional law by which an express provision can be abrogated and made of no force by an implication from any other provision of the instrument. The clauses should be construed so as to give effect to each, and prevent conflict. This is done by giving to Art. XII, sec. 3, the effect of allowing military possession of a county to be taken, and the arrest of all suspected persons to be made by military authority, but requiring, by force of Art. I, sec. 21, the persons arrested to be surrendered for trial to the civil authorities, on habeas corpus, should they not be delivered over without the writ. *Ex parte Moore*, 64 N. C. appx., 802, 808.

Art. 2. Application.

§ 17-3. Who may prosecute writ.—Every person imprisoned or restrained of his liberty within this state, for any criminal or supposed criminal

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matter, or on any pretense whatsoever, except in cases specified in § 17-4, may prosecute a writ of habeas corpus, according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and, if illegal, to be delivered therefrom. (Rev., s. 1821; Code, s. 1623; 1868-9, c. 116, s. 1; C. S. 2205.)

Prisoner under Illegal Sentence.—Where a defendant, charged with the crime of burglary with intent to commit murder, consented to a mistrial and pleaded "guilty of larceny," and was sentenced to imprisonment in the penitentiary, a writ of habeas corpus will issue, in order that he may be taken from the penitentiary and held to answer the charge in the court below. *State v. Queen*, 91 N. C. 659.

Denial of Due Process of Law.—A person convicted without due process of law may be discharged on habeas corpus. *In re Frederick*, 149 U. S. 70, 37 L. Ed. 653, 13 S. Ct. 793.

Voluntary Custody.—If the prisoner is in custody by his own voluntary act, the writ will not issue for his release. *McElvaine v. Brush*, 142 U. S. 155, 35 L. Ed. 971, 12 S. Ct. 156.

Where one is actually confined in the State prison for a longer term of imprisonment than is legal, a writ of habeas corpus will issue to the end that a proper sentence may be imposed. *State v. Green*, 85 N. C. 600, 601.

There must be actual confinement, or the present means of enforcing it, in order to justify the issuance of the writ of habeas corpus and granting a release therefrom. *Wales v. Whitney*, 114 U. S. 564, 572, 29 L. Ed. 277, 5 S. Ct. 1050.

One Imprisoned for Contempt.—Where a defendant punished for direct contempt contends that a legal right has been denied him, and it is made to appear that the court was without jurisdiction of the cause or power to impose the sentence, his remedy is by habeas corpus proceedings, taken to the Supreme Court, if necessary, by writ of certiorari. *State v. Little*, 175 N. C. 743, 744, 94 S. E. 680.

Relief of Soldier in Army.—A soldier actually and rightfully in the army can have no relief by the writ of habeas corpus against any abuse of military authority, and if he be wrongfully held as a soldier he is not entitled to a habeas corpus while he is undergoing punishment or awaiting trial for a military offense. *Cox v. Gee*, 60 N. C. Appx., 516.

§ 17-4. When application denied.—Application to prosecute the writ shall be denied in the following cases:

1. Where the persons are committed or detained by virtue of process issued by a court of the United States, or a judge thereof, in cases where state courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of suits in such courts.

2. Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree.

3. Where any person has willfully neglected, for the space of two whole terms after his imprisonment, to apply for the writ to the superior court of the county in which he may be imprisoned, such person shall not have a habeas corpus in vacation time for his enlargement.

4. Where no probable ground for relief is shown in the application. (Rev., s. 1822; Code, s. 1624; 1868-9, c. 116, s. 2; C. S. 2206.)

In General.—In construing this term, "final judgment or decree of a competent tribunal," it has come to be well understood that the exception refers only to judgments warranted by the law applicable to the case in hand, and where it appears from an inspection of the record proper and the

judgment itself that the court had no jurisdiction of the cause and was manifestly without power to enter the judgment or impose the sentence in question, in such case there would be no final sentence of a competent tribunal, and the exception established by the statute does not obtain. *State v. Queen*, 91 N. C. 659; *In re Holley*, 154 N. C. 163, 167, 69 S. E. 872.

Presumption of Validity.—Proceedings before a court of competent jurisdiction will be presumed to be regular and valid, unless upon their face they plainly appear to be void; and when they do not so appear, they are not subject to review in habeas corpus proceedings. *State v. Burnette*, 173 N. C. 734, 91 S. E. 364.

Meaning of "Competent Jurisdiction."—The term, "competent jurisdiction," used by this section in making an exception to the power of this court to review a judgment in habeas corpus proceedings, means that where a committed criminal is detained under a sentence not authorized by law, he is entitled to be heard, and where, though authorized in kind, it extends beyond what the law expressly permits, he may be relieved from further punishment after serving the lawful portion of the sentence; and a different construction would render the statute unconstitutional. *In re Holley*, 154 N. C. 163, 69 S. E. 872.

Cannot Be Used as Writ of Error.—The writ of habeas corpus cannot be used in the nature of a writ of error. *State v. Dunn*, 159 N. C. 470, 74 S. E. 1014.

Habeas corpus is in the nature of a writ of error to the extent of examining into the legality of a person's detention, but it is not available as a means of reviewing and correcting mere errors as distinguished from defects of jurisdiction. *State v. Edwards*, 192 N. C. 321, 135 S. E. 37; *In re Chase*, 193 N. C. 450, 452, 137 S. E. 305.

The writ of habeas corpus may not be used as a substitute for appeal. *In re Smith*, 218 N. C. 462, 11 S. E. (2d) 317.

Process by United States Judge.—The petitioner in habeas corpus proceedings adjudged in contempt of court shall, under the provisions of this section, be remanded when upon the hearing it is made to appear that he is held in custody by virtue of a process issued by a court or judge of the United States where such judge or court has exclusive jurisdiction. *State v. Hooker*, 183 N. C. 763, 111 S. E. 351.

Remedy Denied to One Imprisoned by Final Judgment.—Where one is imprisoned under the final process of a court of competent jurisdiction the writ of habeas corpus may not successfully be sued out since this section expressly forbids it. *Howie v. Spittle*, 156 N. C. 180, 182, 72 S. E. 207; *Ledford v. Emerson*, 143 N. C. 527, 536, 55 S. E. 969; *In re Holley*, 154 N. C. 163, 69 S. E. 872.

Same—Where Sentence Erroneous.—The application must be refused, even where it appears that the applicant is imprisoned in the State's prison, and the sentence of the court is erroneous, and the applicant, in default of appeal, must be left to his remedy by writ of certiorari when he is detained by virtue of a final judgment of a court of competent jurisdiction. *In re Schenck*, 74 N. C. 607.

Same—Reasons for Rule.—Without reference to the positive prohibition of this section, it is otherwise clear that the power cannot extend to cases where the person is confined on final process. For if so, this unseemly and discordant result would follow, that one superior court judge might try and sentence a person to death or the penitentiary, and another might issue the writ of habeas corpus and discharge the prisoner. Results so disgraceful and destructive to the orderly and harmonious administration of justice were never contemplated by the framers of our judicial system; on the contrary, they were carefully guarded against, both by the Constitution and legislation. *In re Schenck*, 74 N. C. 607, 610.

Prior Writ of Habeas Corpus.—See *In re Adams*, 218 N. C. 379, 11 S. E. (2d) 163.

Examples.—Where the petitioner in habeas corpus proceedings directed to a superior court judge has previously been convicted in that court of an offense of which it had jurisdiction, and accordingly sentenced to imprisonment under a final order, the judgment imports verity, and evidence to collaterally impeach it is incompetent, and the application to prosecute the writ will be denied. *In the matter of Croom*, 175 N. C. 455, 95 S. E. 903.

An indictment and judgment against the prisoner for an illegal sale of spirituous liquors alleged to have been based upon illegal evidence authorized by an unconstitutional statute, may not be passed upon in habeas corpus proceedings, for such would be to permit one superior court judge to examine into the proceedings before another judge, upon parol evidence, and review his action. *State v. Dunn*, 159 N. C. 470, 74 S. E. 1014.

§ 17-5. By whom application is made.—Application for the writ may be made either by the

party for whose relief it is intended or by any person in his behalf. (Rev., s. 1823; Code, s. 1625; 1868-9, c. 116, s. 3; C. S. 2207.)

Application May Be Withdrawn.—One who has petitioned for a writ of habeas corpus may withdraw his application whenever he chooses. *State v. Wiley*, 64 N. C. appx., 821, 823.

§ 17-6. To judge of supreme or superior court; in writing.—Application for the writ shall be made in writing, signed by the applicant—

1. To any one of the justices of the supreme court.

2. To any one of the superior court judges, either at term time or in vacation. (Rev., s. 1824; Code, s. 1626; 1868-9, c. 116, s. 4; C. S. 2208.)

Cross Reference.—As to jurisdiction of special or emergency judges of the superior court, see §§ 7-52, 7-58.

In General.—The Constitution required the Legislature to furnish an adequate remedy, and when it was declared that all such persons should have the right to "prosecute a writ of habeas corpus", it followed *ex vi termini*, that they were entitled to demand this remedy before any judge of any court of general jurisdiction in this country. The power of all judges to grant it was conceded before the Magna Charta, and was only reaffirmed, like many other cardinal principles, in that instrument and those that followed reaffirming it. *Harkins v. Cathey*, 119 N. C. 649, 663, 26 S. E. 136.

Concurrent Jurisdiction in State and Federal Courts.—On habeas corpus, the state courts have concurrent jurisdiction with the federal courts of all cases of imprisonment within their territorial jurisdiction, except in the case where the petitioner is in custody under the authority, or claim of authority, of the United States. *Robb v. Connolly*, 111 U. S. 624, 633, 28 L. Ed. 542, 4 S. Ct. 544.

The federal and state courts have concurrent jurisdiction to inquire into the legality of detention under a governor's warrant in interstate extradition cases. *United States v. Jung Ah Lung*, 124 U. S. 621, 626, 31 L. Ed. 591, 8 S. Ct. 663.

Source from Which Authority of State Judges Emanates.—It is to be observed that the authority of the state judges in cases of habeas corpus emanates from the several states, and not from the United States. In order to destroy their jurisdiction, therefore, it is necessary to show, not that the United States has given them jurisdiction, but that Congress possesses and has exercised the power of taking away that jurisdiction which the states have vested in their own judges. *In the matter of Bryon*, 60 N. C. 1.

Jurisdiction of Courts.—The courts of this State, as well as the individual judges, have jurisdiction to issue writs of habeas corpus, returnable to them in term time, and as a court. *In the matter of Bryon*, 60 N. C. 1.

Judges Mentioned Have Equal Powers.—A single judge of the Supreme Court has the same and no other jurisdiction to issue the writ than a judge of the superior court, and the same limitation of power to issue the writ in certain cases extends equally to the two classes of judges. *In re Schenck*, 74 N. C. 607, 608.

Extent of Jurisdiction.—The habeas corpus jurisdiction of every court, and of every judge, extends to every possible case of privation of liberty to the National Constitution, treaties and laws. *In re Burrus*, 136 U. S. 586, 592, 34 L. Ed. 500, 10 S. Ct. 850.

Obtaining Jurisdiction.—Presenting a petition to a judge for a writ of habeas corpus gives him jurisdiction of the subject. *State v. Edney*, 60 N. C. appx., 453.

Section 1-76 et seq. concerning venue all refer to "actions" and have no application to habeas corpus proceedings. *McEachern v. McEachern*, 210 N. C. 98, 185 S. E. 684.

Discretionary Power of Judge as to Place Writ Is Returnable Not Reviewed in Absence of Abuse.—Since any judge of the Superior Court or Justice of the Supreme Court has the power to issue a writ of habeas corpus at any time or any place, he has the discretionary power to make the writ returnable at such place as he may determine, which discretion will not be reviewed in the absence of a showing of abuse or failure to afford full opportunity to be heard, and therefore an exception to the refusal of a motion for change of venue of habeas corpus proceedings cannot be sustained. *McEachern v. McEachern*, 210 N. C. 98, 185 S. E. 684.

§ 17-7. Contents of application.—The application must state, in substance, as follows:

1. That the party, in whose behalf the writ is applied for, is imprisoned or restrained of his

liberty, the place where, and the officer or person by whom he is imprisoned or restrained, naming both parties, if their names are known, or describing them if they are not known.

2. The cause or pretense of such imprisonment or restraint, according to the knowledge or belief of the applicant.

3. If the imprisonment is by virtue of any warrant or other process, a copy thereof shall be annexed, or it shall be made to appear that a copy thereof has been demanded and refused, or that for some sufficient reason a demand for such copy could not be made.

4. If the imprisonment or restraint is alleged to be illegal, the application must state in what the alleged illegality consists; and that the legality of the imprisonment or restraint has not been already adjudged, upon a prior writ of habeas corpus, to the knowledge or belief of the applicant.

5. The facts set forth in the application must be verified by the oath of the applicant, or by that of some other credible witness, which oath may be administered by any person authorized by law to take affidavits. (Rev., s. 1825; Code, s. 1627; 1868-9, c. 116, s. 5; C. S. 2209.)

Waiver of Errors.—The parties may waive all errors and dispense with all forms in the proceedings on the petition. *State v. Edney*, 60 N. C. appx., 463.

Necessary Allegation.—A petition for habeas corpus must allege that the imprisonment has not been already adjudged upon a prior writ of habeas corpus. In the matter of *Brittain*, 93 N. C. 587.

Where Other Remedies Exist.—The writ of habeas corpus will be refused where the prisoner can be otherwise discharged. In *re Belt*, 159 U. S. 95, 100, 40 L. Ed. 88, 15 S. Ct. 987.

Prior Writ of Habeas Corpus.—See *In re Adams*, 218 N. C. 379, 11 S. E. (2d) 163.

§ 17-8. Issuance of writ without application.—When the supreme or superior court, or any judge of either, has evidence from any judicial proceeding before such court or judge that any person within this state is illegally imprisoned or restrained of his liberty, it is the duty of said court or judge to issue a writ of habeas corpus for his relief, although no application be made for such writ. (Rev., s. 1826; Code, s. 1632; 1868-9, c. 116, s. 10; C. S. 2210.)

When Illegal Imprisonment Appears.—If a case comes before the Supreme Court by appeal, or by certiorari, and upon the trial it appears that the prisoner was suffering an illegal confinement in the penitentiary, it would be the duty of that court, by virtue of its supervisory power, and of this section, enacted to carry into effect this constitutional power of the Supreme Court, to issue the writ of habeas corpus, even of its own motion, and discharge the prisoner. In *re Schenck*, 74 N. C. 607, 610.

Art. 3. Writ.

§ 17-9. Writ granted without delay.—Any court or judge empowered to grant the writ, to whom such applications may be presented, shall grant the writ without delay, unless it appear from the application itself or from the documents annexed that the person applying or for whose benefit it is intended is, by this chapter, prohibited from prosecuting the writ. (Rev., s. 1827; Code, s. 1628; 1868-9, c. 116, s. 6; C. S. 2211.)

Cross Reference.—As to when application shall be denied, see § 17-4.

Duty of Court to Issue.—There can be no doubt of the duty and power of the court to issue the writ of habeas corpus when applied for in accordance with statutory provisions. In *re Boyett*, 136 N. C. 415, 424, 48 S. E. 789.

§ 17-10. Penalty for refusal to grant.—If any judge authorized by this chapter to grant writs of habeas corpus refuses to grant such writ when legally applied for, every such judge shall forfeit to the party aggrieved two thousand five hundred dollars. (Rev., s. 1828; Code, s. 1631; 1868-9, c. 116, s. 9; C. S. 2212.)

Writ Always Issues.—The writ of habeas corpus always issues when legally applied for, because this section subjects a judge who refuses to entertain the petition to a penalty of \$2,500. In the matter of *Croom*, 175 N. C. 455, 456, 95 S. E. 903.

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

§ 17-11. Sufficiency of writ; defects of form immaterial.—No writ of habeas corpus shall be disobeyed on account of any defect of form. It shall be sufficient—

1. If the person having the custody of the party imprisoned or restrained be designated either by his name of office, if he have any, or by his own name, or, if both such names be unknown or uncertain, he may be described by an assumed appellation, and any one who may be served with the writ shall be deemed the person to whom it is directed, although it may be directed to him by a wrong name, or description, or to another person.

2. If the person who is directed to be produced be designated by name, or if his name be uncertain or unknown, he may be described by an assumed appellation or in any other way, so as to designate the person intended. (Rev., s. 1829; Code, ss. 1629, 1630; 1868-9, c. 116, ss. 7, 8; C. S. 2213.)

§ 17-12. Service of writ.—The writ of habeas corpus may be served by any qualified elector of this state thereto authorized by the court or judge allowing the same. It may be served by delivering the writ, or a copy thereof, to the person to whom it is directed; or, if such person cannot be found, by leaving it, or a copy, at the jail, or other place in which the party for whose relief it is intended is confined, with some under officer or other person of proper age; or, if none such can be found, or if the person attempting to serve the writ be refused admittance, by affixing a copy thereof in some conspicuous place on the outside, either of the dwelling-house of the party to whom the writ is directed or of the place where the party is confined for whose relief it is sued out. (Rev., s. 1833; Code, s. 1657; 1868-9, c. 116, s. 32; C. S. 2214.)

To Whom Issued.—The writ should be issued to the person who has the immediate custody of the petitioner with the power to produce the body of such party before the court or judge. *Wales v. Whitney*, 114 U. S. 564, 574, 29 L. Ed. 277, 5 S. Ct. 1050.

Art. 4. Return.

§ 17-13. When writ returnable.—Writs of habeas corpus may be made returnable at a certain time, or forthwith, as the case may require. If the writ be returnable at a certain time, such return shall be made and the party shall be produced at the time and place specified therein. (Rev., s. 1830; Code, s. 1656; 1868-9, c. 116, s. 31; C. S. 2215.)

§ 17-14. Contents of return; verification.—The person or officer on whom the writ is served

must make a return thereto in writing, and, except where such person is a sworn public officer and makes his return in his official capacity, it must be verified by his oath. The return must state plainly and unequivocally—

1. Whether he has or has not the party in his custody or under his power or restraint.

2. If he has the party in his custody or power, or under his restraint, the authority and the cause of such imprisonment or restraint, setting forth the same at large.

3. If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return; and the original shall be produced and exhibited on the return of the writ to the court or judge before whom the same is returnable.

4. If the person or officer upon whom such writ is served has had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause and by what authority such transfer took place. (Rev., s. 1831; Code, s. 1633; 1868-9, c. 116, s. 11; C. S. 2216.)

§ 17-15. Production of body if required.—If the writ requires it, the officer or person on whom the same has been served shall also produce the body of the party in his custody or power, according to the command of the writ, except in the case of the sickness of such party, as hereinafter provided. (Rev., s. 1832; Code, s. 1636; 1868-9, c. 116, s. 14; C. S. 2217.)

Art. 5. Enforcement of Writ.

§ 17-16. Attachment for failure to obey.—If the person or officer on whom any writ of habeas corpus has been duly served refuses or neglects to obey the same, by producing the body of the party named or described therein, and by making a full and explicit return thereto, within the time required, and no sufficient excuse is shown for such refusal or neglect, it is the duty of the court or judge before whom the writ has been made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person or officer, directed to the sheriff of any county within this state, and commanding him forthwith to apprehend such person or officer and bring him immediately before such court or judge. On being so brought such person or officer shall be committed to close custody in the jail of the county where such court or judge may be, without being allowed the liberties thereof, until such person or officer make return to such writ and comply with any order that may be made by such court or judge in relation to the party for whose relief the writ has been issued. (Rev., s. 1834; Code, s. 1637; 1868-9, c. 116, s. 15; C. S. 2218.)

In General.—The attachment warranted by this section does not rest on the idea of punishing for a contempt of the judge, or court, but of compelling a return to the writ and a production of a body. It is a substitute for the provision in the old habeas corpus act, which punished the officer or person refusing or neglecting to make due return, "upon conviction by indictment," with a fine of \$500 for the first offense, and of \$1,000, and incapacity to hold office, for the second. Ex parte Moore, 64 N. C. appx., 802, 809. See also, Ex parte Kerr, 64 N. C. appx., 816.

No Power to Arrest Governor.—Under the habeas corpus act, a judge has no power to order the arrest of the Governor of the State. Ex parte Moore, 64 N. C. appx., 802, 815.

Excuse for Refusal to Make Return.—Where a military officer detaining persons arrested in counties declared by the Governor to be in a state of insurrection, answered to a writ of habeas corpus, that he held them under the orders of the Governor, who had also ordered him not to obey the writ: it was held, that such return was a sufficient excuse, under this section, and, therefore, that such officer was not liable to be attached. Ex parte Moore, 64 N. C. appx., 802, 815.

§ 17-17. Liability of judge refusing attachment.

—If any judge willfully refuses to grant the writ of attachment, as provided for in § 17-16, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars. (Rev., s. 1835; Code, s. 1638; 1870-1, c. 221, s. 2; C. S. 2219.)

§ 17-18. Attachment against sheriff to be directed to coroner; procedure.—If a sheriff has neglected to return the writ agreeably to the command thereof, the attachment against him may be directed to the coroner or to any other person to be designated therein, who shall have power to execute the same, and such sheriff, upon being brought up, may be committed to the jail of any county other than his own. (Rev., s. 1836; Code, s. 1639; 1868-9, c. 116, s. 16; C. S. 2220.)

Cross Reference.—As to requirement of coroner to act for sheriff in certain cases, see § 152-8.

§ 17-19. Precept to bring up party detained.

The court or judge by whom any such attachment may be issued may also at the same time, or afterwards, direct a precept to any sheriff, coroner, or other person to be designated therein, commanding him to bring forthwith before such court or judge the party, wherever to be found, for whose benefit the writ of habeas corpus has been granted. (Rev., s. 1837; Code, s. 1640; 1868-9, c. 116, s. 17; C. S. 2221.)

§ 17-20. Liability of judge refusing precept.

—If any judge refuses to grant the precept provided for in § 17-19, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars. (Rev., s. 1838; Code s. 1641; 1870-1, c. 221, s. 3; C. S. 2222.)

§ 17-21. Liability of judge conniving at insufficient return.

—If any judge grants the attachment, or the precept, and gives the officer or other person charged with the execution of the same verbal or written instructions not to execute the same, or to make any evasive or insufficient return, or any return other than that provided by law; or shall connive at the failing to make any return or any evasive or insufficient return, or any return other than that provided by law, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars. (Rev., s. 1839; Code, s. 1642; 1870-1, c. 221, s. 4; C. S. 2223.)

§ 17-22. Power of county to aid service.—In the execution of any such attachment, precept or writ, the sheriff, coroner, or other person to whom it may be directed, may call to his aid the power of the county, as in other cases. (Rev., s. 1840; Code, s. 1643; 1868-9, c. 116, s. 18; C. S. 2224.)

Editor's Note.—The posse comitatus is discussed in Worth v. Craven County Com'rs, 118 N. C. 112, 24 S. E. 778.

In the dissenting opinion to that case by Judge Clark, this section is mentioned on page 125.

Means "Men of the County."—The power of the county, or "posse comitatus," means the men of the county in which the writ is to be executed. *Ex Parte Moore*, 64 N. C. appx., 802, 812.

§ 17-23. Obedience to order of discharge compelled.—Obedience to a judgment or order for the discharge of a prisoner or person restrained of his liberty, pursuant to the provisions of this chapter, may be enforced by the court or judge by attachment in the same manner and with the same effect as for a neglect to make return to a writ of habeas corpus; and the person found guilty of such disobedience shall forfeit to the party aggrieved two thousand five hundred dollars, besides any special damages which such party may have sustained. (Rev., s. 1841; Code, s. 1649; 1868-9, c. 116, s. 24; C. S. 2225.)

§ 17-24. No civil liability for obedience.—No officer or other person shall be liable to any civil action for obeying a judgment or order of discharge upon writ of habeas corpus. (Rev., s. 1842; Code, s. 1650; 1868-9, c. 116, s. 25; C. S. 2226.)

§ 17-25. Recommittal after discharge; penalty.—If any person shall knowingly again imprison or detain one who has been set at large upon any writ of habeas corpus, for the same cause, other than by the legal process or order of the court wherein he is bound by recognizance to appear, or of any other court having jurisdiction in the case, he shall be guilty of a misdemeanor. (Rev., s. 3581; Code, s. 1651; 1868-9, c. 116, s. 26; C. S. 2227.)

Cross Reference.—See also, § 17-38 and notes.

When Rearrest Valid.—A party, set at large by writ of habeas corpus, upon the ground that the judgment of imprisonment was void for want of jurisdiction in the court, may be again arrested for the same cause upon legal process of a court having jurisdiction. *State v. Weatherspoon*, 88 N. C. 19.

§ 17-26. Disobedience to writ or refusing copy of process; penalty.—If any person to whom a writ of habeas corpus is directed shall neglect or refuse to make due return thereto, or to bring the body of the party detained according to the command of the writ without delay, or shall not, within six hours after demand made therefor, deliver a copy of the commitment or cause of detainer, such person shall, upon conviction on indictment, be fined one thousand dollars, or imprisoned not exceeding twelve months, and if such person be an officer, shall moreover be removed from office. (Rev., s. 3597; Code, s. 1652; 1868-9, c. 116, s. 27; C. S. 2228.)

§ 17-27. Penalty for false return.—If any person shall make a false return to a writ of habeas corpus, he shall be guilty of a misdemeanor. (Rev., s. 3582; Code, s. 1653; 1868-9, c. 116, s. 28; C. S. 2229.)

§ 17-28. Penalty for concealing party entitled to writ.—If any one having in his custody, or under his power, any party who, by law, would be entitled to a writ of habeas corpus, or for whose relief such writ shall have been issued, shall, with intent to elude the service of such writ, or to avoid the effect thereof, transfer the party to the custody, or put him under the power or control, of another, or shall conceal or change the place

of his confinement, or shall knowingly aid or abet another in so doing, he shall be guilty of a misdemeanor. (Rev., s. 3583; Code, ss. 1654, 1655; 1868-9, c. 116, ss. 29, 30; C. S. 2230.)

Art. 6. Proceedings and Judgment.

§ 17-29. Notice to interested parties.—When it appears from the return to the writ that the party named therein is in custody on any process, or by reason of any claim of right, under which any other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge until it appears that the person so interested, or his attorney, if he have one, has had reasonable notice of the time and place at which such writ is returnable. (Rev., s. 1843; Code, s. 1634; 1868-9, c. 116, s. 12; 1870-1, c. 221, s. 1; C. S. 2231.)

§ 17-30. Notice to solicitor.—When it appears from the return that such party is detained upon any criminal accusation, the court or judge may, if he thinks proper, make no order for the discharge of such party until sufficient notice of the time and place at which the writ has been returned, or is made returnable, is given to the solicitor of the district in which the person prosecuting the writ is detained. (Rev., s. 1844; Code, s. 1635; 1868-9, c. 116, s. 13; C. S. 2232.)

Hearing May Be Continued.—If it appear from the return on a writ of habeas corpus that the petitioner is detained on a criminal charge, the court may continue the hearing for a reasonable time to give the solicitor an opportunity to examine into the case. *State v. Jones*, 113 N. C. 669, 18 S. E. 249.

§ 17-31. Subpœnas to witnesses.—Any party to a proceeding on a writ of habeas corpus may procure the attendance of witnesses at the hearing, by subpœna, to be issued by the clerk of any superior court, under the same rules, regulations and penalties prescribed by law in other cases. (Rev., s. 1845; Code, s. 1659; 1868-9, c. 116, s. 34; C. S. 2233.)

Cross Reference.—As to issuance of subpoenas, see §§ 2-16, 8-59.

§ 17-32. Proceedings on return; facts examined; summary hearing of issues.—The court or judge before whom the party is brought on a writ of habeas corpus shall, immediately, after the return thereof, examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same has been upon commitment for any criminal or supposed criminal matter or not; and if issue be taken upon the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge, the court or judge shall proceed, in a summary way, to hear the allegations and proofs on both sides, and to do what to justice appertains in delivering, bailing or remanding such party. (Rev., s. 1846; Code, s. 1644; 1868-9, c. 116, s. 19; C. S. 2234.)

Proceedings Must Be Summary.—Proceedings under the writ of habeas corpus, which have for their principal object a release of a party from illegal restraint, must necessarily be summary and prompt to be useful, and if an action could be arrested by an appeal, they would lose many of their most beneficial results. *State v. Miller*, 97 N. C. 451, 454, 1 S. E. 776.

Hearing Not Perfunctory.—The words "if issue be taken upon the material facts . . . the judge shall proceed in

a summary way to hear the allegations and proofs of both sides," preclude the idea that such hearing shall be perfunctory and merely formal. In *re Bailey*, 203 N. C. 362, 365, 166 S. E. 165.

Hearing Confined to Record.—The hearing is confined to the record and judgment, and relief may be afforded only when on the record itself the judgment is one clearly and manifestly beyond the power of the court, a statement of the doctrine supported in numerous and authoritative decisions here and elsewhere. *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957; In *re Schenck*, 74 N. C. 607; In *re Swan*, 150 U. S. 637, 37 L. Ed. 1207, 14 S. Ct. 225; In *re Coy*, 127 U. S. 731, 32 L. Ed. 274, 8 S. Ct. 1263; In the matter of *Croom*, 175 N. C. 455, 457, 95 S. E. 903.

Same—Questions Open to Inquiry.—Where the petitioner in habeas corpus proceedings is held under a final sentence of a court, a commitment of contempt or order, the only questions open to inquiry at the hearing are whether on the record the court had jurisdiction of the matter and whether on the facts disclosed in the record and under the law applicable to the case in hand, the court has exceeded its powers in imposing the sentence whereof the petitioner complains. *State v. Hooker*, 183 N. C. 763, 111 S. E. 351.

Evidence Not Reviewable.—As was held in *State v. Dunn*, 159 N. C. 470, 74 S. E. 1014, the Supreme Court cannot review the evidence or other matters in a criminal case in habeas corpus proceedings, but only the jurisdiction of the court and the validity of the judgment which is attacked. *State v. Burnette*, 173 N. C. 734, 91 S. E. 364.

Question of Insanity Determined.—When the petitioner in habeas corpus has been adjudged insane and her detention is ordered by a court of lunacy of another state, the judge of the superior court in this State by whom the proceedings of habeas corpus are heard should determine the validity of the order of the adjudication of insanity when the same is properly presented to him, and this is the determinative question involved, and upon failure to have done so the case will be remanded. In *re Chase*, 193 N. C. 450, 137 S. E. 305.

Discretion of Judge.—The quantum of evidence and the number of witnesses to be examined must necessarily be left also to the sound discretion of the judge who hears the writ, and his action in that regard cannot be reviewed. *State v. Herndon*, 107 N. C. 934, 935, 12 S. E. 268. See also In *re Bailey*, 203 N. C. 362, 367, 166 S. E. 165.

Presumption of Innocence and Burden of Proof.—The presumption of innocence applies only on a trial, and does not avail to furnish a presumption that the detention of a party on regular process, when the committing officer has jurisdiction, is illegal; therefore, where, upon the return of a sheriff to a writ of habeas corpus, it appeared that the petitioners were in custody on a mittimus, regular in every way, from a justice of the peace, for failure to give bond for their appearances at the next term of the superior court to answer a criminal charge of which the court had jurisdiction, the detention, nothing else appearing, was clearly legal, and the burden was upon the petitioner to show wherein it was illegal, and not upon the State to show that they were lawfully in custody. *State v. Jones*, 113 N. C. 669, 18 S. E. 249.

No Appeal Lies.—Appeal to the Supreme Court will not lie from the refusal of a superior court judge to discharge the defendant from custody in proceedings in habeas corpus, the remedy being by a petition for a writ of certiorari which is addressed to the sound discretion of the Supreme Court. In the matter of *Croom*, 175 N. C. 455, 95 S. E. 903; *State v. Burnette*, 173 N. C. 734, 91 S. E. 364.

Constitutional Provision.—In habeas corpus proceedings wherein upon the hearing are involved questions of law or legal inference, and judgment is a denial of a legal right, it may be reviewed by the Supreme Court by virtue of the Constitution, Art. IV, sec. 8, under the power given to the court "to issue any remedial writs necessary to give it general supervision and control over the proceedings of inferior courts." In *re Holley*, 154 N. C. 163, 69 S. E. 872.

Writ of Certiorari Proper Remedy.—Where it appears that, upon the return of the writ, the judge declined to hear evidence or investigate the charge, the writ of certiorari should issue. *Walton v. Gatlin*, 60 N. C. 318; *Ex parte Biggs*, 64 N. C. 202; *State v. Jefferson*, 66 N. C. 309; *State v. Herndon*, 107 N. C. 934, 935, 12 S. E. 268.

The remedy given under the constitutional power conferred upon the Supreme Court to review a judgment in habeas corpus proceedings in matters not involving the care and custody of children, Constitution, Art. IV, sec. 8, shall only be exercised by certiorari. In *re Holley*, 154 N. C. 163, 69 S. E. 872.

Same—When Denied.—A petition for certiorari in the Supreme Court will be denied in habeas corpus proceedings

when it appears therefrom that the prisoner is not entitled to his discharge. In the matter of *Croom*, 175 N. C. 455, 95 S. E. 903.

If the judge, upon the investigation of the evidence on a petition for habeas corpus, adjudges that there is or is not probable cause, and admits or refuses to admit to bail, no appeal or certiorari lies, either in favor of the State or the petitioner. *Walton v. Gatlin*, 60 N. C. 310, 318; *State v. Miller*, 97 N. C. 451, 1 S. E. 776; *Stat. v. Herndon*, 107 N. C. 934, 935, 12 S. E. 268.

In habeas corpus proceedings, where it appears from the application for certiorari in the Supreme Court, or the documents annexed thereto, that the petition is determined under a final judgment of a competent tribunal, the writ will be denied in the Supreme Court. In *re Holley*, 154 N. C. 163, 69 S. E. 872.

Proceeding Where Judgment Reversed.—If, upon certiorari, the court reverses and sets aside the judgment of the court below, and the proceedings are remanded, no procedendo issues to any particular judge, but the petitioner can exercise his statutory right to apply, de novo, to any judge authorized to grant the writ of habeas corpus. *State v. Herndon*, 107 N. C. 934, 12 S. E. 268.

Judicial Review of Questions of Law.—In deciding questions which arise under writs of habeas corpus the judiciary may review and control the action of the Governor in regard to points of law; but cannot interfere with such action in regard to any matter within the discretion of the Governor.

In the matter of *Hughes*, 61 N. C. 57.

§ 17-33. When party discharged.—If no legal cause is shown for such imprisonment or restraint, or for the continuance thereof, the court or judge shall discharge the party from the custody or restraint under which he is held. But if it appears on the return to the writ that the party is in custody by virtue of civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, such party can be discharged only in one of the following cases:

1. Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person.
2. Where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged.
3. Where the process is defective in some matter of substance required by law, rendering such process void.
4. Where the process, though in proper form, has been issued in a case not allowed by law.
5. Where the person, having the custody of the party under such process, is not the person empowered by law to detain him.
6. Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law. (Rev., s. 1847; Code, s. 1645; 1868-9, c. 116, s. 20; C. S. 2235.)

Cross Reference.—See also, notes under § 17-32.

Where Imprisonment for Contempt.—It was held in *Ex parte Summers*, 27 N. C. 149, that in a case of imprisonment for contempt, where the court states the facts upon which it proceeds, a reviewing tribunal may, on a habeas corpus, discharge the party if it appears plainly that the facts do not amount to a contempt. *State v. Queen*, 91 N. C. 659, 662.

Sentence Partly Valid and Partly Void.—Where a prisoner is detained by virtue of a sentence in part valid and part otherwise, he may not be liberated on habeas corpus until he shall have served the valid portion of his sentence, and he shall be remanded when it appears that the time during which he may legally be detained has not expired. *State v. Hooker*, 183 N. C. 763, 111 S. E. 351.

State Cannot Appeal.—The State cannot appeal from an order in habeas corpus proceedings discharging from imprisonment one convicted of crime. Proceedings in habeas corpus, the object of which is to release a person from illegal restraint, must necessarily be summary to be useful, and if action could be arrested by an appeal upon the part of the

State, the great writ of liberty would be deprived of its most beneficial results. In the matter of Williams, 149 N. C. 436, 437, 63 S. E. 108; State v. Miller, 97 N. C. 451, 1 S. E. 776.

§ 17-34. When party remanded.—It is the duty of the court or judge forthwith to remand the party, if it appears that he is detained in custody, either—

1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction.

2. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree.

3. For any contempt specially and plainly charged in the commitment by some court, officer or body having authority to commit for the contempt so charged.

4. That the time during which such party may be legally detained has not expired. (Rev., s. 1848; Code, s. 1646; 1868-9, c. 116, s. 21; C. S. 2236.)

Cross Reference.—See also, § 17-4, when application for writ shall be denied.

Judgment Imports Verity.—A judgment in habeas corpus imports verity, and it can not be collaterally impeached. In the matter of Croom, 175 N. C. 455, 95 S. E. 903.

§ 17-35. When the party bailed or remanded.—If it appears that the party has been legally committed for any criminal offense, or if it appears by the testimony offered with the return of the writ, or upon the hearing thereof, that the party is guilty of such an offense, although the commitment is irregular, the court or judge shall proceed to let such party to bail, if the case is bailable and good bail is offered; if not, the court or judge shall forthwith remand such party to the custody or place him under the restraint from which he was taken, if the person or officer, under whose custody or restraint he was, is legally entitled thereto; if not so entitled, the court or judge shall commit such party to the custody of the officer or person legally entitled thereto. (Rev., s. 1849; Code, s. 1647; 1868-9, c. 116, s. 22; C. S. 2237.)

Judge May Admit to Bail.—Any person charged (but not convicted) of any crime whatever may be admitted to bail if the judge, upon hearing the testimony upon a writ of habeas corpus, adjudges that, upon the facts developed, the petitioner is entitled to be released on bail. State v. Herndon, 107 N. C. 934, 937, 12 S. E. 268. And although a sentence is not valid the defendant may not be unconditionally released, as the court may hold him to bail. State v. Burnette, 173 N. C. 734, 91 S. E. 364.

No Discharge After Indictment.—Of course, after indictment found, the judge cannot absolutely discharge the prisoner in any case, however clear a case of innocence may be made out, but must require his appearance at the next term of court. State v. Herndon, 107 N. C. 934, 938, 12 S. E. 268.

§ 17-36. Party held in execution not to be discharged.—When a writ of habeas corpus cum causa issues and the sheriff or other officer to whom it is directed returns upon the same that the prisoner is condemned, by judgment given against him, and held in custody by virtue of an execution issued against him, the prisoner shall not be let to bail but shall be presently remanded, where he shall remain until discharged in due course of law. (Rev., s. 1850; Code, s. 937; R. C., c. 31, s. 111; 2 Hen. V, c. 2; C. S. 2238.)

§ 17-37. When party ill, cause determined in his

absence.—When, from the illness or infirmity of the person directed to be produced by a writ of habeas corpus, such person cannot, without danger, be brought before the court or judge where the writ is made returnable, the party in whose custody he is may state the fact in his return to the writ; and if the court or judge is satisfied of the truth of the allegation, and the return is otherwise sufficient, the court or judge shall proceed to decide on such return and to dispose of the matter in the same manner as if the body had been produced. (Rev., s. 1851; Code, s. 1648; 1868-9, c. 116, s. 23; C. S. 2239.)

§ 17-38. No second committal after discharged; penalty.—No person who has been set at large upon any writ of habeas corpus shall be again imprisoned or detained for the same cause by any person whatsoever other than by the legal order or process of the court wherein he shall be bound by recognizance to appear or of any other court having jurisdiction in the case, under the penalty of two thousand five hundred dollars to the party aggrieved thereby. (Rev., s. 1852; Code, s. 1651; 1868-9, c. 116, s. 26; C. S. 2240.)

Cross Reference.—As to recommittal after discharge, see § 17-25.

Surrender by Sureties.—Where the defendant was not originally liable to arrest and had been discharged upon habeas corpus, he cannot be held upon a surrender by his sureties. Ledford v. Emerson, 143 N. C. 527, 55 S. E. 969.

When Rearrest Permissible.—According to the express terms of this section, a party once discharged may be again arrested and imprisoned for the same cause, provided it be done by the legal order or process of a court of competent jurisdiction. State v. Weatherspoon, 88 N. C. 19, 21.

Art. 7. Habeas Corpus for Custody of Children in Certain Cases.

§ 17-39. Custody as between parents in certain cases; modification of order.—When a contest shall arise on a writ of habeas corpus between any husband and wife, who are living in a state of separation, without being divorced, in respect to the custody of their children, the court or judge, on the return of such writ, may award the charge or custody of the child or children so brought before it either to the husband or to the wife, for such time, under such regulations and restrictions, and with such provisions and directions as will, in the opinion of such court or judge, best promote the interest and welfare of the children. At any time after the making of such orders the court or judge may, on good cause shown, annul, vary or modify the same; provided, that where the father is a non-resident of North Carolina and the custody of the child has been awarded, by an order of a court of this State, to the mother who is a resident of North Carolina, no motion on the part of such non-resident father may be heard or entertained by the court for a modification of the order of the court, unless such father has first shown under oath that, since the making of the original order, he has regularly contributed to the support of said child according to his means and according to the needs of the child, and, if said motion is heard and at said hearing such fact is not established to the satisfaction of the court, the motion for a modification of the order shall be denied, unless the court shall find that, at the time of said hearing the mother is not a fit and proper person to have the custody of said child. Provided, that

the last two provisos shall only apply after the case has been reopened on time. (Rev., s. 1853; Code, s. 1661; 1858-9, c. 53; 1868-9, c. 116, s. 36; 1929, c. 270, s. 1; C. S. 2241.)

Cross References.—As to custody of children in divorce, see § 50-13 and notes thereto. As to persons entitled to custody of children in general, see § 33-2.

Editor's Note.—The Act of 1929 added the two provisos to this section.

Broad Powers Conferred.—This section confers upon the court very large powers to "promote the interest and welfare of the children." *Holley v. Holley*, 96 N. C. 229, 1 S. E. 553; *Knott v. Taylor*, 96 N. C. 553, 2 S. E. 680; *Jones v. Cotten*, 108 N. C. 457, 458, 13 S. E. 161.

When Section Applies.—When, without being divorced, parents are living apart, the question concerning the disposition of their offspring must be decided under the provisions of this section. In *re Habeas Corpus of Jones*, 153 N. C. 312, 69 S. E. 217.

It is essential that the parents must be living in a state of separation "without being divorced" before the court has power in a habeas corpus proceeding to determine the custody of the children. In the matter of *Blake*, 184 N. C. 278, 280, 114 S. E. 294; *McEachern v. McEachern*, 210 N. C. 98, 185 S. E. 684.

Habeas corpus may be used to decide a contest "between any husband and wife, who are living in a state of separation, without being divorced, in respect to the custody of their children." It is not available as between other parties, nor as between divorced parents. In *re Young*, 222 N. C. 708, 709, 24 S. E. (2d) 539.

Except as between parents, the right of custody of a child can not be determined by writ of habeas corpus. In *re Parker*, 144 N. C. 170, 56 S. E. 878.

When Parents Divorced Section 50-13 Applies.—When this section is considered in connection with section 50-13, it becomes apparent that the Legislature intended that the custody of children shall be determined by the court in which the divorce was granted, and, where there is no divorce, by proceedings in habeas corpus. Jurisdiction of the court in which a divorce is granted to award the custody of a child is exclusive and continuing. In the matter of *Blake*, 184 N. C. 278, 281, 114 S. E. 294. See *McEachern v. McEachern*, 210 N. C. 98, 185 S. E. 684.

But where the parties have been divorced and the decree does not award the custody of the children, the procedure to determine the right to their custody, is by motion in the cause, and habeas corpus will not lie, and where in habeas corpus proceedings a decree for absolute divorce between the parties is introduced in the record without objection, but the court makes no finding as to whether the parties had been divorced, but awards the custody of the child to its mother, on appeal the case will be remanded for a finding as to whether the parties had been divorced. In *re Albertson*, 205 N. C. 742, 172 S. E. 411.

Jurisdiction of Juvenile Court.—In *Clegg v. Clegg*, 186 N. C. 28, 118 S. E. 824, it was held that the jurisdiction of the superior court or judge thereof in habeas corpus proceedings between husband and wife, living apart without divorce, where the custody of the minor children of their marriage is claimed by each of them, is not ousted or interfered with by the jurisdiction given by statute to the juvenile court. See also, In the matter of *Blake*, 184 N. C. 278, 114 S. E. 294.

Where Foreign Decree Invalid.—When, under an invalid decree of divorce rendered in favor of the wife in another state, in which the custody of a child was awarded to the wife, it is sought by habeas corpus proceeding in this State to obtain the custody of the child domiciled with its father in this State, the proceeding will be regarded as one between husband and wife living in separation without being divorced. And the custody of the child rests in the sound discretion of the judge, subject to review, on appeal, upon the facts found. *Harris v. Harris*, 115 N. C. 587, 20 S. E. 187.

Parents Have Prima Facie Right to Custody.—In habeas corpus proceedings for the possession of a nine-year old child, the parents of the child, who are living together as lawful man and wife, have prima facie the right to its control and custody. In *re Habeas Corpus of Jones*, 153 N. C. 312, 69 S. E. 217.

Where the father of an infant upon the death of its mother told the grandparents of the child that the latter should always remain with them, but subsequently desired the custody of the child and upon refusal brought habeas corpus proceedings, and it appeared that the father was of good moral character, industrious and kind and in every way fitted to care for and educate the child, the custody was

properly awarded to him. *Latham v. Ellis*, 116 N. C. 30, 20 S. E. 1012.

Same—Welfare of Child First Consideration.—In habeas corpus for the custody of a child the welfare of the child is the first consideration but the father has a natural right of such custody. To lose this right it must be shown that he is not fit to exercise it. In *re Fain*, 172 N. C. 790, 90 S. E. 928.

The right of the parent is not absolute and yields to the welfare of the child when so required. In *re Hamilton*, 182 N. C. 44, 108 S. E. 385.

Same—Same—Custody Awarded to Mother.—The mother, in habeas corpus proceedings against her husband, may be allowed the superior claim when both are equally worthy and it is shown that the welfare of their children requires it. *Clegg v. Clegg*, 186 N. C. 28, 118 S. E. 824. In the opinion of this case, written by Justice Clarkson, there is a comprehensive and able discussion and review of the authorities relating to the custody of children.

But the court will not award the custody of a child to a nonresident mother if it does not appear that the child desires to go to her or that the husband is not a proper person to have it, or that the child will be benefitted by the change. *Harris v. Harris*, 115 N. C. 587, 20 S. E. 187.

Same—Illegitimates.—In the care of illegitimate children, the same prima facie right of the parent to the custody of the offspring exists as in case of legitimacy, perhaps to a lesser degree, in the mother, where she evinces a capacity and disposition to properly care for her children. In *re Habeas Corpus of Jones*, 153 N. C. 312, 69 S. E. 217.

Action by Father against Grandmother.—Where the father of a child brings a writ of habeas corpus against the grandmother for the custody of the child but the contest is to all intents and purposes between the husband and wife for the custody of the child the writ comes within the spirit and letter of this section. In *re Ten Hoopen*, 202 N. C. 223, 162 S. E. 619.

Award Not Necessarily Final with Changed Conditions.—An award in habeas corpus proceedings does not finally determine the rights of the parties to the custody of the child sought in habeas corpus proceedings; and where, in our courts, the award has been in favor of a nonresident mother against the father of the child, the courts, properly established and having jurisdiction at the domicile of the mother, may further hear and determine the matter touching the care and control of the child on such changed conditions, properly established, as would require it. In *re Means*, 176 N. C. 307, 97 S. E. 39.

Habeas Corpus Not Available Where Divorce Is Granted in Another State Where Parents Resided.—Habeas corpus is not available to determine the custody of a child as between its divorced parents and where the divorce is granted in another state of which the parents were residents, the writ is not available to enforce the provisions of the divorce decree relating to the custody of the child as against the mother moving to this State and bringing the child with her. In *re Ogden*, 211 N. C. 100, 189 S. E. 119.

Findings of Fact Are Conclusive When Based on Evidence.—The findings of fact by the court in proceedings in habeas corpus, to determine the custody of minor children of the parties, are conclusive when based on evidence. *McEachern v. McEachern*, 210 N. C. 98, 185 S. E. 684.

Cited in *re Gibson*, 222 N. C. 350, 23 S. E. (2d) 50.

§ 17-40. Appeal to supreme court.—In all cases of habeas corpus, where a contest arises in respect to the custody of minor children, either party may appeal to the supreme court from the final judgment. (Rev., s. 1854; Code, s. 1662; 1858-9, c. 53, s. 2; C. S. 2242.)

No Appeal Except under This Section.—There is no provision for appeal from a judgment in habeas corpus proceedings, except in cases concerning the care and custody of children under this section. In *re Holley*, 154 N. C. 163, 166, 69 S. E. 872.

It is a significant indication of the legislative intent in giving an appeal in this case only, not to recognize it in other cases. *State v. Miller*, 97 N. C. 451, 454, 1 S. E. 776.

Death of Party Pending Appeal.—Where in a habeas corpus proceeding brought to secure the custody of infant children, the respondent (in whose favor judgment had been rendered below) died pending appeal, it was held, that the proceeding abated, and could not be revived against the personal representative. *Brown v. Rainor*, 108 N. C. 204, 12 S. E. 1028.

Judgment of Superior Court Stayed Pending Appeal.—Upon appeal to the Supreme Court from an order of the judge of the superior court in habeas corpus proceedings be-

tween husband and wife for the custody of the minor children of the marriage upon petition of the wife, living by mutual consent separated from her husband, without divorce, it is within the power of the Supreme Court, upon notification to the adverse party to appear before one of the Justices, and after a regular hearing, for the Justice to allow a supersedeas bond in a fixed amount, to stay the judgment of the lower court pending appeal, and by consent to set the hearing after the call of a certain district in the Supreme Court in term. *Clegg v. Clegg*, 186 N. C. 28, 118 S. E. 824.

Discretion in Supreme Court.—When the superior court judge has entered judgment in habeas corpus proceedings between husband and wife, and has found the facts upon which his judgment was based, and both parties appeal, the Supreme Court, in its sound legal discretion, may review the judgment and affirm, reverse, or modify it. *Clegg v. Clegg*, 186 N. C. 28, 118 S. E. 824; *Atkinson v. Downing*, 175 N. C. 244, 95 S. E. 487.

What Reviewed.—Upon an appeal from a judgment upon a writ of habeas corpus awarding the custody of a minor child, the court will only review errors of "law or legal inference," Constitution, Art. IV, Section 8, and not the findings of fact made by the lower court upon competent evidence; and this section allowing an appeal in such cases, does not affect the matter. *Stokes v. Cogdell*, 153 N. C. 181, 69 S. E. 65.

Decree as between Divorced Parents Is Not Appealable.—A decree in habeas corpus proceedings to determine the custody of a child as between its divorced parents is not appealable, since the proceeding does not come within the provisions of this and § 17-39, nor will the provisions made for the child be considered when the judge below finds that the child is in school and is being properly cared for by the parent having its custody, and awards its custody to such parent during the school term, the sole remedy being by certiorari to invoke the constitutional power of the Supreme Court to supervise and control proceedings of inferior courts. *In re Ogden*, 211 N. C. 100, 189 S. E. 119.

Applied in *In re Albertson*, 205 N. C. 742, 172 S. E. 411.

Art. 8. Habeas Corpus Ad Testificandum.

§ 17-41. Authority to issue the writ.—Every court of record has power, upon the application of any party to any suit or proceeding, civil or criminal, pending in such court, to issue a writ of habeas corpus, for the purpose of bringing before the said court any prisoner who may be detained in any jail or prison within the state, for any cause, except a prisoner under sentence for a capital felony, to be examined as a witness in such suit or proceeding in behalf of the party making the application.

Such writ of habeas corpus may be issued by any justice of the peace or clerk of the superior court, upon application as provided in this section, to bring any person confined in the jail or prison of the same county where such justice or clerk may reside, to be examined as a witness before such justice or clerk.

In cases where the testimony of any prisoner is needed in a proceeding before a justice of the peace, or a clerk, and such person is confined in a county in which such justice or clerk does not reside, application for habeas corpus to testify may be made to any judge of the supreme or superior court. (Rev., ss. 1855, 1856; Code, ss. 1663, 1664; 1868-9, c. 116, ss. 37, 38; C. S. 2243.)

An Inherent Power.—The right to bring a person, whose presence is necessary, before a court for the exercise of its powers is inherent in every court of general jurisdiction, and its exercise is essential to the preservation of its power and dignity. *State v. Haskins*, 77 N. C. 530; *Haskins v. Cathey*, 119 N. C. 649, 664, 26 S. E. 136.

No Application to State.—This section applies only to parties strictly so called, and not to the State. *Ex parte Harris*, 73 N. C. 65, citing *State v. Adair*, 68 N. C. 68.

Murderer Is Competent Witness.—One who has been convicted of murder, and is under sentence of death, is a competent witness; and the solicitor for the State is entitled to a habeas corpus to bring such condemned prisoner into court for the purpose of testifying before the grand jury. *Ex parte Harris*, 73 N. C. 65.

Same—Objection Untenable.—When the State has procured the attendance of a witness under sentence of death, the objection by the defendant that he could not be procured by writ of habeas corpus ad testificandum under this section, is untenable, this not applying to the State; nor will objection avail that the time set for the execution had passed, and the witness, being dead, in the eye of the law, could not testify, the witness having been present and having testified. *State v. Jones*, 176 N. C. 702, 97 S. E. 32.

§ 17-42. Contents of application.—The application for the writ shall be made by the party to the suit or proceeding in which the writ is required, or by his agent or attorney. It must be verified by the applicant, and shall state—

1. The title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired.

2. That the testimony of such prisoner is material and necessary to such party on the trial or hearing of such suit or proceeding, as he is advised by counsel and verily believes. (Rev., s. 1857; Code, s. 1665; 1868-9, c. 116, s. 39; C. S. 2244.)

§ 17-43. Service of writ.—The writ of habeas corpus to testify shall be served by the same person, and in like manner in all respects, and enforced by the court or officer issuing the same as prescribed in this chapter for the service and enforcement of the writ of habeas corpus cum causa. (Rev., s. 1858; Code, s. 1666; 1868-9, c. 116, s. 40; C. S. 2245.)

Cross Reference.—As to service of writ in habeas corpus proceedings, see § 17-12.

§ 17-44. Applicant to pay expenses and give bond to return.—The service of the writ shall not be complete, however, unless the applicant for the same tenders to the person in whose custody the prisoner may be, if such person is a sheriff, coroner, constable or marshal, the fees and expenses allowed by law for bringing such prisoner, nor unless he also gives bond, with sufficient security, to such sheriff, coroner, constable or marshal, as the case may be, conditioned that such applicant will pay the charges of carrying back such prisoner. (Rev., s. 1859; Code, s. 1667; 1868-9, c. 116, s. 41; C. S. 2246.)

§ 17-45. Duty of officer to whom writ delivered or on whom served.—It is the duty of the officer to whom the writ is delivered or upon whom it is served, whether such writ is directed to him or not, upon payment or tender of the charges allowed by law, and the delivery or tender of the bond herein prescribed, to obey and return such writ according to the exigency thereof upon pain, on refusal or neglect, to forfeit to the party on whose application the same has been issued the sum of five hundred dollars. (Rev., s. 1860; Code, s. 1668; 1868-9, c. 116, s. 42; C. S. 2247.)

§ 17-46. Prisoner to be remanded.—After having testified, the prisoner shall be remanded to the prison from which he was taken. (Rev., s. 1861; Code, s. 1669; 1868-9, c. 116, s. 43; C. S. 2248.)

Chapter 18. Regulation of Intoxicating Liquors.

Art. 1. The Turlington Act.

- Sec.
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- 18-36. Purposes of article.
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18-42. Compensation for members of county boards.
18-43. Persons disqualified for membership on boards.
18-44. Bonds required of members of county boards.
18-45. Powers and duties of county boards.
18-46. No sales except during hours fixed by county boards; sales to minors, habitual drunkards, etc.; discretion of managers and employees; list of persons convicted of drunkenness, etc.; unlawful to buy for person prohibited.
18-47. Drinking upon premises prohibited; stores closed on Sundays, election days, etc.
18-48. Possession illegal if taxes not paid; punishment and forfeiture for violations; possession in container without proper stamp, prima facie evidence.
18-49. Transportation, not in excess of one gallon, authorized; transportation in course of delivery to stores.
18-50. Possession for sale and sales of illicit liquors; sales of liquors purchased from stores.
18-51. Drinking or offering drinks on premises of stores, and public roads or streets; drunkenness, etc., at athletic contests or other public places.
18-52. Advertising permitted in newspapers, magazines and periodicals.
18-53. Advertising by county A. B. C. stores and on billboards prohibited.
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18-55. Additional regulations as to advertising.
18-56. Salaries and expenses paid from proceeds of sales.
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18-58. Transportation into state; and purchases, other than from stores, prohibited.
18-59. Violations by member or employee of boards, cause for removal and punishable as misdemeanor.
18-60. Definition of "alcoholic beverage."
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18-62. Elections in counties now operating stores, not required for continued operation.

Art. 4. Beverage Control Act of 1939.

- 18-63. Title.
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- 18-72. Character of license.
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- 18-79. State license.
- 18-80. State license to sell wine at retail.
- 18-81. Additional tax.
- 18-82. By whom tax payable.
- 18-83. Non-resident manufacturers and wholesale dealers to be licensed.
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- 18-90. Appropriation for administration.
- 18-90.1. Sale to minors under 18 a misdemeanor.
- 18-91. Violation made misdemeanor; revocation of permits; forfeiture of license.

Art. 1. The Turlington Act.

§ 18-1. Definitions; application of article. — When used in this article—

(1) The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt or fermented liquors, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume, which are fit for use for beverage purposes: Provided, that the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process of which beer, ale, porter, or wine is produced, if it contains less than one-half of one per cent of alcohol by volume, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, sealed and labeled bottles, casks, or containers, and is made in accordance with the regulations set forth in Title II of "The Volstead Act," an act of Congress enacted October twenty-eight, one thousand nine hundred and nineteen, and an act supplemental to the National Prohibition Act, "H. R. 7294," an act of Congress approved November twenty-third, one thousand nine hundred and twenty-one.

(2) The word "person" shall mean and include natural persons, associations, copartnerships, and corporations.

(3) This article shall not make unlawful any acts authorized or permitted by §§ 18-100 through

Sec.

- 18-92. Effective date.
- 18-93. Adoption of federal regulations.

Art. 5. Fortified Wine Control Act of 1941.

- 18-94. Title of article.
- 18-95. Purpose of article.
- 18-96. Definition of "fortified wines."
- 18-97. Certain sales, etc., prohibited; names of persons ordering wines furnished police or sheriff.
- 18-98. Violation made misdemeanor.
- 18-99. Application of other laws; sale of sweet wines; licensing of wholesale distributors.

Art. 6. Light Domestic Wines; Manufacture and Regulation.

- 18-100. Manufacture of domestic wines permitted.
- 18-101. Manufacture by any person, firm or corporation authorized to do business in state.
- 18-102. Rules and regulations of commissioner of agriculture.
- 18-103. Information furnished farmers.
- 18-104. Fruit ciders included.

Art. 7. Beer and Wine; Hours of Sale.

- 18-105. Sale between certain hours unlawful.
- 18-106. Permitting consumption on premises during certain hours unlawful.
- 18-107. Regulation by counties and municipalities.
- 18-108. Violation a misdemeanor; revocation of license.

18-104, as amended, authorizing cultivation and manufacture of light domestic wines; by §§ 18-36 through 18-62, the Alcoholic Beverage Control Act of 1937 as amended; by §§ 18-63 through 18-92, the Beverage Control Act of 1939 as amended; and by §§ 18-94 through 18-99, the Fortified Wine Control Act of 1941. (1923, c. 1; s. 1; C. S. 3411(a).)

Editor's Note.—For a summary review of this statute, see 1 N. C. L. Rev. 303.

This article is popularly known as the Turlington Act and is often referred to in cases as such. The act was intended to make the state law conform in a substantial manner to the federal Volstead Act. See *State v. Davis*, 214 N. C. 787, 1 S. E. (2d) 104; *State v. Carpenter*, 215 N. C. 635, 3 S. E. (2d) 34.

Similarity to Volstead Act.—This and the following section are, in many respects, the same as "The Volstead Act," although more stringent. *State v. Sigmon*, 190 N. C. 684, 690, 130 S. E. 854.

An act by our Legislature to make the State law conform to the "Volstead Act" passed by Congress, is valid, and in some respects more stringent than the Congressional act. *State v. Hickey*, 198 N. C. 45, 46, 150 S. E. 615.

Same—Power of State to Pass Stricter Regulation.—The State has the power through legislation to further regulate and control the manufacture, sale, etc., of intoxicating liquor beyond the restrictions contained in a Federal statute upon the subject, the latter prevailing in interstate regulations in case of conflict; and the State statute may consistently give further effect or efficiency to the Federal statute upon the subject as it relates to State regulation. *State v. Hammond*, 188 N. C. 602, 125 S. E. 402.

Effect upon Existing Legislation.—This act, with certain reservations as to existing State laws, establishes the rule now prevailing on the subject of prohibition and it applies to the extent that it is inconsistent with former legislation and is in conformity with valid Federal statutes on the subject where interstate regulation is concerned. *State v. Hammond*, 188 N. C. 602, 125 S. E. 402.

Beverages Not Enumerated.—It may be shown in evi-

dence as a fact that other beverages than those defined by this section as intoxicating and prohibited are intoxicating in fact and come within the intent and meaning of the statute. *State v. Fields*, 201 N. C. 110, 159 S. E. 11.

"Spirituuous Liquors."—See *State v. Giersch*, 98 N. C. 720, 4 S. E. 193.

Cited in Hill v. Board of County Com'rs, 209 N. C. 4, 182 S. E. 709; *Sprunt v. Hewlett*, 208 N. C. 695, 182 S. E. 655; *Inscow v. Boone*, 208 N. C. 698, 182 S. E. 926; *State v. Ellis*, 210 N. C. 166, 185 S. E. 663; *State v. Dowell*, 195 N. C. 523, 525, 143 S. E. 133.

§ 18-2. Manufacture, sale, etc., forbidden; construction of law; nonbeverage liquor.—No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor except as authorized in this article; and all the provisions of this article shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as provided by Title II of "The Volstead Act," act of congress enacted October twenty-eighth, one thousand nine hundred and nineteen, an act supplemental to the National Prohibition Act, "H. R. 7294," an act of congress approved November twenty-third, one thousand nine hundred and twenty-one. (1923, c. 1, s. 2; C. S. 3411(b).)

Cross References.—As to law allowing sale, the Alcoholic Beverage Control Act of 1937, see §§ 18-36 to 18-62, and the Beverage Control Act of 1939, see §§ 18-63 to 18-93.

Constitutionality.—The State in its inherent and reserved power preserved to it by the Tenth Amendment to the Federal Constitution may enact valid laws relating to prohibition when not in conflict with the Eighteenth Amendment to the Federal Constitution, or congressional legislation, and this section, making the purchase of intoxicating liquor a criminal offense, is valid and enforceable. *State v. Lassiter*, 198 N. C. 352, 151 S. E. 721.

Effect of Acquiring Possession Prior to Act.—Evidence tending to show that the defendant had intoxicating liquor in his possession before the efficacy of this act, is not a defense under the provisions of this act for the defendant's possession a year thereafter, upon the trial for violating the prohibition law. *State v. Knight*, 188 N. C. 630, 125 S. E. 406.

Effect on Recovery under Compensation Act.—The mere fact that an applicant for compensation under the provisions of the Workmen's Compensation Act had in his possession whiskey contrary to this section does not alone prevent the recovery of compensation. *Jackson v. Dairy-men's Creamery*, 202 N. C. 196, 162 S. E. 359.

When Receipt Prohibited.—There is no provision in this act which in express terms prohibits one from receiving intoxicating liquors. Except as embraced and included by the acts which are prohibited in the statute, the mere receiving of intoxicating liquors is not forbidden. *State v. Hammond*, 188 N. C. 602, 608, 125 S. E. 402.

It is bad pleading to make the mere receipt of liquor the subject of a separate and independent count; and the charge that the mere receipt of same, though only in the home of the recipient, and kept there only for a lawful purpose, is forbidden, is not warranted by any proper construction of the statute that has been suggested to us. *State v. Hammond*, 188 N. C. 602, 608, 125 S. E. 402.

Section Liberally Construed—What Amounts to Possession.—This section was expressly made to be liberally construed to prevent intoxication, and makes it unlawful for one to possess intoxicating liquor, with restricted qualifications; and a conviction will be sustained under a verdict of guilty upon evidence tending to show that the defendant received a bottle of intoxicating liquor from another, took a drink therefrom, and handed the bottle back to the one from whom he had received it, neither of them being upon his own premises. *State v. McAllister*, 187 N. C. 400, 121 S. E. 739.

Character of Possession Necessary.—The possession may, within this statute, be either actual, or constructive. *State v. Meyers*, 190 N. C. 239, 243, 129 S. E. 600. See also *State v. Norris*, 206 N. C. 191, 173 S. E. 14.

A prima facie case of the unlawful sale of intoxicating liquors may be established by circumstances sufficient to

show that the defendant had in his constructive possession large quantities of whiskey not on his premises, in the possession of others who held it for him. *State v. Pierce*, 192 N. C. 766, 136 S. E. 121.

If a man procures another to obtain liquor for him and put it in a given place, and the other performs this agreement and places the liquor, then the possession is complete. A person may be in the possession of the article which he has not at the moment about his person. The constructive possession, as well as the actual possession, is in the contemplation of the statute. *State v. Pierce*, 192 N. C. 766, 769, 136 S. E. 121; *State v. Meyers*, 190 N. C. 239, 129 S. E. 600.

Transportation as Including Possession.—Where the evidence is sufficient to convict the defendant of transporting whiskey under this and the following section, the transportation of spirituuous liquor includes the possession. *State v. Sigmon*, 190 N. C. 684, 130 S. E. 854.

Where an indictment for violating our prohibition law contains a count as to the unlawful possession and also unlawfully transporting spirituuous liquor, an acquittal upon the first is not inconsistent with a conviction on the second issue. They are two distinct offenses under the statute. *State v. Sigmon*, 190 N. C. 684, 130 S. E. 854.

Purpose of Possession.—Upon the trial for transporting intoxicating liquors in violation of our statute, the purpose of the possession of the intoxicants, or that they were for the purpose of profit, are immaterial, and the fact that the person accused is carrying them from one place to another is sufficient. *State v. Sigmon*, 190 N. C. 684, 130 S. E. 854.

Possession—Admissibility of Evidence.—Where on a trial for unlawful possession of intoxicating liquor there is evidence tending to show that on the premises of the defendant's gasoline station two barrels partly containing whiskey were found concealed, buried in the ground and encased in concrete of the same character and material as the filling station, etc., testimony of the officer that the barrels, from the indication, had thus been there since the building of the station is competent as tending to show that the possession of the whiskey was for an unlawful purpose. *State v. Hege*, 194 N. C. 526, 140 S. E. 80.

Evidence tending to show that defendant was apprehended while driving a car owned by him, that he fled the scene with his companion in the car when it bogged down in the mud, and that three and a half gallons of untaxed liquor was found in the car, is held sufficient to be submitted to the jury on the charge of illegal possession of intoxicating liquor for the purpose of sale and on the charge of unlawfully transporting intoxicating liquor, as charged in the bill of indictment. *State v. Epps*, 213 N. C. 709, 197 S. E. 580.

Same—Evidence Sufficient to Go to Jury.—On a trial for the unlawful possession of intoxicating liquors, evidence of the State tending to show that the defendant had several gallons of whiskey concealed on the premises of his gasoline station held, sufficient to take the case to the jury on defendant's motion to dismiss upon the State's evidence. *State v. Hege*, 194 N. C. 526, 140 S. E. 80.

Same—Defense.—Where the defendant is indicted for the unlawful possession of whiskey under this section, evidence of its possession before the enactment of the statute is no defense. *State v. Hege*, 194 N. C. 526, 140 S. E. 80.

Purchase and Transportation for Use in Home.—It is unlawful to purchase and transport intoxicating liquor under this section even though it is intended for use in the home under section 18-11. *State v. Winston*, 194 N. C. 243, 139 S. E. 240.

Separate Offenses Charged in Same Warrant.—The offenses of delivering, and of keeping for sale, are separate offenses under this act and although charged in the same warrant, they will be treated as separate counts. *State v. Jarrett*, 189 N. C. 516, 127 S. E. 590.

Sufficiency of Evidence—To Convict of Transporting.—Where a car, parked with the rear to the road and with the tail light concealed by a cap but with the front lights on, and the rear of the car smelled of liquor, and empty jugs, and a funnel which smelled of liquor, were found on the ground near, and someone ran through the field as the officers approached the car, and the officers arrested the defendant who came up after their arrival, carried him to jail, and upon return to the place found the jug and funnel gone, and a car which passed ran up the road a piece turned around and came back, it was held that the facts were sufficient to justify a finding "beyond a reasonable doubt that not only defendant was transporting liquors, but he had confederates and had been getting the liquor and had sold out and gone back to them to get another load. He had all the implements of a blind-tiger transporting liquor. The officers caught him before he had gotten his new supply." *State v. Sigmon*, 190 N. C. 684, 130 S. E. 854.

Same—To Deny Nonsuit.—Evidence in this case tending to show that the defendant lived in a part of his filling station used as a residence, where was found a quantity of empty bottles smelling of whisky, and that in the vicinity was a used roadway leading to several places where cartons with bottles of whiskey were concealed, etc., was sufficient to deny defendant's motion as of nonsuit. *State v. Pierce*, 192 N. C. 766, 136 S. E. 121.

A motion for nonsuit upon the evidence on the trial for a violation of the prohibition law, will be denied when, though circumstantial, the evidence is sufficient upon the question of possession and unlawful transportation of intoxicating liquor. *State v. Meyers*, 190 N. C. 239, 129 S. E. 600.

Where the man went to feed his hogs, the wife ran out of the house with liquor and hid it; the boy took some and ran and spilled it as he ran; the daughter covered up an old 30-gallon drum, the evidence as to violation of this section and section 18-4 was sufficient to refuse a nonsuit. *State v. Norris*, 206 N. C. 191, 197, 173 S. E. 14.

Harmless Error.—When a defendant is charged in two counts in the bill of indictment with separate offenses of the same grade, and the jury returns a verdict of guilty as to both counts, error in the trial of one count is harmless and does not entitle defendant to a new trial when such error does not affect the verdict on the other count. *State v. Epps*, 213 N. C. 709, 197 S. E. 580.

General Verdict Sufficient for Conviction.—A general verdict of guilty, under evidence tending to show that the defendant unlawfully had in his possession, when not in his private dwelling, intoxicating liquor, under an indictment therefor, as well as for the unlawful receiving and transportation, is sufficient to sustain a conviction upon the count of possession prohibited. *State v. McAllister*, 187 N. C. 400, 121 S. E. 739.

Same—Erroneous Charge as to Separate Count Harmless.—Where a general verdict of guilty has been rendered against the defendant, upon competent evidence, tending to show that he unlawfully had spirituous liquor in his possession, an erroneous charge as to receiving and transporting it, is harmless error. *State v. McAllister*, 187 N. C. 400, 121 S. E. 739.

Sentence of Two Years Constitutional.—A sentence of two years for violating this Act will not be held as inhibited by our State Constitution as cruel and unusual, by reason of the fact that the judge after the trial and before sentence made inquiry into the character of the defendant, the sentence imposed being in conformity with the provisions of the statute. *State v. Beavers*, 188 N. C. 595, 125 S. E. 258.

Distinct Charges Supporting Separate Sentences.—A charge of unlawful possession of intoxicating liquors for the purpose of sale and a charge of unlawful sale of intoxicating liquors, are distinct charges of separate offenses, and support separate sentences by the court on a general plea of guilty. *State v. Moschoure*, 214 N. C. 321, 199 S. E. 92.

Cited in State v. Dowell, 195 N. C. 523, 525, 143 S. E. 133; *State v. Scoggins*, 199 N. C. 821, 155 S. E. 927; *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9 (dis. op.).

§ 18-3. Advertisements, signs, and billboards.—It shall be unlawful to advertise, anywhere or by any means or method, liquor, or the manufacture, sale, keeping for sale or furnishing of the means, or where, how, from whom, or at what price the same may be obtained. No one shall permit any sign or billboard containing such advertisement to remain upon one's premises: Provided, the foregoing provision shall not prohibit newspaper, radio, billboard or other forms of advertising for sale of beer, lager beer, ale, porter, fruit juices and/or other light wines containing not more than 3.2 per cent of alcohol by weight. (1923, c. 1, s. 3; 1933, cc. 216, 229; C. S. 3411(c).)

Cross References.—As to unlawful posting of advertisements without consent of owner, see § 14-145. As to advertising under the Alcoholic Beverage Control Act, see §§ 18-53, 18-54, and 18-55.

§ 18-4. Advertising, etc., of utensils, etc., for use in manufacturing liquor.—It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or receipt advertised, designed, or intended for use in the unlawful manufacture of

intoxicating liquor. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this article, or which has been so used, and no property rights shall exist in any such liquor or property. (1923, c. 1, s. 4; C. S. 3411(d).)

Possession of Property Designed for Manufacture.—An indictment charging the defendant with a violation of this section, in that he had in his possession property designed for the manufacture of intoxicating liquor is not identical with a charge of an attempt to commit a crime. *State v. Jaynes*, 198 N. C. 728, 153 S. E. 410.

"Designated."—In the interpretation of this section making it unlawful to possess any property "designated" for use in manufacturing intoxicating liquor, the word "designated" is construed to mean "designed," and so used it is held in this case that evidence of the defendant's guilt of possessing parts of a still designed and intended for the purpose of manufacturing intoxicating liquor was sufficient to be submitted to the jury and to sustain their verdict of guilty, and the fact that the parts had not been assembled into a distillery is immaterial under the language of the statute. *State v. Jaynes*, 198 N. C. 728, 153 S. E. 410.

§ 18-5. Soliciting orders for liquor.—No person shall solicit or receive, nor knowingly permit his employee to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of this article. (1923, c. 1, s. 5; C. S. 3411(e).)

§ 18-6. Seizure of liquor or conveyance; arrests; sale of property.—When any officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating liquor in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquor found therein being transported contrary to law. Whenever intoxicating liquor transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this article in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court, upon the conviction of the person so arrested, shall order the liquor destroyed, and, unless the claimant can show that the property seized is his property, and that the same was used in transporting liquor without his knowledge and consent, with the right on the part of the claimant to have a jury pass upon his claim, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used for illegal transportation of liquor, and shall pay the balance of the proceeds to the treasurer

or the proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or, if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold, and the proceeds, after deducting the expenses and costs, shall be paid to the treasurer or proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county: Provided, that nothing in this section shall be construed to authorize any officer to search any automobile or other vehicle or baggage of any person without a search warrant duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor in such vehicle or baggage. (1923, c. 1, s. 6; C. S. 3411(f).)

Cross References.—As to disposal of tax-paid liquor that has been seized, see § 18-13. As to fines to be paid into treasurer's office for school fund, see § 153-58, § 115-177 et seq.; N. C. Const., Art. IX, § 5. As to search warrants, see § 18-13.

Editor's Note.—For article discussing limits to search and seizure, see 15 N. C. Law Rev. 229. See also, 15 N. C. Law Rev. 101.

Meaning of "Absolute Personal Knowledge."—Under this section an officer "discovers any person in the act" and has "absolute personal knowledge" (1) when he sees the liquor; (2) when he has absolute personal knowledge . . . acquired through the senses of seeing, hearing, smelling, tasting or touching. 15 N. C. Law Rev. 131, citing *State v. Godette*, 188 N. C. 497, 125 S. E. 24.

Constitutionality.—The provisions of this section do not contravene the provisions of the State Constitution, Art. I, secs. 11 and 15. *State v. Godette*, 188 N. C. 497, 125 S. E. 24.

Arrest without Warrant.—An arrest may not be lawfully made by the properly authorized officers of the law for the violation of our prohibition law, for the transportation of intoxicating liquors upon mere unfounded suspicion arising from information received that the supposed offenders would thus transgress the law on a future occasion, and an arrest so made, not upon an offense committed in the officers' presence or to their personal knowledge as to the particular offense, and without a search warrant, is unlawful and entitles the plaintiff in his action therefor, to recover damages. *State v. DeHerrodora*, 192 N. C. 749, 136 S. E. 6.

It follows that for an officer to fire upon a passing automobile with only an erroneous suspicion that the occupants thereof were thus unlawfully engaged, is without warrant of law, and the unintentional killing of one of those suspected as a result, is manslaughter at least, and a verdict thereof under conflicting evidence will be sustained on appeal. *State v. Simmons*, 192 N. C. 692, 135 S. E. 866.

But where there is evidence that acting upon information previously received that intoxicating liquors are being unlawfully transported, the proper officers of the law lie in wait for and follow automobile, and can see containers and smell the liquor, they have a right to arrest without warrant and seize the vehicle. *State v. Godette*, 188 N. C. 497, 125 S. E. 24.

Same—Evidence Not Excluded.—The arrest by the officer of the law without a warrant, being valid under the provisions of our statute, it may not successfully be maintained that evidence thereof should have been excluded. *State v. Godette*, 188 N. C. 497, 125 S. E. 24.

A search warrant is not necessary to search a suitcase for intoxicating liquor when carried by the defendant after arrest, when under the circumstances the officer had rea-

sonable grounds for belief that it contained intoxicating liquor, and these conditions do not fall within the intent of this section. *State v. Jenkins*, 195 N. C. 747, 143 S. E. 538.

The "baggage" of the proviso of this section, refers to baggage accompanying or in the vehicle transporting the intoxicating liquor. *State v. Jenkins*, 195 N. C. 747, 750, 143 S. E. 538.

By "baggage" is understood such articles of personal convenience or necessity as are usually carried by passengers for their personal use, and not merchandise or other valuables, though carried in the trunk of a passenger, but which are not, however, designed for such use, but for other purposes, such as sale and the like. *State v. Jenkins*, 195 N. C. 747, 751, 143 S. E. 538.

A suitcase or traveling bag with four one-half gallon cans of contraband liquor in it is not baggage, under the definition in this section. *State v. Jenkins*, 195 N. C. 747, 751, 143 S. E. 538.

"Other Vehicle"—Suit Case.—A suitcase carried in one's hand along a public highway would not be an "other vehicle" within the meaning of this section. *State v. Jenkins*, 195 N. C. 747, 750, 143 S. E. 538.

Search without Warrant.—Officers have no authority to search a car without a warrant, under this section where they do not see or have "absolute personal knowledge" that there is intoxicating liquor in his car. *State v. Simmons*, 192 N. C. 692, 135 S. E. 866; *State v. Godette*, 188 N. C. 497, 125 S. E. 24; *State v. DeHerrodora*, 192 N. C. 749, 753, 136 S. E. 6.

Forfeiture of Property Used.—See article in 2 N. C. Law Rev. 126 for a review of the cases and statutes.

Use of Vehicle without Knowledge of Owner.—An instruction that if the jury should find by the greater weight of the evidence that petitioner, the owner of a car seized while being used in the unlawful transportation of intoxicating liquor, aided her husband in attempting flight to avoid arrest, to answer in the affirmative the issue of petitioner's knowledge that the car was being used for the transportation of liquor, is error when petitioner testifies that she did not know her husband was transporting liquor and that she thought the sheriff was pursuing them to serve a capias on her husband for a past offense, there being no evidence inconsistent with such belief on the part of petitioner, and the credibility of petitioner's testimony being for the jury. *State v. Ayres*, 220 N. C. 161, 16 S. E. (2d) 689.

Rights of License on Automobile Forfeited and Sold.—This section expressly transfers the lien upon an automobile seized and sold for the unlawful transportation of liquor to the proceeds of the sale, and does not deprive the lienor of his property in conflict with Const., Art. 1, § 17, or with the Due Process Clause of the Federal Constitution, the statute prescribing notice by publication, and the mode of giving notice being peculiarly a legislative function. *C. I. T. Corporation v. Burgess*, 199 N. C. 23, 153 S. E. 634.

One claiming a lien under an unregistered mortgage on an automobile seized and sold under the provisions of this section, after notice by publication required by the statute, may not successfully maintain his action for possession of the car against the purchaser at the sale had in conformity with law, though he may not have been aware of the proceedings and had no knowledge of the unlawful use of the automobile at the time of its seizure. *C. I. T. Corporation v. Burgess*, 199 N. C. 23, 153 S. E. 634.

Liability of Sheriff for Destruction of Vehicle.—In a case arising prior to this section it was held that where the sheriff took an automobile in custody under a corresponding statute and while he was holding it in a storage garage according to law, it was destroyed by fire through no fault of his, he was not liable on his forthcoming bond. There were two dissenting opinions filed. *Motor Co. v. Sands*, 186 N. C. 732, 120 S. E. 459.

§ 18-7. Use of seized property forbidden.—It shall be unlawful for any State, county, township or municipal officer to use or cause to be used for any purpose whatsoever any automobile or other article of personal property seized by said officer for the reason that the owner of said property or one in possession thereof at time of seizure has violated the terms of the State or Federal prohibition laws, or any other laws, until the respective rights of the owner, or person in possession at time of seizure, or mortgagee if one should intervene, are passed upon by the proper court, and final order is made as to proper disposition of said personal property so seized.

It shall be the duty of the officer seizing said automobile or other personal property to store same in a safe and suitable place, until final disposition is ordered.

Any officer or officers violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed fifty dollars or imprisoned not to exceed thirty days. (1927, c. 18.)

§ 18-8. Witnesses; self crimination; immunity.

—No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence in obedience to a subpoena of any court in any suit or proceeding based upon or growing out of any alleged violation of this article, but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, he may so testify or produce evidence; but no person shall be exempt from prosecution and punishment for perjury committed in so testifying. (1923, c. 1, s. 7; C. S. 3411(g).)

Cross References.—As to general rule of evidence that defendant in criminal action is competent but not compellable to testify, see § 8-54. As to perjury, see § 14-209 et seq.

Validity.—Former statute held valid. *State v. Randall*, 170 N. C. 757, 87 S. E. 227.

Immunity Must Be Claimed Under Section.—The immunity from punishment of an offender against our prohibition law when testifying against others charged with the same offense, must be claimed by him under the provisions of this section which superseded C. S. sec. 3406, so as to make our statute conform to the Federal Act, whereunder no discovery made by such person shall be used against him and he shall be altogether pardoned for the offense done or participated in by him. *State v. Luquire*, 191 N. C. 479, 132 S. E. 162.

Voluntary Testimony of Offender.—The evidence in criminal prosecutions that may not be received from the offender, is such as is compulsory, and does not apply to one volunteering his testimony and willingly giving it. *State v. Luquire*, 191 N. C. 479, 132 S. E. 162.

Same—Waiver.—An offender against the criminal law relating to prohibition may waive his constitutional right not to give evidence that would tend to incriminate himself by his voluntary act in so doing. *State v. Luquire*, 191 N. C. 479, 132 S. E. 162.

Testimony at Former Trial.—Where a witness on a former trial for violating the prohibition law against the manufacture or sale of intoxicating liquor has voluntarily testified as to matters which may tend to incriminate him, claiming no exemption or immunity when called upon to testify, it is competent for witnesses to testify thereto at the second trial, who were present and heard the testimony at the former one, the testimony not coming within the terms of this section. *State v. Burnett*, 184 N. C. 785, 115 S. E. 57.

§ 18-9. Place of sale and delivery; place of prosecution.—In case of a sale of liquor where the delivery thereof was made by a common or other carrier, the sale and delivery shall be deemed to be made in the county wherein the delivery was made by such carrier or the consignee, his agent or employee, or in the county wherein the sale was made, or from which the shipment was made, and prosecution for such sale or delivery may be had in either county. (1923, c. 1, s. 8; C. S. 3411(h).)

§ 18-10. Uniting separate offenses in indictment, etc.; bill of particulars; trial.—In any affidavit, information, warrant, or indictment for the violation of this article, separate offenses may be united in separate counts, and the defendant may be tried on all at one trial, and the penalty

for all offenses may be imposed. It shall not be necessary in any affidavit, information, warrant, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful; but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so. (1923, c. 1, s. 9; C. S. 3411(i).)

§ 18-11. Possession prima facie evidence of keeping for sale.—The possession of liquor by any person not legally permitted under this article to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this article. But it shall not be unlawful to possess liquor in one's private dwelling while the same is occupied and used by him as his dwelling only, provided such liquor is for use only for the personal consumption of the owner thereof, and his family residing in such dwelling, and of his bona fide guests when entertained by him therein. (1923, c. 1, s. 10; C. S. 3411(j).)

Editor's Note.—For a discussion of the wisdom of permitting proof of possession to raise a presumption of unlawful handling for gain, see 5 N. C. Law Rev. 302.

Liberal Construction.—This section is to be liberally construed to prevent the use of liquor as a beverage; and the possession of such liquor is made prima facie evidence of the violation of the law, but the possession thereof for the personal consumption of the owner and bona fide guests, etc., is allowed. *State v. Hammond*, 188 N. C. 602, 125 S. E. 402.

Section Limited to Private Dwelling Used Exclusively as a Dwelling.—The provision of this section that a person may legally possess intoxicating liquor in his dwelling for his personal consumption is limited by its terms to a private dwelling occupied and used exclusively as a dwelling, and a person may not lawfully possess intoxicating liquor in a building or structure used and operated by such person as a filling station and dwelling combined when the parts of the structure used for the respective purposes are connected. *State v. Hardy*, 209 N. C. 83, 182 S. E. 831.

The provision of this section permitting the possession of intoxicating liquor for personal use applies only to possession in a structure used exclusively as a dwelling, and therefore defendants' possession in the structure used as a dwelling and store house was illegal. *State v. Carpenter*, 215 N. C. 635, 3 S. E. (2d) 34.

Possession as Evidence of Sale.—If one had possession of liquor as disclosed by this record it was prima facie evidence that he had it for sale. If not in his private dwelling, if he had actual constructive possession, whether for sale or not, it is a violation of law. *State v. Pierce*, 192 N. C. 766, 770, 136 S. E. 121; *State v. McAllister*, 187 N. C. 400, 121 S. E. 739; *State v. Knight*, 188 N. C. 630, 125 S. E. 406.

But the prima facie case so established may be rebutted by showing that possession was lawful under the statutory qualification, the burden remaining with the State to show guilt beyond a reasonable doubt. *State v. Hammond*, 188 N. C. 602, 125 S. E. 402.

However, the mere possession unrebutted is sufficient to carry the issue to the jury. *State v. Hammond*, 188 N. C. 602, 607, 125 S. E. 402.

Prima Facie Evidence Applies to Possession in Private Dwelling.—The prima facie evidence arising under this section from the possession of liquor applies to possession in a private dwelling or elsewhere. *State v. Dowell*, 195 N. C. 523, 143 S. E. 133.

Keeping in Home.—As shown in this section one is not allowed "to manufacture, sell, barter, etc., or possess intoxicating liquors," except as heretofore explained and modified, but if received only in one's home (without violation of the acts as specified and prohibited in the statute), and is kept there only for the consumption of the owner and his family and the bona fide guests entertained by him, this constitutes no breach of the present statute, though received

since the same was enacted. *State v. Hammond*, 188 N. C. 602, 608, 125 S. E. 402.

Such possession in the absence of a count in the indictment charging that it was for prohibited purposes, is not made unlawful by our prohibition statutes. *State v. Mull*, 193 N. C. 668, 137 S. E. 866.

When Possession in Private Dwelling Unlawful.—Under this section the possession of liquor in the private dwelling of defendant, for any other purpose than stated in the exception, is unlawful. *State v. Dowell*, 195 N. C. 523, 143 S. E. 133.

Purchase and Transportation to Home Unlawful.—While this section does not make it a criminal offense for one to have intoxicating liquor in his own dwelling for his own personal use or that of his family and friends, it is a violation of the criminal law, by the express provisions of section 18-2, for him to either purchase it elsewhere or carry it there. *State v. Winston*, 194 N. C. 243, 139 S. E. 240.

Burden of Proving Proper Purposes.—Where the defendant, charged with the violation of our prohibition law, seeks to defend himself under the provisions of this act, allowing the possession of intoxicating liquors in his house for his own purposes, he must plead and show that the liquor was for the purpose allowed by the act. *State v. Foster*, 185 N. C. 674, 116 S. E. 561. See the discussion in 5 N. C. Law Rev. 302.

Under this section the State is not required to allege or prove that the case does not fall within the exception allowing possession for personal use, etc. This being a matter of defense, must be alleged and proven by the defendant. *State v. Dowell*, 195 N. C. 523, 143 S. E. 133.

Same—Rebuttal by Proof of Large Quantity.—The possession of a large quantity of whiskey in the home of the defendant raised the prima facie case of her guilt, permitting the inference from the method of its being bottled, etc., that it was for the purpose of an unlawful sale, or that it had been received for unlawful purposes, defendant's motion as of non-suit thereon was properly denied. *State v. Hammond*, 188 N. C. 602, 125 S. E. 402.

Charge Negating Proper Purpose Unnecessary.—Where the indictment sufficiently charges the offense of the unlawful possession of whiskey under this section, a charge negating the exception making it lawful to have such possession for family purposes, etc., as provided in this section is unnecessary to a conviction. *State v. Hege*, 194 N. C. 526, 140 S. E. 80.

An indictment for illegal possession and transportation of intoxicating liquor need not negative the conditions under which intoxicating liquor may be possessed for the purpose of sale and may be transported, since the exceptions are matters of defense. *State v. Epps*, 213 N. C. 709, 197 S. E. 580.

Applied in *State v. Libby*, 213 N. C. 662, 197 S. E. 154.

§ 18-12. Summons on citizens having interest in property.—In all cases wherein the property of any citizen is proceeded against or wherein a judgment affecting it might be rendered, and the citizen is not the one who in person violated the provisions of the law, summons must be issued in due form and served personally, if said person is to be found within the jurisdiction of the court. (1923, c. 1, s. 11; C. S. 3411(k).)

§ 18-13. Search warrants; disposal of liquor seized.—Upon the filing of a complaint under oath by a reputable citizen or information furnished under oath by an officer charged with the execution of the law, before a justice of the peace, recorder, mayor, or other officer authorized by the law to issue warrants, that he has reason to believe that any person has in his possession, at a place or places specified, liquor for the purpose of sale, a warrant shall be issued commanding the officer to whom it is directed to search the place or places described in such complaint or information; and if such liquor be found in any such place or places, to seize and take into his custody all such liquor, and to seize and take into his custody all glasses, bottles, jugs, pumps, bars, or other equipment used in the business of selling intoxicating liquor which may be found at such place or places, and to keep the

same subject to the order of the court. The complaint or information shall describe the place or places to be searched with sufficient particularity to identify the same, and shall describe the intoxicating liquor or other property alleged to be used in carrying on the business of selling intoxicating liquor as particularly as practicable, and any description, however general, that will enable the officer executing the warrant to identify the property seized shall be deemed sufficient. All liquor seized under this section shall be held and shall upon the acquittal of the person so charged be returned to the established owner, and shall within ten days from conviction or default of appearance of such person be destroyed: Provided that any tax-paid liquor so seized shall within ten days be turned over to the board of county commissioners, which shall within ninety days from the receipt thereof turn it over to hospitals for medicinal purposes, or sell it to legalized alcoholic beverage control stores within the state of North Carolina, the proceeds of such sale being placed in the school fund of the county in which such seizure was made, or destroy it. (1923, c. 1, s. 12; 1939, c. 12; 1941, c. 310; C. S. 3411(l).)

Editor's Note.—The 1939 amendment added the proviso at the end of this section. The 1941 amendment revised the proviso and added the ten day limitation in the last sentence. For comment on the 1941 amendment, see 19 N. C. Law Rev. 477.

For article discussing limits to search and seizure, see 15 N. C. Law Rev. 229. See also, 15 N. C. Law Rev. 101.

§ 18-14. Grand jury, witnesses before; effect of evidence.—When the solicitor of any judicial district has good reason to believe that liquor has been manufactured or sold contrary to law within a county in his district, and believes that any person has knowledge of the existence and establishment of any illicit distillery, or that any person has sold liquor illegally, then it is lawful for the solicitor to apply to the clerk of the superior court of the county wherein the offense is supposed to have been committed to issue a subpoena for the person so having knowledge of said offense to appear before the next grand jury drawn for the county, there to testify upon oath what he may know touching the existence, establishment, and whereabouts of said distillery, or persons who have sold intoxicating liquor contrary to law, who shall give the names and personal description of the keepers thereof, and of any person who has sold liquor unlawfully; and such evidence, when so obtained, shall be considered and held in law as an information on oath upon which the grand jury shall make presentment, as provided by law in other cases. If any officer shall fail or refuse to use due diligence in the execution of the provisions of this section he shall be guilty of laches in office, and such failure be cause for removal from office. (1923, c. 1, s. 13; C. S. 3411(m).)

§ 18-15. Clubrooms and other places for keeping, etc., of liquor.—No corporation, club, association, or person shall directly or indirectly keep or maintain, alone or by association with others, or by any other means, or shall in any manner aid, assist, or abet others in keeping or maintaining a clubroom or other place where intoxicating liquor is received, kept, or stored for barter, sale, exchange, distribution, or division

among the members of any such club or association or aggregation of persons, or to or among any other persons by any means whatever, or shall act as agents in ordering, procuring, buying, storing, or keeping intoxicating liquor for any such purpose. (1923, c. 1, s. 14; C. S. 3411(n).)

§ 18-16. Records of transportation companies; evidence.—All express companies, railroad companies, or other transportation companies doing business in this state are required hereby to keep a separate book in which shall be entered immediately upon receipt thereof the name of the person to whom liquor is shipped, the amount and kind received, and the date when received, the date when delivered, by whom delivered, and to whom delivered, after which record shall be a blank space, in which the consignee shall be required to sign his name, or, if he cannot write, shall make his mark in the presence of a witness, before such liquor is delivered to such consignee, and which book shall be open for inspection to any officer or citizen of the state, county, or municipality any time during business hours of the company, and such book shall constitute prima facie evidence of the facts therein and will be admissible in any of the courts of this state. Any express company, railroad company, or other transportation company, or any employee or agent of any express company, railroad company, or other transportation company violating the provisions of this section shall be guilty of a misdemeanor. (1923, c. 1, s. 15; C. S. 3411(o).)

Editor's Note.—See *State v. R. Co.*, 169 N. C. 295, 84 S. E. 283.

§ 18-17. Indictments; allegations of sale; circumstantial evidence.—In indictments for violating any provisions of this article it shall not be necessary to allege a sale to a particular person, and the violation of law may be proved by circumstantial evidence as well as by direct evidence. (1923, c. 1, s. 16; C. S. 3411(p).)

Editor's Note.—The cases which follow were decided under a similar section, C. S. § 3383, which has been superseded by this section.

Evidence — Sale to Unknown Persons.—To convict under an indictment of sale of intoxicating liquors "to some person to the jurors unknown," it is as necessary to offer evidence of an actual sale to the unknown person as if his name had been inserted in the indictment. *State v. Watkins*, 164 N. C. 425, 79 S. E. 619.

Same—Other Sales.—The rule of evidence that one illegal sale of intoxicating liquors should not be received as any evidence that another such sale had been made, applies where the sales are entirely separated and distinct transactions, the one having no fair or reasonable tendency to establish the other, but inapplicable when it tends to show that the defendant, accused of violating the prohibition law at a certain city number, with evidence tending to show such violation there, kept the spirituous liquor elsewhere in the city, or under his control, for the purpose of making illegal sales. *State v. Boynton*, 155 N. C. 456, 71 S. E. 341.

Same—Liquors on Hand.—Upon trial on indictment for the sale of intoxicating liquors at a certain city number, testimony that the accused had and kept liquors on hand in other portions of the city is a relevant circumstance tending to show that he had it on hand and was prepared and equipped to make the illegal sale charged in the bill of indictment, and to be considered by the jury with other evidence tending to show that he had sold such liquor at the place charged in the indictment. *State v. Boynton*, 155 N. C. 456, 71 S. E. 341.

Upon indictment for violating the prohibition law, the possession of liquors by the accused, at the time of the offense charged, is always a circumstance admissible against him, and in general the circumstances under which liquors are kept, and even that they are kept at other places or in other rooms, may be shown. *Id.*

Same—Photographs.—Photographs are admissible in evidence. *Butler v. State*, 142 Ga. 286, 82 S. E. 654; *Wade v. R. R.*, 89 S. C. 280, 71 S. E. 859; *Griffith v. Coal Co.*, 75 W. Va. 686, 84 S. E. 621; *Spencer v. Looney*, 116 Va. 767, 82 S. E. 745; *Prok v. R. R.*, 75 W. Va. 697, 84 S. E. 568; *Napier v. Little*, 137 Ga. 242, 73 S. E. 3, 38 L. R. A. (N. S.) 91, (Anno. Cases, 1913 A, 1013); *Shaw v. State*, 83 Ga. 92, 9 S. E. 768; and in *State v. O'Reilly*, 126 Mo. 597, 29 S. W. 577, where it is said: "It has always been permissible to use diagrams in the trial of causes, both civil and criminal, and especially in the latter class to use diagrams, if shown to be correct, to illustrate the position of persons and places and to better enable the witnesses to properly locate them. If, then, a diagram may be used for such a purpose, we can see no good reason why a photograph may not be, by which is presented to view everything within the range of the camera at the time the photograph was taken." *State v. Jones*, 175 N. C. 709, 713, 95 S. E. 576.

Same—Conversation between Accused and Wife.—Where the husband is on trial for violating the prohibition law, it is competent for a third person to testify as to the conversation between the defendant and his wife, with statements by the latter tending to fix the former with guilt of the offense charged. *State v. Randall*, 170 N. C. 757, 87 S. E. 227.

§ 18-18. Serving liquor with meals.—It is unlawful for any person to serve with meals, or otherwise, any liquor or intoxicating biters, where any charge is made for such meal or service. (1923, c. 1, s. 17; C. S. 3411(q).)

Editor's Note.—See *Felia v. Betton*, 170 N. C. 112, 86 S. E. 999.

§ 18-19. Sale by druggists or pharmacists. — It is unlawful for any druggist or pharmacist to sell, or otherwise dispose of for gain, any intoxicating liquor. (1923, c. 1, s. 18; C. S. 3411(r).)

§ 18-20. Grain alcohol for use in medicine or surgery; manufacture or sale of cider.—The provisions of this article shall not apply to grain alcohol, received by duly licensed physicians, druggists, dental surgeons, college, university, and state laboratories, and manufacturers of medicine, when intended to be used in compounding, mixing, or preserving medicines or medical preparations, or for surgical purposes, when obtained as hereinbefore provided: Provided, however, that nothing contained in this article shall prohibit the importation into the state of North Carolina and the delivery and possession in the state for use in industry, manufactures, and arts of any denatured alcohol or other denatured spirits which are compounded and made in accordance with the formulae prescribed by acts of Congress of the United States and regulations made under authority thereof by the Treasury Department of the United States and the commissioner of internal revenue thereof, and which are not now subject to internal revenue tax levied by the Government of the United States: Provided further, that this article shall not apply to wines and liquors required and used by hospitals or sanatoriums bona fide established and maintained for the treatment of patients addicted to the use of liquor, morphine, opium, cocaine, or other deleterious drugs, when the same are administered to patients actually in such hospitals or sanatoriums for treatment, and when the same are administered as an essential part of the particular system or method of treatment and exclusively by or under the direction of a duly licensed and registered physician of good moral character and standing: Provided, further, that this article shall not prohibit the manufacture or

sale of cider or vinegar. (1923, c. 1, s. 19; C. S. 3411(s).)

§ 18-21. Wine for sacramental purposes. — It is lawful for any ordained minister of the gospel who is in charge of a church and at the head of a congregation in this state to receive in the space of ninety consecutive days a quantity of vinous liquor not greater than five gallons, for use in sacramental purposes only, and it shall be lawful for him to receive same in one or more packages or one or more receptacles. (1923, c. 1, s. 20; 1935, c. 114; C. S. 3411(t).)

Editor's Note.—By the amendment of 1935 the quantity which could be received was increased from three to five gallons.

§ 18-22. Sheriffs and police to search for and seize distilleries; confiscation; disposal of property. — It is the duty of the sheriff of each county in the state and of the police of each incorporated town or city in the state to search for and seize any distillery or apparatus used for the manufacture of intoxicating liquor in violation of the laws of North Carolina, and to deliver same, with any materials used for making such liquor found on the premises, to the board of county commissioners, who shall confiscate the same and shall cause the distillery to be cut up and destroyed, in their presence or in the presence of a committee of the board, and who may dispose of the material, including the copper or other material from the destroyed still or apparatus, in such manner as they may deem proper. (1923, c. 1, s. 21; C. S. 3411(u).)

§ 18-23. Destruction of liquor at distillery; persons arrested.—It is the duty of the sheriff and other officers mentioned in § 18-22 to seize and then and there destroy any and all liquor which may be found at any distillery for the manufacture of intoxicating liquor in violation of law, and to arrest and hold for trial all persons found on the premises engaged in distilling or aiding or abetting in the manufacture or sale of intoxicating liquor. (1923, c. 1, s. 22; C. S. 3411(v).)

§ 18-24. Laches of officers; removal from office.—If any officer mentioned in §§ 18-22, 18-23, shall fail or refuse to use diligence in the execution of the provisions of such sections, after being informed of violation thereof, he shall be guilty of laches in office, and such failure shall be cause for removal therefrom. (1923, c. 1, s. 23; C. S. 3411(w).)

Cross Reference.—As to removal of officers, see § 126-16.

§ 18-25. Rewards for seizure of still.—For every distillery seized under this article the sheriff or other police officer shall receive such sum as the board of county commissioners of the county in which the seizure was made shall, in the discretion of such board, allow, which sum shall not be less than five dollars nor more than twenty dollars: Provided, that the commissioners shall not pay any amount if they are satisfied, after due investigation, that the seizure of the distillery was not bona fide made: Provided further, that when the sheriff of a county captures a distillery he shall receive the fee for his own use, regardless of whether he be on fees or salary. (1923, c. 1, s. 24; C. S. 3411(x).)

Local Modification.—Sheriff's fees for seizure of stills were prior to 1923 regulated by C. S. 3401, 3402, § 18-25, part of

the Turlington Act, would seem to supersede C. S. 3401, 3402, since it sets a different fee, and 1933, c. 480 specifically repealed C. S. 3401, 3402, except in three counties. However, many local laws have been passed with reference to C. S. 3401, as well as to §§ 18-25 and 18-26. Citations to all of these laws which have been discovered are listed here, not as a statement of the present status of the law in any county, but merely as an aid in tracing down the fees in the counties named. These citations are: Alamance, Avery, Caswell, Chowan, Graham, Greene, Jackson, Northampton, Surry, Wilson, Yadkin: C. S. 3401, 3402; 1933, c. 480; Anson: 1937, c. 442; Burke: 1933, c. 136; Haywood, Lincoln, Pitt, Transylvania: C. S. 3909; Ex. Sess. 1908, c. 97; Pub. Loc. 1919, c. 30; Lenoir: 1933, c. 246; Moore: 1933, c. 246; 1935, c. 253; Nash: 1931, c. 91; Surry: 1925, c. 173; Union: Pub. Loc. 1933, c. 160; Warren: 1933, c. 230.

§ 18-26. Same—In certain counties.—The Board of Commissioners of the several counties in the State, hereinafter named, shall pay by way of reward to the sheriff or other officers in the various counties for the capture and destruction of stills used in the manufacture of spirituous liquors, the sum of twenty dollars (\$20.00) and no more, upon the production of a certificate from the Clerk of the Superior Court or other court having final jurisdiction, that one or more operators of the still captured and destroyed were by the sheriff or other officer apprehended, captured and have been convicted and that no appeal has been taken from the judgment rendered, which said twenty dollars (\$20.00) shall be in lieu of any and all other rewards authorized by law to be paid for the capture and destruction of stills to the sheriff or other officers in the counties hereinafter named.

This section shall apply to the following counties only: Alleghany, Ashe, Avery, Bladen, Buncombe, Caswell, Catawba, Chowan, Craven, Duplin, Forsyth, Beaufort, Hyde, Hoke, Lee, Lenoir, Lincoln, Mecklenburg, New Hanover, Onslow, Pamlico, Pender, Perquimans, Richmond, Rockingham, Sampson, Vance, Wake, Washington, Watauga, Wilkes, Wilson and Yancey. (1927, c. 42; Pub. Loc. 1933, c. 160.)

§ 18-27. Officers given power to compel evidence; effect of evidence; process; immunity to witnesses.—When any justice of the peace, magistrate, recorder, mayor of a town, or judge of the superior courts or supreme court shall have good reason to believe that any person within his jurisdiction has knowledge of the unlawful sale of liquor or the existence and establishment of any place where intoxicating liquor is sold or manufactured contrary to law, in any town or county within his jurisdiction, such person not being minded to make voluntary information thereof on oath, then it shall be lawful for such justice of the peace, magistrate, recorder, mayor, or judge to issue to the sheriff of the county or to any constable of the town or township in which such place where intoxicating liquor is sold or manufactured contrary to law is supposed to be, a subpoena, *capias ad testificandum*, or other summons in writing, commanding such person to appear immediately before such justice of the peace, magistrate, recorder, mayor, or judge, and give evidence on oath as to what he may know touching the existence, establishment, and whereabouts of such place where intoxicating liquor is sold or manufactured contrary to law, and the name and personal description of the keeper thereof, or person selling or manufactur-

ing liquor. Such evidence, when obtained, shall be considered and held in law as an information under oath, and the justice, magistrate, recorder, mayor, or judge may thereupon proceed to seize and arrest such keeper or person selling, manufacturing, or having liquor contrary to law, and issue such process as is provided by law. No discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him. (1923, c. 1, s. 25; C. S. 3411(y).)

Cross Reference.—As to testimony enforced in criminal investigations, immunity, see § 8-55.

§ 18-28. Distilling or manufacturing liquor; first offense misdemeanor.—It is unlawful for any person to distill, manufacture, or in any manner make, or for any person to aid, assist, or abet any such person in distilling, manufacturing, or in any manner making any spirituous or malt liquors or intoxicating bitters within the state of North Carolina. Any person or persons violating the provisions of this section shall, for the first conviction, be guilty of a misdemeanor and, upon conviction or confession of guilt, punished in the discretion of the court; for the second or any subsequent conviction, said person or persons shall be guilty of a felony, and upon conviction or confession in open court shall be imprisoned in the state prison for not less than four months and not exceeding five years, in the discretion of the court. (1923, c. 1, s. 26; C. S. 3411(z).)

Process of Manufacturing Need Not Be Complete.—It is not necessary for a conviction under the provisions of Public Laws 1917, chap. 157, similar to those of this section, making the distilling or manufacturing, etc., of spirituous or malt liquors or intoxicating bitters within the State unlawful, including within its express terms those who aid, assist, or abet therein, that the liquor should have been actually manufactured or the product finished; and where there is evidence tending to show that such manufacture had been in progress, but had been suspended by the arrest of the prisoner, and that he was aiding or assisting therein, it is sufficient to be submitted to the jury and to sustain conviction of the offense charged. *State v. Horner*, 174 N. C. 788, 94 S. E. 291.

When Question for Jury.—Where there is evidence of defendant's guilty knowledge in aiding in the distilling or manufacturing of intoxicating liquor prohibited by Public Laws 1917, chap. 157, similar to this section, by hauling it away, and also consistent with his innocence in merely hauling away the remnants after the illegal purpose had been accomplished or frustrated, without intention of taking part or aiding in its manufacture, the question of his guilt or innocence is one for the jury, under proper instructions. *State v. Horner*, 174 N. C. 788, 94 S. E. 291.

Second Degree.—Upon a charge in an indictment for manufacturing liquor, etc., the defendant may be convicted of the second degree of the offense—i. e., aiding or abetting its manufacture. *State v. Horner*, 174 N. C. 788, 94 S. E. 291.

Accessories Equally Guilty.—The defendant, guilty of aiding and abetting the unlawful manufacture of liquor, is equally guilty with those who actually operated the still. *State v. Clark*, 183 N. C. 733, 110 S. E. 641.

The appellant, convicted on his trial of aiding or abetting in the manufacture of whiskey on one count of the indictment may not complain because he was tried on another count of the same bill for the unlawful manufacture of liquor and acquitted, there being sufficient evidence to sustain a conviction on each one. *State v. Smith*, 183 N. C. 725, 110 S. E. 654.

Presumption Regarding Previous Conviction.—The first conviction of manufacturing or aiding and abetting in the manufacture of spirituous, etc., liquors is a misdemeanor, and the second is a felony; and where the indictment does not charge a previous conviction it will be presumed that the defendant has not heretofore been convicted of the offense charged. *State v. Clark*, 183 N. C. 733, 110 S. E. 641.

Irrelevant Testimony.—The rejection of evidence as to the

lawful manufacture of liquor, etc., had raised on his farm that year, is of irrelevant testimony, and its exclusion not erroneous. *State v. Smith*, 183 N. C. 725, 110 S. E. 654.

Evidence Sufficient for Conviction.—See *State v. Smith*, 183 N. C. 725, 110 S. E. 564; *State v. Grier*, 184 N. C. 723, 114 S. E. 622; *State v. McMillan*, 180 N. C. 741, 105 S. E. 403.

Indictment.—The second offense of manufacturing spirituous liquor is a felony and a person may be tried on a charge of manufacturing spirituous liquor for the second offense only upon indictment, since the offense is a felony. *State v. Sanderson*, 213 N. C. 381, 196 S. E. 324.

Cited in *State v. Clegg*, 214 N. C. 675, 200 S. E. 371.

§ 18-29. Misdemeanor; punishment; effect of previous punishment by federal court.—Any person violating any of the provisions of this article, except as otherwise specified in this article, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court: Provided, that no person shall be punished who has been previously punished for the same offense by a federal court. (1923, c. 1, s. 27; C. S. 3411(aa).)

§ 18-30. Laws repealed; local laws.—All laws in conflict with this article are hereby repealed, but nothing in this article shall operate to repeal any of the local acts of the general assembly of North Carolina prohibiting the manufacture or sale or other disposition of any liquor mentioned in this article, or any laws for the enforcement of the same, but all such acts shall continue in full force and effect and in concurrence herewith, and indictment or prosecution may be had either under this article or under any local act relating to the same subject. (1923, c. 1, s. 28; C. S. 3411(bb).)

Editor's Note.—See *State v. Johnson*, 170 N. C. 685, 86 S. E. 788.

Art. 2. Miscellaneous Regulations.

§ 18-31. Unlawful sale through agents.—If any person unlawfully and illegally procures and delivers any spirituous or malt liquors to another, he shall be deemed and held in law to be the agent of the person selling said spirituous and malt liquors, and shall be guilty of a misdemeanor and shall be punished in the discretion of the court. (Rev., ss. 3526, 3534; 1905, c. 498, ss. 6, 7, 8; C. S. 3371.)

What Constitutes One an Agent.—Revisal, section 3534, now this section, making it unlawful for any one to procure for and deliver spirituous liquors to another, and making such person, in law, the agent of the seller, and punishable, though its meaning is not plain, makes the one procuring liquor by purchase from an illicit dealer, and delivering it to another, the agent of the seller, and subjects him to the punishment prescribed therein, as a principal in the misdemeanor. *State v. Burchfield*, 149 N. C. 537, 63 S. E. 89.

If one buys whisky for another from an illicit dealer in prohibited territory, without being interested in the sale otherwise than as agent of the purchaser, to whom he delivers it, and pays the money to the seller for the buyer, it is a wrongful procuring of the whiskey for another within the meaning of Revisal, section 3534, now this section, and his testimony, that he was acting solely as agent for the buyer, cannot change the character of the act from that intended by the statute. *State v. Burchfield*, 149 N. C. 537, 63 S. E. 89.

§ 18-32. Keeping liquor for sale; evidence.—It is unlawful for any person, firm, association or corporation, by whatever name called, to have or keep in possession, for the purpose of sale, except as otherwise authorized by law, any spirituous, vinous or malt liquors, and proof of any one of the following facts shall constitute prima facie evidence of the violation of this section:

1. The possession of a license from the govern-

ment of the United States to sell or manufacture intoxicating liquors; or

2. The possession of more than one gallon of spirituous liquors at any one time, whether in one or more places; or

3. The possession of more than three gallons of vinous liquors at any one time, whether in one or more places; or

4. The possession of more than five gallons of malt liquors at any one time, whether in one or more places; or

5. The delivery to such person, firm, association or corporation of more than five gallons of spirituous or vinous liquors, or more than twenty gallons of malt liquors within any four successive weeks, whether in one or more places; or

6. The possession of intoxicating liquors as samples to obtain orders thereon: Provided, that this section shall not prohibit any person from keeping in his possession wines and ciders in any quantity where such wines and ciders have been manufactured from grapes or fruit grown on the premises of the person in whose possession such wines and ciders may be. (1913, c. 44, s. 2; 1915, c. 97, s. 8; C. S. 3379.)

Editor's Note.—See 13 N. C. Law Rev. 315.

Constitutionality.—The section is constitutional and valid. *State v. Randall*, 170 N. C. 757, 87 S. E. 227; *State v. Langley*, 209 N. C. 178, 183 S. E. 526.

And is not in contravention of the Federal Constitution. *State v. Brown*, 170 N. C. 714, 86 S. E. 1042.

For cases holding that this section was unaffected by P. L. 1935, cc. 418, 493, see *State v. Langley*, 209 N. C. 178, 183 S. E. 526; *State v. Tate*, 210 N. C. 168, 185 S. E. 665; *State v. Jones*, 209 N. C. 49, 182 S. E. 699.

"Prima Facie" Defined.—The words "prima facie evidence" are defined in Webster's International Dictionary as meaning "evidence sufficient, in law, to raise a presumption of fact or establish the fact in question, unless rebutted." It must presume that the Legislature had such meaning in mind when such words were used in the statute. *State v. Russell*, 164 N. C. 482, 490, 80 S. E. 66.

Effect of the Presumption.—This (prima facie evidence) neither conclusively determines the guilt or innocence of the party who is accused nor withdraws from the jury the right and duty of passing upon and deciding the issue to be tried. The burden of proof remains continually upon the State to establish the accusation which it makes, as prima facie evidence does not change or shift the burden. *State v. Russell*, 164 N. C. 482, 487, 80 S. E. 66.

Same—Sufficient to Sustain Verdict.—While the prima facie case, unexplained, is sufficient to sustain a verdict of guilty, yet the defendant is not required to show, by the greater weight of evidence, that the whiskey was in his possession for lawful purposes, for such, in effect, would require him to establish his own innocence, and relieve the State of the burden of the issue, which is placed upon it. *State v. Wilkerson*, 164 N. C. 431, 79 S. E. 888.

Same—Power of Legislature to Change Rule of Evidence.—See full discussion in *State v. Wilkerson*, 164 N. C. 431, 440, 79 S. E. 888.

Burden of Proof.—The possession of the specified quantity of spirituous liquors sufficient to make out prima facie evidence of an unlawful purpose is only sufficient to sustain a verdict of guilty, and does not shift the burden upon the defendant to show his innocence, and an instruction to that effect is reversible error. *State v. Helms*, 181 N. C. 566, 107 S. E. 228.

Where the possession of the specified quantities of intoxicating liquors under a statutory provision has made out prima facie evidence of guilt, and the defendant has not introduced evidence, an instruction to the jury placing the burden on the defendant to establish his innocence is reversible error, being equivalent to directing a verdict, which is not permissible in a criminal case. *Id.*

U. S. Government License as Defense.—For cases under the former law, see *Pfeifer v. Drug Co.*, 171 N. C. 214, 88 S. E. 343; *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002; *State v. Boynton*, 155 N. C. 456, 71 S. E. 341.

Possession Means Actual or Constructive.—This section making the "possession of certain specified quantities of spirituous, vinous, or malt liquors" prima facie evidence of

its violation, intends that the "possession" shall be construed as either actual or constructive; so that the possession of such quantities by the agent will be deemed the possession of the principal for the purpose of the act. *State v. Lee*, 164 N. C. 533, 80 S. E. 405.

The possession of the agent, for the one accused of violating our prohibition law, of more than one gallon of intoxicating liquor is sufficient to make out a prima facie case of guilt, under the provisions of this section. *State v. Blauntia*, 170 N. C. 749, 87 S. E. 101.

Possession for Use of Owner.—The mere possession of spirituous liquor in the home for the use of the owner, his family and their guests on the premises in the absence of a count in the indictment charging that it was for prohibited purposes, is not made unlawful by our prohibition statutes. *State v. Mull*, 193 N. C. 668, 137 S. E. 866.

Evidence.—Where there is evidence that the defendant, indicted under this section had in his possession sufficient spirituous liquors to raise the prima facie presumption that it was for the purpose of sale, it is competent to show this intent, and in furtherance of the presumption, that soon thereafter, about two months, he was found working on a copper still on his premises, and had copper enough to make two of them; and that, upon his premises being searched, he had falsely denied the possession and had attempted to shoot the officer making the search. *State v. Simon*, 178 N. C. 679, 100 S. E. 239.

Evidence that over a gallon of whiskey in pint bottles with unbroken seals was found on defendant's premises, that defendant admitted owning the whiskey, and that empty whiskey bottles were found around premises, is held sufficient to be submitted to the jury on a charge of illegal possession of intoxicating liquor for the purpose of sale. *State v. Libby*, 213 N. C. 662, 197 S. E. 154.

Possession of More than Gallon Is Prima Facie Evidence of Possession for Purpose of Sale.—The possession of more than one gallon of intoxicating liquor is prima facie evidence of possession for the purpose of sale under this section, and is sufficient to take the case to the jury on the issue. *State v. Tate*, 210 N. C. 168, 185 S. E. 665.

But evidence establishing defendant's possession of more than a gallon of intoxicating liquor, without other incriminating evidence, is insufficient to support a directed verdict of guilty of possession of intoxicating liquor for the purpose of sale under this section. *State v. Ellis*, 210 N. C. 166, 185 S. E. 663.

Sufficient Evidence to Submit Question of Possession to Jury.—Evidence that officers found a funnel, a number of containers, and glasses smelling of whiskey, in different places on defendant's premises, is held sufficient to be submitted to the jury in a prosecution on a charge of having possession of intoxicating liquor for the purpose of sale, although the amount of whiskey discovered was insufficient to invoke the presumption under the subdivision (2) of this section. *State v. Rhodes*, 210 N. C. 473, 187 S. E. 553.

The defendant was convicted of having liquor in his possession for the purpose of sale in violation of this section. He appealed on the ground that the statute was repealed by the Eighteenth Amendment to the Constitution of the United States. The court sustained the conviction. *State v. Campbell*, 182 N. C. 911, 110 S. E. 86.

Allegation That Whiskey Did Not Contain A. B. C. Stamp Regarded as Surplusage.—In an indictment sufficiently charging possession of liquor for the purpose of sale under this section an additional allegation that the whiskey did not bear the stamp of the A. B. C. Board of the county is an allegation of a nonessential fact, and will be regarded as surplusage. *State v. Atkinson*, 210 N. C. 661, 188 S. E. 73.

Effect of Turlington Act.—The Turlington Act repeals all conflicting laws and makes the possession of any intoxicating liquors for the purpose of sale unlawful, unless such liquors are for the private use and in the residence of the possessor; and the prior statute making the possession of more than one gallon thereof prima facie evidence of the purpose of unlawful sale is not in conflict therewith or repealed thereby. *State v. Foster*, 185 N. C. 674, 116 S. E. 561. Applied in *State v. Potter*, 185 N. C. 742, 117 S. E. 504.

Applied in *State v. Epps*, 213 N. C. 709, 197 S. E. 580. Cited in *State v. Scoggins*, 199 N. C. 821, 155 S. E. 927; *State v. Locky*, 214 N. C. 525, 199 S. E. 715.

§ 18-33. Unlawful to handle draft connected with receipt for liquor.—It is unlawful for any bank incorporated under the laws of this state, or national bank, or any individual, firm or association, to present, collect or in any wise handle any draft, bill of exchange or order to pay money, to which draft, bill of exchange or order to pay

money is attached a bill of lading, or order, or receipt for intoxicating liquors, or which draft is enclosed with, connected with, or in any way related to, directly or indirectly, any bill of lading, order, or receipt for intoxicating liquors. Provided, this section shall not apply to such instruments issued in connection with the sale or purchase of intoxicating liquors when such sale or purchase is not prohibited by the laws of this state. (1913, c. 44, s. 4; C. S. 3381.)

Cross Reference.—As to bills of lading generally, see § 21-1 et seq.

§ 18-34. Allowing distillery to be operated on land.—If any person shall knowingly permit or allow any distillery or other apparatus for the making or distilling of spirituous liquors to be set up for operation or to be operated on lands in his possession or control, he shall be guilty of a misdemeanor and shall be punished in the discretion of the court. (Rev., s. 3533; 1905, c. 498, s. 2; C. S. 3407.)

Editor's Note.—See *State v. Jones*, 175 N. C. 709, 712, 95 S. E. 576.

§ 18-35. Federal license as evidence.—The possession of a license or the issuance to any person of a license to manufacture, rectify or sell, at wholesale or retail, spirituous liquors by the United States government or any officer thereof in any county, city or town where the manufacture, sale or rectification of spirituous liquors is forbidden by the laws of this state shall be prima facie evidence that the person having such license, or to whom the same was issued, is guilty of doing the act permitted by such license in violation of the laws of this state. On the trial of any person charged with the violation of any such laws, it shall be competent to prove that such a license is in the possession of or has been issued to such person, by the testimony of any witness who has personally examined the records of the government office where the official record of such licenses is kept. (Rev., s. 2060; 1905, c. 339, s. 5; 1907, c. 931; C. S. 3408.)

Cross Reference.—As to federal license as prima facie evidence of keeping liquor for sale, see § 18-32.

Art. 3. Alcoholic Beverage Control Act of 1937.

§ 18-36. Purposes of article.—The purpose and intent of this article is to establish a system of control of the sale of certain alcoholic beverages in North Carolina, and to provide the administrative features of the same, in such a manner as to insure, as far as possible, the proper administration of the sale of certain alcoholic beverages under a uniform system throughout the state. (1937, c. 49, s. 1.)

The Alcoholic Beverage Control Acts do not repeal the provisions of the Turlington Act in regard to the possession and transportation of intoxicating liquors except in so far as the control acts are inconsistent with the Turlington Act. *State v. Carpenter*, 215 N. C. 635, 3 S. E. (2d) 34.

Applied in *State v. Davis*, 214 N. C. 787, 199 S. E. 927.

Cited in *State v. Epps*, 213 N. C. 709, 197 S. E. 580; *Bailey v. Bryson*, 214 N. C. 212, 198 S. E. 622.

§ 18-37. State board of alcoholic control created; membership; compensation.—A state board of alcoholic control is hereby created, to consist of a chairman and two associate members. The members of said board shall be men well known for their character and ability and business acumen and success. The chairman of said board

shall devote his whole time to his official duties and shall receive a salary of six thousand (\$6,000.00) dollars per annum, payable monthly, together with necessary traveling expenses, and the two associate members of said board shall receive for the time actually engaged in their official duties, seven dollars (\$7.00) per day and necessary traveling expenses. (1937, c. 49, s. 2, c. 411; 1939, c. 185, s. 5; 1941, c. 107, s. 5.)

§ 18-38. Members of board appointed by governor; terms of office.—The members of said state board shall be appointed by the governor, and the first appointees shall serve as follows:

The chairman shall serve for a period of three years from the date of his appointment and one associate member shall serve for a period of two years from the date of his appointment and the other associate member shall serve for a period of one year from the date of his appointment, and the subsequent appointments of all of the members of the said board shall be for a term of three years from the date of each appointment. (1937, c. 49, s. 3.)

§ 18-39. Powers and authority of board.—Said state board of alcoholic control shall have power and authority as follows, to wit:

(a) To see that all the laws relating to the sale and control of alcoholic beverages are observed and performed.

(b) To audit and examine the accounts, records, books and papers relating to the operation of county stores herein provided for, or to have the same audited.

(c) To approve or disapprove the prices at which the several county stores may sell alcoholic beverages and it shall be the duty of said board to require the store or stores in the several counties coming under the provisions of this article to fix and maintain uniform prices and to require sales to be made at such prices as shall promote temperate use of such beverages and as may facilitate policing.

(d) To remove any member, or members, of county boards whenever in the opinion of the state board, such member, or members, of the county board, or boards, may be unfit to serve thereon.

(e) To test any and all alcoholic beverages which may be sold, or proposed to be sold to the county stores, and to install and operate such apparatus, laboratories, or other means or instrumentalities, and employ to operate the same such experts, technicians, employees and laborers, as may be necessary to operate the same, in accordance with the opinion of the said board. In lieu of establishing and operating laboratories as above directed, the board may, with the approval of the governor and the commissioner of agriculture, arrange with the state chemist to furnish such information and advice, and to perform such analyses and other laboratory services as the board may consider necessary, or may, if they deem advisable, cause such tests to be made otherwise.

(f) To supervise purchasing by the county boards when said state board is of the opinion that it is advisable for it to exercise such power in order to carry into effect the purpose and intent of this article, with full power to disapprove any such purchase and at all times shall have the right to inspect all invoices, papers, books and

records in the county stores or boards relating to purchases.

(g) To exercise the power to approve or disapprove in its discretion all regulations adopted by the several county stores for the operation of said stores and the enforcement of alcoholic beverage control laws which may be in violation of the terms or spirit of this article.

(h) To require that a sufficient amount shall be so allocated as to insure adequate enforcement and the amount shall, in no instance, be less than five per cent, nor more than ten per cent of the net profits arising from the sale of alcoholic beverages.

(i) To remove in case of violation of the terms or spirit of this article, officers employed, elected or appointed in the several counties where county stores may be operated.

(j) To approve or disapprove, in its discretion, the opening of county stores, except each county that may be entitled to operate stores for the sale of alcoholic beverages shall be entitled to operate at least one store for such purpose, at the county seat therein, or at such other place as may be selected by the said county board, provided that in the location of control stores in any county in which a majority of the votes have been cast for liquor control stores due consideration shall be given to communities or towns in which a majority of the votes were cast against control, but nothing herein contained shall be construed so as to abridge any of the provisions elsewhere contained relative to the opening, closing or locating such stores. As to all additional stores in each of said counties the same shall not be opened until and unless the opening of the same and the place of location thereof shall first be approved by the said state board, which at any time may withdraw its approval of the operation of any additional county store when the said store is not operated efficiently and in accordance with the alcoholic beverage control laws and all valid regulations prescribed therefor, or whenever, in the opinion of the said state board, the operation of any county store shall be inimical to the morals or welfare of the community in which it is operated or for such other cause, or causes, as may appear to said state board sufficient to warrant the closing of any county store.

(k) To require the use of a uniform accounting system in the operation of all county stores hereunder and to provide in said system for the keeping therein and the record of all such information as may, in the opinion of the said state board, be necessary or useful in its auditing of the affairs of the said county stores, as well as in the study of such problems and subjects as may be studied by said state board in the performance of its duties.

(l) To grant, to refuse to grant, or to revoke, permits for any person, firm or corporation to do business in North Carolina in selling alcoholic beverages to or for the use of any county store and to provide and to require that such information be furnished by such person, firm or corporation as a condition precedent to the granting of such permit, or permits, and to require the furnishing of such data and information as it may desire during the life of such permit, or permits, and for the purpose of determining whether such permit,

or permits, shall be continued, revoked or re-granted after expiration dates. No permit, however, shall be granted by said state board, to any person, firm or corporation when the said state board has reason sufficient unto itself to believe that such person, firm or corporation has furnished to it any false or inaccurate information or is not fully, frankly and honestly cooperating with the said state board and the several county boards in the observance and performance of all alcoholic beverage laws which may now or hereafter be in force in this state, or whenever the said board shall be of opinion that such permit ought not to be granted or continued for any cause.

(m) The said state board shall have all other powers which may be reasonably implied from the granting of express powers herein named, together with such other powers as may be incidental to, or convenient for, the carrying out and performance of the powers and duties herein given to said board.

(n) To permit the establishment of warehouses for the storage of alcoholic beverages within the state, the storage of alcoholic beverages in warehouses already established, and to prescribe rules and regulations for the storage of such beverages and the withdrawal of the same therefrom. Such warehousing or bailment of alcoholic beverages as may be made hereunder shall be for the convenience of delivery to alcoholic boards of control authorized to purchase the same and shall be under the strict supervision and subject to all of the rules and regulations of the state board of control relating thereto. (1937, c. 49, s. 4, cc. 237, 411.)

Editor's Note.—This section would seem to authorize the making of necessary rules and regulations to carry out the provisions of the act. 15 N. C. Law Rev. 323.

Under this section the state board is given power to grant, deny or revoke permits for the sale of alcoholic beverages to county liquor stores. This seems to be a very flexible provision to secure an honest co-operation by those who sell alcoholic beverages with the state board and the several county boards. There are no provisions for notice or hearing or appeal and it is likely that no such provisions are needed in view of the fact that state agencies are engaged in the purchase of goods and may do so on their own terms. 15 N. C. Law Rev. 328.

§ 18-40. Removal of member by governor; vacancy appointments.—The governor shall at all times have full power and authority to remove any and all members of the said state board, upon notice to such member or members, in his discretion, for any cause that appears to him to be sufficient, and to reappoint his successor or successors to the removed members, observing, however, the terms of office of each of them, as herein set forth, and whenever a vacancy shall occur for any cause then the appointment to fill such vacancy shall be for the unexpired portion of the term of the predecessor of each appointee. (1937, c. 49, s. 5.)

§ 18-41. County boards of alcoholic control.—In each county which may be permitted to engage in the sale of alcoholic beverages, there is hereby created a county board of alcoholic control, to consist of a chairman and two other members. The members of said board shall be well known for their character, ability and business acumen. The members of said board shall be selected in each respective county in a joint meeting of the

board of county commissioners, the county board of health and the county board of education, and each member present shall have only one vote, notwithstanding the fact that there may be instances in which some members are members of another board.

The terms of office of the members of said county boards shall be as follows: The chairman, who shall be so designated by the appointing boards, shall serve for his first term a period of three years and one member shall serve for his first term a period of two years and the other member shall serve for a period of one year, all terms beginning with the date of their appointment and after the said term shall have expired their successors in office shall serve for a period of three years and shall be appointed in the same manner as herein provided in this section.

Any member of any of the county boards herein above referred to in this section may be removed at any time by such composite board consisting of the board of county commissioners, the board of education and the board of health, whenever such composite board may find by a majority vote of its entire membership such member or members unfit to serve thereon, each member having only one vote as above provided for the selection of such members of county boards. In the event any member of the county board shall be removed hereunder, his successor shall be selected to serve out the time for which such member was originally selected.

Upon the death or resignation of the chairman or any other member of the county board of alcoholic control, whether selected under the provisions of this article or under the provisions of chapter four hundred and eighteen or chapter four hundred and ninety-three of the Public Laws of one thousand nine hundred and thirty-five, before the expiration of the term of office for which said chairman or member has been appointed, elected or selected, his successor to fill out such unexpired term shall be selected at a joint meeting of the board of county commissioners, the county board of health and the county board of education, which joint meeting shall be held within ten (10) days after such resignation or death, which meeting shall be called by the chairman or some other member of the county board of alcoholic control, by giving notice to each member of the time and place of holding such meeting. (1937, c. 49, s. 6, cc. 411, 431.)

Local Modification.—Bertie: 1937, c. 310; Dare: 1939, c. 168; Halifax: 1937, c. 302; Pasquotank: 1939, c. 131; Halifax: 1943, c. 433.

§ 18-42. Compensation for members of county boards.—The salaries of the members of the said county board shall be fixed by the joint meeting of the several boards that appoint them and shall be fixed with the view to securing the very best members available, with due regard to the fact that such salaries shall be adequate compensation, but shall not be large enough to make said positions unduly attractive or the objects of political aspirations. (1937, c. 49, s. 7.)

§ 18-43. Persons disqualified for membership on boards.—No person shall be appointed a member of either the state board or of any county board or employed thereby who shall be a stockholder in any brewery or the owner of any inter-

est therein in any manner whatsoever, or interested therein directly or indirectly, or who is likewise interested in any distillery or other enterprise that produces, mixes, bottles or sells alcoholic beverages, or who is related to any person likewise interested or associated in business with any person likewise interested and neither of said boards shall employ any person who is interested in, directly or indirectly, or related to, any person interested in any firm, person or corporation permitted to sell alcoholic beverages in this state. (1937, c. 49, s. 8, c. 411.)

§ 18-44. Bonds required of members of county boards.—The several members of the county board shall give bond for the faithful performance of their duties, in the penal sum of five thousand (\$5,000.00) dollars, and the said bond shall be payable to the state of North Carolina and to the county in which said board performs its duties, with some corporate surety, which surety shall be satisfactory to, and approved by, the county attorney of said county, and the chairman of the state board, and shall be deposited with the chairman of the state board. The state board for and on behalf of the state of North Carolina, and the county named in said bond, shall each be secured therein to the full amount of the penalty thereof and the recovery or payment of any sums due thereunder to either shall not diminish or affect the right of the other obligee in said bond to recover the full amount of the said penalties thereof, and the giving and the approval of such bond shall be a part of the qualification of said members and no member shall be entitled to exercise any of the functions or powers incident to his appointment until and unless the said bond shall have been given and approved as herein provided. The three joint boards referred to in § 18-41 shall be authorized to relieve any member of the county boards who does not handle any money or funds from furnishing such bond, and shall be further authorized to require bond in excess of five thousand dollars (\$5,000) of any member of the board handling money or funds in the event said joint boards deem it advisable to increase such bond. (1937, ch. 49, s. 9; 1939, c. 202.)

Editor's Note.—The 1939 amendment added the last sentence.

§ 18-45. Powers and duties of county boards.—The said county boards shall each have the following powers and duties:

(a) Control and jurisdiction over the importation, sale and distribution of alcoholic beverages within its respective county.

(b) Power to buy and to have in its possession and to sell alcoholic beverages within its county.

(c) Power and authority to adopt rules and regulations governing the operation of stores within its county and relating to the carrying out of the provisions and purposes of this article.

(d) To prescribe and regulate and direct the duties and services of all employees of said county board.

(e) To fix the hours for the opening and closing of stores operated by it. No store, however, shall be permitted to remain open between the hours of nine o'clock p. m. and nine o'clock a. m.

(f) To require any county stores to close on such days as it may designate, but all stores in any county operating under the provisions of this

article shall remain closed on Sundays, election days, New Year's Day, Fourth of July, Labor Day, Armistice Day, Thanksgiving and Christmas Day.

(g) To import, transport, receive, purchase, sell and deliver and have in its possession for sale for present and future delivery alcoholic beverages.

(h) To purchase or lease property, furnish and equip buildings, rooms and accommodations as and when required for the storage and sale of alcoholic beverages and for distribution to all county stores within said county.

(i) To borrow money, guarantee the payment thereof and the interest thereon, in such manner as may be required or permitted by law, and to issue, sign, endorse and accept checks, promissory notes, bills of exchange and other negotiable instruments and to do all such other and necessary things as may be required or may be convenient in the conduct of liquor stores in its county.

(j) To investigate and aid in the prosecution of violations of this article and other liquor laws, by whatever name called, and to seize alcoholic beverages in said county sold, kept, imported or transported illegally and to apply for confiscation thereof and to cooperate in the prosecution of offenders in any court in said county.

(k) To regulate and to prescribe rules and regulations that may be necessary or feasible for the obtaining of purity in all alcoholic beverages, including true statements of contents and the proper labeling thereof.

(l) To fix and maintain the prices of all alcoholic beverages sold by liquor stores in said county and to prescribe to whom the same may be sold.

The provisions of this article shall not apply to ethyl alcohol intended for use and/or used for the following purposes:

For scientific, chemical, mechanical, industrial, medicinal and culinary purposes.

For use by those authorized to procure the same tax free, as provided by the acts of congress and regulations promulgated thereunder.

In the manufacture of denatured alcohol produced and used as provided by the acts of congress and regulations promulgated thereunder.

In the manufacture of patented, patent, proprietary, medicinal, pharmaceutical, antiseptic, toilet, scientific, chemical, mechanical, and industrial preparations or products unfit for beverage purposes.

In the manufacture of flavoring extracts and syrups unfit for beverage purposes.

(m) To exercise the power to buy, purchase and sell and to fix the prices at which all alcoholic beverages may be purchased from it, but nothing herein contained shall give said board the power to purchase or sell or deal in alcoholic beverages which contain less than five per centum of alcohol by weight.

(n) To locate stores in its county and to provide for the management thereof and to appoint and employ at least one person for each store conducted by it, who shall be known as "manager" thereof. The duty of such manager shall be to conduct the said store under directions of the county board and to carry out the law applying thereto, and such manager shall give bond

for the faithful performance of his duties in such sum as may be fixed by said county board, with sufficient corporate surety and said surety, or sureties thereon, shall be approved by the said county board as a part of the qualifications of such manager for his appointment, and the said county board shall have the right to sue on said bond and to recover for all failures on the part of said manager faithfully to perform his duties as such manager, to the extent of any loss occasioned by such manager on his part, but as against the surety, or sureties, thereon, such aggregate recovery, or recoveries, shall not exceed the penalty of said bond.

(o) To expend for law enforcement a sum not less than five per cent nor more than ten per cent of the total profits to be determined by quarterly audits and in the expenditure of said funds shall employ one or more persons to be appointed by and directly responsible to the respective county boards. The persons so appointed shall, after taking the oath prescribed by law for the peace officers, have the same powers and authorities within their respective counties as other peace officers. And any person so appointed, or any other peace officer while in hot pursuit of anyone found to be violating the prohibition laws of this state, shall have the right to go into any other county of the state and arrest such offender therein so long as such hot pursuit of such person shall continue, and the common law of hot pursuit shall be applicable to said offenses and such officers. Any law enforcement officer appointed by such county boards and any other peace officer is hereby authorized, upon request of the sheriff or other lawful officer in any other county, to go into such other county and assist in suppressing a violation of the prohibition law therein, and while so acting shall have such powers as a peace officer as are granted to him in his own county and be entitled to all the protection provided for said officer while acting in his own county.

(p) To discontinue the operation of any store in its county whenever it shall appear to said board that the operation thereof is not sufficiently profitable to justify a continuance of its operation, or when, in its opinion, the operation of any store is inimical or hurtful to the morals or welfare of the community in which it is operated, or when said county board may be directed to close any store by the state board.

All the powers and duties herein conferred upon county boards, or required of them, shall be subject to the powers herein conferred upon the state board and whenever or wherever herein the state board has been given power to approve or disapprove anything in respect to county stores or county boards, then no power on the part of the county boards and no act of any county board shall be exercisable or valid until and unless the same has been approved by the state board. (1937, c. 49, s. 10, cc. 411, 431; 1939, c. 98.)

Local Modification.—Moore: 1937, c. 49, s. 10(p).

Editor's Note.—The 1939 amendment added the last two sentences to subsection (o). For comment on 1939 amendatory act, see 17 N. C. Law Rev. 349.

§ 18-46. No sales except during hours fixed by county boards; sales to minors, habitual drunkards, etc.; discretion of managers and em-

ployees; list of persons convicted of drunkenness, etc.; unlawful to buy for person prohibited.—No alcoholic beverage shall be sold knowingly by any county store or the manager thereof or any employee therein at any time other than within the opening and closing hours for said store, as fixed in the manner herein provided, and otherwise as prescribed by the said county board. No alcoholic beverage shall be sold knowingly to any minor, or to any person who has been convicted of public drunkenness or of driving any motor vehicle while under the influence of intoxicating liquors, or has been convicted of any crime wherein the court or judge shall find as a fact that such person committed said crime or aided and abetted in the commission thereof as a result of the influence of intoxicating liquors (within one year of any such conviction), or to any person known to be an habitual drunkard or who has within one year been confined in the inebriate ward of any state institution. The manager and employees of and in any county store may, in their discretion, refuse to sell alcoholic beverage to any individual applicant, and such power and the duty to exercise the same shall vest in and apply to such manager and employees, regardless of the failure of the county boards to make any regulations providing for the same, and in their discretion may refuse to sell more than four quarts at any one time in any one day to any person.

The various clerks of the superior court and of any inferior courts in counties coming under the provisions of this article shall furnish to the chairman of the control board of their county a list of all persons convicted of public drunkenness or convicted of driving an automobile while intoxicated; and the state motor vehicle department shall furnish to the chairmen of all the control boards in this state a list of all persons whose driving licenses have been revoked for driving an automobile while intoxicated, or for the illegal use of whiskey.

It shall be unlawful for any person to buy any alcoholic beverage if he be within the class prohibited from purchasing same as set out in this section, and it shall further be unlawful for any person to buy any alcoholic beverage for any person who may be prohibited from purchasing for himself under any of the provisions of this article. (1937, c. 49, s. 11, c. 411.)

§ 18-47. Drinking upon premises prohibited; stores closed on Sundays, election days, etc.—No alcoholic beverage shall be drunk upon the premises of any county store or warehouse, or room or building occupied or used by any county board or any of its employees for the purpose of performing their duties in respect to alcoholic beverages, and such county boards, managers and employees shall not permit alcoholic beverages to be drunk upon said premises and all county stores shall be closed on Sundays and election days, and such other days as the state board may designate. (1937, c. 49, s. 12.)

§ 18-48. Possession illegal if taxes not paid; punishment and forfeiture for violations; possession in container without proper stamp, prima facie evidence.—It shall be unlawful for any firm, person or corporation to have in his or its pos-

session any alcoholic beverages as defined herein upon which the taxes imposed by the laws of congress of the United States or by the laws of this state, have not been paid and any person convicted of the violation of this section shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court and the alcoholic beverage shall be seized and forfeited, together with any vehicle, vessel, aeroplane or other equipment used in the transportation and to carry the said alcoholic beverages, and the procedure pointed out in § 18-6 for the seizure, arrest, confiscation and sale of such vehicle, vessel, aeroplane or other means of transportation shall be used and the provisions of said § 18-6 are hereby declared to be in full force and effect in any of the counties of the state which shall operate under the provisions of this article, and the possession of such alcoholic beverages in a container which does not bear either a revenue stamp of the federal government or a stamp of any of the county boards of the state of North Carolina shall constitute prima facie evidence of the violation of this section. (1937, c. 49, s. 13.)

§ 18-49. Transportation, not in excess of one gallon, authorized; transportation in course of delivery to stores.—It shall not be unlawful for any person to transport a quantity of alcoholic beverages not in excess of one gallon from a county in North Carolina coming under the provisions of this article to or through another county in North Carolina not coming under the provisions of this article: Provided, said alcoholic beverages are not being transported for the purposes of sale, and provided further that the cap or seal on the container or containers of said alcoholic beverages has not been opened or broken. Nothing contained in this article shall be construed to prevent the transportation through any county not coming under the provisions of this article, of alcoholic beverages in actual course of delivery to any alcoholic beverage control board established in any county coming under the provisions of this article. (1937, c. 49, s. 14.)

Cross Reference.—As to transportation into state, etc., see § 18-58.

§ 18-50. Possession for sale and sales of illicit liquors; sales of liquors purchased from stores.—The possession for sale, or sales, of illicit liquors, or the sale of any liquors purchased from the county stores, is hereby prohibited and a violation of this section shall constitute a crime and shall be punishable by fine or imprisonment, or both, in the discretion of the court. (1937, c. 49, s. 15.)

In a prosecution for possession of intoxicating liquor in violation of this section, the fact of possession does not constitute prima facie evidence that the possession was for the purpose of sale, since the statute under which the warrant is drawn does not provide for such prima facie rule. *State v. Locke*, 214 N. C. 525, 199 S. E. 715.

§ 18-51. Drinking or offering drinks on premises of stores, and public roads or streets; drunkenness, etc., at athletic contests or other public places.—It shall be unlawful for any person to drink alcoholic beverages or to offer a drink to another person, or persons, whether accepted or not, at the place where the same is purchased from the county store, or the premises thereof, or upon any premises used or occupied

by county boards for the purpose of carrying out the provisions of this article, or on any public road or street, and it shall be unlawful for any person or persons to be or become intoxicated or to make any public display of any intoxicating beverages at any athletic contest or other public place in North Carolina. The violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not exceeding fifty (\$50.00) dollars or imprisoned for not more than thirty days in the discretion of the court. (1937, c. 49, s. 16, c. 411.)

§ 18-52. Advertising permitted in newspapers, magazines and periodicals.—It shall be lawful for newspapers, magazines and periodicals to accept and publish advertisements relating to wines, beers and other alcoholic beverages permitted to be sold and distributed under the laws of North Carolina. (1935, c. 465.)

§ 18-53. Advertising by county A. B. C. stores and on billboards prohibited.—It shall be unlawful for any county store to advertise anywhere, or by any means or method, alcoholic beverages which it has for sale and it shall not advertise or post its prices, other than in the store, or stores, which it operates, and in such stores it shall only state the brands or kinds of beverages and the price of each kind and such price list shall only be posted for public view in said store.

It shall be unlawful for any person, firm or corporation to erect or set up, or permit to be set up, any sign or bill-board, or other device, containing any advertisement of alcoholic beverages as defined herein on his premises, and if the same shall be set up by any other person, then such owner or lessee of such premises shall not permit the same to remain thereon.

It shall be unlawful for any person, firm, or corporation to display, or permit to be displayed, upon any billboard, signboard, or any other similar advertising medium, any advertisement of any alcoholic beverages or any spirituous liquors as defined herein. (1937, c. 49, s. 17; 1937, c. 398.)

Cross Reference.—As to advertising provisions under the Turlington Act, see § 18-3.

§ 18-54. Advertising by radio broadcasts prohibited.—No firm, person or corporation in this state shall broadcast, or permit to be broadcast, any statement, speech, or any other message by whatsoever name called, over any radio broadcasting system doing business in this state, when such advertising matter tends to advertise alcoholic beverages as defined herein and the broadcast thereof originates in this state. (1937, c. 49, s. 18.)

§ 18-55. Additional regulations as to advertising.—The several county boards by and with the consent and approval of the state board, shall have power to make such other rules and regulations as will prevent and tend to prevent advertisement of alcoholic beverages otherwise than is expressly prohibited herein and to publish such rules and regulations and to take effective measures to enforce the same. (1937, c. 49, s. 19.)

§ 18-56. Salaries and expenses paid from proceeds of sales.—All salaries and expenses incurred under the provisions of this article except those provided for in § 18-37 shall be paid out of

the proceeds of the sales of the alcoholic beverages referred to in this article. All salaries and expenses of county boards and their employees shall be paid out of the receipts for their sales as operating expenses. (1937, c. 49, s. 20.)

§ 18-57. Net profits to be paid into general fund of the various counties.—After deducting the amount required to be expended for enforcement as herein provided and retaining sufficient and proper working capital, the amount to be determined by the board, and except as hereinbefore provided in chapters four hundred ninety-three and four hundred eighteen of the Public Laws of one thousand nine hundred thirty-five, the entire net profits derived from any stores shall be paid quarterly to the general fund of each respective county wherein county stores are operated. (1937, c. 49, s. 21; c. 411.)

Local Modification.—Brunswick: 1937, c. 269; Cumberland: 1941, c. 48; Franklin: 1937, c. 250, s. 2; New Hanover: 1941, c. 135.

§ 18-58. Transportation into state; and purchases, other than from stores, prohibited.—It shall be unlawful for any person, firm, or corporation, to purchase in, or to bring in this state, any alcoholic beverage from any source, except from a county store operated in accordance with this article, except a person may purchase legally outside of this state and bring into the same for his own personal use not more than one gallon of such alcoholic beverage. A violation of this section shall constitute a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. (1937, c. 49, s. 22.)

Cross Reference.—As to transportation to or through dry counties, see § 18-49.

§ 18-59. Violations by member or employee of boards, cause for removal and punishable as misdemeanor.—A violation of any of the provisions of this article by any person, firm or corporation, and the violation of any provision of this article, or any regulation adopted by any county board or by the state board, by any member of the state board, or any member of any county board, or any employee of either of said boards, shall constitute a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court, and in addition thereto shall constitute sufficient cause for the removal of such person from either of said boards, or from his employment under either of said boards and in addition to the powers of the state board to remove any of its employees or any member of any county board and the power of any county board to remove any of its employees from such employment, the court in which the said conviction is had shall have the power upon such conviction and as a part of its judgment thereon to remove such person from either of said boards or from the employment of either. (1937, c. 49, s. 23.)

§ 18-60. Definition of "alcoholic beverage."—The term "alcoholic beverage", as used in this article, is hereby defined to be and to mean alcoholic beverages of any and all kinds which shall contain more than fourteen per centum of alcohol by volume, and this article is not intended to apply to, or regulate, the possession, sale, manufacture or transportation of beer, wines or ales containing a lower alcoholic content than above specified,

and whenever the term alcoholic beverages is used in this article, it shall be construed as defined in this section. (1937, c. 49, s. 24, c. 411; 1941, c. 339, s. 3.)

Editor's Note.—The 1941 amendment reduced the per centum of alcohol from twenty-four to fourteen.

§ 18-61. County elections as to liquor control stores; application of Turlington Act; time of elections.—No county liquor store shall be established, maintained or operated in this state, in any county thereof, until and unless there shall have been held in such county an election, under the same rules and regulations which apply to elections for members of the general assembly, and at said election there shall be submitted to the qualified voters of such county the question of setting up and operating in such county a liquor store, or stores, as herein provided, and those favoring the setting up and operation of liquor stores in such county shall mark in the voting square to the left of the words, "for county liquor control stores" printed on the ballot, and those opposed to setting up and operating liquor stores in such county shall mark in the voting square to the left of the words, "against county liquor control stores," printed on the same ballot, and if a majority of the votes cast in such election shall be for county liquor stores, then a liquor store, or liquor stores, may be set up and operated in such county as herein provided, and if a majority of the votes cast at said election shall be against county liquor stores, then no liquor stores shall be set up or operated in said county under the provisions of this article.

Such election shall be called in such county by the board of elections of such county only upon the written request of the board of county commissioners therein, or upon a petition to said board of elections signed by at least fifteen per centum of the registered voters in said county that voted in the last election for governor. In calling for such special liquor election the county board of elections shall give at least twenty days public notice of same prior to the opening of the registration books, and the registration books shall remain open for the same period of time before such special liquor election as is required by law for them to remain open for a regular election. A new registration of voters for such special liquor election is not required and all qualified electors who are properly registered prior to the registration for the special election, as well as those electors who register in said special liquor election, shall be entitled to vote in said election.

If any county while operating any such control store under the provisions of chapter four hundred ninety-three or four hundred eighteen of the Public Laws of one thousand nine hundred thirty-five or under the terms of this article shall hereafter under the provisions of this article hold an election and at such election a majority of the votes shall be cast "against county liquor control stores," then the county control board in such county shall within three (3) months from the canvassing of such vote and the declaration of the result thereof, close said stores and shall thereafter cease to operate the same. During this period of time, the county control board shall dispose of all alcoholic beverages on hand, all fixtures and all other property in the hands and under the control

of the county control board and convert the same into money and shall, after making a true and faithful accounting, turn all money in its hands over to the general fund of the county. Thereafter, chapter one of the Public Laws of one thousand nine hundred twenty-three [§ 18-1 et seq.], being commonly known as the Turlington Act, shall be in full force and effect in such county, until and unless another election is held under the provisions of this article, in which a majority of the votes shall be cast "for county liquor control stores," except as modified by this article or any acts amendatory hereof.

No election under this section shall be held on the day of any biennial election for county officers, or within sixty days of such an election, and the date of such elections under this section shall be fixed by the board of elections of the county wherein the same is held.

No other election shall be called and held in any of the counties in the state under the provisions of this article within three years from the holding of the last election under this article. In any county in which an election was held either under the provisions of chapter four hundred ninety-three or chapter four hundred eighteen of the Public Laws of one thousand nine hundred thirty-five, an election may be called under the provisions of this article, provided no such election shall be called within three years of the holding of the last election. (1937, c. 49, s. 25, c. 431.)

§ 18-62. Elections in counties now operating stores, not required for continued operation.—Nothing herein contained shall be so construed as to require counties in which liquor stores have been established under chapters four hundred eighteen or four hundred ninety-three of the Public Laws of one thousand nine hundred thirty-five to have any further election in order to enable such counties to establish liquor stores, and as to such counties in which liquor stores are now being operated under chapters four hundred eighteen or four hundred ninety-three of the Public Laws of one thousand nine hundred thirty-five, such stores shall from February 22, 1937 be operated under the terms of this article. (1937, c. 49, s. 26.)

Local Modification.—Moore: 1937, c. 49, s. 26.

Art. 4. Beverage Control Act of 1939.

§ 18-63. Title.—This article shall be known as the Beverage Control Act of one thousand nine hundred thirty-nine. (1939, c. 158, s. 500.)

Local Modification.—The following laws are amendments to or modifications of 1933, c. 216, of which the Beverage Control Act of 1939 is a successor: Alamance (Elon College, Sylvan High School, and Cane Creek Church): 1933, cc. 381, 417; Bladen (Frenches Creek Township): 1933, c. 475; Buncombe (Ridgecrest, Montreat, town of Weaver-ville): 1933, c. 396; Caswell (village of Yanceyville and Pelham M. E. Church, South): 1933, cc. 472, 508; Dare (Stumpy Point voting precinct): 1933, c. 455; Guilford (Guilford College and Oak Ridge Military Institute): 1933, cc. 369, 370, 406; Harnett (Campbell College): 1933, c. 398; Madison (Mars Hill College): 1933, c. 396; Mecklenburg (Davidson College): 1933, c. 313; Mitchell (town of Bakersville): 1933, c. 416; Moore (Quaker Children's Home): 1933, c. 454; Randolph (village of Worthville): 1933, c. 512; Sampson (Pineland Junior College): 1933, c. 358; Union (Wingate Junior College): 1933, c. 454; Wake (Wake Forest College): 1933, c. 564; Warren (village of Macon): 1933, c. 395.

§ 18-64. Definitions.—The term “beverages” as used in this article shall include:

(a) Beer, lager beer, ale, porter, and other brewed or fermented beverages containing one-half of one per cent (1%) of alcohol by volume but not more than five per cent (5%) of alcohol by weight as authorized by the laws of the United States of America.

(b) Unfortified wines, as used in this article, shall mean wine of an alcoholic content produced only by natural fermentation or by the addition of pure cane, beet, or dextrose sugar and having an alcoholic content of not less than five per centum (5%) and not more than fourteen per centum (14%) of absolute alcohol, the per centum of alcohol to be reckoned by volume.

The term “person” used in this article shall mean any individual, firm, partnership, association, corporation, or other groups or combination acting as a unit.

The term “sale” as used in this article shall include any transfer, trade, exchange or barter in any manner or by any means whatsoever, for a consideration. (1939, c. 158, s. 501; 1941, c. 339, s. 4.)

Editor's Note.—The 1941 amendment struck out former subsection (c) defining fortified wines. For new definition of fortified wines enacted by the 1941 General Assembly, see § 18-96.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 492.

§ 18-65. Regulations; statement required on container; application of other law.—The beverages enumerated in § 18-64 may be manufactured, transported, or sold in this state in the manner and under the regulations hereinafter set out: Provided, however, that, except as otherwise provided by law, no wines shall be transported or sold in this state unless there be firmly fastened or impressed on the barrel, bottle, or other container in which the same may be a written statement showing that the same are not fortified and that the alcoholic content thereof reckoned by volume, is not more than fourteen per cent.

The possession, transportation, or sale of wines defined in § 18-64, subsection (b) without such statement, and any misrepresentation made in any such statement, shall constitute a misdemeanor and be punished as provided in § 18-91. Except as otherwise provided by law, the manufacture, possession, transportation or sale of wines other than those defined in § 18-64, subsection (b), including fortified wines, shall be subject to all the provisions of chapter one of the Public Laws of one thousand nine hundred and twenty-three, commonly called the Turlington Act, as amended and supplemented, codified as § 18-1 et seq. (1939, c. 158, s. 502; 1941, c. 339, s. 4.)

Editor's Note.—The 1941 amendment added the proviso and the second paragraph.

§ 18-66. Transportation. — The beverages enumerated in § 18-64 may be transported into, out of or between points in this state by railroad companies, express companies or by steamboat companies engaged in public service as common carriers and having regularly established schedules of service upon condition that such companies shall keep accurate records of the character and volume of such shipments, the character and number of packages or containers, shall keep records open at all times for inspection by the commis-

sioner of revenue of this state or his authorized agent, and upon condition that such common carrier shall make report of all shipments of such beverages into, out of or between points in this state at such times and in such detail and form as may be required by the commissioner of revenue.

The beverages enumerated in § 18-64 may be transported into, out of or between points in this state over the public highways of this state by motor vehicles upon condition that every person intending to make such use of the highways of this state shall as a prerequisite thereto register such intention with the commissioner of revenue in advance of such transportation, with notice of the kind and character of such products to be transported and the license and motor number of each motor vehicle intended to be used in such transportation. Upon the filing of such information, together with an agreement to comply with the provisions of this article, the commissioner of revenue shall without charge therefor issue a numbered certificate to each such owner or operator for each motor vehicle intended to be used for such transportation, which numbered certificate shall be prominently displayed on the motor vehicle used in transporting the products named in § 18-64. Every person transporting such products over any of the public highways of this state shall during the entire time he is so engaged have in his possession an invoice or bill of sale or other record evidence, showing the true name and address of the person from whom he has received such beverages, the character and contents of containers, the number of bottles, cases or gallons of such shipment, the true name and address of every person to whom deliveries are to be made. The person transporting such beverages shall, at the request of any representative of the commissioner of revenue, produce and offer for inspection said invoice or bill of sale or record evidence. If said person fails to produce invoice or bill of sale or record evidence, or if when produced, it fails to clearly and accurately disclose said information, the same shall be prima facie evidence of the violation of this article. Every person engaged in transporting such beverages over the public highways of this state shall keep accurate records of the character and volume of such shipments, the character and number of packages or containers, shall keep records open at all times for inspection by the commissioner of revenue of this state, or his authorized agent, and upon condition that such person shall make report of all shipments of such beverages into, out of or between points in this state at such times and in such detail and form as may be required by the commissioner of revenue.

The purchase, transportation and possession of beverages enumerated in § 18-64 by individuals for their own use is permitted without restriction or regulation. The provisions of this section as to transportation of beverages enumerated in § 18-64 by motor vehicles over the public highways of this state shall in like manner apply to the owner or operator of any boat using the waters of the state for such transportation, and all of the provisions of this section with respect to permit for such transportation and reports to the commissioner of revenue by the operators of motor vehicles on public highways shall in like manner

apply to the owner or operator of any boat using the waters of this state. (1939, c. 158, s. 503.)

§ 18-67. Manufacture.—The brewing or manufacture of beverages for sale enumerated in section 18-64 shall be permitted in this state upon the payment of an annual license tax to the commissioner of revenue in the sum of five hundred dollars (\$500.00) for a period ending on the next succeeding thirtieth day of April and annually thereafter. Persons licensed under this section may sell such beverages in barrels, bottles, or other closed containers only to persons licensed under the provisions of this article for resale, and no other license tax shall be levied upon the business taxed in this section. The sale of malt, hops, and other ingredients used in the manufacture of beverages for sale enumerated in § 18-64 is hereby permitted and allowed: Provided, that any person engaged in the business of manufacturing in this state the wines described in § 18-64, subsection (b) shall be required to pay the following tax based on the number of gallons manufactured:

Where not more than one hundred gallons are manufactured for sale	\$ 5.00
Where one hundred gallons and not more than two hundred gallons are manufactured for sale	10.00
Where two hundred gallons and not more than five hundred gallons are manufactured for sale	25.00
Where five hundred gallons and not more than one thousand gallons are manufactured for sale	50.00
Where one thousand gallons and not more than two thousand five hundred gallons are manufactured for sale	200.00
Where two thousand five hundred gallons or more are manufactured for sale	250.00

Nothing in this article shall be construed to impose any tax upon any resident citizen of this state who makes native wines for the use of himself, his family and guests from fruits, grapes and berries cultivated or grown wild upon his own land. (1939, c. 158, s. 504.)

§ 18-68. Bottler's license.—Any person who shall engage in the business of receiving shipments of the beverages enumerated in § 18-64, subsection (a) in barrels or other containers, and bottling the same for sale to others for resale, shall pay an annual license tax of two hundred fifty dollars (\$250.00); and any person who shall engage in the business of bottling the beverages described in § 18-64, subsection (b), shall pay an annual license tax of two hundred fifty dollars (\$250.00): Provided, however, that any person engaged in the business of bottling the beverages described in § 18-64, subsection (a) and also the beverages described in § 18-64, subsection (b), or either, shall pay an annual license tax of four hundred dollars (\$400.00). No other license tax shall be levied upon the businesses taxed in this section, but licensees under this section shall be liable for the payment of the taxes imposed by § 18-81 in the manner therein set forth. (1939, c. 158, s. 505; 1941, c. 339, s. 4.)

Editor's Note.—The 1941 amendment struck out references to former subsection (c) of § 18-64.

§ 18-69. Wholesaler's license.—License to sell

at wholesale, which shall authorize licensees to sell beverages described in § 18-64, subsection (a) in barrels, bottles, or other containers, in quantities of not less than one case or container to a customer, shall be issued as a state-wide license by the commissioner of revenue. The annual license under this section shall be one hundred and fifty dollars (\$150.00) and shall expire on the next succeeding thirtieth day of April. The license issued under this section shall be revocable at any time by the commissioner of revenue for failure to comply with any of the conditions of this article with respect to the character of records required to be kept, reports to be made or payment of other taxes hereinafter set out.

Licensees to sell at wholesale the beverages described in section 18-64, subsection (b) shall pay an annual license tax of one hundred fifty dollars (\$150.00): Provided, that a licensee to sell at wholesale the beverages described in § 18-64, subsection (a) and the beverages described in § 18-64, subsection (b) shall pay an annual license tax of two hundred fifty dollars (\$250.00).

If any wholesaler maintains more than one place of business or storage warehouse from which orders are received or beverages are distributed a separate license shall be paid for each separate place of business or warehouse.

The owner or operator of every distributing warehouse selling, distributing or supplying to retail stores beverages enumerated in § 18-64 shall be deemed a wholesale distributor within the meaning of this article and shall be liable for the tax imposed in this section and shall comply with the conditions imposed in this article upon wholesale distributors of beverages with respect to payment of taxes levied in this article and bond for the payment of such taxes.

No county shall levy a tax on any business under the provisions of this section, nor shall any city or town, in which any person, firm, corporation or association taxed hereunder has its principal place of business levy and collect more than one-fourth of the state tax levied under this section; nor shall any tax be levied or collected by any county, city or town on account of delivery of the products, beverages or articles enumerated in § 18-64. (1939, c. 158, s. 506; 1941, c. 339, s. 4.)

Editor's Note.—The 1941 amendment struck out the reference in the second paragraph to former subsection (c) of § 18-64.

§ 18-70. Sales on railroad trains.—The sale of beverages enumerated in § 18-64 shall be permitted on railroad trains in this state to be sold only in dining cars, buffet cars, Pullman cars, or club cars, and for consumption on such cars upon payment to the commissioner of revenue of one hundred dollars (\$100.00) for each railroad system over which such cars are operated in this state for an annual state-wide license expiring on the next succeeding thirtieth day of April. No other license shall be levied upon licensees under this section, but every licensee under this section shall make a report to the commissioner of revenue on or before the tenth day of each calendar month covering sales for the previous month and payment of the tax on such sales at the rate of tax levied in this article. (1939, c. 158, s. 507.)

§ 18-71. Salesman's license.—License for sales-

men, which shall authorize the licensee to offer for sale within the state or solicit orders for the sale of within the state beverages enumerated in this article, shall be issued by the commissioner of revenue upon the payment of an annual license tax of twelve dollars and fifty cents (\$12.50) to the commissioner of revenue, such license to expire on the next succeeding thirtieth day of April. License to salesmen shall be issued only upon the recommendation of the vendor whom they represent, and no other license tax shall be levied under this section. (1939, c. 158, s. 508.)

§ 18-72. Character of license.—License issued under authority of § 18-64, subsection (a) shall be of two kinds:

(1) "On premises" license which shall be issued for bona fide restaurants, cafes, cafeterias, hotels, lunch stands, drug stores, filling stations, grocery stores, cold drink stands, tea rooms, or incorporated or chartered clubs. Such license shall authorize the licensee to sell at retail beverages for consumption on the premises designated in the license, and to sell the beverages in original packages for consumption off the premises.

(2) "Off premises" license which shall authorize the licensee to sell at retail beverages for consumption only off the premises designated in the license, and only in the immediate container in which the beverages was received by the licensee.

In a municipality the governing board of such municipality shall determine whether an applicant for license is entitled to a "premises" license under the terms of this article, and outside of municipalities such determination shall be by the board of commissioners of the county. (1939, c. 158, s. 509.)

§ 18-73. Retail license issued for sale of wines.—License issued under authority of section 18-64, subsection (b) shall be of two kinds:

1. "On premises" licenses shall be issued to bona fide hotels, cafeterias, cafes and restaurants and shall authorize the licensees to sell at retail for consumption on the premises designated in the license; provided no such license shall be issued except to hotels, cafeterias, cafes and restaurants where prepared food is customarily sold and to such only as are licensed under the provisions of § 105-62 and which, at the time of the application for such license, have been given a grade A or B rating by the state department of health.

2. "Off premises" license shall authorize the licensee to sell said beverages at retail for consumption off the premises designated in the license, and all such sales shall be made in the immediate container in which the beverage was purchased by the licensee, and every such container shall have the tax stamp displayed thereon, as provided in § 18-81. (1939, c. 158, s. 509½; 1941, c. 339, s. 4.)

Editor's Note.—The 1941 amendment struck out in line two of the text of this section the reference to former subsection (c) of § 18-64.

§ 18-74. Amount of retail license tax.—The license tax to sell at retail under § 18-64, subsection (a) for municipalities shall be:

(1) For "on premises" license, fifteen dollars (\$15.00).

(2) For "off premises" license, five dollars (\$5.00).

The license tax to sell at retail under section 18-64, subsection (b), or both, shall be:

(1) For "on premises" license, fifteen dollars (\$15.00).

(2) For "off premises" license, ten dollars (\$10.00).

The rate of license tax levied in this section shall be for the first license issued to one person and for each additional license issued to one person an additional tax of ten per cent (10%) of the base tax, such increase to apply progressively for each additional license issued to one person. (1939, c. 158, s. 510; 1943, c. 400, s. 6.)

Editor's Note.—The 1943 amendment reduced the license tax stated in lines six and seven from ten to five dollars.

§ 18-75. Who may sell at retail.—Every person making application for license to sell at retail beverages enumerated in § 18-64, if the place where such sale is to be made is within a municipality, shall make application first to the governing board of such municipality, and the application shall contain:

(1) Name and residence of the applicant and the length of his residence within the state of North Carolina.

(2) The particular place for which the license is desired, designating the same by a street and number, if practicable; if not, by such other apt description as definitely locates it.

(3) The name of the owner of the premises upon which the business licensed is to be carried on.

(4) That the applicant intends to carry on the business authorized by the license for himself or under his immediate supervision and direction.

(5) A statement that the applicant is a citizen and resident of North Carolina and not less than twenty-one years of age; that he has never been convicted of a felony or other crime involving moral turpitude; and that he has not, within the last two years prior to the filing of the application, been adjudged guilty of violating the prohibition laws, either state or federal. The application must be verified by the affidavit of the petitioner made before a notary public or other person duly authorized by law to administer oaths. If it appears from the statement of the applicant or otherwise that he has at any time been convicted of a felony or other crime involving moral turpitude, or that he has, within the two years prior to the filing of the application, been adjudged guilty of violating the prohibition laws, either state or federal, or that he has within two years prior to the filing of the application completed a sentence for violation of the prohibition laws, such license shall not be granted. If it appears that any false statement is knowingly made in any part of the application and license is received thereon, the license shall be revoked and the applicant subjected to the penalty provided by law for misdemeanors. Before issuing a license, the governing body of the municipality shall be satisfied that the statements required by subsections (1), (2), (3), (4), and (5) of this section are true.

Neither the state nor any county or city shall issue a license under this article to any person, or firm, or corporation who has not been a bona fide resident of North Carolina for one year. No

resident of the state shall obtain a license under this article and employ or receive aid from a non-resident for the purpose of defeating this requirement. Any person violating this paragraph shall be guilty of a misdemeanor, and upon conviction shall be imprisoned not more than thirty days or fined not more than two hundred dollars (\$200.00). (1939, c. 158, s. 511.)

§ 18-76. County license to sell at retail.—

License to sell at retail shall be issued by the board of commissioners of the county, and application for such license shall be made in the same manner and contain the same information set out in § 18-75 with respect to municipal license. If the application is for license to sell within a municipality, the application must also show that license has been granted the applicant by the governing board of such municipality. The granting of a license by the governing board of a municipality shall determine the right of an applicant to receive a county license upon compliance with the conditions of this article.

If the application is for license to sell outside of a municipality within the county, the application shall also show the distance to the nearest church or public or private school from the place at which the applicant purposes to sell at retail. No license shall be granted to sell within three hundred feet of any public or private school buildings or church building outside of incorporated cities and towns: Provided, the restriction set forth in this sentence shall not apply to unincorporated towns and villages having police protection.

The clerk of the board of commissioners of each county shall make prompt report to the commissioner of revenue of each license granted by the board of commissioners of such county. The county license fee shall be fixed at (1) twenty-five dollars (\$25.00) for "on premises" license and (2) five dollars (\$5.00) for "off premises" license, for the sale of beverages described in § 18-64, subsection (a), and twenty-five dollars (\$25.00), for the sale of beverages described in § 18-64, subsection (b) and the same shall be placed in the county treasury, for the use of the county. (1939, c. 158, s. 512; 1941, c. 339, s. 4; 1943, c. 400, s. 6.)

Local Modification.—Anson: 1941, c. 331; Currituck (Poplar Branch Township): 1937, c. 390.

Editor's Note.—The 1941 amendment struck out the reference to former subsection (c) of § 18-64 appearing in the third paragraph.

The 1943 amendment struck out the words and figures "twenty-five dollars (\$25.00)" in lines five and six of the third paragraph and inserted in lieu thereof "(1) twenty-five dollars (\$25.00) for 'on premises' license and (2) five dollars (\$5.00) for 'off premises' license."

§ 18-77. Issuance of license mandatory; sales during religious services.—It shall be mandatory that the governing body of a municipality or county issue license to any person applying for the same when such person shall have complied with requirements of this article: Provided, no person shall dispense beverages herein authorized to be sold, within fifty feet of a church building in an incorporated city or town, or in a city or town having police protection whether incorporated or not, while religious services are being held in such church, or within three hundred feet of a church building outside the incorporate limits of a city or town while church serv-

ices are in progress: And provided further that this section shall not apply in any territory where the sale of wine and/or beer prohibited by special legislative act. And provided further, that such governing bodies in the counties of Watauga, Ashe, Jackson, Haywood, Duplin, Alexander, Robeson, McDowell, Yadkin, Wilkes, Sampson, Greene, Montgomery, Transylvania, Randolph, Chatham, Alamance, Clay, Madison, Pender, Avery, Nash, Granville and the Town of Aulander, or any municipality therein shall be authorized in their discretion to decline to issue the "on premises" licenses provided for in subsection one of § 18-73. The governing bodies in the counties of Watauga, Ashe, Jackson, Haywood, Duplin, Alexander, Robeson, McDowell, Yadkin, Wilkes, Sampson, Greene, Montgomery, Transylvania, Randolph, Chatham, Alamance, Clay, Madison, Pender, Avery, Nash, Granville and the town of Aulander or municipalities therein, shall be authorized to prohibit the sale of beer and/or wine between the hours of 12:01 A. M. on Sundays and midnight Sunday night. (1939, c. 158, s. 513; 1939, c. 405.)

§ 18-78. Revocation or suspension of license; rule making power of commissioner of revenue.—

If any licensee violates any of the provisions of this article or any rules and regulations under authority of this article or fails to superintend in person or through a manager, the business for which the license was issued, or allows the premises with respect to which the license was issued to be used for any unlawful, disorderly, or immoral purposes, or knowingly employs in the sale or distribution of beverages any person who has been convicted of a felony involving moral turpitude or adjudged guilty of violating the prohibition laws within two years or otherwise fails to carry out in good faith the purposes of this article, the license of any such person may be revoked by the governing board of the municipality or by the board of county commissioners after the licensee has been given an opportunity to be heard in his defense. Whenever any person, being duly licensed under this article, shall be convicted of the violation of any of the prohibition laws or of any of the provisions of this article or of any rule or regulation of the commissioner of revenue on the premises herein licensed, it shall be the duty of the court to revoke said license. Whenever any license which has been issued by any municipality, any board of county commissioners, or by the commissioner of revenue has been revoked, it shall be unlawful to reissue said license for said premises to any person for a term of six months after the revocation of said license.

The commissioner of revenue shall have the power to adopt, repeal, and amend rules and regulations to carry out the provisions of this article and to revoke or suspend the state license of any licensee for violation of the provisions of this article or of any rule or regulation adopted by him, as provided in § 18-78.1. Whenever there shall be filed with the commissioner of revenue a certified copy of a judgment of a court convicting a licensee of a violation of the prohibition laws or of any provision of this article or of any rule or regulation issued by the commissioner of revenue, the commissioner of revenue shall forthwith

revoke the license of said licensee. The revocation or suspension of either a state, county, or municipal license shall automatically revoke or suspend any other license issued to the licensee under the authority of this article. (1939, c. 158, s. 514; 1943, c. 400, s. 6.)

Cross Reference.—See also § 18-91.

Editor's Note.—The 1943 amendment inserted in the second sentence the words "or of any of the provisions of this article or of any rule or regulation of the commissioner of revenue." It also added the second paragraph.

§ 18-78.1. Prohibited acts under license for sale for consumption on premises; procedure for revocation or suspension of license; enforcement.—No holder of a license authorizing the sale at retail of beverages, as defined in § 18-64, for consumption on the premises where sold, or any servant, agent, or employee of the licensee, shall do any of the following upon the licensed premises:

(1) Knowingly sell such beverages to any person under eighteen (18) years of age.

(2) Knowingly sell such beverages to any person while such person is in an intoxicated condition.

(3) Sell such beverages upon the licensed premises or permit such beverages to be consumed thereon, on any day or at any time when such sale or consumption is prohibited by law.

(4) Permit on the licensed premises any disorderly conduct, breach of peace, or any lewd, immoral, or improper entertainment, conduct or practices.

(5) Sell, offer for sale, possess, or permit the consumption on the licensed premises of any kind of alcoholic liquors the sale or possession of which is not authorized under his license.

Proceedings for the revocation or suspension under this section of any license authorizing the sale of such beverages at retail for consumption on the premises shall be instituted by the filing of a complaint with the commissioner of revenue against the licensee. Said complaint may be filed by the commissioner of revenue upon his own initiative and the said commissioner of revenue may, in his discretion, file a complaint when requested to do so by a peace officer or any person as hereinafter provided. Any peace officer, who learns that any such licensee within his jurisdiction has violated any of the provisions of this section, shall file with commissioner of revenue an affidavit specifying in detail the facts alleged to constitute said violation and requesting that a complaint be filed against said licensee for the revocation or suspension of his license. A like affidavit may be filed with the commissioner of revenue by any person who resides, and has for at least one year prior thereto resided, within two miles of the licensed premises, of such licensee, requesting that a complaint be filed for the revocation or suspension of said licensee's license. Promptly upon receiving any such affidavit, the said commissioner of revenue shall prepare a proper complaint, which shall be signed and sworn to by the person or persons filing the affidavit with him. The commissioner of revenue shall serve, or cause to be served, upon the licensee by personal service or by United States registered mail a notice of the filing of said complaint, together with a copy of said complaint.

The licensee shall have a right at any time within twenty days after service of the notice, above provided for, within which to file with the commissioner of revenue a written denial of the facts alleged in the complaint and demand a hearing thereon. In event such licensee files a written denial of the facts set out in the complaint and demands a hearing thereon, the commissioner of revenue shall immediately certify the record to the superior court of the county in which the license was issued where the matter shall be heard and determined at the next term of the superior court held in said county. If, upon the trial of said matter in the superior court, the allegations contained in the complaint are found against the licensee, the court shall immediately order a revocation or suspension of the license. In event the licensee fails to file a written denial of the facts set out in the complaint and demand a hearing thereon within twenty days after the service of the notice above provided for, the commissioner of revenue shall immediately revoke or suspend the license of said licensee.

It shall be the duty of all peace officers to enforce within their jurisdiction the provisions of this section and they shall frequently visit all such licensed premises within their jurisdiction to determine whether such licensees are complying with the laws; and shall promptly investigate all complaints made to them by any citizen relative to any alleged violations of this section within their jurisdiction. When any peace officer has knowledge of a violation of this section committed by a licensee within his jurisdiction, it shall be his duty forthwith to file an affidavit with the commissioner of revenue, as herein provided, requesting that a complaint be filed for the revocation or suspension of the license of said licensee.

The jurisdiction herein conferred upon the commissioner of revenue shall not be exclusive and any authority conferred upon the governing boards of a municipality, or boards of county commissioners to revoke or suspend licenses shall remain in full force and effect: Provided, however, that when a complaint is filed with the commissioner of revenue, any proceedings which may then be pending before the municipal or county authorities against the same licensee on the same charges shall abate and no proceedings for the revocation or suspension of a license for a violation of the provisions of this section shall be filed with the governing board of municipality or a board of county commissioners when proceedings are pending with the commissioner of revenue against the licensee on the same charge.

The revocation or suspension of a licensee's license, as herein provided, shall be in addition to and not in lieu of or limitation of any other penalty imposed by law. (1943, c. 400, s. 6.)

Cross Reference. — See also § 18-91.

§ 18-79. State license.—Every person who intends to engage in the business of retail sale of the beverages enumerated in § 18-64, subsection (a) shall also apply for and procure a state license from the commissioner of revenue.

For the first license issued to each licensee five dollars (\$5.00), and for each additional license

issued to one person an additional tax of ten per cent (10%) of the five dollars base tax shall be charged. That is to say, that for the second license issued the tax shall be five dollars and fifty cents (\$5.50) annually, for third license six dollars (\$6.00) annually, and an additional fifty cents (50c.) per annum for each additional license issued to such person. (1939, c. 158, s. 515.)

§ 18-80. State license to sell wine at retail.—Every person who intends to engage in the business of selling wines as defined in § 18-64, subsection (b) shall procure a state license for such business which license shall in all cases be issued under the same restrictions, rules and regulations as set out in this article for the issuance of license for the sale of beverages described in § 18-64, subsection (a) and for which license the following schedule of taxes is hereby levied:

- (1) For "on premises" license twenty-five dollars\$25.00
- (2) For "off premises" license five dollars 5.00

Such retail license shall authorize the sale of the beverages described in this section only on the premises described in the license, and if the same person operates more than one place at which said beverages are sold at retail, he shall obtain a license for each such place and pay therefor the license tax provided in this section.

If the license issued to any person by any municipality or county to sell the beverages referred to in this article shall be revoked by the proper officers of such municipality or county, or by any court, it shall be the duty of the commissioner of revenue to revoke the state license of such licensee; and in such event, the licensee shall not be entitled to a refund of any part of the license tax paid.

It shall be unlawful for any wholesale licensee to make any sale or delivery of the beverages described in § 18-64, subsection (b) to any person except persons who have been licensed to sell such beverages at retail, as prescribed in this article.

It shall be unlawful for any retail licensee to purchase any of the beverages described in § 18-64, subsection (b) from any person except wholesale licensees maintaining a place of business within this state and duly licensed under the provisions of this article. (1939, c. 158, s. 516; 1941, c. 339, s. 4.)

Editor's Note.—The 1941 amendment struck out the references to former subsection (c) of § 18-64 formerly appearing in the first, fourth and fifth paragraphs of this section.

§ 18-81. Additional tax.—(a) In addition to the license taxes herein levied, a tax is hereby levied upon the sale of beverages enumerated in § 18-64, subsection (a) of three dollars and seventy-five cents (\$3.75) per barrel of thirty-one gallons, or the equivalent of such tax in containers of more or less than thirty-one gallons, and in bottles or other containers of not more than twelve ounces, a tax of one and one-quarter cents per bottle or container: Provided fruit cider of alcoholic content not exceeding that provided in this article may be sold in bottles or other containers of not more than six ounces at a tax of five-eighths of a cent per bottle or container.

(b) The payment of the tax imposed by the preceding subsection shall be evidenced as to

containers of not more than six ounces by the affixing of crowns or lids to such containers in which beverages are placed, received, stored, shipped, or handled, and upon which the tax has been paid at the rate of five-eighths of a cent per bottle or container. And the payment of the tax imposed by the preceding subsection shall be evidenced as to containers of more than six ounces and not more than twelve ounces by the affixing of crowns or lids to such containers in which beverages are placed, received, stored, shipped, or handled, and upon which a tax has been paid of one and one-quarter cents per bottle or container.

(c) Except as may be otherwise provided herein, each manufacturer or bottler manufacturing, selling or delivering beverages in this state shall, within twenty-four hours after the beverages are placed in original containers or bottles, and prior to delivery of any container of beverages to any wholesaler, distributor, retailer, jobber, or any other person whatsoever in this state, affix the proper crown or lid to each container.

(d) Except as may be otherwise provided herein, and unless such crowns or lids have been previously affixed, such crowns or lids shall be affixed as herein provided by each distributor or wholesaler in this state within twenty-four hours after such beverages come into the possession of such wholesaler and prior to the delivery of any container thereof to any retailer or other person in this state.

(e) The commissioner of revenue shall prescribe, prepare, furnish and sell the crowns or lids provided for in this section under rules and regulations prescribed by him, and all such crowns and lids shall carry the following words: "N. C. Tax Paid," and shall be so designed as to enable the manufacturer or bottler to place his brand or trade mark thereon, and they shall be purchased by the manufacturer or bottler or other person after the payment of the tax imposed by this article, only from such persons, firms or corporations as may be designated as manufacturers of such crowns and lids by the commissioner of revenue. The commissioner of revenue is authorized to enter into contracts on behalf of the state with one or more manufacturers for the manufacture, sale and distribution of such crowns or lids and shall require of such persons, firms and corporations so manufacturing, selling and distributing such crowns or lids a bond or bonds with a company authorized to do business in this state as surety payable to the state of North Carolina in such penalty and upon such conditions as in the opinion of the commissioner of revenue will adequately protect the state. The crowns and lids shall be manufactured, sold and distributed at the cost of the taxpayer. No manufacturer or bottler will be allowed to purchase the crowns or lids prescribed by this section unless such bottler or manufacturer has a valid permit from the federal government and the state of North Carolina, or the state in which such manufacturer or bottler is located, to manufacture, bottle, or sell the beverages herein described. The crowns and lids shall be sold by the commissioner of revenue at a discount of two per cent (2%) as sole compensation for North Carolina tax-paid crown and lid losses sustained in the process of production of malt beverages. No compensation or refund shall be

made for tax-paid malt beverages given as free goods, or advertising, and losses, sustained by spoilage and breakage incident to the sale and distribution of malt beverages.

(f) At the time of delivering beverages to any person, firm or corporation in this state, each manufacturer or bottler shall make a true duplicate invoice showing the date of delivery, the amount and value of each shipment of beverages delivered, and the name of the purchaser to whom the delivery is made, and shall retain the same for a period of two years, subject to the use and inspection of the commissioner of revenue or his agents.

(g) Persons operating boats, dining cars, buffet cars or club cars upon or in which beverages are sold shall not be required to evidence the payment of the tax herein provided for by affixing crowns or lids as herein provided, but instead shall keep such records of the sales of such beverages in this state as the commissioner of revenue shall prescribe and shall submit monthly reports of such sales to the commissioner of revenue upon a form prescribed therefor by the commissioner of revenue, and shall pay the tax levied under this article at the time such reports are filed.

(h) It is the intent and purpose of this section to require all manufacturers and bottlers and other persons, except as herein provided, to affix the crowns or lids provided for herein to all original containers in which beverages are normally placed, prepared for market, received, sold or handled, before such beverages are sold, offered for sale, or held for sale within this state.

(i) Any person, firm or corporation, except as herein provided, who shall sell the beverages enumerated in § 18-64, subsection (a) to wholesalers, retailers, or consumers which do not have affixed thereto the crowns or lids required by this section, or who shall purchase, receive, transport, store, or possess any beverage in containers to which the crowns or lids required herein are not affixed, shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court, and, in addition thereto, such person shall be liable for double the amount of the tax due under this article and the commissioner of revenue shall have authority to assess said tax and penalty and cause the same to be collected in the same manner provided for the collection of other taxes levied in this article.

(j) Manufacturers, bottlers, or vendors of beverages enumerated in § 18-64, subsection (a), from without this state, shall affix the crowns or lids to original containers of such beverages to be sold, offered for sale, held for sale, delivered or transported for delivery in this state.

(k) The commissioner of revenue shall promulgate rules and regulations to relieve manufacturers or bottlers of beverages from the liability to affix crowns or lids to such containers of such beverages as are intended to be shipped and are thereafter shipped out of this state by such manufacturers or bottlers for resale out of this state.

(l) Any person who falsely or fraudulently makes, forges, alters, or counterfeits any crowns or lids prescribed by the commissioner of revenue under the provisions of this section, or causes or procures to be falsely or fraudulently made, forged, altered,

or counterfeited any such crowns or lids, or knowingly or wilfully utters, passes or tenders as true any such false, forged, altered, or counterfeited crowns or lids, or uses more than once any crown or lid provided for and required by this article, or uses a crown or lid other than that prescribed herein for the purpose of evading the tax imposed under this article, or for the purpose of aiding or abetting others to evade the tax imposed under this article, shall be guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the state's prison for not more than five years, or by a fine of not more than five thousand dollars (\$5,000.00), or by both such fine and imprisonment in the discretion of the court.

(m) Any person, firm or corporation having in his possession a container or containers of beverages not bearing the crowns or lids required to be affixed to such container, or who fails to produce upon demand by the commissioner of revenue or his agent, invoices of all beverages purchased or received by him within two years prior to such demand, unless upon satisfactory proof it is shown that such non-production is due to providential or other causes beyond his control, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned in the discretion of the court.

(n) Any person who shall fail, neglect, or refuse to comply with or shall violate any provisions of this section, for which no specific penalty is provided, or who shall refuse to permit the commissioner of revenue or his agents to examine his books, papers, invoices and other records, his store of beverages in and upon any premises where the same are manufactured, bottled, stored, sold, offered for sale, or held for sale, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned in the discretion of the court.

(o) The commissioner of revenue is hereby charged with the enforcement of the provisions of this section and hereby authorized and empowered to prescribe, adopt, promulgate, and enforce rules and regulations relating to any matter or thing pertaining to the administration and enforcement of the provisions of this section, and the collection of taxes, penalties, and interest imposed by this article.

In the event that the commissioner of revenue shall find as facts that due to war conditions or other unusual circumstances, a free supply of taxpaid crowns cannot be obtained, and that the beverage tax revenues of the state are being, or will likely be, impaired by the difficulty or impossibility in obtaining said taxpaid crowns, the commissioner shall be empowered to promulgate a regulation authorizing the use of stamps, labels, or other suitable devices in lieu of or in addition to crowns as evidences of tax payments for the duration of the emergency, but no longer. In the event that stamps, labels, or other devices are authorized by the commissioner as herein provided, the remaining provisions of this article shall not be affected, and shall be construed by substituting the name of the substituted device for "crown or lid" or "crowns or lids" wherever these words appear, unless the context clearly will not permit such construction.

The action of the commissioner of revenue in

promulgating a regulation under date of September second, one thousand nine hundred and forty-two, authorizing the use of stamps as an alternative to crowns or lids, is in all respects hereby approved, ratified and confirmed.

(p) The commissioner of revenue is hereby authorized to prescribe, adopt, promulgate, and enforce the rules and regulations relating to the transportation of beverages enumerated in § 18-64 through this state, and from points outside of this state to points within this state, and to prescribe, adopt, promulgate and enforce rules and regulations reciprocal to those of, or laws of, any other state or territory affecting the transportation of beverages manufactured in this state.

(q) The commissioner of revenue shall have authority at any time after March 24, 1939, to make provisions for the furnishing of crowns or lids required by this section.

(r) In addition to the license taxes herein levied, a tax is hereby levied upon the sale of beverages described in section 18-64, subsection (b) of twenty cents (20c.) per gallon.

These additional taxes levied under this subsection shall be paid to the commissioner of revenue by the wholesale distributor or bottler of such beverages.

Reports shall be made to the commissioner of revenue in such form as he may prescribe, on or before the tenth day of each month, for all beverages sold by such wholesale distributor or bottler within the preceding month, and such reports when filed shall be accompanied by a remittance of the amount of tax shown to be due. Failure to file the reports herein prescribed and pay the tax as shown to be due thereon shall subject such wholesale distributor or bottler to a penalty of five per centum of the amount of the tax due, per month from the date the tax is due.

If the wholesale distributor or bottler shall refuse to make the reports required under this section, then such reports shall be made by the commissioner or his duly authorized agents from the best information available, and such reports shall be prima facie correct for the purposes of this section, and the amount of tax due thereby shall be a lien against all the property of the taxpayer until discharged by payments, and if payment is not made within thirty days after demand therefor by the commissioner or his duly authorized agents, there shall be added not more than one hundred per centum as damages, together with interest at the rate of one per centum per month from the time such tax was due. If such tax be paid within thirty days after notice by the commissioner, then there shall be added not more than ten per centum as damages, per month from the time such tax was due until paid.

The commissioner for good cause may extend the time for making any report required under the provisions of this section, and may grant such additional time within which to make such report as he may deem proper, but the time for filing any such report shall not be extended beyond the fifteenth day of the month next succeeding the regular due date of such report. If the time for filing a report be extended, interest at the rate of one-half of one per centum per month from the

time the report was required to be filed to the time of payment shall be added and paid.

The taxes levied in this section are in addition to the taxes levied in Schedule E of the Revenue Act. (1939, c. 158, s. 517; c. 370, s. 1; 1941, c. 50, s. 7; c. 339, s. 4; 1943, c. 400, s. 6; 1943, cc. 564, 565.)

Editor's Note.—The 1941 amendments added the last two sentences in subsection (e) and struck out references to former subsection (c) of § 18-64.

The first 1943 amendment added the second and third paragraphs of subsection (o). The third 1943 amendment substituted in the first paragraph of subsection (r) "twenty cents" for "ten cents," and the second 1943 amendment rewrote the other paragraphs of the subsection.

§ 18-82. By whom tax payable.—The tax levied in § 18-81 upon the sale of beverages enumerated in § 18-64, subsection (a) shall be paid to the commissioner of revenue by the manufacturer or bottler of such beverages, and the tax levied in § 18-81 upon the sale of the beverages enumerated in § 18-64, subsection (b) shall be paid to the commissioner of revenue by the wholesale distributor or bottler of such beverages. As a condition precedent to the granting of license by the commissioner of revenue to any wholesale distributor, manufacturer or bottler of beverages under this article, the commissioner of revenue shall require each such wholesale distributor, manufacturer or bottler to furnish bond in an indemnity company licensed to do business under the insurance laws of this state in such sums as the commissioner of revenue shall find adequate to cover the tax liability of each such wholesale distributor, manufacturer or bottler, proportioned to the volume of business of each such wholesale distributor, manufacturer or bottler, but in no event to be less than one thousand dollars (\$1,000.00), or to deposit federal, state, county or municipal bonds in required amounts, such county and municipal bonds to be approved by the commissioner of revenue. The commissioner of revenue may grant such extension of time for compliance with this condition as may be found to be reasonable. (1939, c. 158, s. 518; 1941, c. 339, s. 4.)

Editor's Note.—The 1941 amendment struck out the reference to former subsection (c) of § 18-64, appearing in the first sentence of this section.

§ 18-83. Nonresident manufacturers and wholesale dealers to be licensed.—From and after April thirtieth, one thousand nine hundred thirty-nine, every non-resident desiring to engage in the business of making sales of the beverages described in § 18-64, to wholesale dealers licensed under the provisions of this article, shall first apply to the commissioner of revenue for a permit so to do. The commissioner of revenue may require of every such applicant that a bond in a sum not to exceed two thousand dollars (\$2,000.00) be executed by such applicant and deposited with the commissioner, conditioned upon the faithful compliance by such applicant with the provisions of this article, and particularly that such applicant shall not make sales of any of the beverages described in section 18-64 to any person in this state except a duly licensed wholesale dealer. Upon the payment of a license tax of one hundred fifty dollars (\$150.00), if the commissioner is satisfied that said applicant is a bona fide manufacturer or distributor of the beverages defined in § 18-64, he shall then issue a permit to such applicant which shall bear a serial

number. Every holder of such non-resident permit and license shall thereafter put the number of such permit on every invoice for any quantity of beverages sold by such licensee to any wholesale dealer in North Carolina. Upon the failure of any such licensee to comply with all the provisions of this article, the commissioner of revenue may revoke such permit or license.

Any resident manufacturer licensed under § 18-67 shall not be required to post the bond required by this section. (1939, c. 158, s. 518½.)

§ 18-84. Payment of tax by retailers.—The granting of license by any municipality or county under this article to any person to sell at retail the beverages enumerated under § 18-64 shall not be valid license for such sale at retail until such person shall have filed with the commissioner of revenue a bond in a surety company licensed by the insurance department to do business in this state in such sum as the commissioner of revenue may find to be sufficient to cover the tax liability of every such person, but in no event to be less than one thousand dollars (\$1,000.00). The commissioner of revenue may waive the requirement of this section for indemnity bond with respect to any such person who may file a satisfactory contract or agreement with the commissioner of revenue that such person will purchase and sell beverages enumerated in § 18-64 only from wholesale distributors or bottlers licensed by the commissioner of revenue under this article who pay the tax under § 18-81 upon all such beverages sold to retail dealers in this state. The violation of the terms of any such contract or agreement between any such retail dealer and the commissioner of revenue by the purchase or sale of any of the beverages enumerated in § 18-64 from any one other than a licensed wholesale distributor or bottler under this article shall automatically cancel the license of any such retail dealer and shall be prima facie evidence of intent to defraud, and any person guilty of violation of any such contract or agreement shall be guilty of a misdemeanor. (1939, c. 158, s. 519.)

§ 18-85. Tax on fortified wines and spirituous liquors; sale of fortified wines in A. B. C. stores.—In addition to other taxes levied in this article, and in lieu of taxes levied in Schedule E of the Revenue Act on the sale of fortified wines and spirituous liquors, there is hereby levied a tax of eight and one-half per cent (8½%) on the retail price of fortified wines and spirituous distilled liquors of every kind that may be sold in this state, including liquors sold in county liquor stores. Provided, however, that in no event shall the amount paid under this section exceed one-half of the net profits from liquors sold through such stores in any county. The taxes levied in this section shall be payable monthly, at the same time and in the same manner as taxes levied in Schedule E of the Revenue Act, and the liability for such tax shall be subject to all the rules, regulations and penalties provided in Schedule E and in other sections of the Revenue Act for the payment of taxes. One-fourteenth of the taxes collected under this section are intended to pay the necessary expenses of the state alcoholic control board, and for other necessary expenses in connection with the enforcement of such laws as may be

enacted by this general assembly for the sale of alcoholic liquors and to meet such appropriations there is hereby appropriated and made available for the purpose above set forth one-fourteenth of the amount of taxes collected under this section, such sum to be allocated for such purpose by the director of the budget upon request of the state alcohol control board and expended and accounted for as other state funds, and the director of the budget is hereby given authority to estimate the revenues to be received under this section, to the end that a sufficient sum shall be made available for the purpose of defraying the expenses of the state alcoholic control board until sufficient revenues have been collected as provided hereunder for said purposes.

Spirituous liquors, as referred to in this section, shall be deemed to include any alcoholic beverages containing an alcoholic content of more than twenty-four per cent (24%) by volume.

Fortified wines may be sold in county alcoholic beverage control stores duly established under the authority of article 3 of this chapter. (1939, c. 158, s. 519½; 1941, c. 339, s. 4.)

Editor's Note.—The 1941 amendment inserted the references to fortified wines in the first sentence of the first paragraph and added the third paragraph.

§ 18-86. Books, records, reports.—Every person licensed under any of the provisions of this article shall keep accurate records of purchase and sale of all beverages taxable under this article, such records to be kept separate from all purchases and sales of merchandise taxable under this article, including a separate file and record of all invoices. The commissioner of revenue or any authorized agent, shall at any time during business hours, have access to such records. The commissioner of revenue may also require regular or special reports to be made by every such person, at such times and in such form as the commissioner may require. (1939, c. 158, s. 520.)

§ 18-87. No license for sales upon school property.—No license shall be issued for the sale of beverages enumerated in § 18-64 upon the campus or property of any public or private school or college in this state. (1939, c. 158, s. 521.)

§ 18-88. License shall be posted.—Each form of license required by this article shall be kept posted in a conspicuous place at each place where the business taxable under this article is carried on, and a separate license shall be required for each place of business. (1939, c. 158, s. 522.)

§ 18-89. Administrative provisions.—The commissioner of revenue and the authorized agents of the state department of revenue shall have and exercise all the rights, duties, powers, and responsibilities in enforcing this article that are enumerated in the Revenue Act in administering taxes levied in Schedule B of that act. (1939, c. 158, s. 523.)

§ 18-90. Appropriation for administration.—For the efficient administration of this article an appropriation is hereby made for the use of the department of revenue in addition to the appropriation in the Appropriation Bill of a sum equal to three per cent (3%) of the total revenue collections under this article to be expended under allotments made by the budget bureau of such part of the whole of such appropriation as

may be found necessary for the administration of this article. The budget bureau may estimate the yield of revenue under this article and make advance apportionment based upon such estimate. (1939, c. 158, s. 524.)

§ 18-90.1. Sale to minors under 18 a misdemeanor.—It shall be unlawful for any person, firm, or corporation to sell or give any of the products authorized to be sold by this article to any minor under eighteen years of age. (1933, c. 216, s. 8.)

Cross Reference.—As to sale of liquor to minors under the Alcoholic Beverage Control Act, see § 18-46.

§ 18-91. Violation made misdemeanor; revocation of permits; forfeiture of license.—Whoever violates any of the provisions of this article, or any of the rules and regulations promulgated pursuant thereto, shall be guilty of a misdemeanor, and upon conviction thereof, be punished by a fine or by imprisonment, or by both fine and imprisonment, in the discretion of the court. If any licensee is convicted of the violation of the provisions of this article, or any of the rules and regulations promulgated pursuant thereto, the court shall immediately declare his permit revoked, and notify the county commissioners accordingly, and no permit shall thereafter be granted to him within a period of three years thereafter. Any licensee who shall sell or permit the sale on his premises or in connection with his business, or otherwise, of any alcoholic beverages not authorized under the terms of this article, unless otherwise permitted by law, shall, upon conviction thereof, forfeit his license in addition to any punishment imposed by law for such offense. (1939, c. 158, s. 525.)

§ 18-92. Effective date.—All taxes levied in this article shall be in effect from and after April thirtieth, one thousand nine hundred thirty-nine. (1939, c. 158, s. 528.)

§ 18-93. Adoption of federal regulations.—The "Standards of Identity for Wine" and the regulations relating to "Labeling and Advertising of Wine" promulgated by the Federal Alcohol Administration of the United States Treasury Department, and known respectively as Regulation Number Four, Article II, and Regulation Number Four, Articles III and VI, are hereby adopted by North Carolina. (1937, c. 335, s. 2.)

Art. 5. Fortified Wine Control Act of 1941.

§ 18-94. Title of article.—The title of this article shall be the "Fortified Wine Control Act of one thousand nine hundred and forty-one." (1941, c. 339, s. A.)

Editor's Note.—Public Laws 1941, c. 339, § 8, provides: "This act shall be in full force and effect on and after May first one thousand nine hundred and forty-one."

And § 7 of said chapter provides: "This act shall be in full force and effect on and after midnight, July first, one thousand nine hundred and forty-one, in so far as it applies to the sale of fortified wines, but the effective date of same as applicable to wholesale distributors shall be midnight, July fifteenth, one thousand nine hundred and forty-one. The intent of this section being to grant to the wholesale distributors fifteen (15) days time in which to deplete the entire stock of the retailers, package and return same to such wineries from which said wines were purchased. The commissioner of revenue is hereby empowered and directed to reimburse all wholesale distributors in an amount of money equivalent to the sum represented by North Carolina wine tax stamps in possession of said wholesale distributors, whether affixed to containers or not, as of July second, one thousand nine hundred and forty-one. Such distributors

claiming refunds hereunder shall prepare and forward to the commissioner of revenue sworn itemized statements of such tax stamps in their possession, and the commissioner of revenue is empowered to audit and verify such statements before granting refunds."

§ 18-95. Purpose of article.—The purpose of this article is to prevent and prohibit sales of fortified wines at any places in the state except through county operated alcoholic beverage control stores and to regulate such sales. (1941, c. 339, s. B.)

Cross Reference.—As to alcoholic beverage control stores, see § 18-36 to § 18-62.

Stated in State v. Tola, 222 N. C. 406, 23 S. E. (2d) 321.

§ 18-96. Definition of "fortified wines."—Fortified wines shall mean any wine or alcoholic beverage made by fermentation of grapes, fruit and berries and fortified by the addition of brandy or alcohol or having an alcoholic content of more than fourteen per cent of absolute alcohol, reckoned by volume. (1941, c. 339, s. 1.)

Quoted in State v. Tola, 223 N. C. 406, 23 S. E. (2d) 321.

§ 18-97. Certain sales, etc., prohibited; names of persons ordering wines furnished police or sheriff.—It shall be unlawful for any person, firm or corporation, except alcoholic beverage control stores operated in North Carolina, to sell, or possess for sale, any fortified wines as defined herein. It shall be unlawful for any person to purchase on order and receive by mail or express from any such alcoholic beverage control store fortified wines in quantities not in excess of one gallon at any one time. Upon the request of any chief of police or sheriff any alcoholic beverage control system shall furnish the names of any persons ordering such wines, and the dates and amounts of such orders. Nothing herein contained shall be construed to permit any person to order and receive by mail or express any spirituous liquors. (1941, c. 339, s. 2.)

§ 18-98. Violation made misdemeanor.—The violation of § 18-97 by any person, firm or corporation shall constitute a misdemeanor punishable as provided in § 18-91. (1941, c. 339, s. 5.)

§ 18-99. Application of other laws; sale of sweet wines; licensing of wholesale distributors.—The provisions of article 3 of this chapter shall apply to fortified wines: Provided, that it shall be legal to sell sweet wines in hotels, grade A restaurants, drug stores and grocery stores in any county in which the operation of alcoholic beverage control stores is authorized by law; such sales, however, shall be subject to the rules and regulations of the state alcoholic beverage control board. For the purpose of this article as amended, sweet wines shall be any wine made by fermentation from grapes, fruits or berries, to which nothing but pure brandy has been added, which brandy is made from the same type of grape, fruit or berry, which is contained in the base wine to which it is added, and having an alcoholic content of not less than fourteen per centum (14%) and not more than twenty per centum (20%) of absolute alcohol, reckoned by volume: Provided further that the state alcoholic control board shall approve and authorize the licensing of wholesale wine distributors in such counties where alcoholic board control stores are operated. (1941, c. 339, s. 6.)

Local Modification.—Mitchell: Pub. Loc. 1937, c. 394; 1941, c. 339, s. 6; Yancey: Pub. Loc. 1937, c. 579; 1941, c. 339, s. 6. **Stated in** State v. Tola, 222 N. C. 406, 23 S. E. (2d) 321.

Art. 6. Light Domestic Wines; Manufacture and Regulation.

§ 18-100. **Manufacture of domestic wines permitted.**—It shall be lawful for any person growing crops, either wild or cultivated, of grapes, fruits or berries to make therefrom light domestic wines or wines having only such alcoholic content as natural fermentation may produce, for the use of his family and guests. (1935, c. 393, s. 1.)

§ 18-101. **Manufacture by any person, firm or corporation authorized to do business in State.**—Any person, firm or corporation authorized to do business in the state may, subject to the requirements of the Beverage Control Act, under regulations prescribed by the commissioner of agriculture and approved by the governor, engage in the business of manufacturing and producing wines and ciders by natural fermentation from the juices of fruits, grapes and berries grown within the state, and such wines and ciders shall be classified and recognized as food and distributed as such. (1935, c. 393, s. 3, c. 466, s. 1.)

§ 18-102. **Rules and regulations of commissioner of agriculture.**—The commissioner of agriculture shall promulgate and publish such reasonable rules and regulations, with the approval of the governor, for the regulation of such wineries as may be established, and such rules and regulations shall have the force and effect of laws, after the same have been approved by the governor. (1935, c. 393, s. 4.)

§ 18-103. **Information furnished farmers.**—It shall be the duty of the department of agriculture to disseminate to the farmers of the State in an economical way the best information it can get of the best methods of cultivation of such crops, and the making of such light domestic wines. (1935, c. 393, s. 7.)

Cross Reference.—As to duties of board and commissioner of agriculture with reference to new agricultural industries, especially grapes, etc., see § 106-22, subsec. 6.

§ 18-104. **Fruit ciders included.**—All the provisions of this article shall also apply to the manufacture of fruit ciders. (1935, c. 393, s. 7½.)

Art. 7. Beer and Wine; Hours of Sale.

§ 18-105. **Sale between certain hours unlawful.**—It shall be unlawful for any person, firm, or corporation, licensed to sell beer and/or wine in North Carolina to sell, or offer for sale, any beer and/or wine in North Carolina between the

hours of eleven-thirty p. m. and seven a. m. every day. (1943, c. 339, s. 1.)

§ 18-106. **Permitting consumption on premises during certain hours unlawful.**—It shall be unlawful for any person, firm, or corporation, licensed to sell beer and/or wine in North Carolina, to permit or allow the consumption of any beer and/or wine in any place in North Carolina under the control of, or being operated by, said licensee, between the hours of twelve midnight and seven a. m. every day. (1943, c. 339, s. 2.)

§ 18-107. **Regulation by counties and municipalities.**—In addition to the restrictions on the sale of beer and/or wine set out in §§ 18-105 and 18-106, the county commissioners of the various counties in North Carolina shall have, and they are hereby vested with, full power and authority to regulate and prohibit the sale of beer and/or wine from eleven-thirty p. m. on each Saturday until seven a. m. on the following Monday. The governing bodies of all municipalities in the state shall have, and they are hereby vested with, the full power and authority to regulate and prohibit the sale of beer and/or wine from eleven-thirty p. m. on each Saturday until seven a. m. on the following Monday.

The power herein vested in governing bodies of municipalities shall be exclusive within the corporate limits of their respective municipalities, and the powers herein vested in the county commissioners of the various counties in North Carolina shall be exclusive in all portions of their respective counties not embraced in the corporate limits of municipalities therein. (1943, c. 339, s. 3.)

§ 18-108. **Violation a misdemeanor; revocation of license.**—Any person, firm, or corporation, licensed to sell beer and/or wine, violating the provisions of this article or any person, firm, or corporation, licensed to sell beer and/or wine, violating any regulations which may be made under this article by the county commissioners of the county in which said person, firm, or corporation is licensed to sell beer and/or wine, shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than fifty dollars (\$50.00) and/or imprisoned not less than thirty days, and his or its license to sell beer and/or wine shall automatically be revoked, by the court, or as otherwise provided by law. (1943, c. 339, s. 4.)

Chapter 19. Offenses against Public Morals.

Sec.

19-1. What are nuisances under this chapter.

19-2. Action for abatement; injunction.

19-3. When triable; evidence; dismissal of complaint.

19-4. Violation of injunction; punishment.

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19-5. Order abating nuisance; what it shall contain.

19-6. Application of proceeds of sale.

19-7. How order of abatement may be canceled.

19-8. Attorney's fees may be taxed as costs.

§ 19-1. **What are nuisances under this chapter.**—Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assigna-

tion, prostitution, gambling, or illegal sale of whiskey is guilty of nuisance, and the building, erection, or place, or the ground itself, in or upon which such lewdness, assignation, prostitution,

gambling, or illegal sale of liquor is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments and contents, are also declared a nuisance, and shall be enjoined and abated as hereinafter provided. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 25; C. S. 3180.)

Cross References.—As to criminal actions: For prostitution, see § 14-203 et seq.; for gambling, see § 14-289 et seq.; for unlawful sale of whiskey, see § 18-31 et seq.; for lewdness, etc., see § 14-190.

Constitutionality.—This section, et seq., providing for the abatement of public nuisances is constitutional as a valid exercise of the police power of the state. *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850. See also, *Barker v. Palmer*, 217 N. C. 519, 8 S. E. (2d) 610.

Nuisance Need Not Be Nucleus of Crime.—It is not essential to the nuisance defined by this section that the acts of the customers, which impart that quality to the premises and the business conducted there, should be violations of the criminal law, either generally speaking or under the terms of the statute. It is not necessary that the nuisance declared should have a nucleus of crime essential to its existence. While nuisance is frequently associated with criminal offenses, the law is not under the necessity of predicating one crime upon another to make valid its denunciation of an act which it denominates a nuisance. *State v. Brown*, 221 N. C. 301, 20 S. E. (2d) 286.

Establishment Facilitating Betting on Races.—The maintenance of an establishment with ticker tape and other paraphernalia to facilitate the making of wagers on horse races, and in which offers to lay wagers were transmitted to race tracks outside the state, and through which wagers were paid off to successful betters, constitutes a public nuisance. *State v. Brown*, 221 N. C. 301, 20 S. E. (2d) 286.

Authority of Municipalities Concerning Nuisances.—Under the authority conferred upon a municipal corporation to adopt ordinances for the government of the corporation and to abate nuisances, no power is granted to enact that the permitting of prostitution by the owner or occupant of any house therein shall constitute such owner or occupant the keeper of a house of ill fame, nor to declare what shall be a bawdy house or a disorderly house. *State v. Webber*, 107 N. C. 962, 12 S. E. 598.

Cited, in dissenting opinion, in *Newman v. Watkins*, 208 N. C. 675, 182 S. E. 453.

§ 19-2. Action for abatement; injunction.—Whenever a nuisance is kept, maintained, or exists as defined in this chapter, the city prosecuting attorney, the solicitor, or any citizen of the county may maintain civil action in the name of the state of North Carolina upon the relation of such city prosecuting attorney, solicitor, or citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists. In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor, alleging that the nuisance complained of exists, allow a temporary writ of injunction without bond, if it shall be made to appear to the satisfaction of the judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as complainant may elect, unless the judge, by previous order, shall have directed the form and manner in which it shall be presented. When an injunction has been granted it shall be binding on the defendant throughout the county in which it was issued, and any violation of the provisions of injunction herein provided shall be a contempt, as hereinafter provided. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 26; C. S. 3181.)

Evidence Supporting Abatement.—The evidence disclosed that defendant operated a tourist camp with filling station, dining room and dance hall in front, and cabins in the rear, that the camp was on highway in a thickly settled rural community, that whiskey and contraceptives were sold, that drunken men and women were seen nightly at the place, and

seen to go in the cabins in pairs and stay for a short time, that the community was constantly awakened at night by loud and boisterous conduct and profanity, that fighting occurred between drunken men and women, with many of both sexes nude or indecently clad, and that the general reputation of the place was bad, is held amply sufficient to be submitted to the jury upon the issue of whether the place constituted a nuisance against public morals as defined by § 19-1, and to support a judgment for its abatement in accordance with this section in an action brought by the solicitor as relator. *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850.

Lease Is Made in Contemplation of Section.—A lease contract will be held to have been made in contemplation of the statute, in effect at the time of the execution of the lease, providing for the abatement of nuisances against public morals, and the lessor is subject to the rights of the state to padlock the premises in accordance with the statute if they are used in operating a nuisance as defined by the act. *Barker v. Palmer*, 217 N. C. 519, 8 S. E. (2d) 610.

Cited in *Calcutt v. McGeachy*, 213 N. C. 1, 195 S. E. 49.

§ 19-3. When triable; evidence; dismissal of complaint.—The action when brought shall be triable at the first term of court after service of the summons has been made, and in such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance. If the complaint is filed by a citizen, it shall not be dismissed except upon a sworn statement made by the complainant and his attorney, setting forth the reason why the action should be dismissed, and the dismissal approved by the city prosecuting attorney, or solicitor, in writing or in open court. If the court is of the opinion that the action ought not to be dismissed, he may direct the city prosecuting attorney, or the solicitor, to prosecute said action to judgment; and if the action continued more than one term of court, any citizen of the county, or the county attorney, may be substituted for the complaining party and prosecute said action to judgment. If the action is brought by a citizen, and the court finds there was no reasonable ground or cause of said action, the costs may be taxed to such citizen. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 27; C. S. 3182.)

Cross Reference.—As to certain evidence relative to keeping disorderly houses admissible in criminal proceedings, see § 14-188.

By provision of this section, evidence of the general reputation of the place in question is competent in an action to abate a public nuisance. *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850.

§ 19-4. Violation of injunction; punishment.—In case of the violation of any injunction granted under the provisions of this chapter, the court, or, in vacation, a judge thereof, may summarily try and punish the offender. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred or more than one thousand dollars, or by imprisonment in the county jail not less than three or more than six months, or by both fine and imprisonment. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 28; C. S. 3183.)

Cited in *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850.

§ 19-5. Order abating nuisance; what it shall contain.—If the existence of the nuisance be established in an action as provided in this chapter, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the cause, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale

thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released. If any person shall break and enter, or use said building, erection, or place so directed to be closed, he shall be punished as for contempt, as provided in the preceding section. For moving and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 29; C. S. 3184.)

Fishing in waters when prohibited by law is a public nuisance and the General Assembly has the power to authorize a prompt abatement of the nuisance by seizure and sale of the nets, subject to the right of their owner to contest the fact of his violation of the law by a proceeding in the nature of claim and delivery, or by injunction to prevent sale, or by an action to recover the proceeds of sale plus damages. *Daniels v. Homer*, 139 N. C. 219, 51 S. E. 992.

Proceeding Is In Personam.—A proceeding to abate a nuisance against the public morals is not a proceeding in rem against the property itself, but is in personam, and the provisions of the statute for padlocking the premises and for the sale of chattels used in connection with the operation of the nuisance, being more than sufficient for the abatement of the nuisance, are penalties prescribed by law for its violation, and therefore innocent lessors of the premises or owners or mortgagees of chattels which do not constitute a nuisance per se may not be deprived of their property rights unless they have actual or constructive notice that the property is used in the operation of the nuisance, and they have the right to have this issue determined by the verdict of a jury. *Sinclair v. Croom*, 217 N. C. 526, 8 S. E. (2d) 834.

Innocent Mortgagee May Recover Property before Sale.—An innocent mortgagee without knowledge that the property was being used by the mortgagor in operating a nuisance contrary to law and in violation of provisions in the conditional sales contract, may institute action to recover the property after it has been seized by the sheriff but before it has been sold under this section. *Habit v. Stephenson*, 217 N. C. 447, 8 S. E. (2d) 245.

Lessors Must Have Knowledge before Personal Judgment Can Be Rendered.—In an action to abate a nuisance against public morals under this chapter, lessors of the property are entitled to the submission of an issue as to whether they knew the lessee was operating a public nuisance thereon before personal judgment is rendered against lessors taxing them with the cost and padlocking the premises, such personal judgment against them being justified only if they knew or, by the exercise of due diligence, should have known of the maintenance of the nuisance. *Barker v. Palmer*, 217 N. C. 519, 8 S. E. (2d) 610.

As Must Conditional Seller.—Intervener sold a cash register under a conditional sales contract and same, together with other chattels of the purchaser, was seized for sale upon the determination that the purchaser was using it in the maintenance of a nuisance against public morals. Upon the facts agreed intervenor had no actual or constructive knowledge that the cash register was used in the maintenance of a nuisance. Only the equity of the purchaser could be condemned for sale under the statute and the intervenor may be charged with no part of the cost. *Sinclair v. Croom*, 217 N. C. 526, 8 S. E. (2d) 834.

Restraining Sale of Part of Personalty.—Where judgment directing the sale of personal property used in the operation of a nuisance is entered in a proceeding instituted by the

solicitor, the complaint in an independent action thereafter instituted against the sheriff alone by the defendant in the former proceeding to restrain the sale of certain of the personalty on the ground that it was not used in the operation of the nuisance cannot be treated as a motion in the cause, since the plaintiff in the former action is not a party. *Humphrey v. Churchill*, 217 N. C. 530, 8 S. E. (2d) 810.

In a proceeding under this chapter, judgment was entered upon determination that the defendant therein was operating a nuisance against public morals, directing that the personal property of defendant used in the operation of the nuisance be sold in accordance with this section. Thereafter the defendant in that proceeding instituted this action against the sheriff to restrain the sale of certain of the personal property upon allegations that the property specified had not been used in the operation of the nuisance and that the sheriff was about to sell it under the prior judgment. There was neither allegation nor contention that the execution was void. The temporary restraining order was properly dissolved, the proper remedy being by motion in the cause and not by independent action to restrain the sheriff from selling the chattels as directed by the prior judgment. *Id.*

Cited in *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850.

§ 19-6. Application of proceeds of sale.—The proceeds of the sale of the personal property as provided in § 19-5 shall be applied in the payment of the costs of action and abatement, and the balance, if any, shall be paid to the defendant. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 30; C. S. 3185.)

Cited in *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850.

§ 19-7. How order of abatement may be canceled.—If the owner appears and pays all cost of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk of the superior court, conditioned that he will immediately abate said nuisance, and prevent the same from being established or kept within a period of one year thereafter, the court may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as same may relate to said property; and if the proceeding be a civil action, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 31; C. S. 3186.)

Cited in *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850.

§ 19-8. Attorney's fees may be taxed as costs.—The court shall tax as part of the cost in any action brought hereunder such fee for the attorney prosecuting the action or proceedings as may in the court's discretion be reasonable remuneration for the services performed by such attorney. (1919, c. 288; Pub. Loc. 1913, c. 761, s. 32; C. S. 3187.)

Cited in *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850.

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Art. 1. Department of Motor Vehicles.

§ 20-1. Department of motor vehicles created; power and duties.—A department of the government of this state, to be known as the department of motor vehicles, is hereby created. It is the intent and purpose of this article, and it shall be liberally construed to accomplish that purpose, to transfer and consolidate under one administrative head in the department of motor vehicles agencies now operated under the department of revenue and dealing with the subject of the regulation of motor vehicular traffic, whether such activities are at present handled directly by the commissioner of revenue or by the motor vehicle bu-

Sec.

- 20-201. Bond to satisfy execution.
20-202. Abstracts of operating record furnished on request.
20-203. Commissioner to furnish other information on request.
20-204. Return by operator of licenses, number plates upon request of commissioner.
20-205. Cancellation or return of bond by commissioner.
20-206. Fraudulent transfer of registration certificate.
20-207. Present policies of automobile insurance unaffected.
20-208. Fraudulent proof of ability to respond in damages.
20-209. Motor vehicle liability policy.
20-210. Rules and regulations.
20-211. Reliance on other security unaffected.

Art. 6. Giving Publicity to Highway Traffic Laws through the Public Schools.

- 20-212. State highway commission to prepare digest.
20-213. State superintendent of public instruction to distribute pamphlet.
20-214. Pamphlets brought to attention of children.
20-215. Practice to be continued; highway commission to supply additional copies yearly.

Art. 7. Miscellaneous Provisions Relating to Motor Vehicles.

- 20-216. Driving regulations; frightened animals; crossings.
20-217. Motor vehicles to stop for school buses in certain instances.
20-218. Standard qualifications for school bus drivers; speed limit.
20-218.1. Jurisdiction over violations by persons over fifteen years of age.
20-219. Refund to counties of costs of prosecuting theft cases.

Art. 8. Sales of Used Motor Vehicles Brought into State.

- 20-220. Dealers required to register vehicles with department of revenue and furnish bond.
20-221. Titles to all used cars to be furnished upon delivery.
20-222. Non-compliance defeats right of action; violations a misdemeanor.
20-223. "Dealers" and "vendors," defined.

reau, the auto theft bureau, the division of highway safety, the major of the state highway patrol, the officials handling the Uniform Drivers License Act; and the department of motor vehicles shall succeed to and is hereby vested with all the powers, duties and jurisdiction now vested by law in any of said agencies; provided, however, all powers, duties and functions relating to the collection of motor fuel taxes, the inspection of gasoline and oil, and the collection of the gasoline and oil inspection taxes, and the duties, powers and functions arising by virtue of §§ 119-41 and 119-42, relating to the issuance of permits to vehicles engaged in the transportation of petroleum prod-

ucts, shall not be affected by such transfer, but shall continue to be vested in and exercised by the commissioner of revenue, and wherever it is now provided by law that reports shall be filed with the commissioner or department of revenue as a basis for collecting the motor fuel or gasoline and oil inspection taxes, or enforcing any of the laws regarding the motor fuel or gasoline and oil inspection taxes, such reports shall continue to be made to the department of revenue and the commissioner of motor vehicles shall make available to the commissioner of revenue all information from the files of the department of motor vehicles which the commissioner of revenue may request to enable him to better enforce the law with respect to the collection of such taxes: Provided, further, nothing in this article shall deprive the utilities commissioner of any of the duties or powers now vested in him with regard to the regulation of motor vehicle carriers. (1941, c. 36, s. 1.)

Cross Reference.—As to control of motor carriers by utilities commission, see § 62-103, et seq.

Editor's Note.—Public Laws 1941, c. 36, is effective from and after July 1, 1941.

For comment on the 1941 act, see 19 N. C. Law Rev. 444.

§ 20-2. Commissioner of motor vehicles.—The department of motor vehicles shall be under control of an executive officer to be designated as the commissioner of motor vehicles, who shall be appointed by the governor and be responsible directly to the governor and subject to removal by the governor at his discretion and without requirement of the assignment of any cause. The commissioner shall be paid an annual salary to be fixed by the governor, with the approval of the advisory budget commission, payable in monthly installments, and shall likewise be allowed his traveling expenses when away from Raleigh on official business. (1941, c. 36, s. 2.)

§ 20-3. Organization of department; operating funds.—The commissioner shall organize the department in such manner as he may deem necessary properly to segregate and conduct the work of the department; but the work of the department is hereby divided into at least two divisions, to be known respectively as the division of registration and the division of highway safety and patrol. The commissioner shall, as soon as practicable after appointment, prepare a general plan for the organization of the department, which plan shall not be put into effect until approved by the governor and the advisory budget commission, subject to such changes as may be recommended by the governor and approved by the advisory budget commission. The plan of organization herein provided for may increase or decrease the number of persons now assigned to any of the activities transferred to this department, and the titles may be changed. (1941, c. 36, s. 3.)

§ 20-4. Clarification of conflicts as to transfer of functions.—In the event that there shall arise any conflict as to the transfer of any functions from the department of revenue to the department of motor vehicles, the governor of the state is hereby authorized to issue an executive order clarifying and making certain the issue thus arising. (1941, c. 36, s. 5.)

Art. 2. Uniform Driver's License Act.

§ 20-5. Title of article.—This article may be

cited as the Uniform Driver's License Act. (1935, c. 52, s. 31.)

§ 20-6. Definitions.—Terms used in this article shall be construed as follows, unless another meaning is clearly apparent from the language or context or unless such construction is inconsistent with the manifest intention of the legislature.

"Highway" shall include any trunk line highway, state aid road or other public highway, road, street, avenue, alley, driveway, parkway, or place, under the control of the state or any political subdivision thereof, dedicated, appropriated or opened to public travel or other use.

"Motor vehicle" shall mean any rubber-tired vehicle propelled or drawn by any power other than muscular, except aircraft, road rollers, street sprinklers, ambulances owned by municipalities, baggage trucks, and tractors used about railroad stations and yards, agricultural tractors, industrial tractors used in and around warehouses and yards, and such vehicles as run only upon rails or tracks.

"Non-resident" shall mean any person whose legal residence is in some state other than North Carolina or in a foreign country.

"Operator" shall mean any person other than a "chauffeur" who shall operate a motor vehicle or who shall be in the driver's seat of a motor vehicle when the engine is running or who shall steer or direct the course of a motor vehicle which is being towed or pushed by another motor vehicle.

"Chauffeur" shall mean every person who is employed for the principal purpose of operating a passenger motor vehicle, except school busses, and every person who drives any motor vehicle while in use as a public or common carrier for persons or property, and this shall apply to city delivery motor vehicles.

"Person" shall include any individual, corporation, association, co-partnership, company, firm or other aggregation of individuals.

"Vehicle" shall include any device suitable for use on the highways for the conveyance, drawing or other transportation of persons or property, except those propelled or drawn by muscular power or those used exclusively upon tracks.

"Department" shall mean the department of motor vehicles.

As applied to operators' and chauffeurs' licenses issued under this article, the words:

"Suspension" shall mean that the licensee's privilege to drive a vehicle is temporarily withdrawn.

"Revocation" shall mean that the licensee's privilege to drive a vehicle is terminated.

"Canceled" shall mean that a license which was issued through error or fraud has been declared void and terminated. A new license may be obtained only as permitted in this article. (1935, c. 52, s. 1; 1941, c. 36; 1943, c. 787, s. 1.)

Editor's Note.—The 1943 amendment added the definitions of "Suspension," "Revocation" and "Canceled."

§ 20-7. Operators and chauffeurs must be licensed.—(a) No person except those expressly exempted under § 20-8 shall operate a motor vehicle upon any highway in this State unless such person upon application has been licensed as an operator or chauffeur by the department under the provisions of this article. Provided, that any person over sixteen (16) years of age who has not

been refused such license or who has not had such license suspended or revoked may, for a period not exceeding thirty days, operate a motor vehicle, during daylight hours, while under the instruction of and accompanied by a licensed operator or chauffeur, who shall have full control of and responsibility for the motor vehicle as provided by law.

(b) Every application for an operator's or chauffeur's license shall be made upon the approved form furnished by the department and shall be verified by the applicant before a person authorized to administer oaths. All members of the state highway patrol, the drivers' license examiners, or other designated representatives of the department of motor vehicles are hereby authorized and directed to administer oaths in the administration of this article, and no fee shall be charged by them for such service.

(c) Before granting an operator's or chauffeur's license to any applicant who has not had previous experience in the operation of a motor vehicle, the department shall require such applicant to demonstrate personally in such manner and to such person or persons as the department may direct, that such applicant is a proper person to operate a motor vehicle, has sufficient knowledge of the mechanism of motor vehicles to insure their safe operation by him, and a satisfactory knowledge of the laws concerning motor vehicles and the rules of the road pertaining to same. Provided that when such applicant shall have held a license from a state where a similar examination is required, the department may waive part or all of such examination, in its discretion. Provided, further, that until November first, one thousand nine hundred and thirty-five, one year's driving experience and freedom from conviction of traffic violations during such year shall be considered prima facie qualification for license as operator.

(d) When the department is satisfied as to the ability and competency of any applicant, it shall issue to him a license, either unlimited or containing such limitations as the department shall deem advisable. If any applicant shall suffer from physical defect or from any disease which might affect the operation by him of a motor vehicle, the department may require a certificate of such applicant's condition signed by medical authority designated by the department, which certificate shall in all cases be treated as confidential. A license containing such limitations as the department shall deem advisable may be issued in any case, but nothing in this section shall be construed to prevent the department from refusing a license, either limited or unlimited, to any person deemed to be incapable of operating a motor vehicle with safety to himself and to the public. Provided nothing herein shall prohibit deaf persons from operating a motor vehicle who in every other way meet the requirements.

(e) Every operator's or chauffeur's license issued by the department shall bear thereon the distinguishing number assigned to the licensee and shall contain the name, age, residence address and a brief description of the licensee, who, for the purpose of identification and as a condition precedent to the validity of the license, immediately upon receipt thereof, shall endorse his or her reg-

ular signature in ink upon the same in the space provided for that purpose. Such license shall be carried by the licensee at all times while engaged in the operation of a motor vehicle. However no person charged with failing to so carry such license shall be convicted, if he produces in court an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest.

(f) Any person operating a motor vehicle in violation of this section shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this article.

(g) Any person who, except for lack of instruction in operating a motor vehicle, would otherwise be qualified to obtain an operator's license under this article, shall apply for a temporary learner's permit, and the department shall issue such permit, entitling the applicant, while having such permit in his immediate possession, to drive a motor vehicle upon the highways for a period of thirty (30) days, during daylight hours. Any such learner's permit may be renewed or a new permit issued for an additional period of thirty (30) days. Such person must be accompanied by a licensed operator or chauffeur who is actually occupying a seat by the driver. (1935, c. 52, s. 2; 1943, c. 649, s. 1; c. 787, s. 1.)

Editor's Note.—The first 1943 amendment struck out former subsection (f) relating to chauffeur's badge, and changed former subsection (g) to subsection (f). The second 1943 amendment inserted in the second sentence of subsection (b) the words "the drivers' license examiners, or other designated representatives of the department of motor vehicles." It also added present subsection (g).

Temporary Law.—Acts 1943, c. 346, § 1, in force for two years from March 1, 1943, amended the proviso of subsection (a) by changing the age mentioned therein from sixteen to fifteen years.

Cited in *State v. Payne*, 213 N. C. 719, 197 S. E. 573.

§ 20-8. Persons exempt from license.—The following are exempt from license hereunder:

(a) Any person while operating a motor vehicle the property of, and in the service of the Army, Navy or Marine Corps of the United States. This shall not be construed to exempt any chauffeurs or operators of the United States Civilian Conservation Corps motor vehicles;

(b) Any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway;

(c) A non-resident who is at least sixteen (16) years of age and who has in his immediate possession a valid operator's license issued to him in his home state or country, may operate a motor vehicle in this state only as an operator;

(d) A non-resident who is at least eighteen (18) years of age and who has in his immediate possession a valid chauffeur's license issued to him in his home state or country may operate a motor vehicle in this state either as an operator or chauffeur except any such person must be licensed as a chauffeur hereunder before accepting employment as a chauffeur from a resident of this state;

(e) Any non-resident who is at least eighteen (18) years of age, whose home state or country does not require the licensing of operators may operate a motor vehicle as an operator only, for a period of not more than ninety (90) days in any calendar year if the motor vehicle so operated is

duly registered in the home state or country of such non-resident;

(f) Any non-resident who is at least eighteen (18) years of age, whose home state or country does not require the licensing of chauffeurs may operate a motor vehicle as a chauffeur for a period of not more than ten days in any calendar year if the motor vehicle so operated is duly registered in the home state or country of such non-resident. (1935, c. 52, s. 3.)

Editor's Note.—Acts 1943, c. 346, § 2, in force for two years from March 1, 1943, amended subsection (c) by changing the age mentioned therein from sixteen to fifteen years.

§ 20-9. What persons shall not be licensed.

—(a) An operator's license shall not be issued to any person under the age of sixteen (16) years, and no chauffeur's license shall be issued to any person under the age of eighteen (18) years.

(b) The department shall not issue an operator's or chauffeur's license to any person whose license, either as operator or chauffeur, has been suspended, during the period for which license was suspended; nor to any person whose license, either as operator or chauffeur, has been revoked under the provisions of this article, until the expiration of one year after such license was revoked.

(c) The department shall not issue an operator's or chauffeur's license to any person whom it has determined is an habitual drunkard or is addicted to the use of narcotic drugs.

(d) No operator's or chauffeur's license shall be issued to any applicant who has been previously adjudged insane or an idiot, imbecile, grand mal epileptic, or feeble-minded, and who has not at the time of such application been restored to competency by judicial decree or released from a hospital for the insane or feeble-minded upon a certificate of the superintendent that such person is competent, nor then unless the department is satisfied that such person is competent to operate a motor vehicle with safety to persons and property.

(e) The department shall not issue an operator's or chauffeur's license to any person when in the opinion of the department such person is afflicted with or suffering from such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, nor shall a license be issued to any person who is unable to understand highway warnings or direction signs. (1935, c. 52, s. 4.)

Editor's Note.—Acts 1943, c. 346, § 3, in force for two years from March 1, 1943, amended subsection (a) by changing the first age mentioned therein from sixteen to fifteen years.

§ 20-10. Age limits for drivers of public passenger-carrying vehicles.—It shall be unlawful for any person, whether licensed under this article or not, who is under the age of twenty-one years to drive a motor vehicle while in use as a public passenger-carrying vehicle. (1935, c. 52, s. 5.)

§ 20-11. Application of minors.—The department shall not grant the application of any minor between the ages of sixteen (16) and eighteen (18) years for an operator's license unless such application is signed by the father of the applicant, if the father is living and has custody of the appli-

cant, otherwise by the mother or guardian having the custody of such minor, or in the event a minor under the age of eighteen years has no mother, father, or guardian, then the operator's license shall not be granted to the minor unless his application therefor is signed by his employer. (1935, c. 52, s. 6.)

Editor's Note.—Acts 1943, c. 346, § 4, in force for two years from March 1, 1943, amended this section by changing the first age mentioned therein from sixteen to fifteen years. See note under § 20-17.

§ 20-12. Instruction.—Any licensed operator or chauffeur may instruct a person who is sixteen or more years of age, during daylight hours, in the operation of a motor vehicle. Any person so instructing another shall be seated as to be within reach of the controls of the motor vehicle and shall be responsible for the operation thereof. (1935, c. 52, s. 7.)

Cross Reference.—See also, § 20-7, paragraph (a).

Editor's Note.—Acts 1943, c. 346, § 5, in force for two years from March 1, 1943, amended this section by changing the age mentioned therein from sixteen to fifteen years.

§ 20-13. Expiration of license.—(a) Every operator's license issued hereunder shall be valid until suspended or revoked as provided in this article except that the department shall hereafter, but not more often than once every three years and after public notice, cancel all outstanding operators' licenses and issue in lieu thereof new operators' licenses to persons applying therefor and entitled thereto under the provision of this article. Such licenses shall be issued without fee and without examination except in those instances when the department has reason to believe that the applicant may not be qualified to hold an operator's license under this article.

(b) Every chauffeur's license shall expire June thirtieth each year and shall be renewed annually upon application and payment of fees required by law, provided that the department may in its discretion waive the examination of any such applicant previously licensed as a chauffeur under this article. (1935, c. 52, s. 8.)

§ 20-14. Duplicate certificates.—In the event that an operator's or chauffeur's license issued under the provisions of this article is lost or destroyed, the person to whom the same was issued may, upon payment of a fee of fifty cents (\$.50), obtain a duplicate, or substitute thereof, upon furnishing proof satisfactory to the department that such license has been lost or destroyed. (1935, c. 52, s. 9; 1943, c. 649, s. 2.)

Editor's Note.—The 1943 amendment struck out the words "or badge" formerly appearing after the word "license."

§ 20-15. Authority of department to cancel license.—(a) The department shall have authority to cancel any operator's or chauffeur's license upon determining that the licensee was not entitled to the issuance thereof hereunder, or that said licensee failed to give the required or correct information in his application, or committed fraud in making such application.

(b) Upon such cancellation, the licensee must surrender the license so cancelled to the department. (1935, c. 52, s. 10; 1943, c. 649, s. 3.)

Editor's Note.—The 1943 amendment struck out in subsection (b) the words, "together with chauffeur's badge, if any," formerly appearing after the word "cancelled."

§ 20-16. Authority of department to suspend license.—(a) The department shall have authority to suspend the license of any operator or chauffeur without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee:

1. Has committed an offense for which mandatory revocation of license is required upon conviction;

2. Has been involved as a driver in any accident resulting in the death or personal injury of another or serious property damage, which accident is obviously the result of the negligence of such driver;

3. Is an habitually reckless or negligent driver of a motor vehicle;

4. Is incompetent to drive a motor vehicle;

5. Is an habitual violator of the traffic laws;

6. Has permitted an unlawful or fraudulent use of such license;

7. Has committed an offense in another state, which if committed in this state would be grounds for suspension or revocation; or

8. Has been convicted of illegal transportation of intoxicating liquors.

(b) Upon suspending the license of any person as hereinbefore in this section authorized, the department shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing as early as practical within not to exceed twenty (20) days after receipt of such request in the county wherein the licensee resides unless the department and the licensee agree that such hearing may be held in some other county. Upon such hearing the duly authorized agents of the department may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a re-examination of the licensee. Upon such hearing the department shall either rescind its order of suspension, or good cause appearing therefor, may extend the suspension of such license or revoke such license. (1935, c. 52, s. 11.)

Cross Reference.—As to period of suspension or revocation, see § 20-19.

§ 20-17. Mandatory revocation of license by department.—(a) The department shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction for any of the following offenses when such conviction has become final:

1. Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle.

2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug.

3. Any felony in the commission of which a motor vehicle is used.

4. Failure to stop and render aid as required under the laws of this State in the event of a motor vehicle accident.

5. Perjury or the making of a false affidavit or statement under oath to the department under this article or under any other law relating to the ownership of motor vehicles.

6. Conviction, or forfeiture of bail not vacated, upon two charges of reckless driving committed within a period of twelve months.

7. Conviction, or forfeiture of bail not vacated,

upon one charge of reckless driving while engaged in the illegal transportation of intoxicants for the purpose of sale.

(b) The department, upon receiving a record of the conviction of any person upon a charge of operating a motor vehicle while the license of such person is suspended or revoked, shall immediately extend the period of such first suspension or revocation for an additional like period. (1935, c. 52, s. 12.)

Cross Reference.—As to period of suspension or revocation, see § 20-19.

Editor's Note.—Section 9 of Chapter 346 of the Public Laws of 1943, makes violation of sections 7 and 8 of the act ground for the revocation of license of 15-year-olds licensed for two years under the act. Section 7 makes it unlawful for any person under 16 to drive a vehicle of more than 1½ tons in weight or to drive a vehicle hauling any material of a highly inflammable nature. Section 8 provides that no license shall be issued to any person under 16 except upon written application of parent or person in loco parentis.

§ 20-18. Conviction for failure to dim, etc., lights not ground for suspension or revocation.—Conviction of the offense of failure to shift, depress, deflect, tilt or dim the beams of the head lamps whenever a motor vehicle meets another vehicle on the highways of this state shall not be cause for the suspension or revocation of the operator's or chauffeur's license under the terms of this article. (1939, c. 351, s. 2.)

Cited in State v. McDaniels, 219 N. C. 763, 14 S. E. (2d) 793.

§ 20-19. Period of suspension or revocation.—The department shall not suspend a license for a period of more than one year and upon revoking a license shall not in any event grant application for a new license until the expiration of one year. (1935, c. 52, s. 13.)

§ 20-20. Surrender and return of license.—The department upon suspending or revoking a license shall require that such license shall be surrendered to and be retained by the department except that at the end of a period of suspension such license so surrendered shall be returned to the licensee. (1935, c. 52, s. 14; 1943, c. 649, s. 4.)

Editor's Note.—The 1943 amendment struck out provision relating to chauffeur's badge.

§ 20-21. No operation under foreign license during suspension or revocation in this state.—Any resident or nonresident whose operator's or chauffeur's license or right or privilege to operate a motor vehicle in this State has been suspended or revoked as provided in this article shall not operate a motor vehicle in this State under a license, permit or registration issued by another jurisdiction or otherwise during such suspension, or after such revocation until a new license is obtained when and as permitted under this article. (1935, c. 52, s. 15.)

§ 20-22. Suspending privileges of nonresidents and reporting convictions.—(a) The privilege of driving a motor vehicle on the highways of this State given to a nonresident hereunder shall be subject to suspension or revocation by the department in like manner and for like cause as an operator's or chauffeur's license issued hereunder may be suspended or revoked.

(b) The department is further authorized, upon receiving a record of the conviction in this State of a non-resident driver of a motor vehicle of any

offense under the motor vehicle laws of this State, to forward a certified copy of such record to the motor vehicle administrator in the state wherein the person so convicted is a resident. (1935, c. 52, s. 16.)

§ 20-23. Suspending resident's license upon conviction in another state.—The department is authorized to suspend or revoke the license of any resident of this State upon receiving notice of the conviction of such person in another state of any offense therein which, if committed in this State, would be grounds for the suspension or revocation of the license of an operator or chauffeur. (1935, c. 52, s. 17.)

§ 20-24. When court to forward license to department and report convictions.—(a) Whenever any person is convicted of any violation of the motor vehicle laws of this State, a notation of such conviction shall be entered by the court upon the license of the person so convicted. Whenever any person is convicted of any offense for which this article makes mandatory the revocation of the operator's or chauffeur's license of such person by the department, the court in which such conviction is had shall require the surrender to it of all operator's and chauffeur's licenses then held by the person so convicted and the court shall thereupon forward the same, together with a record of such conviction, to the department.

(b) Every court having jurisdiction over offenses committed under this article, or any other law of this State regulating the operation of motor vehicles on highways, shall forward to the department a record of the conviction of any person in said court for a violation of any said laws, and may recommend the suspension of the operator's or chauffeur's license of the person so convicted.

(c) For the purpose of this article the term "conviction" shall mean a final conviction. Also, for the purposes of this article a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction.

(d) Pending an appeal, the court from which the appeal is taken shall make such recommendation to the department relative to suspension of license until the appeal shall have been finally determined, as to it may seem just and proper under the circumstances.

(e) After November 1, 1935, no operator's or chauffeur's license shall be suspended or revoked except in accordance with the provisions of this article. (1935, c. 52, s. 18.)

Jurisdiction to Revoke.—A municipal court is without authority to revoke a driver's license, the power to suspend or revoke drivers' licenses being vested exclusively in the department of revenue, subject to the right of review by the superior court, as provided in the following section. *State v. McDaniels*, 219 N. C. 763, 14 S. E. (2d) 793.

§ 20-25. Right of appeal to court.—Any person denied a license or whose license has been cancelled, suspended or revoked by the department, except where such cancellation is mandatory under the provisions of this article, shall have a right to file a petition within thirty (30) days thereafter for a hearing in the matter in the superior court of the county wherein such person shall reside, or to the resident judge of the district or judge holding the court of that district,

or special or emergency judge holding a court in such district in which the violation was committed, and such court or judge is hereby vested with jurisdiction and it shall be its or his duty to set the matter for hearing upon thirty (30) days, written notice to the department, and thereupon to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation or revocation of license under the provisions of this article. (1935, c. 52, s. 19.)

§ 20-26. Records.—The department shall keep a record of proceedings and orders pertaining to all licenses granted, refused, suspended or revoked by the department. It shall furnish without charge, for official use only, certified copies of certificates and licenses and documents relating thereto, to officials of the State, counties and municipalities or to any court in this State. A charge not to exceed one dollar (\$1.00) shall be made by the department for copies furnished for other than official use. (1935, c. 52, s. 20.)

§ 20-27. Availability of records.—All records of the department pertaining to application and to operator's and chauffeur's license, except the confidential medical report referred to in section 20-7, of the current or previous five years shall be open to public inspection at any reasonable time during office hours. (1935, c. 52, s. 21.)

§ 20-28. Unlawful to drive while license suspended or revoked.—Any person whose operator's or chauffeur's license has been suspended or revoked, as provided in this article, and who shall drive any motor vehicle upon the highways of this State while such license is suspended or revoked, may be guilty of a misdemeanor and upon conviction shall be punished by imprisonment for not more than six months, and there may be imposed in addition thereto a fine of not more than five hundred dollars (\$500.00). (1935, c. 52, s. 22.)

§ 20-29. Surrender of license.—Any person operating or in charge of a motor vehicle, when requested by an officer in uniform, or, in the event of accident in which the vehicle which he is operating or in charge of shall be involved, when requested by any other person, who shall refuse to write his name for the purpose of identification or to give his name and address and the name and address of the owner of such vehicle, or who shall give a false name or address, or who shall refuse, on demand of such officer or such other person, to produce his license and exhibit same to such officer or such other person for the purpose of examination, or who shall refuse to surrender his license on demand of the department, or fail to produce same when requested by a court of this State, shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this article. (1935, c. 52, s. 23.)

§ 20-29.1. Commissioner may require reexamination.—The commissioner of motor vehicles, having good and sufficient cause to believe that a licensed operator or chauffeur is incompetent or otherwise not qualified to be licensed, may, upon written notice of at least five days to such licensee, require him to submit to a reexamination to determine his competency to operate a motor vehicle. Upon the conclusion of such

examination, the commissioner shall take such action as may be appropriate, and may suspend or revoke the license of such person or permit him to retain such license, or may issue a license subject to restrictions. Refusal or neglect of the licensee to submit to such reexamination shall be grounds for the suspension or revocation of his license. (1943, c. 787, s. 2.)

§ 20-30. Violations of license provisions.—It shall be unlawful for any person to commit any of the following acts:

(a) To display or cause to be displayed or to have in possession any operator's or chauffeur's license, knowing the same to be fictitious or to have been cancelled, revoked, suspended or altered.

(b) To counterfeit, sell, lend to, or knowingly permit the use of, by one not entitled thereto, any operator's or chauffeur's license.

(c) To display or to represent as one's own a license not issued to the person so displaying same.

(d) To fail or refuse to surrender to the department upon demand any license or the badge of any chauffeur whose license has been suspended, cancelled or revoked as provided by law.

(e) To use a false or fictitious name or give a false or fictitious address in any application for an operator's or chauffeur's license, or any renewal or duplicate thereof, or knowingly to make a false statement or knowingly conceal a material fact or otherwise commit a fraud in any such application. Any license procured as aforesaid shall be void from the issuance thereof, and any monies paid therefor shall be forfeited to the State. (1935, c. 52, s. 24.)

§ 20-31. Making false affidavits perjury.—Any person who shall make any false affidavit, or shall knowingly swear or affirm falsely, to any matter or thing required by the terms of this article to be sworn to or affirmed shall be guilty of perjury and upon conviction shall be punished by fine or imprisonment as other persons committing perjury are punishable under the laws of this State. (1935, c. 52, s. 25.)

Cross Reference.—As to perjury, see § 14-209, et seq.

§ 20-32. Unlawful to permit unlicensed minor to drive motor vehicle.—It shall be unlawful for any person to cause or knowingly permit any minor over sixteen and under the age of eighteen years to drive a motor vehicle upon a highway as an operator, unless such minor shall have first obtained a license to so drive a motor vehicle under the provisions of this article. (1935, c. 52, s. 26.)

Editor's Note.—Acts 1943, c. 346, § 6, in force for two years from March 1, 1943, amended this section by changing the first age mentioned therein from sixteen to fifteen years. The cases treated below were decided under a corresponding provision of an earlier law, but should be of assistance in the interpretation of the present section.

Violation of Age Limit as Negligence.—Where a person within the age prohibited by the statute runs an automobile upon and injures a pedestrian, the violation of the statute is negligence per se, and a charge by the court that it is a circumstance from which the jury could infer negligence is reversible error. *Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134.

Same—Liability for Injuries.—While it is negligence per se for one within the prohibited age to run an automobile, it is necessary that such negligence proximately cause the injury for damages to be recovered on that account, with the burden of proof on the plaintiff to show it by the pre-

ponderance of the evidence. *Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134.

Same—Jury Question.—It is for the jury to determine whether a competent and careful chauffeur of maturer years could have avoided the injury under the circumstances, or whether it was due to the fact that a lad within the prohibited age was running it at the time. *Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134.

Same—Liability of Father.—While ordinarily a father is not held responsible in damages for the negligent acts of his minor son done without his knowledge and consent, such may be inferred, as where the father constantly permitted his 13 year-old son to run his automobile. *Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134.

Liability of Owner for Torts of Driver.—See *Cates v. Hall*, 171 N. C. 360, 88 S. E. 524; *Linville v. Nissen*, 162 N. C. 95, 77 S. E. 1096; *Williams v. May*, 173 N. C. 78, 91 S. E. 604; *Wilson v. Polk*, 175 N. C. 490, 95 S. E. 849. For a complete treatment, see 2 N. C. Law Rev. 181 et seq.

Same—Where Driver Is Son.—*Clark v. Sweaney*, 176 N. C. 529, 97 S. E. 474; *Linville v. Nissen*, 162 N. C. 95, 77 S. E. 1096. See 2 N. C. Law Rev. 181 et seq.

§ 20-33. Unlawful to employ unlicensed chauffeur.—No person shall employ any chauffeur to operate a motor vehicle who is not licensed as provided by this article. (1935, c. 52, s. 27.)

§ 20-34. Unlawful to permit violations of this article.—No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven by any person who has no legal right to do so or in violation of any of the provisions of this article. (1935, c. 52, s. 28.)

§ 20-35. Penalties for misdemeanor.—(a) It shall be a misdemeanor to violate any of the provisions of this article unless such violation is by this article or other law of this State declared to be a felony.

(b) Unless another penalty is in this article or by the laws of this State provided, every person convicted of a misdemeanor for the violation of any provision of this article shall be punished by a fine of not more than five hundred (\$500.00) dollars or by imprisonment for not more than six (6) months. (1935, c. 52, s. 29.)

§ 20-36. Fees.—(a) The fees charged for the licenses herein provided for shall be as follows:

For an operator's license the sum of one (\$1.00) dollar, which shall continue the license in effect until revoked or cancelled; chauffeur's license two (\$2.00) dollars annually, or until revoked: Provided, that no charge shall be made for any private operator's license which shall be applied for prior to November first, one thousand nine hundred and thirty-five.

(b) All fees collected under the provisions of this article shall be paid by the commissioner of revenue to the state treasurer to be credited by him to the state highway fund. (1935, c. 52, s. 30.)

§ 20-37. Limitations on issuance of licenses.—There shall be no operator's or chauffeur's license issued within this State other than that provided for in this article, nor shall there be any other examination required: Provided, however, that cities and towns shall have the power to license, regulate and control drivers and operators of taxicabs within the city or town limits and to regulate and control operators of taxicabs operating between the city or town to points, not incorporated, within a radius of five miles of said city or town. (1935, c. 52, s. 34; 1942, c. 639, s. 2.)

Editor's Note.—The 1943 amendment added the proviso.

Art. 3. Motor Vehicle Act of 1937.**Part 1. General Provisions.**

§ 20-38. **Definition of words and phrases.**—The following words and phrases when used in this article shall, for the purpose of this article, have the meanings respectively prescribed to them in this section, except in those instances where the context clearly indicates a different meaning:

(a) **Business District.**—The territory contiguous to a highway where seventy-five per cent or more of the frontage thereon for a distance of three hundred (300) feet or more is occupied by buildings in use for business purposes.

(b) **Commissioner.**—Commissioner, when herein referred to, shall refer to the commissioner of motor vehicles.

(c) **Department.**—Department herein used shall mean the department of motor vehicles acting directly or through its duly authorized officers and agents.

(d) **Dealer.**—Every person engaged in the business of buying, selling, distributing, or exchanging motor vehicles, trailers or semi-trailers in this state, having an established place of business in this state and being subject to the tax levied by § 105-89.

(e) **Essential Parts.** — All integral and body parts of a vehicle of any type required to be registered hereunder, the removal, alteration or substitution of which would tend to conceal the identity of the vehicle or substantially alter its appearance, model, type, or mode of operation.

(f) **Established Place of Business.**—The place actually occupied either continuously or at regular periods by a dealer or manufacturer, where his books and records are kept and a large share of his business is transacted.

(g) **Explosives.** — Any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion and which contains any oxidizing and combusive units or other ingredients in such proportions, quantities, or packing that an ignition by fire, by friction, by concussion, by percussion, or by a detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous presses are capable of producing destructible effects on contiguous objects or of destroying life or limb.

(h) **Farm Tractor.** — Every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry.

(i) **Foreign Vehicle.**—Every vehicle of a type required to be registered hereunder brought into this state from another state, territory or country, other than in the ordinary course of business, by or through a manufacturer or dealer and not registered in this state.

(j) **House Trailer.**—Any trailer or semi-trailer so designed and equipped as to provide living and/or sleeping facilities and drawn by a motor vehicle.

(k) **Implement of Husbandry.** — Every vehicle which is designed for agricultural purposes and used exclusively in the conduct of agricultural operations.

(l) **Intersection.**—The area embraced within the prolongation of the lateral curb lines or, if none, then the lateral boundary lines of two or more highways which join one another at any angle

whether or not one such highway crosses the other.

(m) **Local Authorities.**—Every county, municipality, or other territorial district with local board or body having authority to adopt local police regulations under the constitution and laws of this state.

(n) **Manufacturer.**—Every person engaged in the business of manufacturing motor vehicles, trailers or semi-trailers.

(o) **Metal Tire.** — Every tire the surface of which in contact with the highway is wholly or partly of metal or other hard, non-resilient material.

(p) **Motor Vehicle.** — Every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from trolley wires but not operated upon rails, and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle.

(q) **Passenger Vehicles.** — (1) Excursion passenger vehicles.

Passenger vehicles kept in use for the purpose of transporting persons on sight-seeing or travel tours.

(2) For hire passenger vehicles.

Passenger motor vehicles engaged in the business of transporting passengers for compensation; but this classification shall not include motor vehicles of seven-passenger capacity or less operated by the owner where the cost of operation is shared by neighbor fellow workmen between their homes and the place of regular daily employment, when operated for not more than two trips each way per day, nor shall this classification include automobiles operated by the owner where the cost of operation is shared by the passengers on a "share the expense" plan.

(3) Franchise bus carriers.

Passenger motor vehicles operated under a franchise certificate issued by the utilities commission under §§ 62-103 to 62-121, for operation on the public highways of this state between fixed termini or over a regular route for the transportation of persons or property for compensation.

(4) Motorcycle.

Every motor vehicle having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, but excluding a tractor.

(5) U-Drive-It passenger vehicles.

Passenger motor vehicles used for the purpose of rent or lease to be operated by the lessee.

(6) Private passenger vehicles.

All other passenger vehicles not included in the above definitions.

(r) **Property-Hauling Vehicles.** — (1) Contract hauler vehicles.

Motor vehicles used for the transportation of property for hire, but not licensed as franchise hauler vehicles under the provisions of §§ 62-103 to 62-121: Provided, it shall not be construed to include the transportation of farm crops or products, including logs, bark, pulp and tannic acid wood delivered from farms and forests to the first or primary market, nor to merchandise hauled for neighborhood farmers incidentally and not as a regular business in going to and from farms and primary markets. Provided further, that the term "for hire" as used herein shall include every

arrangement by which the owner of a motor vehicle uses, or permits such vehicle to be used, for the transportation of the property of another for compensation, subject to the exemptions aforesaid. Provided, however, that the term "for hire" shall not include motor vehicles whose sole operation in carrying the property of others is limited to the transportation of T. V. A. or A. A. A. phosphate, and/or agricultural limestone in bulk which is furnished as a grant of aid under the United States agricultural adjustment administration.

(2) Franchise hauler vehicles.

Every motor vehicle used for the transportation of property between fixed termini, or over a regular route, with the right to make occasional trips off said route as provided in §§ 62-103 to 62-121: Provided, only such vehicles shall be so classified as the utilities commission shall determine to be reasonably necessary for the proper handling of the business on said route, and the determination so arrived at shall be duly certified by the utilities commissioner to the motor vehicle bureau.

(3) Private hauler vehicles.

All motor vehicles used for the transportation of property not falling within one of the above defined classifications.

(4) Semi-Trailer.

Every vehicle without motive power designed for carrying property or persons and for being drawn by a motor vehicle, and so constructed that part of its weight and/or its load rests upon or is carried by the pulling vehicle.

(5) Trailers.

Every vehicle without motive power designed for carrying property or persons wholly on its own structure and to be drawn by a motor vehicle. This shall include so-called pole trailers or a pair of wheels used primarily to balance a load, rather than for purposes of transportation.

(s) Non-Resident.—Every person who is not a resident of this state.

(t) Owner.—A person who holds the legal title of a vehicle or, in the event a vehicle is subject to an agreement for conditional sale or lease thereof, with the right of purchase upon performance of the conditions stated in the agreement and with the immediate right of possession vested in the original vendee or lessee; or, in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this article.

(u) Person.—Every natural person, firm, co-partnership, association, corporation, or governmental agency.

(v) Pneumatic Tire.—Every tire in which compressed air is designed to support the load.

(w) Private Road or Driveway.—Every road or driveway not open to the use of the public as a matter of right for the purpose of vehicular traffic.

(w)1. Residential District.—The territory contiguous to a highway not comprising a business district, where seventy-five per cent or more of the frontage thereon for a distance of three hundred (300) feet or more is mainly occupied by dwellings or by dwellings and buildings in use for business purposes.

(x) Reconstructed Vehicle.—Every vehicle of a type required to be registered hereunder materially altered from its original construction by the re-

moval, addition, or substitution of essential parts, new or used.

(y) Road Tractor.—Every motor vehicle designed and used for drawing other vehicles upon the highway and not so constructed as to carry any part of the load, either independently or as a part of the weight of the vehicle so drawn.

(z) Safety Zone.—The area or space officially set aside within a highway for the exclusive use of pedestrians and which is so plainly marked or indicated by proper signs as to be plainly visible at all times while set apart as a safety zone.

(aa) Specially Constructed Vehicles. — Every vehicle of a type required to be registered hereunder not originally constructed under a distinctive name, make, model, or type by a generally recognized manufacturer of vehicles and not materially altered from its original construction.

(bb) Special Mobile Equipment.—Every vehicle not designed or used primarily for the transportation of persons or property, but incidentally operated or moved over the highways, such as farm tractors, road construction or maintenance machinery, ditch-digging apparatus, well-boring apparatus, and concrete mixers. The foregoing enumeration shall be deemed partial and shall not operate to exclude other vehicles which are within the general terms of this section.

(cc) Street and Highway.—The entire width between property lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic.

(dd) Solid Tire.—Every tire of rubber or other resilient material which does not depend upon compressed air for the support of the load.

(ee) Truck Tractor. — Every motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry any load independent of the vehicle so drawn.

(ff) Vehicle. — Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks; provided, that for the purposes of this article bicycles shall be deemed vehicles, and every rider of a bicycle upon a highway shall be subject to the provisions of this article applicable to the driver of a vehicle except those which by their nature can have no application. (1937, c. 407, s. 2; 1939, c. 275; 1941, cc. 22, 36, 196; 1943, cc. 201, 202.)

Editor's Note.—The 1939 amendment changed subsection (a), added the second proviso to subsection (r) (1), added the proviso to subsection (ff) and inserted subsection (w) 1.

The second 1941 act amended subdivision (1) of subsection (r) as it appeared in the original act. It ignored the second proviso which had been added by Public Laws 1939, c. 275, and the last proviso which was added by the first 1941 amendment.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 514.

The first 1943 amendment inserted in subsection (r) (1) that part of the first proviso beginning with the words "nor to merchandise." The second 1943 amendment added at the end of subsection (q) (2) the clause relating to "share the expense" plans.

The cases treated below were decided under the corresponding provisions of the earlier law, but should be of assistance in the interpretation of the present section.

"Auto Truck" Defined as Automobile.—See *Bethlehem Motors Corp. v. Flynt*, 178 N. C. 399, 100 S. E. 693.

Motorcycle. — Statutory definition cited in *Anderson v. Life, etc., Ins. Co.*, 197 N. C. 72, 76, 147 S. E. 693, holding

that the expression "motor driven car" in an insurance policy excludes a motorcycle.

Intersection.—Under this section where one public highway joins another, but does not cross it, the point where they join is an intersection of public highways. *Goss v. Williams*, 196 N. C. 213, 145 S. E. 169, citing *Vartanian, Law of Automobiles*, Part II, chapter 1, p. 414, note.

Bicycle.—Under this section a bicycle is deemed a vehicle, and the rider of a bicycle upon the highway is subject to the applicable provisions of the statutes relating to motor vehicles. *Van Dyke v. Atlantic Greyhound Corp.*, 218 N. C. 283, 10 S. E. (2d) 727.

A bicycle is a vehicle and is subject to provisions of the motor vehicle act except those which by their nature can have no application. *Tarrant v. Pepsi-Cola Bottling Co.*, 221 N. C. 390, 20 S. E. (2d) 565.

Residential District.—A charge defining a "residential district" as being "the territory contiguous to a highway, not comprising a business district, when the frontage on the highway for a distance of 300 feet or more is mainly occupied by dwellings and buildings in use for business" is held without error, the definition of a residential district in chapter 148, Public Laws of 1927, Art. 1, § (s), not having been repealed by this section. *Reid v. City Coach Co.*, 215 N. C. 469, 2 S. E. (2d) 578, 123 A. L. R. 140. But note 1939 amendment adding subd. (w) 1.

Where the evidence established that the scene of the accident was not in a business district, and there was no evidence that defendant's vehicle was being driven in excess of 20 miles an hour, whether the accident occurred in a residential district as defined by subsection (w) 1 of this section, was held immaterial, since such speed did not violate the statutory restriction. *Mitchell v. Melts*, 220 N. C. 793, 18 S. E. (2d) 406.

That part of a highway comprising an intersection may not properly be considered in applying subsection (w) 1 of this section to any given locality. *Mitchell v. Melts*, 220 N. C. 793, 18 S. E. (2d) 406.

Business District.—Uncontradicted testimony that only two business buildings front on the street in the block in which the accident occurred and that both of them together comprise not more than 40 feet frontage, establishes as a matter of law that the locus in quo is not a business district as defined by subsection (a) of this section. *Mitchell v. Melts*, 220 N. C. 793, 18 S. E. (2d) 406.

Applied in *State v. Brooks*, 210 N. C. 273, 186 S. E. 237; *Kelly v. Hunsucker*, 211 N. C. 153, 189 S. E. 664; *Wooten v. Smith*, 215 N. C. 48, 200 S. E. 921.

Cited in *Latham v. Elizabeth City Orange Crush Bottling Co.*, 213 N. C. 158, 195 S. E. 372; *Goss v. Williams*, 196 N. C. 213, 145 S. E. 169; *Bass v. Hocutt*, 221 N. C. 218, 19 S. E. (2d) 871.

Part 2. Authority and Duties of Commissioner and Department.

§ 20-39. Administering and enforcing laws; rules and regulations; agents, etc.; seal.—(a) The commissioner is hereby vested with the power and is charged with the duty of administering and enforcing the provisions of this article and of all laws regulating the operation of vehicles or the use of the highways, the enforcement or administration of which is now or hereafter vested in the department.

(b) The commissioner is hereby authorized to adopt and enforce such rules and regulations as may be necessary to carry out the provisions of this article and any other laws the enforcement and administration of which are vested in the department.

(c) The commissioner is authorized to designate and appoint such agents, field deputies, and clerks as may be necessary to carry out the provisions of this article.

(d) The commissioner shall adopt an official seal for the use of the department. (1937, c. 407, s. 4.)

Cross Reference.—As to commissioner and organization of department, see §§ 20-2, 20-3.

§ 20-40. Offices of department.—The commissioner shall maintain an office in Raleigh, North Carolina, and in such places in the state as he shall

deem necessary to properly carry out the provisions of this article. (1937, c. 407, s. 5.)

§ 20-41. Commissioner to provide forms required.—The commissioner shall provide suitable forms for applications, certificates of title and registration cards, registration number plates and all other forms requisite for the purpose of this article, and shall prepay all transportation charges thereon. (1937, c. 407, s. 6.)

§ 20-42. Authority to administer oaths and certify copies of records.—(a) Officers and employees of the department designated by the commissioner are, for the purpose of administering the motor vehicle laws, authorized to administer oaths and acknowledge signatures, and shall do so without fee.

(b) The commissioner and such officers of the department as he may designate are hereby authorized to prepare under the seal of the department and deliver upon request a certified copy of any record of the department, charging a fee of fifty cents (50c) for each document so authenticated, and every such certified copy shall be admissible in any proceeding in any court in like manner as the original thereof. (1937, c. 407, s. 7.)

Cross Reference.—As to copy of record kept by commissioner, etc., certified by commissioner, as evidence, see § 8-37.

§ 20-43. Records of department.—(a) All records of the department, other than those declared by law to be confidential for the use of the department, shall be open to public inspection during office hours.

(b) The commissioner may destroy any registration records of the department which have been maintained on file for three years which he may deem obsolete and of no further service in carrying out the powers and duties of the department. (1937, c. 407, s. 8.)

§ 20-44. Authority to grant or refuse applications.—The department shall examine and determine the genuineness, regularity and legality of every application for registration of a vehicle and for a certificate of title therefor, and of any other application lawfully made in the department, and may in all cases make investigation as may be deemed necessary or require additional information, and shall reject any such application if not satisfied of the genuineness, regularity, or legality thereof or the truth of any statement contained therein, or for any other reason, when authorized by law. (1937, c. 407, s. 9.)

§ 20-45. Seizure of documents and plates.—The department is hereby authorized to take possession of any certificate of title, registration card, permit, license, or registration plate issued by it upon expiration, revocation, cancellation, or suspension thereof, or which is fictitious, or which has been unlawfully or erroneously issued, or which has been unlawfully used. (1937, c. 407, s. 10.)

§ 20-46. Distribution of synopsis of laws.—The department may publish a synopsis or summary of the laws of this state regulating the operation of vehicles, and deliver to any person on request a copy thereof without charge. (1937, c. 407, s. 11.)

§ 20-47. Department may summon witnesses and take testimony.—(a) The commissioner and officers of the department designated by him shall have authority to summon witnesses to give testimony under oath or to give written deposition upon any matter under the jurisdiction of the department. Such summons may require the production of relevant books, papers, or records.

(b) Every such summons shall be served at least five days before the return date, either by personal service made by any person over eighteen years of age or by registered mail, but return acknowledgment is required to prove such latter service. Failure to obey such a summons so served shall constitute a misdemeanor. The fees for the attendance and travel of witnesses shall be the same as for witnesses before the superior court.

(c) The superior court shall have jurisdiction, upon application by the commissioner, to enforce all lawful orders of the commissioner under this section. (1937, c. 407, s. 12.)

Cross References.—As to misdemeanors for which no specific punishment is prescribed, see § 14-3. As to fees of witnesses generally, see § 2-52.

§ 20-48. Giving of notice.—Whenever the department is authorized or required to give any notice under this article or other law regulating the operation of vehicles, unless a different method of giving such notice is otherwise expressly prescribed, such notice shall be given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at his address as shown by the records of the department. The giving of notice by mail is complete upon the expiration of four days after such deposit of such notice. Proof of the giving of notice in either such manner may be made by the certificate of any officer or employee of the department or affidavit of any person over twenty-one years of age, naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof. (1937, c. 407, s. 13.)

§ 20-49. Police authority of department.—The commissioner and such officers and inspectors of the department as he shall designate and all members of the highway patrol shall have the power:

(a) Of peace officers for the purpose of enforcing the provisions of this article and of any other law regulating the operation of vehicles or the use of the highways.

(b) To make arrests upon view and without warrant for any violation committed in their presence of any of the provisions of this article or other laws regulating the operation of vehicles or the use of the highways.

(c) At all times to direct all traffic in conformance with law, and in the event of a fire or other emergency or to expedite traffic or to insure safety, to direct traffic as conditions may require, notwithstanding the provisions of law.

(d) When on duty, upon reasonable belief that any vehicle is being operated in violation of any provision of this article or of any other law regulating the operation of vehicles to require the driver thereof to stop and exhibit his driver's license and the registration card issued for the ve-

hicle, and submit to an inspection of such vehicle, the registration plates and registration card thereon or to an inspection and test of the equipment of such vehicle.

(e) To inspect any vehicle of a type required to be registered hereunder in any public garage or repair shop or in any place where such vehicles are held for sale or wrecking, for the purpose of locating stolen vehicles and investigating the title and registration thereof.

(f) To serve all warrants relating to the enforcement of the laws regulating the operation of vehicles or the use of the highways.

(g) To investigate traffic accidents and secure testimony of witnesses or of persons involved.

(h) To investigate reported thefts of motor vehicles, trailers and semi-trailers. (1937, c. 407, s. 14.)

Part 3. Registration and Certificates of Titles of Motor Vehicles.

§ 20-50. Owner to secure registration and certificate of title.—Every owner of a vehicle intended to be operated upon any highway of this state and required by this article to be registered shall, before the same is so operated, apply to the department for and obtain the registration thereof, the registration plates therefor, and a certificate of title therefor, and attach the registration plates to the vehicle, except when an owner is permitted to operate a vehicle under the registration provisions relating to manufacturers, dealers and non-residents contained in § 20-79: Provided, that nothing herein contained shall require the application for or the issuance of a certificate of title for a trailer having not more than two wheels with a gross weight of vehicle and load of twenty-five hundred (2500) pounds or less, and towed by a passenger car but before operating a trailer as described above upon the highways of the state, the owner thereof must obtain the registration thereof and pay the registration fees as now provided by part seven of this article. (1937, c. 407, s. 15; 1943, c. 648.)

Editor's Note.—The 1943 amendment rewrote the proviso. The cases treated below were decided under the corresponding provisions of the earlier law, but should be of assistance in the interpretation of the present section.

Purpose as Compared with Mortgage Registration Statute.—This statute is a police regulation to protect the general public from fraud, imposition and theft of motor vehicles. The registration statute, secs. 47-20 and 47-23, specifically protects mortgagees. *Carolina Discount Corp. v. Landis Motor Co.*, 190 N. C. 157, 160, 129 S. E. 414.

Effect upon Mortgage Registration Statute.—The provisions of secs. 47-20 and 47-23 are not affected or repealed by this article as amended. *Carolina Discount Corp. v. Landis Motor Co.*, 190 N. C. 157, 160, 129 S. E. 414.

Necessity of Registering Conditional Sale Contracts.—All chattel mortgages and conditional-sale contracts on motor vehicles must be registered in the county in which the mortgagor resides, and in case the mortgagor resides out of the State, then in the county where the said motor vehicle is situated, in order to obtain immunity against the creditors and purchasers for value, from the mortgagor. The conditional-sale contract, purchased by the plaintiff, never having been registered, is invalid as against the defendant, a purchaser for full value. *Carolina Discount Corp. v. Landis Motor Co.*, 190 N. C. 157, 160, 129 S. E. 414.

§ 20-51. Exempt from registration.—The following shall be exempt from the requirement of registration and certificate of title: (a) Any such vehicle driven or moved upon a highway in conform-

ance with the provisions of this article relating to manufacturers, dealers, or nonresidents.

(b) Any such vehicle which is driven or moved upon a highway only for the purpose of crossing such highway from one property to another.

(c) Any implement of husbandry, whether of a type otherwise subject to registration hereunder or not, which is only incidentally operated or moved upon a highway.

(d) Any special mobile equipment as herein defined.

(e) No certificate of title need be obtained for any vehicle of a type subject to registration owned by the government of the United States.

(f) Farm tractors and trailers or semi-trailers with rubber tires used in farming operations, if such farm tractors or trailers or semi-trailers are otherwise exempt from registration, shall not be rendered subject to registration by reason of the use of such vehicles upon public highways by the owner of a farm in transporting wood, fertilizer, farm products, farm supplies, farm implements, or farm equipment from place to place on the same farm or from one farm to another. (1937, c. 407, s. 16; 1943, c. 500.)

Cross References.—As to manufacturers and dealers, see § 20-79. As to non-residents, see § 20-83.

Editor's Note.—The 1943 amendment added paragraph (f).

§ 20-52. Application for registration and certificate of title.—(a) Every owner of a vehicle subject to registration hereunder shall make application to the department for the registration thereof and issuance of a certificate of title for such vehicle upon the appropriate form or forms furnished by the department, and every such application shall bear the signature of the owner written with pen and ink, and said signature shall be acknowledged by the owner before a person authorized to administer oaths, and said application shall contain:

1. The name, bona fide residence and mail address of the owner or business address of the owner if a firm, association or corporation;

2. A description of the vehicle, including, in so far as the hereinafter specified data may exist with respect to a given vehicle, the make, model, type of body, the serial number of the vehicle, the engine and other identifying numbers of the vehicle and whether new or used, and if a new vehicle, the date of sale and actual date of delivery of vehicle by the manufacturer or dealer to the person intending to operate such vehicle;

3. A statement of the applicant's title and of all liens or encumbrances upon said vehicle and the names and addresses of all persons having any interest therein and the nature of every such interest;

4. Such further information as may reasonably be required by the department to enable it to determine whether the vehicle is lawfully entitled to registration and the owner entitled to a certificate of title.

(b) When such application refers to a new or foreign vehicle purchased from a dealer, the application shall be accompanied by an application for certificate of title in the name of the dealer containing the description of vehicle, statement of dealer's title and all liens or encumbrances upon said vehicle, the name and address of person to whom sold, date of sale, actual date vehicle was

delivered to purchaser, and such other information as may be required by the department. (1937, c. 407, s. 17.)

§ 20-53. Application for specially constructed, reconstructed, or foreign vehicle.—(a) In the event the vehicle to be registered is a specially constructed, reconstructed, or foreign vehicle, such fact shall be stated in the application, and with reference to every foreign vehicle which has been registered outside of this state, the owner shall surrender to the department all registration cards and certificates of title or other evidence of such foreign registration as may be in his possession or under his control, except as provided in sub-division (b) hereof.

(b) Where, in the course of interstate operation of a vehicle registered in another state, it is desirable to retain registration of said vehicle in such other state, such applicant need not surrender, but shall submit for inspection said evidence of such foreign registration, and the department in its discretion, and upon a proper showing, shall register said vehicle in this state but shall not issue a certificate of title for such vehicle. (1937, c. 407, s. 18.)

§ 20-54. Authority for refusing registration or certificate of title.—The department shall refuse registration or issuance of a certificate of title or any transfer of registration upon any of the following grounds:

(a) That the application contains any false or fraudulent statement or that the applicant has failed to furnish required information or reasonable additional information requested by the department or that the applicant is not entitled to the issuance of a certificate of title or registration of the vehicle under this article;

(b) That the vehicle is mechanically unfit or unsafe to be operated or moved upon the highways;

(c) That the department has reasonable ground to believe that the vehicle is a stolen or embezzled vehicle, or that the granting of registration or the issuance of a certificate of title would constitute a fraud against the rightful owner or other person having valid lien upon such vehicle;

(d) That the registration of the vehicle stands suspended or revoked for any reason as provided in the motor vehicle laws of this state;

(e) That the required fee has not been paid. (1937, c. 407, s. 19.)

Cross Reference.—As to fees, see § 20-85.

§ 20-55. Examination of registration records and index of stolen and recovered vehicles.—The department, upon receiving application for any transfer of registration or for original registration of a vehicle, other than a new vehicle sold by a North Carolina dealer, shall first check the engine and serial numbers shown in the application against the indexes of registered motor vehicles, and against the index of stolen and recovered motor vehicles required to be maintained by this article. (1937, c. 407, s. 20.)

§ 20-56. Registration indexes.—The department shall file each application received, and when satisfied as to the genuineness and regularity thereof, and that the applicant is entitled to register such vehicle and to the issuance of a certificate of title, shall register the vehicle therein described

and keep a record thereof in suitable books or on index cards as follows:

(a) Under a distinctive registration number assigned to the vehicle;

(b) Alphabetically, under the name of the owner;

(c) Under the motor number, if available; otherwise any other identifying number of the vehicle; and

(d) In the discretion of the department, in any other manner it may deem advisable. (1937, c. 407, s. 20½.)

§ 20-57. The department to issue certificate of title and registration card.—(a) The department upon registering a vehicle shall issue a registration card and a certificate of title as separate documents.

(b) The registration card shall be delivered to the owner and shall contain upon the face thereof the name and address of the owner, space for owner's signature, the registration number assigned to the vehicle, and such description of the vehicle as determined by the commissioner, and upon the reverse side a form for endorsement of notice to the department upon transfer of the vehicle.

(c) Every owner, upon receipt of a registration card, shall write his signature thereon with pen and ink in the space provided. Every such registration card shall at all times be carried in the vehicle to which it refers, or shall be carried by the person operating or in control of such vehicle, who shall display the same upon demand of any peace officer or any officer of the department: Provided, however, no person charged with failing to so carry such registration card shall be convicted if he produces in court a registration card theretofore issued to him and valid at the time of his arrest.

(d) The certificate of title shall contain upon the face thereof the identical information required upon the face of the registration card, and in addition thereto the date of issuance and a statement of the owner's title and of all liens and encumbrances upon the vehicle therein described, and whether possession is held by the owner under a lease, contract or conditional sale, or other like agreement.

(e) The certificate of title shall also contain upon the reverse side form of assignment of title or interest and warranty thereof, with space for notation of liens and encumbrances upon such vehicle at the time of a transfer.

(f) Certificates of title upon which liens or encumbrances are shown shall be delivered or mailed by the department to the holder of the first lien or encumbrance.

(g) Certificates of title shall bear thereon the seal of the department.

(h) Certificates of title need not be renewed annually, but shall remain valid until canceled by the department for cause or upon a transfer of any interest shown therein. (1937, c. 407, s. 21; 1943, c. 715.)

Editor's Note.—The 1943 amendment added the proviso to paragraph (c).

§ 20-58. Release by lien holder to owner.—

(a) A person holding a lien or encumbrance as shown upon a certificate of title upon a vehicle may release such lien or encumbrance or assign

his interest to the owner without affecting the registration of said vehicle. The department, upon receiving a certificate of title upon which a lien holder has released or assigned his interest to the owner or upon receipt of a certificate of title not so endorsed, but accompanied by a legal release from a lien holder of his interest in or to a vehicle, shall issue a new certificate of title as upon an application for duplicate certificate of title.

(b) Any lien in favor of any person, firm or corporation which, since notice of such lien to the department has dissolved, ceased to do business, or gone out of business for any reason whatsoever, and which shall remain of record in the department as a notice of lien of such person, firm or corporation for a period of more than three years from the date of notice, shall become null and void and of no further force and effect as it relates to the issuance or transfer of title by the department. (1937, c. 407, s. 22.)

§ 20-59. Unlawful for lienor who holds certificate of title not to surrender same when lien satisfied.—It shall be unlawful and constitute a misdemeanor for a lienor who holds a certificate of title as provided in this article to refuse or fail to surrender such certificate of title to the person legally entitled thereto, when called upon by such person, within ten days after his lien shall have been paid and satisfied, and any person convicted under this section shall be fined not more than fifty dollars (\$50.00) or imprisoned not more than thirty days. (1937, c. 407, s. 23.)

§ 20-60. Owner after transfer not liable for negligent operation.—The owner of a motor vehicle who has made a bona fide sale or transfer of his title or interest, and who has delivered possession of such vehicle and the certificate of title thereto properly endorsed to the purchaser or transferee, shall not be liable for any damages thereafter resulting from negligent operation of such vehicle by another. (1937, c. 407, s. 24.)

§ 20-61. Owner dismantling or wrecking vehicle to return evidence of registration.—Any owner dismantling or wrecking any vehicle shall forward to the department the certificate of title, registration card and/or other proof of ownership, and the registration plate or plates last issued for such vehicle. No person, firm or corporation shall dismantle or wreck any motor vehicle without first complying with the requirements of this section. (1937, c. 407, s. 25.)

§ 20-62. Sale of motor vehicles to be dismantled.—Any owner who sells a motor vehicle as scrap or to be dismantled or destroyed shall assign the certificate of title thereto to the purchaser, and shall deliver such certificate so assigned to the department with an application for a permit to dismantle such vehicle. The department shall thereupon issue to the purchaser a permit to dismantle the same, which shall authorize such person to possess or transport such vehicle or to transfer ownership thereto by endorsement upon such permit. A certificate of title shall not again be issued for such motor vehicle in the event it is scrapped, dismantled, or destroyed. In any case, where the owner for any reason fails to send in title for a junked or dismantled vehicle, the department shall have authority to take possession of such title for cancellation. (1937, c. 407, s. 26.)

§ 20-63. Registration plates to be furnished by the department.—(a) The department upon registering a vehicle shall issue to the owner one registration plate for a motorcycle, trailer or semi-trailer and two registration plates for every other motor vehicle. Registration plates issued by the department under this article shall be and remain the property of the state, and it shall be lawful for the commissioner or his duly authorized agents to summarily take possession of any plate or plates which he has reason to believe is being illegally used, and to keep in his possession such plate or plates pending investigation and legal disposition of the same.

(b) Every registration plate shall have displayed upon it the registration number assigned to the vehicle for which it is issued, also the name of the state of North Carolina, which may be abbreviated, and the year number for which it is issued or the date of expiration thereof.

(c) Such registration plate and the required numerals thereon, except the year number for which issued, shall be of sufficient size to be plainly readable from a distance of one hundred feet during daylight.

(d) Registration plates issued for a motor vehicle other than a motorcycle, trailer or semi-trailer shall be attached thereto, one in the front and the other in the rear. The registration plate issued for a motorcycle, trailer or semi-trailer shall be attached to the rear thereof.

(e) Preservation and cleaning of registration plates: It shall be the duty of each and every registered owner of a motor vehicle to keep the registration plates assigned to such motor vehicle reasonably clean and free from dust and dirt, and such registered owner, or any person in his employ, or who operates such motor vehicle by his authority, shall, upon the request of any proper officer, immediately clean such registration plates so that the numbers thereon may be readily distinguished, and any person who shall neglect or refuse to so clean a registration plate, after having been requested to do so, shall be guilty of a misdemeanor, and fined not exceeding fifty dollars (\$50.00) or imprisoned not exceeding thirty days.

(f) Operating with false numbers. Any person who shall wilfully operate a motor vehicle with a registration plate which has been repainted or altered or forged, or which was issued by the commissioner for a motor vehicle other than the one on which used, shall be guilty of a misdemeanor.

(g) Alteration, disguise, or concealment of numbers. Any operator of a motor vehicle who shall wilfully mutilate, bend, twist, cover or cause to be covered or partially covered by any bumper, light, spare tire, tire rack, strap, or other device, or who shall paint, enamel, emboss, stamp, print, perforate, or alter or add to or cut off any part or portion of a registration plate or the figures or letters thereon, or who shall place or deposit or cause to be placed or deposited any oil, grease, or other substance upon such registration plates for the purpose of making dust adhere thereto, or who shall deface, disfigure, change, or attempt to change any letter or figure thereon, or who shall display a number plate in other than a horizontal upright position, shall be

guilty of a misdemeanor. (1937, c. 407, s. 27; 1943, c. 726.)

Editor's Note.—The 1943 amendment struck out the words "and with intent to defraud the state of registration fees" formerly appearing after the word "wilfully" in line two of paragraph (f). The amendment also struck out the words "and with intent to conceal the identity of such motor vehicle or the identity of the registered owner thereof" formerly appearing after the word "wilfully" in line three of paragraph (g).

§ 20-64. Transfer of registration plates. — (a) Registration plates issued by the department for vehicles privately owned and operated shall not be transferred from one vehicle to another, but shall be assigned and transferred from one owner to another, upon the assignment of title as required by this article, and shall remain on the vehicle for which originally issued.

(b) Registration plates issued by the department for vehicles owned and operated by the state or any department thereof, or by any county, city or town, school district or other political subdivision of the state, shall not be assigned and transferred from one owner to another, but shall be retained by the owner to whom originally issued, and may be used by the owner on another vehicle: Provided, that the owner shall make application to the department for said transfer and comply with the requirements of this article relative to certificate of title for vehicle the registration plates are to be transferred to.

(c) Registration plates issued by the department for vehicles operated for hire shall be subject to the same transfer provision as of vehicles owned by the state or any department thereof as set forth in subsection (b) of this section. (1937, c. 407, s. 28.)

§ 20-65. Expiration of registration.—Every vehicle registration under this article and every registration card and registration plate issued hereunder shall expire at midnight on the thirty-first day of December of each year: Provided, however, that it shall not be unlawful to continue to operate any vehicle upon the highways of this state after the expiration of the registration of said vehicle, registration card and registration plate during the period between the thirty-first day of December and the thirty-first day of January, inclusive. (1937, c. 407, s. 29; 1943, c. 592, s. 1.)

Editor's Note.—The 1943 amendment added the proviso.

§ 20-66. Application for renewal of registration.—(a) Application for renewal of a vehicle registration shall be made by the owner upon proper application and by payment of the registration fee for such vehicle, as provided by law.

(b) The department may receive applications for renewal of registration and grant the same, and issue new registration cards and plates at any time prior to expiration of registration, but no person shall display upon a vehicle the new registration plates prior to December first. (1937, c. 407, s. 30.)

§ 20-67. Notice of change of address or name.—(a) Whenever any person, after making application for or obtaining the registration of a vehicle or a certificate of title, shall move from the address named in the application or shown upon a registration card or certificate of title, such person shall within ten days thereafter notify the

department in writing of his old and new addresses.

(b) Whenever the name of any person who has made application for or obtained the registration of a vehicle or a certificate of title is thereafter changed by marriage or otherwise, such person shall within ten days notify the department of such former and new name. (1937, c. 407, s. 31.)

§ 20-68. Replacement of lost or damaged certificates, cards and plates.—(a) In the event any registration card or registration plate is lost, mutilated, or becomes illegible, the owner or legal representative of the owner of the vehicle for which the same was issued, as shown by the records of the department, shall immediately make application for and may obtain a duplicate or a substitute or a new registration under a new registration number, as determined to be most advisable by the department, upon the applicant's furnishing under oath information satisfactory to the department and payment of required fee.

(b) When a dealer acquires a motor vehicle which has been previously licensed, he should advise the party from whom he acquires the vehicle as to the provisions of the law which require that party to report to the motor vehicle bureau the sale or disposal of the vehicle. If the dealer wishes to have the license transferred to his name he may do so, but this is optional with him. However, should the license plate or plates be lost or destroyed while the vehicle is in the possession of the dealer, no replacement may be issued unless and until license and title has been transferred to the dealer. Nor shall any subsequent owner secure replacement plates until application for transfer of title and license has been made.

(c) In the event any certificate of title is lost, mutilated, or becomes illegible, the owner or legal representative of the owner of the vehicle for which the same was issued, as shown by the records of the department, shall immediately make application for and may obtain a duplicate upon the applicant furnishing under oath information satisfactory to the department and payment of required fee. Upon issuance of any duplicate certificate of title the previous certificate last issued shall be void. (1937, c. 407, s. 32.)

Cross Reference.—As to fees for duplicate certificate, see § 20-85.

§ 20-69. Department authorized to assign new engine number.—The owner of a motor vehicle upon which the engine number or serial number has become illegible or has been removed or obliterated shall immediately make application to the department for a new engine or serial number for such motor vehicle. The department, when satisfied that the applicant is the lawful owner of the vehicle referred to in such application is hereby authorized to assign a new engine or serial number thereto, and shall require that such number, together with the name of this state, or a symbol indicating this state, be stamped upon the engine, or in the event such number is a serial number, then upon such portion of the motor vehicle as shall be designated by the department. (1937, c. 407, s. 33.)

§ 20-70. Department to be notified when another engine is installed or body changed.—(a) Whenever a motor vehicle registered hereunder is altered by the installation of another engine in

place of an engine, the number of which is shown in the registration records, or the installation of another body in place of a body, the owner of such motor vehicle shall immediately give notice to the department in writing on a form prepared by it, which shall state the number of the former engine and the number of the newly installed engine, the registration number of the motor vehicle, the name of the owner and any other information which the department may require. Whenever another engine has been substituted as provided in this section, and the notice given as required hereunder, the department shall insert the number of the newly installed engine upon the registration card and certificate of title issued for such motor vehicle.

(b) Whenever a new engine or serial number has been assigned to and stamped upon a motor vehicle as provided in section 20-69, or whenever a new engine has been installed or body changed as provided in this section, the department shall require the owner to surrender to the department the registration card and certificate of title previously issued for said vehicle. The department shall also require the owner to make application for a duplicate registration card and a duplicate certificate of title showing the new motor or serial number thereon or new style of body, and upon receipt of such application and fee, as for any other duplicate title, the department shall issue to said owner a duplicate registration and a duplicate certificate of title showing thereon the new number in place of the original number or the new style of body. (1937, c. 407, s. 34; 1943, c. 726.)

Cross Reference.—As to fee for duplicate registration card and certificate of title, see § 20-85.

Editor's Note.—The 1943 amendment made this section applicable to change of body of motor vehicle.

§ 20-71. Altering or forging certificate of title a felony.—Any person who shall alter with fraudulent intent any certificate of title or registration card issued by the department, or forge or counterfeit any certificate of title or registration card purporting to have been issued by the department under the provisions of this article, or who shall alter or falsify with fraudulent intent or forge any assignment thereof, or who shall hold or use any such certificate, registration card or assignment knowing the same to have been altered, forged or falsified, shall be guilty of a felony and upon conviction thereof shall be punished in the discretion of the court. (1937, c. 407, s. 35.)

Cross Reference.—As to punishment of felonies for which no specific punishment is prescribed, see § 14-2.

Part 4. Transfer of Title or Interest.

§ 20-72. Transfer by owner.—(a) Whenever the owner of a registered vehicle transfers or assigns his title or interest thereto, he shall endorse upon the reverse side of the registration card issued for such vehicle the name and address of the transferee and the date of transfer, and shall immediately forward such card to the department.

(b) The owner of any vehicle registered under the foregoing provisions of this article, transferring or assigning his title or interest thereto, shall

also endorse an assignment and warranty of title in form approved by the department upon the reverse side of the certificate of title or execute an assignment and warranty of title of such vehicle and a statement of all liens or encumbrances thereon, which statement shall be verified under oath by the owner, who shall deliver the certificate of title to the purchaser or transferee at the time of delivering the vehicle, except that where a deed of trust, mortgage, conditional sale or title retaining contract is obtained from purchaser or transferee in payment of purchase price or otherwise, the lien holder shall forward such certificate of title papers to the department within twenty days together with necessary fees, or deliver such papers to the purchaser at the time of delivering the vehicle, as he may elect, but in either event the penalty provided in section 20-74 shall apply if application for transfer is not made within twenty days. (1937, c. 407, s. 36.)

Cross Reference.—As to fees, see § 20-85.

Editor's Note.—The case cited below was decided under the corresponding provisions of the former law.

Transfer of Certificate as Prerequisite to Passing of Title.—A careful perusal of this article fails to disclose any provision prohibiting a sale or transfer of the title of a motor vehicle without a transfer and delivery of a certificate of registration of title, and there is no provision that a sale so made is either fraudulent or void. Its provisions operate upon the parties who make a sale or a purchase without complying with its terms. Its penal provisions are clear. They are directed against those who violate after the sale, or transfer, has been made. *Carolina Discount Corp. v. Landis Motor Co.*, 190 N. C. 157, 160, 129 S. E. 414.

Necessity for Writing to Pass Title.—"A sale of personal property is not required to be evidenced by any written instrument in order to be valid. This rule had been of such long standing prior to the enactment of the Motor Vehicle Registration Act, we cannot assume that the Legislature intended to change this rule, unless it says so." *Carolina Discount Corp. v. Landis Motor Co.*, 190 N. C. 157, 160, 129 S. E. 414.

§ 20-73. New owner to secure transfer of registration and new certificate of title.—The transferee within twenty days after the purchase shall apply to the department for a transfer of registration of the vehicle and shall present the certificate of title endorsed and assigned as hereinbefore provided to the department, and make application for and obtain a new certificate of title for such vehicle except as otherwise permitted in sections 20-75 and 20-76. (1937, c. 407, s. 37; 1939, c. 275.)

Editor's Note.—The 1939 amendment substituted "twenty" for "fifteen" with reference to number of days.

§ 20-74. Penalty for failure to make application for transfer within the time specified by law.—It is the intent and purpose of this article that every new owner or purchaser of a vehicle previously registered shall make application for transfer of title and registration within twenty days after acquiring same, or see that such application is sent in by the lien holder with proper fees, and responsibility for such transfer shall rest on the purchaser. Any person, firm or corporation failing to do so shall pay a penalty of two dollars (\$2.00) in addition to the fees otherwise provided in this article. It is further provided that any dealer or owner who shall knowingly make any false statement as to the date a vehicle was sold or acquired shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars (\$50.00) or imprisoned not more than thirty days. All moneys collected under this section shall go

to the state highway fund. (1937, c. 407, s. 38; 1939, c. 275.)

Editor's Note.—The 1939 amendment substituted "twenty" for "fifteen" with reference to number of days.

§ 20-75. When transferee is a dealer.—When the transferee of a vehicle is a dealer who holds the same for resale and operates the same only for purposes of demonstration under a dealer's number plate such transferee shall not be required to register such vehicle nor forward the certificate of title to the department as provided in section 20-73, but such transferee, upon transferring his title or interest to another person, shall give notice of such transfer to the department and shall execute and acknowledge an assignment and warranty of title in form approved by the department, and deliver the same to the person to whom such transfer is made at the same time the vehicle is delivered, except as provided in section 20-72, sub-section (b). (1937, c. 407, s. 39.)

§ 20-76. Title lost or unlawfully detained.—Whenever the applicant for the registration of a vehicle or a new certificate of title thereto is unable to present a certificate of title thereto by reason of the same being lost or unlawfully detained by one in possession, or the same is otherwise not available, the department is hereby authorized to receive such application and to examine into the circumstances of the case, and may require the filing of affidavits or other information; and when the department is satisfied that the applicant is entitled thereto is hereby authorized to register such vehicle and issue a new registration card, registration plate or plates and certificates of title to the person entitled thereto, upon payment of proper fee for duplicate title and/or replacement. (1937, c. 407, s. 40.)

Cross Reference.—As to proper fee, see § 20-85.

§ 20-77. Transfer by operation of law.—(a) Whenever the title or interest of an owner in or to a vehicle shall pass to another by operation of law, as upon order in bankruptcy, execution sale, repossession upon default in performing the terms of a lease or executory sales contract, or otherwise than by voluntary transfer, the transferee shall secure a transfer of registration to himself and a new certificate of title upon proper application, payment of the fees provided by law, and presentation of the last certificate of title, if available and such instruments or documents of authority or certified copies thereof as may be sufficient or required by law to evidence or effect a transfer of interest in or to chattels in such cases: Provided, however, transfers of registration shall only be made as provided for in § 20-64, sub-sections (a), (b) and (c).

(b) In the event of transfer as upon inheritance, devise or bequest, the department shall, upon receipt of a certified copy of a will, letters of administration and/or a certificate from the clerk of the superior court showing that the motor vehicle registered in the name of the decedent owner has been assigned to his widow as part of her year's support, transfer both title and license as otherwise provided for transfers. However, if no administrator has qualified or the clerk of the superior court refuses to issue a certificate, the department may upon affidavit showing satisfactory

reasons therefor effect such transfer, but the new title so issued shall not affect the validity nor be in prejudice of any creditor's lien.

(c) **Mechanic's or Storage Lien.**—In any case where a vehicle is sold under a mechanic's or storage lien, the department shall be given a twenty-day notice as provided in § 20-114. (1937, c. 407, s. 41; 1943, c. 726.)

Cross Reference.—As to fees required, see § 20-85.

Editor's Note.—The 1943 amendment substituted the word "twenty-day" for the word "thirty-day" in subsection (c).

§ 20-78. When department to transfer registration and issue new certificate.—(a) The department, upon receipt of a properly endorsed certificate of title and application for transfer of registration, accompanied by the required fee, shall transfer the registration thereof under its registration number to the new owner, and shall issue a new registration card and certificate of title as upon an original registration.

(b) The department shall retain and appropriately file every application for certificate of title upon which certificate of title was issued and every surrendered certificate of title, such file to be so maintained as to permit the tracing of title of the vehicle designated therein.

After such applications for certificate of title or surrendered certificates of title have been on file with the department for a period of three years, the commissioner is hereby authorized and empowered to provide for the photographic or photostatic recording of such documents in such manner as he may deem expedient. The photographic or photostatic copies herein authorized shall be sufficient as evidence in the tracing of the titles of the motor vehicles designated therein, and shall also be admitted in evidence in all actions or proceedings to the same extent that the originals would have been admitted. (1937, c. 407, s. 42; 1943, c. 726.)

Cross Reference.—As to required fees, see § 20-85.

Editor's Note.—The 1943 amendment added the second and third sentences of subsection (b).

Part 5. Issuance of Special Plates.

§ 20-79. Registration by manufacturers and dealers.—(a) A manufacturer of or dealer in motor vehicles, trailers or semi-trailers, owning or operating any such vehicle or any vehicle known as a wrecker upon any highway, in lieu of registering such vehicle, may obtain from the department, upon application therefor upon the proper official forms and payment of the fees required by law, and attach to each such vehicle, two number plates, which plates shall each bear thereon a distinctive number, also the name of this state, which may be abbreviated, and the year for which issued, together with the word "dealer" or a distinguishing symbol indicating that such plate or plates are issued to a dealer may, during the calendar year for which issued, be transferred from one such vehicle to another owned and operated by such manufacturer or dealer.

(b) Every manufacturer of or dealer in motor vehicles shall obtain and have in his possession a certificate of title issued by the department to such manufacturer or dealer of each vehicle, owned and operated upon the highways by such manufacturer or dealer, except that a certificate of title shall not be required for any new vehicle to

be sold as such by a manufacturer or dealer prior to the sale of such vehicle by the manufacturer or dealer; and except that any dealer or any employee of any dealer may operate any motor vehicle, trailer or semi-trailer, the property of the dealer, for the purpose of furthering the business interest of the dealer in the sale, demonstration and servicing of motor vehicles, trailers and semi-trailers, of collecting accounts, contacting prospective customers and generally carrying on routine business necessary for conducting a general motor vehicle sales business: Provided, that no use shall be made of dealer's demonstration plates on vehicles operated in any other business dealers may be engaged in: Provided further, that dealers may allow the operation of motor vehicles owned by dealers and displaying dealer's demonstration plates in the personal use of persons other than those employed in the dealer's business: Provided further, that said persons shall, at all times while operating a motor vehicle under the provisions of this section, have in their possession a certificate on such form as approved by the commissioner from the dealer, which shall be valid for not more than forty-eight hours: Provided further, that motor vehicles, trailers and semi-trailers sold by dealers may be operated for a period not exceeding ten days from the date of sale by the purchaser thereof with dealer's demonstration plates, provided the purchasers have in their possession receipts from the dealers upon which the dealer has certified that the necessary amount of money to pay for titles and licenses has been paid by the purchasers to the dealers to be forwarded to the motor vehicle bureau, either direct or through one of its branch offices, on such form as approved by the commissioner.

(c) No manufacturer of or dealer in motor vehicles, trailers or semi-trailers shall cause or permit any such vehicle owned by such person to be operated or moved upon a public highway without there being displayed upon such vehicle a number plate or plates issued to such person, either under section 20-63 or under this section.

(d) No manufacturer of or dealer in motor vehicles, trailers or semi-trailers shall cause or permit any such vehicle owned by such person or by any person in his employ, which is in the personal use of such person or employee, to be operated or moved upon a public highway with a "dealer" plate attached to such vehicle.

(e) **Transfer of Dealer Registration.** — No change in the name of a firm, partnership or corporation, nor the taking in of a new partner, nor the withdrawal of one or more of the firm, shall be considered a new business; but if any one or more of the partners remain in the firm, or if there is change in ownership of less than a majority of the stock, if a corporation, the business shall be regarded as continuing and the dealers' plates originally issued may continue to be used. (1937, c. 407, s. 43.)

§ 20-80. National guard plates.—The commissioner shall cause to be made each year a sufficient number of automobile license plates to furnish each officer of the North Carolina National Guard with a set thereof, said license plates to be in the same form and character as other license plates now or hereafter authorized by law to be used upon private passenger vehicles registered in this state, ex-

cept that such license plates shall bear on the face thereof the following words, "National Guard." The said license plates shall be issued only to officers of the North Carolina National Guard, and for which license plates the commissioner shall collect fees in an amount equal to the fees collected for the licensing and registering of private vehicles. The adjutant general of North Carolina shall furnish to the commissioner each year, prior to the date that licenses are issued, a list of the officers of the North Carolina National Guard, which said list shall contain the rank of each officer listed in the order of his seniority in the service, and the said license plates shall be numbered, beginning with the number two hundred and one and in numerical sequence thereafter up to and including the number five hundred, according to seniority, the senior officer being issued the license bearing the numerals two hundred and one. Upon transfer of the ownership of a private passenger vehicle upon which there is a license plate bearing the words national guard, said plates shall be removed and the authority to use the same shall thereby be canceled; however, upon application to the commissioner, he shall reissue said plate to the officer of the national guard to whom the same were originally issued, and upon said reissue the commissioner shall collect fees in an amount equal to the fees collected for the original licensing and registering of said private passenger vehicle as is now or may be prescribed by law. (1937, c. 407, s. 44; 1941, c. 36.)

§ 20-81. Official license plates.—Official license plates issued as a matter of courtesy to state officials shall be subject to the same transfer provisions as provided in section 20-80. (1937 c. 407, s. 45.)

§ 20-82. Manufacturer or dealer to give notice of sale or transfer.—Every manufacturer or dealer, upon transferring a motor vehicle, trailer or semi-trailer, whether by sale, lease or otherwise, to any person other than the manufacturer or dealer shall, on or before the tenth of each month, give written report of all such transfers made during the preceding calendar month to the department upon the official form provided by the department. Every such report shall contain the date of such transfer, the names and addresses of the transferer and transferee and such description of the vehicle as may be called for in such official form. Every manufacturer or dealer shall keep a record of all vehicles received or sold containing such information regarding same as the department may require. (1937, c. 407, s. 46.)

Part 6. Vehicles of Non-Residents of States, etc.

§ 20-83. Registration by non-residents. — (a) Nonresidents of this state, except as otherwise provided in this article, will be exempt from the provisions of this article as to the registration of motor vehicles for the same time and to the same extent as like exemptions are granted residents of this state under laws of another state, district or territory: Provided, that they shall have complied with the provisions of the law of the state, district or territory of their residence relative to the registration and equipment of their motor vehicles, and shall conspicuously display the registration plates as required thereby, and have in their possession the registration certifi-

cates issued for such motor vehicles, and that nothing herein contained shall be construed to permit a bona fide resident of this state to use any registration plate or plates from a foreign state, district or territory, under the provisions of this section. The commissioner shall determine what exemptions the non-resident vehicle operators of the several states, districts or territories, are entitled to under the provisions of this section, and ordain and publish rules and regulations for making effective the provisions of this section, which rules and regulations shall be observed and enforced by all the officers of this state whose duties require the enforcement of the automobile registration laws, and any violations of such rules and regulations shall constitute a misdemeanor.

(b) Motor vehicles duly registered in a state or territory which are not allowed exemptions by the commissioner, as provided for in the preceding paragraph, desiring to make occasional trips into or through the state of North Carolina, or operate in this state for a period not exceeding thirty days, may be permitted the same use and privileges of the highways of this state as provided for similar vehicles regularly licensed in this state, by procuring from the commissioner trip licenses upon forms and under rules and regulations to be adopted by the commissioner, good for use for a period of thirty days upon the payment of a fee in compensation for said privilege equivalent to one-tenth of the annual fee which would be chargeable against said vehicle if regularly licensed in this state: Provided, however, that nothing in this provision shall prevent the extension of the privileges of the use of the roads of this state to vehicles of other states under the reciprocity provisions provided by law: Provided further, that nothing herein contained shall prevent the owners of vehicles from other states from licensing such vehicles in the state of north Carolina under the same terms and the same fees as like vehicles are licensed by owners resident in this state.

(c) Every non-resident, including any foreign corporation carrying on business within this state and owning and operating in such business any motor vehicle, trailer or semi-trailer within this state, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state. (1937, c. 407, s. 47; 1941, cc. 99, 365.)

Local Modification.—Buncombe, Catawba, Lee, New Hanover, Pender, Sampson, Wake: 1941, c. 99, s. 2.

Editor's Note.—Public Laws 1941, c. 99, amended by c. 365, inserted in subsection (b) the words "or operate in this state for a period not exceeding thirty days."

For comment on the 1941 amendment, see 19 N. C. Law Rev. 514.

§ 20-84. Vehicles owned by state, municipalities or orphanages, etc.—The department, upon proper proof being filed with it that any motor vehicle for which registration is herein required is owned by the state or any department thereof, or by any county, township, city or town, or by any board of education, or by any orphanage, shall collect one dollar for the registration of such motor vehicles, but shall not collect any fee for application for certificate of title in the name of the state or any department thereof, or by any county, township, city or town, or by any board of education or orphanage: Provided, that the term "owned" shall be construed to mean that such motor vehicle is

the actual property of the state or some department thereof, or of the county, township, city or town, or of the board of education, and no motor vehicle which is the property of any officer or employee of any department named herein shall be construed as being "owned" by such department. Provided, that the above exemptions from registration fees shall also apply to any church owned bus used exclusively for transporting children and parents to Sunday School and church services and for no other purpose. (1937, c. 407, s. 48; 1939, c. 275.)

Cross Reference.—As to school trucks, etc., exempt, see § 115-101.

Editor's Note.—The 1939 amendment added the second proviso.

Part 7. Title and Registration Fees.

§ 20-85. Schedule of fees.—There shall be paid to the department for the issuance of certificates of title, transfer of registration and replacement of registration plates fees according to the following schedules:

- (a) Each application for certificate of title..\$.50
 - (b) Each application for duplicate certificate of title50
 - (c) Each application of reposessor for certificate of title50
 - (d) Each transfer of registration..... 1.00
 - (e) Each set of replacement registration plates 1.00
 - (f) Each duplicate registration card25
- (1937, c. 407, s. 49; 1943, c. 648.)

Editor's Note.—The 1943 amendment added subsection (f).

§ 20-86. Penalty for engaging in a "for hire" business without proper license plates.—Any person, firm or corporation engaged in the business of transporting persons or property for compensation, except as otherwise provided in this article, shall, before engaging in such business, pay the license fees prescribed by this article and secure the license plates provided for vehicles operated for hire. Any person, firm or corporation operating vehicles for hire without having paid the tax prescribed or using private plates on such vehicles shall be liable for an additional tax of twenty-five dollars (\$25.00) for each vehicle in addition to the normal fees provided in this article. (1937, c. 407, s. 50.)

§ 20-87. Passenger vehicle registration fees.—There shall be paid to the department annually, as of the first day of January, for the registration and licensing of passenger vehicles, fees according to the following classifications and schedules:

(a) **Franchise Bus Carriers.**—Franchise bus carriers shall pay an annual license tax of ninety cents per hundred pounds weight of each vehicle unit, and in addition thereto six per cent of the gross revenue derived from such operation: Provided, said additional six per cent shall not be collectible unless and until and only to the extent that such amount exceeds the license tax of ninety cents per hundred pounds: Provided further, that franchise bus carriers operating from a point or points in this state to another point or other points in this state shall be liable for a tax of six per cent on the gross revenue earned in such intrastate hauls. Franchise bus carriers operating between a point or points within this state and a point or points without this state

shall be liable for a six per cent tax only on that proportion of the gross revenue earned between terminals in this state and terminals outside this state that the mileage in North Carolina bears to the total mileage between the respective terminals. Franchise bus carriers operating through this state from a point or points outside this state to a point or points outside this state shall be liable for a six per cent tax on that proportion of the gross revenue earned between such terminals as the mileage in North Carolina bears to the total mileage between the respective terminals. In no event shall the tax paid by such franchise bus carriers be less than ninety cents per hundred pounds weight for each vehicle. The tax prescribed in this subsection is levied as compensation for the use of the highways of this state and for the special privileges extended such franchise bus carriers by this state.

(b) **U-Drive-It Passenger Vehicles.**—U-drive-it passenger vehicles shall pay the following tax:

- Motorcycles: 1-passenger capacity\$12.00
- 2-passenger capacity 15.00
- 3-passenger capacity 18.00
- Automobiles: \$1.90 per hundred pounds weight of each vehicle.

(c) **For Hire Passenger Vehicles.**—For hire passenger vehicles shall be taxed at the rate of \$1.90 per hundred pounds of weight.

(d) **Excursion Passenger Vehicles.**—Excursion passenger vehicles shall be taxed at the rate of \$8.00 per passenger capacity, with a minimum charge of \$25.00, but such vehicles operating under a certificate as a restricted common carrier under §§ 62-103 to 62-121, shall also be liable to the gross revenue six per cent tax to the extent it exceeds the tax herein levied under the same provisions provided for franchise bus carriers.

(e) **Private Passenger Vehicles.**—Private passenger vehicles shall be taxed at thirty-five cents per hundred pounds of weight or major fraction thereof, according to the manufacturer's shipping weight: Provided, that no fee for any private passenger vehicles shall be less than \$7.00.

(f) **Private Passenger Motorcycles.**—Private passenger motorcycles shall pay for each motorcycle \$5.00, and for each side car \$5.00.

(g) **Manufacturers and Motor Vehicle Dealers.**—Manufacturers and dealers in motor vehicles for demonstration tags shall pay as a registration fee and for one set of plates \$25.00, and for each additional set of plates \$1.00.

(h) **Driveaway Companies.**—Any person, firm or corporation engaged in the business of driving new motor vehicles from the place of manufacture to the place of sale in this state for compensation shall pay as a registration fee and for one set of plates one hundred dollars (\$100.00) and for each additional set of plates five dollars (\$5.00). (1937, c. 407, s. 51; 1939, c. 275; 1943, c. 648.)

Editor's Note.—The 1939 and 1943 amendments made changes in subsection (a).

For case citing corresponding provisions of former law, see *Safe Bus v. Maxwell*, 214 N. C. 12, 197 S. E. 567.

§ 20-88. Property hauling vehicles.—(a) **Determination of Weight.**—For the purpose of licensing, the weight of the several classes of motor vehicles used for transportation of property shall be the gross weight and load, to be determined

by the manufacturer's gross weight capacity as shown in an authorized national publication, such as "Commercial Car Journal" or the statistical issue of "Automotive Industries," all such weights subject to verification by the commissioner or his authorized deputy, and if no such gross weight on any vehicle is available in such publication, then the gross weight shall be determined by the commissioner or his authorized agent: Provided, that any determination of weight shall be made only in units of one thousand pounds or major fraction thereof, weights of over five hundred pounds being counted as one thousand and weights of five hundred pounds or less being disregarded. Semi-trailers licensed for use in connection with a truck or truck-tractor shall in no case be licensed for less gross weight capacity than the truck or truck-tractor with which it is to be operated. The gross weight of a single unit equipped with three or more axles may be computed for license fee at a rate not in excess of the rate on trucks and semi-trailers of the same gross weight.

(b) There shall be paid to the department annually, as of the first day of January, for the registration and licensing of trucks, truck-tractors, trailers and semi-trailers, fees according to the following classifications and schedules:

Schedule of Weights and Rates

Rate per hundred pounds gross weight:

	Private Contract	Franchise	
	Hauler	Hauler	Hauler
			(Deposit)
Gross weight not over			
4,500 pounds	\$0.30	\$0.75	\$0.60
4,501 pounds to 8,500 inclusive .....	.40	.75	.60
8,501 pounds to 12,500 pounds inclusive .....	.50	1.00	.60
12,501 pounds to 16,500 inclusive .....	.70	1.15	.60
Over 16,500 pounds .....	.80	1.40	.60

(c) The minimum rate for any vehicle licensed under this section shall be twelve dollars (\$12.00), except that the license fee for a trailer having not more than two wheels with a gross weight of vehicle and load not exceeding fifteen hundred (1500) pounds and towed by a passenger car shall be two dollars (\$2.00) for any part of the license year for which said license is issued, and the license fee for a two-wheel trailer with gross weight for vehicle and load of more than fifteen hundred (1500) pounds but not more than twenty-five hundred (2500) pounds and towed by a passenger car shall be ten dollars (\$10.00) for the entire year, subject to the provision for quarterly license as provided for other vehicles: Provided, however, that any such trailers operated for hire shall be taxed at the same rate as contract hauler vehicles: Provided, further, that in addition to the motor vehicle licenses authorized to be issued pursuant to the provisions of this chapter, the department shall issue, upon application therefor, a license plate for trucks marked "farmer", which shall be issued upon evidence satisfactory to the department that the applicant is a farmer and is actually engaged in the growing, raising and producing of farm products as an occupation. License plates issued under authority of this section shall

be placed upon motor trucks engaged exclusively in the carrying or transportation of applicant's farm products, raised or produced on his farm, and farm supplies, and not engaged in hauling for hire: Provided further that the department shall issue necessary rules and regulations providing for the recall, transfer, exchange or cancellation of "farmer" license plates issued hereunder when trucks bearing such shall be sold and/or transferred. Applicants for license plates herein authorized shall pay therefor at a rate equal to one-half the present registration fee provided for trucks by this chapter; provided that the minimum rate for any vehicle licensed under this proviso shall be ten dollars (\$10.00): and provided, further, persons applying for "farmer" license under the provisions of this section shall not be entitled to the benefits of § 20-95. The term "farmer" as used in this section means any person engaged in the raising, growing and producing of farm products on a farm not less than ten acres in area, and who does not engage in the business of buying farm products for resale; and the term "farm products" means any food crop, cattle, hogs, poultry, dairy products and other agricultural products designed and to be used for food purposes.

(d) Rates on trucks, trailers and semi-trailers wholly or partially equipped with solid tires shall be double the above schedule.

(e) Franchise Haulers.—Franchise haulers shall pay an annual license tax as per the above schedule of rates for each vehicle unit, and in addition thereto six per cent of the gross revenue derived from such operations: Except on vehicles licensed for interstate routes and used exclusively for interstate business where more than fifty per cent of the designated route lies outside of the state of North Carolina, the required deposit may be reduced by the commissioner to fifty per cent of the above schedule of rates as to deposit only: Provided, said additional six per cent shall not be collectible unless and until and only to the extent that such amount exceeds the license tax or deposit per the above schedule: Provided, further, franchise haulers operation from a point or points in this state to another point or points in this state, shall be liable for a tax of six per cent on the gross revenue earned in such intrastate hauls. Franchise haulers operating between a point or points within this state and a point or points without this state shall be liable for a six per cent tax only on that proportion of the gross revenue earned between terminals in this state and terminals outside this state that the mileage in North Carolina bears to the total mileage between the respective terminals. Franchise haulers operating through this state from a point or points outside this state to a point or points outside this state shall be liable for a six per cent tax on that proportion of the gross revenue earned between such terminals as the mileage in North Carolina bears to the total mileage between the respective terminals. In no event shall the tax paid by such franchise haulers be less than the license tax or deposit shown on the above schedule, except where a franchise is hereafter issued by the utilities commission for service over a route within the state which is not now served by any franchise hauler the six per cent gross revenue tax may be reduced to four per

cent for the first two years only. The tax prescribed in this subsection is levied as compensation for the use of the highways of this state and for the special privileges extended such franchise haulers by this state.

(f) Non-resident motor vehicle carriers which do not operate in intrastate commerce in this state, and the title to whose vehicles are not required to be registered under the provisions of this article, shall be taxed for the use of the roads in this state and shall pay the same fees therefor as are required with reference to like vehicles owned by residents of this state: Provided, that if any such fees as applied to non-residents shall at any time become inoperative, such carriers shall be taxed for the use of the roads of this state as franchise haulers as provided above: Provided further, that this provision shall not prevent the extension to vehicles of other states of the benefits of the reciprocity provisions provided by law.

(g) Contract haulers under the definitions of this article who receive and operate under a certificate or permit or other authority from the utilities commissioner as restricted common carriers under the provisions of §§ 62-103 to 62-121, shall, in addition to the rate of tax for contract carriers provided above, be subject to the gross six per cent tax to the extent that it exceeds the rate for contract haulers to be levied and collected in the same manner provided for franchise haulers, and the tax in the schedule provided for contract haulers shall be deemed a deposit only.

(h) Every person operating a motor vehicle upon the highways of the state equipped with motors of the Diesel type shall make a report to the commissioner upon forms to be prescribed and furnished by the commissioner at least four times a year on dates to be designated by the commissioner; and such reports shall show, among other things, the purchases of motor fuel for use in said Diesel type motor and whether or not the tax levied upon motor fuels has been paid or assumed by the person from whom bought; and it shall be unlawful to operate any such motor equipment upon the highways of this state except with fuel upon which the tax has been paid. It shall be unlawful for any person, firm, or corporation operating such Diesel type motor to fail, refuse, or neglect to make returns in accordance with the forms prescribed by the commissioner; and any person knowingly making false returns shall be guilty of a felony. (1937, c. 407, s. 52; 1939, c. 275; 1941, cc. 36, 227; 1943, c. 648.)

Cross Reference.—As to franchise certificates, see §§ 62-105, 62-106.

Editor's Note.—The 1939 amendment added subsection (h). The 1941 amendment, which added that part of subsection (c) relating to "farmer" license plates, provides that it shall be effective beginning with license period of 1942.

For temporary act exempting trucks engaged in national defense projects from contract hauler license fees, see Public Laws 1941, c. 14.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 514.

The 1943 amendment added the last sentence of subsection (a) and made changes in subsection (e).

§ 20-89. Method of computing gross revenue of franchise bus carriers and haulers.—In computing the gross revenue of franchise bus carriers and franchise haulers, revenue derived from the transportation of United States mail or other United States government services shall not

be included. All revenue earned both within and without this state from the transportation of persons or property, except as herein provided, by franchise bus carriers and franchise haulers, whether on fixed schedule routes or by special trips or by auxiliary vehicles not licensed as franchise haulers, whether owned by the franchise hauler or hired from another for the transportation of persons or property within the limits of the designated franchise route shall be included in the gross revenue upon which said tax is based. (1937, c. 407, s. 53; 1943, c. 726.)

The 1943 amendment struck out the word "collected" formerly appearing after the word "provided" in line eight.

§ 20-90. Due date of franchise tax.—The six per cent additional tax on franchise bus carriers and franchise haulers shall become due and payable on or before the twentieth day of the month following the month in which it accrues. (1937, c. 407, s. 54.)

§ 20-91. Records and reports required of franchise carriers.—(a) Every franchise bus carrier and franchise hauler shall keep a record of all business transacted and all revenue received on such forms as may be prescribed by or satisfactory to the commissioner, and such records shall be preserved for a period of three years, and shall at all times during the business hours of the day be subject to inspection by the commissioner or his deputies or such other agents as may be duly authorized by the commissioner. Any operator of such a franchise line failing to comply with or violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court.

(b) All franchise bus carriers and franchise haulers shall, on or before the twentieth day of each month, make a report to the department of gross revenue earned and gross mileage operated during the month previous, in such manner as the department may require and on such forms as the department shall furnish.

(c) It shall be the duty of the commissioner, by competent auditors, to have the books and records of every franchise bus carrier and franchise hauler examined at least once each year to determine if such operators are keeping complete records as provided by this section of this article, and to determine if correct reports have been made to the state department of motor vehicles covering the total amount of tax liability of such operators.

(d) If any franchise bus carrier or franchise hauler shall fail, neglect, or refuse to keep such records or to make such reports as required, and within the time provided in this article, the commissioner shall immediately inform himself as best he may as to all matters and things required to be set forth in such records and reports, and from such information as he may be able to obtain, determine and fix the amount of the tax due the state from such delinquent operator for the period covering the delinquency, adding to the tax so determined and as a part thereof an amount equal to five per cent (5%) of the tax, to be collected and paid. The said commissioner shall proceed immediately to collect the tax including the additional five per cent (5%).

(e) Except in accordance with proper judicial order, or as otherwise provided by law, it shall

be unlawful for the commissioner of motor vehicles, any deputy, assistant, agent, clerk, other officer, employee, or former officer or employee, to divulge or make known in any manner the amount of gross revenue or tax paid by any franchise bus carrier or franchise hauler as set forth or disclosed in any report or return required in remitting said tax, or as otherwise disclosed. Nothing in this section shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns, and the items thereof; the inspection of such reports or returns by the governor, attorney general, utilities commission, or their or its duly authorized representatives; or the inspection by a legal representative of the state of the report or return of any franchise bus carrier or franchise hauler which shall bring an action to set aside or review the tax based thereon, or against which action or proceeding has been instituted to recover any tax or penalty imposed by this article. Any person, officer, agent, clerk, employee, or former officer or employee violating the provisions of this section shall be guilty of a misdemeanor. (1937, c. 407, s. 55, 1939, c. 275; 1941, c. 36; 1943, c. 726.)

Editor's Note.—The 1939 amendment struck out the word "willfully" formerly appearing after the word "shall" in subsection (d).

The 1943 amendment added subsection (e).

§ 20-92. Revocation of franchise registration.

—The failure of any franchise bus carrier or any franchise hauler to pay any tax levied under this article, and/or to make reports as is required, shall constitute cause for revocation of registration and franchise, and the commissioner is hereby authorized to seize the registration plates of any such delinquent carrier and require the cessation of the operation of such vehicles. (1937, c. 407, s. 56.)

§ 20-93. Bond or deposit required.—The commissioner, before issuing any registration plates to a franchise bus carrier or a franchise hauler, shall either satisfy himself of the financial responsibility of such carrier or require a bond or deposit in such amount as he may deem necessary to insure the collection of the tax imposed by this section. (1937, c. 407, s. 57.)

§ 20-94. Partial payments.—In the purchase of licenses, where the gross amount of the license to any one owner amounts to more than four hundred dollars (\$400.00), half of such payment may, if the commissioner is satisfied of the financial responsibility of such owner, be deferred until April first in any calendar year upon the execution to the commissioner of a draft upon any bank or trust company upon forms to be provided by the commissioner in an amount equivalent to one-half of such tax, plus a carrying charge of two per cent (2%): Provided, that any person using any tag so purchased after the first day of April in any such year, without having first provided for the payment of such draft, shall be guilty of a misdemeanor. Any such drafts being dishonored and not paid shall be subject to the penalties prescribed in § 20-178 and shall be immediately turned over by the commissioner to his duly authorized agents and/or the state highway

patrol, to the end that this provision may be enforced. (1937, c. 407, s. 58; 1943, c. 726.)

Editor's Note.—The 1943 amendment added after the word "may" in line five the words "if the commissioner is satisfied of the financial responsibility of such owner." It also inserted in the last sentence the following: "shall be subject to the penalties prescribed in section 20-178 and."

§ 20-95. Licenses for less than a year.—Licenses issued on or after April first of each year and before July first for all vehicles, except franchise haulers and two-wheel trailers under one thousand five hundred pounds weight pulled by passenger cars, shall be three-fourths of the annual fee. Licenses issued on or after July first and before October first, except two-wheel trailers under one thousand five hundred pounds weight pulled by passenger cars, shall be one-half the annual fee. Licenses issued on or after October first, except on two-wheel trailers under one thousand five hundred pounds weight pulled by passenger cars, shall be one-fourth of the annual fee. (1937, c. 407, s. 59.)

§ 20-96. Overloading.—The commissioner, or his authorized agent, may allow any owner of a motor vehicle for transportation of property to overload said vehicle by paying the fee at the rate per hundred pounds which would be assessed against such vehicle if its gross weight capacity provided for such load; but such calculation shall be made only in units of one thousand pounds or major fraction thereof, excessive weights of five hundred pounds or less being disregarded and weights of more than five hundred pounds and not more than one thousand pounds being counted as one thousand. It is the intent of this section that every owner of a motor vehicle shall procure license in advance to cover any overload which may be carried. Any owner failing to do so, and whose vehicle shall be found in operation on the highways carrying an overload in excess of one ton over the weight for which such vehicle is licensed, shall pay in addition to the normal tax levied in this article an additional tax of three dollars (\$3.00) per each thousand pounds in excess of the licensed weight of such vehicle. Any person who shall willfully violate the provisions of this section shall be guilty of a misdemeanor in addition to being liable for the additional tax herein prescribed. (1937, c. 407, s. 60; 1943, c. 726.)

The 1943 amendment added the last sentence.

§ 20-97. Taxes compensatory; no additional tax.

—(a) All taxes levied under the provisions of this article are intended as compensatory taxes for the use and privileges of the public highways of this state, and shall be paid by the commissioner to the state treasurer, to be credited by him to the state highway fund; and no county or municipality shall levy any license or privilege tax upon the use of any motor vehicle licensed by the state of North Carolina, except that cities and towns may levy not more than one dollar (\$1.00) per year upon any such vehicle resident therein: Provided, however, that cities and towns may levy, in addition to the one dollar (\$1.00) per year, herein set forth, a sum not to exceed fifteen dollars (\$15.00) per year upon each vehicle operated in such city or town as a taxicab.

(b) No additional franchise tax, license tax, or other fee shall be imposed by the state against

any franchise motor vehicle carrier taxed under this article nor shall any county, city or town impose a franchise tax or other fee upon them, except that cities and towns may levy a license tax not in excess of fifteen dollars (\$15.00) per year on each vehicle operated in such city as a taxicab as provided in subsection (a) hereof.

(c) In addition to the appropriation carried in the Appropriations Act there shall be appropriated to the motor vehicle department the additional sum of fifteen thousand dollars (\$15,000.00) from the state highway fund: Provided, that such additional sum shall be made available only in the event that the regular appropriation is insufficient and it shall be determined by the director of the budget that such additional amount is necessary to carry out the provisions of this article. (1937, c. 407, s. 61; 1941, c. 36; 1943, c. 639, ss. 3, 4.)

Editor's Note.—The 1943 amendment added the proviso to subsection (a), and the exception clause to subsection (b).

Municipalities are prohibited by this section from levying a license or privilege tax for use of its streets by motor trucks. *Kenny Co. v. Brevard*, 217 N. C. 269, 7 S. E. (2d) 542.

May Not Impose Additional License Tax on Vehicles for Hire.—This section expressly prohibits a municipality from levying a license or privilege tax in excess of \$1.00 upon the use of any motor vehicle licensed by the state, and must be construed with and operates as an exception to, and limitation upon the general power to levy license and privilege taxes upon businesses, trades and professions granted by charter and § 160-56, and provisions of a municipal ordinance imposing a license tax upon the operation of passenger vehicles for hire in addition to the \$1.00 theretofore imposed by it upon motor vehicles generally, is void, nor may the additional municipal tax be sustained upon the theory that it is a tax upon the business of operating a motor vehicle for hire rather than ownership of the vehicle, since the word "business" and the word "use" as used in the sections mean the same thing. *Cox v. Brown*, 218 N. C. 350, 11 S. E. (2d) 152.

For cases decided under the corresponding provisions of the former law, see *Southeastern Exp. Co. v. Charlotte*, 186 N. C. 668, 120 S. E. 475; *State v. Fink*, 179 N. C. 712, 103 S. E. 16; *State v. Jones*, 191 N. C. 371, 131 S. E. 734.

§ 20-98. Tax lien.—In the distribution of assets in case of receivership or insolvency of the owner against whom the tax herein provided is levied and in the order of payment thereof, the state shall have priority over all other debts or claims except prior recorded liens or liens given by statute an express priority. (1937, c. 407, s. 62.)

§ 20-99. Sale under execution; franchise canceled.—Whenever any tax imposed by this article shall be in default for a period of ten days, it shall be the duty of the commissioner to certify the same to the sheriff of any county of this state in which such delinquent motor vehicle operator is operating, which said certificate to said sheriff shall have all the force and effect of a judgment and execution, and the said sheriff is hereby authorized and directed to levy upon any property in said county owned by said delinquent motor vehicle operator and to sell the same for the payment of said tax as other property is sold in the state for the non-payment of taxes; and for such services the sheriff shall be allowed the fees now prescribed by law for sales under execution, and the cost in such cases shall be paid by the delinquent taxpayer or out of the proceeds of the said property, and upon the filing of said certificate with the sheriff, in the event the delinquent taxpayer shall be the operator of any franchise bus carrier or franchise hauler vehicle, the franchise certificate issued to such operator shall become null and void and shall be canceled by the utilities com-

missioner, and it shall be unlawful for any such franchise bus carrier or the operator of any franchise hauler vehicle to continue the operation under said franchise. (1937, c. 407, s. 63.)

Cross References.—As to fees of sheriffs, see § 162-6. As to cancellation of franchise certificates, see § 62-111.

§ 20-100. Vehicles junked or destroyed by fire or collision.—Upon satisfactory proof to the commissioner that any motor vehicle, duly licensed, has been completely destroyed by fire or collision, or has been junked and completely dismantled so that the same can no longer be operated as a motor vehicle, the owner of such vehicle may be allowed on the purchase of a new license for another vehicle a credit equivalent to the unexpired proportion of the cost of the original license, dating from the first day of the next month after the date of such destruction. (1937, c. 407, s. 64; 1939, c. 369, s. 1.)

Editor's Note.—The 1939 amendment inserted the provision relating to junked vehicle.

§ 20-101. Vehicles to be marked.—All motor vehicles licensed as franchise bus carriers, franchise hauler vehicles and contract hauler vehicles, shall have printed on the side thereof in letters not less than three inches in height the name and home address of the owner, or such other identification as the utilities commissioner may approve. (1937, c. 407, s. 65.)

Part 8. Anti-Theft and Enforcement Provisions.

§ 20-102. Report of stolen and recovered motor vehicles.—Every sheriff, chief of police, or peace officer upon receiving reliable information that any vehicle registered hereunder has been stolen shall immediately report such theft to the department. Any said officer upon receiving information that any vehicle, which he has previously reported as stolen, has been recovered, shall immediately report the fact of such recovery to the department. (1937, c. 407, s. 66.)

§ 20-103. Reports by owners of stolen and recovered vehicles.—The owner, or person having a lien or encumbrance upon a registered vehicle which has been stolen or embezzled, may notify the department of such theft or embezzlement, but in the event of an embezzlement may make such report only after having procured the issuance of a warrant for the arrest of the person charged with such embezzlement. Every owner or other person who has given any such notice must notify the department of the recovery of such vehicle. (1937, c. 407, s. 67.)

§ 20-104. Action by department on report of stolen or embezzled vehicles.—(a) The department, upon receiving a report of a stolen or embezzled vehicle as hereinbefore provided, shall file and appropriately index the same and shall immediately suspend the registration of the vehicle so reported, and shall not transfer the registration of the same until such time as it is notified in writing that such vehicle has been recovered.

(b) The department shall at least once each month compile and maintain at its headquarters office a list of all vehicles which have been stolen or embezzled or recovered as reported to it during the preceding month, and such lists shall be open to inspection by any peace officer or other

persons interested in any such vehicle. (1937, c. 407, s. 68.)

§ 20-105. Unlawful taking of a vehicle.—Any person who drives or otherwise takes and carries away a vehicle, not his own, without the consent of the owner thereof, and with intent to temporarily deprive said owner of his possession of such vehicle, without intent to steal the same, is guilty of a misdemeanor. The consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of such owner's consent on a previous occasion to the taking or driving of such vehicle by the same or a different person. Any person who assists in, or is a party or accessory to or an accomplice in any such unauthorized taking or driving, is guilty of a misdemeanor. (1937, c. 407, s. 69; 1943, c. 543.)

Cross Reference.—As to misdemeanors for which no specific punishment is prescribed, see § 14-3.

Editor's Note.—The 1943 amendment inserted after the word "drives" in the second line the words "or otherwise takes and carries away."

The cases treated below were decided under the corresponding provisions of the earlier law, but should be of assistance in the interpretation of the present section.

Civil Liability of Owner for Injuries.—The owner is not liable for an injury caused by his automobile while it is operated by another without his consent. This applies to parent and child and where the father forbade his child from taking his car he is not liable. *Linville v. Nissen*, 162 N. C. 95, 77 S. E. 1096.

An indictment charging larceny and receiving does not include a charge of driving a motor vehicle without the knowledge or consent of the owner, and a defendant charged in the indictment only with larceny and receiving may not be convicted under this section. *State v. Stinnett*, 203 N. C. 829, 167 S. E. 63.

§ 20-106. Receiving or transferring stolen vehicles.—Any person who, with intent to procure or pass title to a vehicle which he knows or has reason to believe has been stolen or unlawfully taken, receives or transfers possession of the same from or to another, or who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken, and who is not an officer of the law engaged at the time in the performance of his duty as such officer, is guilty of a felony. (1937, c. 407, s. 70.)

Cross Reference.—As to felonies for which no specific punishment is prescribed, see § 14-2.

§ 20-107. Injuring or tampering with vehicle.—(a) Any person who either individually or in association with one or more other persons wilfully injures or tampers with any vehicles or breaks or removes any part or parts of or from a vehicle without the consent of the owner is guilty of a misdemeanor.

(b) Any person who, with intent to steal, commit any malicious mischief, injury or other crime, climbs into or upon a vehicle, whether it is in motion or at rest, or with like intent attempts to manipulate any of the levers, starting mechanism, brakes, or other mechanism or device of a vehicle while the same is at rest and unattended or with like intent sets in motion any vehicle while the same is at rest and unattended, is guilty of a misdemeanor. (1937, c. 407, s. 71.)

§ 20-108. Vehicles without manufacturer's numbers.—Any person who knowingly buys, receives, disposes of, sells, offers for sale, conceals, or has in his possession any motor vehicle, or engine removed from a motor vehicle, from which the

manufacturer's serial or engine number or other distinguishing number or identification mark or number placed thereon under assignment from the department has been removed, defaced, covered, altered, or destroyed for the purpose of concealing or misrepresenting the identity of said motor vehicle or engine is guilty of a misdemeanor. (1937, c. 407, s. 72.)

§ 20-109. Altering or changing engine or other numbers.—No person shall wilfully deface, destroy, or alter the manufacturer's serial or engine number or other distinguishing number or identification mark of a motor vehicle, nor shall any person place or stamp any serial, engine, or other number or mark upon a motor vehicle, except one assigned thereto by the department. Any violation of this provision is a misdemeanor. (1937, c. 407, s. 73; 1943, c. 726.)

The 1943 amendment substituted the word "wilfully" in line one for the words "with fraudulent intent."

§ 20-110. When registration shall be rescinded.—(a) The department shall rescind and cancel the registration of any vehicle which the department shall determine is unsafe or unfit to be operated or is not equipped as required by law.

(b) The department shall rescind and cancel the registration of any vehicle whenever the person to whom the registration card or registration number plates therefor have been issued shall make or permit to be made any unlawful use of the said card or plates or permit the use thereof by a person not entitled thereto.

(c) The department shall rescind and cancel the license of any dealer to whom such license has been issued when such dealer allows his registration number plates to be used for other than demonstration purposes except as provided by § 20-79, fails to carry out the provisions of § 20-79 and § 20-82, or is convicted of a felony. (1937, c. 407, s. 74.)

§ 20-111. Violation of registration provisions.—It shall be unlawful for any person to commit any of the following acts:

(a) To operate or for the owner thereof knowingly to permit the operation upon a highway of any motor vehicle, trailer, or semi-trailer which is not registered or for which a certificate of title has not been issued, or which does not have attached thereto and displayed thereon the registration number plate or plates assigned thereto by the department for the current registration year, subject to the exemption mentioned in §§ 20-65 and 20-79.

(b) To display or cause or permit to be displayed or to have in possession any registration card, certificate of title or registration number plate knowing the same to be fictitious or to have been canceled, revoked, suspended or altered.

(c) The giving, lending, or borrowing of a license plate for the purpose of using same on some motor vehicle other than that for which issued shall make the giver, lender, or borrower guilty of a misdemeanor, and upon conviction he shall be fined not more than fifty dollars (\$50.00), or imprisoned not more than thirty days. Where license plate is found being improperly used, such plate or plates shall be revoked or canceled, and new license plates must be purchased before further operation of the motor vehicles.

(d) To fail or refuse to surrender to the department, upon demand, any title certificate registration card or registration number plate which has been suspended, canceled or revoked as in this article provided.

(e) To use a false or fictitious name or address in any application for the registration of any vehicle or for a certificate of title or for any renewal or duplicate thereof, or knowingly to make a false statement or knowingly to conceal a material fact or otherwise commit a fraud in any such application. (1937, c. 407, s. 75; 1943, c. 592, s. 2.)

The 1943 amendment inserted the reference to § 20-65 near the end of subsection (a).

§ 20-112. Making false affidavit perjury.—Any person who shall knowingly make any false affidavit or shall knowingly swear or affirm falsely to any matter or thing required by the terms of this article to be sworn or affirmed to shall be guilty of perjury, and upon conviction shall be punishable by a fine and imprisonment as other persons committing perjury are punishable. (1937, c. 407, s. 76.)

Cross References.—As to punishment for perjury, see § 14-209. As to revocation of license in event of conviction of perjury or the making of false affidavits, etc., see § 20-17.

§ 20-113. Licenses protected.—No person, partnership, association or corporation shall maintain an office or place of business in which or through which persons desiring transportation for themselves or their baggage are brought into contact by advertisement or otherwise with persons owning or operating motor vehicles and willing to transport other persons, or baggage, for compensation, or on a division of expense basis, unless the owner or operator of such motor vehicles furnishing the transportation has qualified under the tax provisions of this article for the class of service he holds himself out to perform. (1937, c. 407, s. 77.)

§ 20-114. Duty of officer; manner of enforcement.—(a) For the purpose of enforcing the provisions of this article, it is hereby made the duty of every police officer, every marshal, deputy marshal, or watchman of any incorporated city or village, and every sheriff, deputy sheriff, and all other lawful officers of any county, and every constable of any township, to arrest within the limits of their jurisdiction any person known personally to any such officer, or upon the sworn information of a creditable witness, to have violated any of the provisions of this article, and to immediately bring such offender before any justice of the peace or officer having jurisdiction, and any such person so arrested shall have the right of immediate trial, and all other rights given to any person arrested for having committed a misdemeanor. Every officer herein named who shall neglect or refuse to carry out the duties imposed by this chapter shall be liable on his official bond for such neglect or refusal as provided by law in like cases.

(b) It shall be the duty of all sheriffs, police officers, deputy sheriffs, deputy police officers, and all other officers within the state to co-operate with and render all assistance in their power to the officers herein provided for, and nothing in this article shall be construed as relieving said sheriffs, police officers, deputy sheriffs, deputy police officers, and other officers of the duties imposed on them by this chapter.

(c) It shall also be the duty of every sheriff of every county of the state and of every police or peace officer of the state to make immediate report to the commissioner of all motor vehicles reported to him as abandoned or that are seized by him for being used for illegal transportation of intoxicating liquors or other unlawful purposes, and no motor vehicle shall be sold by any sheriff, police or peace officer, or by any person, firm or corporation claiming a mechanic's or storage lien, or under judicial proceedings, until notice shall have been given the commissioner at least twenty days before the date of such sale. (1937, c. 407, s. 78; 1943, c. 726.)

The 1943 amendment substituted "twenty" for "thirty" in the next to the last line of subsection (c).

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-115. Scope and effect of regulations in this title.—It shall be unlawful and constitute a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or vehicles of a size or weight exceeding the limitations stated in this title, or any vehicle or vehicles which are not so constructed or equipped as required in this title, or the rules and regulations of the commission adopted pursuant thereto and the maximum size and weight of vehicles herein specified shall be lawful throughout this state, and local authorities shall have no power or authority to alter said limitations except as express authority may be granted in this article. (1937, c. 407, s. 79.)

§ 20-116. Size of vehicles and loads.—(a) The total outside width of any vehicle or the load thereon shall not exceed ninety-six inches, except as otherwise provided in this section.

(b) No passenger-type vehicle shall be operated on any highway with any load carried thereon extending beyond the line of the fenders on the left side of such vehicle nor extending more than six inches beyond the line of the fenders on the right side thereof.

(c) No vehicle unladen or with load shall exceed a height of twelve feet, six inches.

(d) No vehicle shall exceed a length of thirty-five feet extreme over-all dimension, inclusive of front and rear bumpers. A truck-tractor and semi-trailer shall be regarded as two vehicles for the purpose of determining lawful length and license taxes.

(e) No combination of vehicles coupled together shall consist of more than two units and no such combination of vehicles shall exceed a total length of forty-five feet exclusive of front and rear bumpers, subject to the following exceptions: Said length limitation shall not apply to vehicles operated in the daytime when transporting poles, pipe, machinery or other objects of a structural nature which cannot readily be dismembered, nor to such vehicles transporting such objects operated at night-time by a public utility when required for emergency repair of public service facilities or properties, but in respect to such night transportation every such vehicle and the load thereon shall be equipped with a sufficient number of clearance lamps on both sides and marker lamps upon the extreme ends of said projecting load to clearly mark the dimensions of such load: Provided,

that the state highway and public works commission shall have authority to designate any highways upon the state system as light-traffic roads when, in the opinion of the commission, such roads are inadequate to carry and will be injuriously affected by the maximum load, size, and/or width of trucks or busses using such roads as herein provided for, and all such roads so designated shall be conspicuously posted as light-traffic roads and the maximum load, size and/or width authorized shall be displayed on proper signs erected thereon. The operation of any vehicle whose gross load, size and/or width exceed the maximum shown on such signs over the roads thus posted shall constitute a misdemeanor: Provided further, that no standard concrete highway, or other highway built of material of equivalent durability, and not less than eighteen feet in width, shall be designated as a light-traffic road: Provided further, that the limitations placed on any road shall not be less than eighty per cent (80%) of the standard weight, unless there shall be available an alternate improved route of not more than twenty per cent (20%) increase in the distance.

(f) The load upon any vehicle operated alone, or the load upon the front vehicle of a combination of vehicles, shall not extend more than three feet beyond the front wheels of such vehicle or the front bumper of such vehicle, if it is equipped with such a bumper.

(g) No vehicle shall be driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction, or water or other substance may be sprinkled on a roadway in cleaning or maintaining such roadway.

(h) Wherever there exist two highways of the state system of approximately equivalent construction, convenience and distance between two or more points, the state highway and public works commission shall have authority, when in the opinion of the commission the public interest is served thereby, to designate one of said roads for heavy or truck-line traffic between said points, and to prohibit the use of the other or parallel road by heavy or truck-line traffic thereon; and in such instances the roads selected for heavy or truck-line traffic shall be so designated by signs conspicuously posted thereon, and the roads upon upon which heavy or truck-line traffic is prohibited shall likewise be so designated by signs conspicuously posted thereon showing the maximum load authorized for said roads. The operation of any vehicle whose gross load exceeds the maximum load shown on such signs over the road thus posted shall constitute a misdemeanor: Provided, that nothing herein shall prohibit a truck or other motor vehicle whose gross load exceeds that prescribed for the light traffic roads from using said light traffic road when the destination of said truck is located solely upon said light traffic road: Provided, further, that nothing herein shall prohibit passenger or other light traffic vehicles from using any road or roads so designated for heavy or truck-line traffic.

(i) The total width of any vehicle propelled by electric power obtained from trolley wires, but not operated upon rails, commonly known as an

electric trackless trolley coach, which is operated as a part of the general trackless trolley system of passenger transportation of the city of Greensboro and vicinity, shall not exceed one hundred and two inches, and the total length, inclusive of front and rear bumpers, of any such vehicle shall not exceed thirty-six feet, and the height of any such vehicle, exclusive of trolley pole for operating same, shall not exceed twelve feet, six inches. (1937, c. 246; 1937, c. 407, s. 80; 1943, c. 213, s. 1.)

Cross Reference.—As to size and weight limitations for motor vehicle carriers applying for franchise certificates, see § 62-105, subsec. (e).

Editor's Note.—The 1943 amendment added subsection (i). This section prohibiting the extension of any part of the load of a passenger vehicle beyond the line of the fenders on the left side of such vehicle imposes a duty for the safety of other vehicles on the highway, and is not conclusive on the question of contributory negligence of a passenger riding on the running board, with none of his body extending beyond the line of the fenders, who is injured by the negligent operation of another vehicle. *Roberson v. Carolina Taxi Service*, 214 N. C. 624, 200 S. E. 363.

§ 20-117. Flag or light at end of load.—Whenever the load on any vehicle shall extend more than four feet beyond the rear of the bed or body thereof, there shall be displayed at the end of such load, in such position as to be clearly visible at all times from the rear of such load, a red flag not less than twelve inches both in length and width, except that between one-half hour after sunset and one-half hour before sunrise there shall be displayed at the end of any such load a red light plainly visible under normal atmospheric conditions at least two hundred feet from the rear of such vehicle. (1937, c. 407, s. 81.)

The corresponding provision of the former law was cited in *Williams v. Frederickson Motor Exp. Lines*, 198 N. C. 193, 151 S. E. 197.

§ 20-118. Weight of vehicles and load.—No vehicle or combination of vehicles shall be moved or operated on any highway or bridge when the gross weight thereof exceeds the limits specified below:

(a) When the wheel is equipped with high-pressure pneumatic, solid rubber or cushion tire, eight thousand pounds.

(b) When the wheel is equipped with low-pressure pneumatic tire, nine thousand pounds.

(c) The gross weight on any one axle of the vehicle when the wheels attached to said axle are equipped with high-pressure solid rubber or cushion tires, sixteen thousand pounds.

(d) When the wheels attached to said axle are equipped with low-pressure pneumatic tires, eighteen thousand pounds.

(e) For the purposes of this section an axle load shall be defined as the total load on all wheels whose centers are included within two parallel transverse vertical planes not more than forty inches apart.

(f) For the purposes of this section every pneumatic tire designed for use and used when inflated with air to less than one hundred pounds pressure shall be deemed a low-pressure pneumatic tire, and every pneumatic tire inflated to one hundred pounds pressure or more shall be deemed a high-pressure pneumatic tire.

(g) No vehicle shall be operated on any highway the weight of which, resting on the surface of such highway, exceeds six hundred pounds upon any inch of tire roller or other support.

(h) Subject to the foregoing limitations, the gross weight of any vehicle having two axles shall not exceed twenty-six thousand pounds.

(i) Subject to the foregoing limitations, the gross weight of any vehicle or combination of vehicles having three or more axles shall not exceed forty thousand pounds. For the purpose of determining gross weight, no axle shall be considered unless the wheels thereof are equipped with adequate brakes. (1937, c. 407, s. 82.)

(j) The gross weight with normal load of passengers of any vehicle propelled by electric power obtained from trolley wires, but not operated upon rails, commonly known as an electric trackless trolley coach, which is operated as a part of the general trackless trolley system of passenger transportation of the city of Greensboro and vicinity, shall not exceed thirty thousand pounds. (1937, c. 407, s. 82; 1943, c. 213, s. 2; 1943, cc. 726, 784.)

Cross Reference.—As to size and weight limitations for motor vehicle carriers applying for franchise certificates, see § 62-105, subsec. (e).

Editor's Note.—The first 1943 amendment added subsection (j). The second 1943 amendment as changed by the third amendment substituted "twenty-six" for "twenty" in subsection (h).

§ 20-118.1. Peace officer may weigh vehicle and require removal of excess load.—Any peace officer having reason to believe that the weight of a vehicle and load is unlawful is authorized to weigh the same either by means of portable or stationary scales, and may require that such vehicle be driven to the nearest scales in the event such scales are within two miles. The officer may then require the driver to unload immediately such portion of the load as may be necessary to decrease the gross weight of such vehicle to the maximum therefor specified in this article. (1927, c. 148, s. 37.)

§ 20-119. Special permits for vehicles of excessive size or weight.—The state highway and public works commission may, in their discretion, upon application in writing and good cause being shown therefor, issue a special permit in writing authorizing the applicant for seasonal operations to operate or move a vehicle of a size or weight exceeding a maximum specified in this article upon any highway under the jurisdiction and for the maintenance of which the body granting the permit is responsible. Every such permit shall be carried in the vehicle to which it refers and shall be open to inspection by any peace officer; and it shall be a misdemeanor for any person to violate any of the terms or conditions of such special permit: Provided, the authorities in any incorporated city or town may grant permits in writing and for good cause shown, authorizing the applicant to move a vehicle over the streets of such city or town, the size or width exceeding the maximum expressed in this article. (1937, c. 407, s. 83.)

§ 20-120. Operation of flat trucks on state highways regulated.—It shall be unlawful for any person, firm or corporation to operate, or have operated on any public highway in the state any open, flat truck loaded with logs, cotton bales, boxes or other load piled on said truck, without having the said load securely fastened on said truck. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon

conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1939, c. 114.)

§ 20-121. When authorities may restrict right to use highways.—The state highway and public works commission or local authorities may prohibit the operation of vehicles upon or impose restrictions as to the weight thereof, for a total period not to exceed ninety days in any one calendar year, when operated upon any highway under the jurisdiction of and for the maintenance of which the body adopting the ordinance is responsible, whenever any said highway by reason of deterioration, rain, snow or other climatic conditions will be damaged unless the use of vehicles thereon is prohibited or the permissible weights thereof reduced. The local authority enacting any such ordinance shall erect, or cause to be erected and maintained, signs designating the provisions of the ordinance at each end of that portion of any highway to which the ordinance is applicable, and the ordinance shall not be effective until or unless such signs are erected and maintained. (1937, c. 407, s. 84.)

Cross Reference.—As to powers of municipal corporations as to streets, see § 160-200, subsections 11, 31.

§ 20-122. Restrictions as to tire equipment.—(a) Every solid rubber tire on a vehicle moved on any highway shall have rubber on its entire traction surface at least one and a half inches thick above the edge of the flange of the entire periphery.

(b) No tire on a vehicle moved on a highway shall have on its periphery any block, stud, flange, cleat or spike or any other protuberance of any material other than rubber which projects beyond the tread of the traction surface of the tire, except that it shall be permissible to use farm machinery with tires having protuberances which will not injure the highway and except, also, that it shall be permissible to use tire chains of reasonable proportions upon any vehicle when required for safety because of snow, ice or other conditions tending to cause a vehicle to slide or skid.

(c) The state highway and public works commission or local authorities in their respective jurisdictions may, in their discretion, issue special permits authorizing the operation upon a highway of traction engines or tractors having movable tracks with transverse corrugation upon the periphery of such movable tracks or farm tractors or other farm machinery.

(d) It shall not be unlawful to drive farm tractors on dirt roads from farm to farm: Provided, in doing so they do not damage said dirt roads or interfere with traffic. (1937, c. 407, s. 85; 1939, c. 266.)

Editor's Note.—The 1939 amendment added subsection (d).

§ 20-123. Trailers and towed vehicles.—(a) No motor vehicle shall be driven upon any highway drawing or having attached thereto more than one trailer or semi-trailer.

(b) No trailer or semi-trailer shall be operated over the highways of the state unless such trailer or semi-trailer be firmly attached to the rear of the motor vehicle drawing same, and unless so equipped that it will not shake, but will travel in the path of the wheels of the vehicle drawing such trailer or semi-trailer, which equipment shall at all times be kept in good condition. (1937, c. 407, s. 86.)

§ 20-124. Brakes. — (a) Every motor vehicle when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop such vehicle or vehicles, and such brakes shall be maintained in good working order and shall conform to regulations provided in this section.

(b) No person having control or charge of a motor vehicle shall allow such vehicle to stand on any highway unattended without first effectively setting the hand brake thereon, stopping the motor and turning the front wheels into the curb or side of the highway.

(c) On a dry, hard, approximately level stretch of highway free from loose material, the service (foot) brake shall be capable of stopping the motor vehicle at a speed of twenty miles per hour within a distance of twenty-five feet with four wheel brakes or forty-five feet with two wheel brakes. The hand brake shall be capable of stopping the vehicle under like conditions of this section within a distance of not more than seventy-five feet.

(d) Motor trucks and tractor-trucks with semi-trailers attached shall be capable of stopping on a dry, hard, approximately level highway free from loose material at a speed of twenty miles per hour within the following distances: thirty feet with both hand and service brake applied simultaneously and fifty feet when either is applied separately, except that vehicles maintained and operated permanently for the transportation of property and which were registered in this or any other state or district prior to August, nineteen hundred and twenty-nine, shall be capable of stopping on a dry, hard, approximately level highway free from loose material at a speed of twenty miles per hour within a distance of fifty feet with both hand and service brake applied simultaneously, and within a distance of seventy-five feet when either applied separately.

(e) Every semi-trailer, or trailer, or separate vehicle, attached by a draw-bar or coupling to a towing vehicle, and having a gross weight of two tons, and all house trailers of one thousand pounds gross weight or more, shall be equipped with brakes controlled or operated by the driver of the towing vehicle, which shall conform to the specifications set forth in sub-section (d) of this section and shall be of a type approved by the commissioner. (1937, c. 407, s. 87.)

Quoted in *Newbern v. Leary*, 215 N. C. 134, 1 S. E. (2d) 384.

§ 20-125. Horns and warning devices. — (a) Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order capable of emitting sound audible under normal conditions from a distance of not less than two hundred feet, and it shall be unlawful, except as otherwise provided in this section, for any vehicle to be equipped with or for any person to use upon a vehicle any siren, compression or spark plug whistle or for any person at any time to use a horn otherwise than as a reasonable warning or to make any unnecessary or unreasonable loud or harsh sound by means of a horn or other warning device. All such horns and warning devices shall be maintained in good working order and shall conform to regulation not inconsistent with this section to be promulgated by the commissioner.

(b) Every police and fire department and fire patrol vehicle and every ambulance used for emergency calls shall be equipped with a bell, siren or exhaust whistle of a type approved by the commissioner. (1937, c. 407, s. 88.)

§ 20-126. Mirrors. — No person shall drive a motor vehicle on a highway which motor vehicle is so constructed or loaded as to prevent the driver from obtaining a view of the highway to the rear by looking backward from the driver's position, unless such vehicle is equipped with a mirror of a type to be approved by the commissioner so located as to reflect to the driver a view of the highway for a distance of at least two hundred feet to the rear of such vehicle. (1937, c. 407, s. 89.)

Cited in *Bechtler v. Bracken*, 218 N. C. 515, 11 S. E. (2d) 721.

§ 20-127. Windshields must be unobstructed. — (a) It shall be unlawful for any person to drive any vehicle upon a highway with any sign, poster or other non-transparent material upon the front windshield, side wings, side or rear window of such motor vehicle other than a certificate or other paper required to be so displayed by law.

(b) Every permanent windshield on a motor vehicle shall be equipped with a device for cleaning snow, rain, moisture or other matter from the windshield directly in front of the operator, which device shall be so constructed as to be controlled or operated by the operator of the vehicle. The device required by this sub-section shall be of a type approved by the commissioner. (1937, c. 407, s. 90.)

§ 20-128. Prevention of noise, smoke, etc.; muffler cut-outs regulated. — (a) No person shall drive a motor vehicle on a highway unless such motor vehicle is equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise, annoying smoke and smoke screens.

(b) It shall be unlawful to use a "muffler cut-out" on any motor vehicle upon a highway. (1937, c. 407, s. 91.)

§ 20-129. Required lighting equipment of vehicles. — (a) When vehicles must be equipped: Every vehicle upon a highway within this state during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of two hundred feet ahead, shall be equipped with lighted front and rear lamps as in this section respectively required for different classes of vehicles, and subject to exemption with reference to lights on parked vehicles as declared in § 20-134.

(b) **Head Lamps on Motor Vehicles:** Every motor vehicle other than a motorcycle, road-roller, road machinery, or farm tractor shall be equipped with two head lamps, no more and no less, at the front of and on opposite sides of the motor vehicle, which head lamps shall comply with the requirements and limitations set forth in §§ 20-131 or 20-132.

(c) **Head Lamps on Motorcycles:** Every motorcycle shall be equipped with at least one and not more than two head lamps which shall com-

ply with the requirements and limitations set forth in § 20-131 or 20-132.

(d) **Rear Lamps:** Every motor vehicle and every trailer or semi-trailer which is being drawn at the end of a train of vehicles shall carry at the rear a lamp of a type which has been approved by the commissioner and which exhibits a red light plainly visible under normal atmospheric conditions from a distance of five hundred feet to the rear of such vehicle, and so constructed and placed that the number plate carried on the rear of such vehicle shall under like conditions be so illuminated by a white light as to be read from a distance of fifty feet to the rear of such vehicle, and every trailer or semi-trailer shall carry at the rear, in addition to a rear lamp as above specified, a red reflector of a type which has been approved by the commissioner and which is so designed, located as to a height and maintained as to be visible for at least five hundred feet when opposed by a motor vehicle displaying lawful undimmed headlights at night on an unlighted highway. Such reflector shall be placed at the extreme end of the load.

(e) **Clearance Lamps:** Every motor vehicle having a width at any part in excess of eighty inches shall carry two clearance lamps at the front, one at each side reflecting an amber light plainly visible under normal atmospheric conditions from a distance of five hundred feet to the front of said vehicle and two clearance lamps at the rear, one on each side and reflecting a red light visible under like conditions from a distance of five hundred feet to the rear of the vehicle. As relates to truck-trailer or tractor-trailer combinations, such lights shall be required only at the front and rear of the overall dimensions.

(f) **Lamps on Bicycles:** Every bicycle shall be equipped with a lighted lamp on the front thereof, visible under normal atmospheric conditions from a distance of at least three hundred feet in front of such bicycle, and shall also be equipped with a reflex mirror or lamp on the rear, exhibiting a red light visible under like conditions from a distance of at least two hundred feet to the rear of such bicycle, when used at night.

(g) **Lights on Other Vehicles:** All vehicles not heretofore in this section required to be equipped with specified lighted lamps shall carry on the left side one or more lighted lamps or lanterns projecting a white light, visible under normal atmospheric conditions from a distance of not less than five hundred feet to the front of such vehicle and visible under like conditions from a distance of not less than five hundred feet to the rear of such vehicle, or in lieu of said lights shall be equipped with reflectors of a type which is approved by the commissioner. (1937, c. 407, s. 92; 1939, c. 275.)

Editor's Note.—The 1939 amendment changed subsection (e). Some of the cases noted below were decided under the corresponding provisions of the prior law.

Effect of Violation in Civil Action.—Negligence in not having a light on the rear of a truck will not preclude recovery against one who drove his car into the truck, unless it contributed to the injury. *Hughes v. Luther*, 189 N. C. 841, 128 S. E. 145.

Absence of Rear Lights on Smoke Covered Road.—Where plaintiff's evidence tended to show that he was driving at night along a highway covered with smoke from fires along its side and that he collided with the rear of an oil truck which was headed in the same direction and which had been stopped on the highway without rear lights in viola-

tion of this section it was held that conceding negligence on the part of defendant, plaintiff's evidence discloses contributory negligence barring recovery as a matter of law, either in driving at a speed in excess of that at which he could stop within the distance to which his lights would disclose the existence of obstructions, or, if he could have seen the oil truck in time to have avoided a collision, in failing to do so. *Sibbitt v. R. & W. Transit Co.*, 220 N. C. 702, 18 S. E. (2d) 203.

Whether Obstruction Should Have Been Seen Is Jury Question.—Generally speaking, where the statutes, as this section, or the decisions of the courts, require red lights as a warning of danger on any object in the highway and such lights are not present, it is a question for the jury to determine whether the driver at night should have seen the obstruction, notwithstanding the absence of red lights. *Morris v. Sells-Floto Circus*, 65 F. (2d) 783, 785.

Evidence Sufficient for Jury.—Evidence tending to show that the headlights on defendant's car were defective and that he was driving at a speed of 60 to 65 miles an hour and, in a sudden effort to avoid colliding with another automobile which had been backed into the highway and which was apparently not in motion at the time, defendant drove off the road, causing the car to overturn, inflicting serious injury to plaintiff, a guest in the car, require the submission of the case to the jury. *Stewart v. Stewart*, 221 N. C. 147, 19 S. E. (2d) 242.

Cited in *Pike v. Seymour*, 222 N. C. 42, 21 S. E. (2d) 884; *Newbern v. Leary*, 215 N. C. 134, 1 S. E. (2d) 384.

§ 20-130. Additional permissible light on vehicle.—(a) **Spot Lamps:** Any motor vehicle may be equipped with not to exceed two spot lamps, except that a motorcycle shall not be equipped with more than one spot lamp, and every lighted spot lamp shall be so aimed and used upon approaching another vehicle that no part of the beam will be directed to the left of the center of the highway nor more than one hundred feet ahead of the vehicle. No spot lamps shall be used on the rear of any vehicle.

(b) **Auxiliary Driving Lamps:** Any motor vehicle may be equipped with not to exceed two auxiliary driving lamps mounted on the front, and every such auxiliary driving lamp or lamps shall meet the requirements and limitations set forth in § 20-131, subsection (c).

(c) **Restrictions on Lamps:** Any device, other than head lamps, spot lamps, or auxiliary driving lamps, which projects a beam of light of an intensity greater than twenty-five candle power, shall be so directed that no part of the beam will strike the level of the surface on which the vehicle stands at a distance of more than fifty feet from the vehicle. (1937, c. 407, s. 93.)

§ 20-130.1. Use of red lights on front of vehicles prohibited; exceptions.—It shall be unlawful for any person to drive upon the highways of this state any vehicle displaying red lights visible from the front of said vehicle. The provisions of this section shall not apply to police cars, highway patrol cars, ambulances, wreckers, or fire fighting vehicles, or to such lights as may be prescribed by the interstate commerce commission. (1943, c. 726.)

§ 20-131. Requirements as to head lamps and auxiliary driving lamps.—(a) The head lamps of motor vehicles shall be so constructed, arranged, and adjusted that, except as provided in subsection (c) of this section, they will at all times mentioned in § 20-129, and under normal atmospheric conditions and on a level road, produce a driving light sufficient to render clearly discernible a person two hundred feet ahead, but any person operating a motor vehicle upon the highways, when meeting another vehicle, shall so control the lights of the vehicle operated by him by shifting,

depressing, deflecting, tilting, or dimming the headlight beams in such manner as shall not project a glaring or dazzling light to persons in front of such head lamp.

(b) Head lamps shall be deemed to comply with the foregoing provisions prohibiting glaring and dazzling lights if none of the main bright portion of the head lamp beams rises above a horizontal plane passing through the lamp centers parallel to the level road upon which the loaded vehicle stands, and in no case higher than forty-two inches, seventy-five feet ahead of the vehicle.

(c) Whenever a motor vehicle is being operated upon a highway, or portion thereof, which is sufficiently lighted to reveal a person on the highway at a distance of two hundred feet ahead of the vehicle, it shall be permissible to dim the head lamps or to tilt the beams downward or to substitute therefor the light from an auxiliary driving lamp or pair of such lamps, subject to the restrictions as to tilted beams and auxiliary driving lamps set forth in this section.

(d) Whenever a motor vehicle meets another vehicle on any highway it shall be permissible to tilt the beams of the head lamps downward or to substitute therefor the light from an auxiliary driving lamp or pair of such lamps subject to the requirement that the tilted head lamps or auxiliary lamp or lamps shall give sufficient illumination under normal atmospheric conditions and on a level road to render clearly discernible a person seventy-five feet ahead, but shall not project a glaring or dazzling light to persons in front of the vehicle: Provided, that at all times required in § 20-129 at least two lights shall be displayed on the front of and on opposite sides of every motor vehicle other than a motorcycle, roadroller, road machinery, or farm tractor.

(e) No city or town shall enact an ordinance in conflict with this section. (1937, c. 407, s. 94; 1939, c. 351, s. 1.)

Cross References.—As to failure to dim headlights not cause for suspension or revocation of driver's license, see § 20-18. As to penalties imposed for failure to dim headlights, see § 20-181.

Editor's Note.—The 1939 amendment inserted in subsection (a) the provision as to controlling lights.

Contributory Negligence.—In an action for damages due to negligence of defendants, where the evidence showed that plaintiffs, on a joint enterprise, driving their car about 2:00 o'clock a. m., at 40 or 45 miles per hour, with lights dimmed so that they could not see ahead over 75 to 100 feet, never applied the brakes and failed to see defendants' truck until after the collision, crashing into the back of the truck with terrific force, plaintiffs were guilty of contributory negligence which was a proximate cause of the accident, thereby barring their recovery. *Pike v. Seymour*, 222 N. C. 42, 21 S. E. (2d) 884.

Quoted in *Newbern v. Leary*, 215 N. C. 134, 1 S. E. (2d) 384.

§ 20-132. Acetylene lights.—Motor vehicles may be equipped with two acetylene head lamps of approximately equal candle power when equipped with clear plane glass fronts, bright six-inch spherical mirrors, and standard acetylene five-eighths foot burners not more and not less and which do not project a glaring or dazzling light into the eyes of approaching drivers. (1937, c. 407, s. 95.)

§ 20-133. Enforcement of provisions.—(a) The commissioner is authorized to designate, furnish instructions to and to supervise official stations for adjusting head lamps and auxiliary driving

lamps to conform with the provisions of § 20-129. When head lamps and auxiliary driving lamps have been adjusted in conformity with the instructions issued by the commissioner, a certificate of adjustment shall be issued to the driver of the motor vehicle on forms issued in duplicate by the commissioner and showing date of issue, registration number of the motor vehicle, owner's name, make of vehicle and official designation of the adjusting station.

(b) The driver of any motor vehicle equipped with approved head lamps, auxiliary driving lamps, rear lamps or signal lamps, who is arrested upon a charge that such lamps are improperly adjusted or are equipped with bulbs of a candle power not approved for use therewith, shall be allowed forty-eight hours within which to bring such lamps into conformance with the requirements of this article. It shall be a defense to any such charge that the person arrested produce in court or submit to the prosecuting attorney a certificate from an official adjusting station showing that within forty-eight hours after such arrest such lamps have been made to conform with the requirements of this article. (1937, c. 407, s. 96.)

§ 20-134. Lights on parked vehicles.—Whenever a vehicle is parked or stopped upon a highway, whether attended or unattended during the times mentioned in § 20-129, there shall be displayed upon such vehicle one or more lamps projecting a white light visible under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle, and projecting a red light visible under like conditions from a distance of five hundred feet to the rear, except that local authorities may provide by ordinance that no lights need be displayed upon any such vehicle when parked in accordance with local ordinances upon a highway where there is sufficient light to reveal any person within a distance of two hundred feet upon such highway. (1937, c. 407, s. 97.)

It is not necessarily unlawful in all cases to park a vehicle at night on the paved portion of a highway without lights thereon, as an emergency may arise thereby making it impossible to move such vehicle immediately. *Pike v. Seymour*, 222 N. C. 42, 21 S. E. (2d) 884.

Violation Is Negligence Per Se.—The parking of a truck on a public highway at night without lights in violation of this section is negligence per se, and the question of proximate cause is for the determination of the jury. [This case was decided under the corresponding section of the former law.] *Barrier v. Thomas, etc., Co.*, 205 N. C. 425, 171 S. E. 626.

§ 20-135. Safety glass.—(a) It shall be unlawful to operate knowingly, on any public highway or street in this state, any motor vehicle which is registered in the state of North Carolina and which shall have been manufactured or assembled on or after January first, one thousand nine hundred and thirty-six, unless such motor vehicle be equipped with safety glass wherever glass is used in doors, windows, windshields, wings or partitions; or for a dealer to sell a motor vehicle manufactured or assembled on or after January first, one thousand nine hundred and thirty-six, for operation upon the said highways or streets unless it be so equipped. The provisions of this article shall not apply to any motor vehicle if such motor vehicle shall have been registered previously in another state by the owner while the owner was a bona fide resident of said other state.

(b) The term "safety glass" as used in this

article shall be construed as meaning glass so treated or combined with other materials as to reduce, in comparison with ordinary sheet glass or plate glass, the likelihood of injury to persons by glass when the glass is cracked or broken.

(c) The department of motor vehicles shall approve and maintain a list of the approved types of glass, conforming to the specifications and requirements for safety glass as set forth in this article, and in accordance with standards recognized by the United States bureau of standards, and shall not issue a license for or relicense any motor vehicle subject to the provisions of this article unless such motor vehicle be equipped as herein provided with such approved type of glass.

(d) The owner of any motor vehicle which is operated knowingly or any dealer who sells a motor vehicle in violation of the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than twenty-five dollars or be imprisoned not more than thirty days, or both, in the discretion of the court. (1937, c. 407, s. 98; 1941, c. 36.)

§ 20-136. Smoke screens.—(a) It shall be unlawful for any person or persons to drive, operate, equip or be in the possession of any automobile or other motor vehicle containing, or in any manner provided with, a mechanical machine or device designed, used or capable of being used for the purpose of discharging, creating or causing, in any manner, to be discharged or emitted, either from itself or from the automobile or other motor vehicle to which attached, any unusual amount of smoke, gas or other substance not necessary to the actual propulsion, care and keep of said vehicle, and the possession by any person or persons of any such device, whether the same is attached to any such motor vehicle, or detached therefrom, shall be prima facie evidence of the guilt of such person or persons of a violation of this section.

(b) Any person or persons violating the provisions of this section shall be guilty of a felony, and upon conviction shall be imprisoned in the state's prison for a period of not less than one year or not more than ten years, in the discretion of the court. (1937, c. 407, s. 99.)

§ 20-137. Unlawful display of emblem or insignia.—It shall be unlawful for any person to display on his motor vehicle, or to allow to be displayed on his motor vehicle, any emblem or insignia of any organization, association, club, lodge, order, or fraternity, unless such person be a member of the organization, association, club, lodge, order, or fraternity, the emblem or insignia of which is so displayed.

Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine not exceeding fifty dollars (\$50) or imprisonment for a period not exceeding thirty days. (Ex. Sess. 1924, c. 63.)

Editor's Note.—The effect of this act was summarized in 3 N. C. Law Rev. 25.

Part 10. Operation of Vehicles and Rules of the Road.

§ 20-138. Persons under the influence of intoxicating liquor or narcotic drugs.—It shall be unlawful and punishable, as provided in § 20-179, for any person, whether licensed or not, who is a

habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs, to drive any vehicle upon the highways within this state. (1937, c. 407, s. 101.)

Editor's Note.—The cases treated below were decided under the corresponding provisions of the earlier law, but should be of assistance in the interpretation of the present section.

Death caused by a violation of this section may be manslaughter but a condition precedent to conviction is that the violation of the law in this respect must have caused the wreck and the death of deceased. *State v. Dills*, 204 N. C. 33, 167 S. E. 459.

One who drives his automobile, in violation of this section, and runs into another car and thereby proximately causes the death of one of the occupants, is guilty of manslaughter at least. *State v. Stansell*, 203 N. C. 69, 74, 164 S. E. 580.

Circumstantial Evidence May Suffice.—Though the evidence on the part of the state as to violation of this section is circumstantial, it may be sufficient to be submitted to a jury. *State v. Newton*, 207 N. C. 323, 326, 177 S. E. 184.

Quoted in *State v. Parker*, 220 N. C. 416, 17 S. E. (2d) 475.

Cited in *State v. Creech*, 210 N. C. 700, 188 S. E. 316.

§ 20-139. Operation upon driveways of public or private institutions while under the influence of intoxicating liquors, etc.—Any person who shall wilfully operate a motor vehicle over any drive, driveway, road, roadway, street or alley upon the grounds and premises of any public or private hospital, college, university, school, or any of the state institutions, maintained and kept up by the state of North Carolina, or any of its subdivisions, while under the influence of intoxicating liquors, opiates, or narcotic drugs, shall be guilty of a misdemeanor and shall be punished as now or hereafter provided by law for the punishment of operators of motor vehicles upon the public highways while under the influence of intoxicating liquors. (1939, c. 292.)

§ 20-140. Reckless driving. — Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving, and upon conviction shall be punished as provided in § 20-180. (1937, c. 407, s. 102.)

Editor's Note.—Most of the cases cited below were decided under the corresponding provisions of the former law.

Surrounding Circumstances Govern Case.—Driving an automobile with tires which are known to be worn out and slick, on a highway which is wet and slippery, at a rate of speed not ordinarily unlawful, under this section may be unlawful under all the circumstances shown by the evidence. *Waller v. Hipp*, 208 N. C. 117, 120, 179 S. E. 428.

Care Required in Emergency.—While the operator of a public automobile is obligated to exercise a high degree of care, he is not charged with the necessity, either of possessing superhuman powers of anticipation or of exercising such powers in a threatened emergency. *Love v. Queen City Lines*, 206 N. C. 575, 579, 174 S. E. 514.

When Person Guilty of Reckless Driving.—Under this section, a person is guilty of reckless driving (1) if he drives an automobile on a public highway in this state, carelessly and heedlessly, in a wilful or wanton disregard of the rights or safety of others, or (2) if he drives an automobile on a public highway in this state without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property. *State v. Folger*, 211 N. C. 695, 697, 191 S. E. 747.

Violation of Traffic Ordinance.—The simple violation of a traffic regulation, which does not involve actual danger to life, limb or property, while importing civil liability if damage or injury ensue, would not perforce constitute the criminal offense of reckless driving. *State v. Cope*, 204 N. C. 28, 31, 167 S. E. 456.

Effect of Using Prudence after Violation.—A reckless vio-

lation which put a driver in such position that he could not avoid an injury though attempting to do so after the danger became apparent, is not excused by the subsequent attempt. *State v. Gray*, 180 N. C. 697, 104 S. E. 647.

Jurisdiction of Mayor's Court—Excessive Sentence.—Defendant was tried in the mayor's court of North Wilkesboro on charges of operating a motor vehicle while under the influence of intoxicating liquor and reckless driving. On appeal to the superior court, judgment was pronounced exceeding that permitted for the offense of reckless driving alone. It was held that the mayor's court was without jurisdiction of the charge of operating a motor vehicle while under the influence of intoxicating liquor, and even conceding it had jurisdiction of the charge of reckless driving, the sentence exceeded that permitted for that offense, and the trial of defendant in the superior court upon the warrants, without a bill of indictment first being found and returned, was a nullity. *State v. Johnson*, 214 N. C. 319, 199 S. E. 96.

Proof of Violation in Criminal Prosecutions.—Our statutes on the subject of regulating the care to be used by those driving motor vehicles upon the State's highways are to secure the reasonable safety of persons in and upon the highways of the State, and where death or great bodily harm results, evidence that the accused was, at the time charged, violating these provisions may be properly received upon a trial for murder or for manslaughter in appropriate instances, or as evidence of an assault where no serious injury has resulted. *State v. Suddarth*, 184 N. C. 753, 114 S. E. 828.

Proximate Cause is Question for Jury.—The violation of this and succeeding sections enacted for the safety of those driving upon the highway is negligence per se, and when such violation is admitted or established the question of proximate cause is ordinarily for the jury. *King v. Pope*, 202 N. C. 554, 163 S. E. 447; *Godfrey v. Queen City Coach Co.*, 201 N. C. 264, 267, 159 S. E. 412.

Sufficiency of Evidence for Jury.—Evidence that the individual defendant drove his car in a negligent manner in violation of this and other sections and that such negligence proximately caused injury to the plaintiff is held sufficient to have been submitted to the jury. *Puckett v. Dyer*, 203 N. C. 684, 167 S. E. 43.

The better rule under this and the following section is that except where the evidence is so conclusive that there could be, in the minds of reasonable men, no doubt as to the plaintiff's negligence contributing to the injury, the question should be left to the jury. *Morris v. Sells-Floto Circus*, 65 F. (2d) 782, 784.

Sufficient Evidence to Sustain Negligence and Proximate Cause as a Matter of Law.—*Smith v. Miller*, 209 N. C. 170, 183 S. E. 370.

An indictment under this section may be consolidated for trial with an indictment under § 20-217, which prohibits the driver of a motor vehicle from passing a standing school bus on the highway without first bringing said motor vehicle to a complete stop. *State v. Webb*, 210 N. C. 350, 186 S. E. 241.

Instruction on Reckless Driving Held Reversible Error.—*See State v. Folger*, 211 N. C. 695, 697, 191 S. E. 747.

An acquittal of reckless driving in the recorder's court will not bar a prosecution of manslaughter in the superior court arising out of the same occurrence, the two offenses differing both in grade and kind and not being the same in law or in fact, and the one not being a lesser degree of the other, and the recorder being without jurisdiction over the charge of manslaughter, but having bound defendant over to the superior court on that charge. *State v. Midgett*, 214 N. C. 107, 198 S. E. 613.

This and the following section constitute the hub of the Motor Traffic Law around which all other provisions regulating the operation of automobiles revolve. *Kolman v. Silbert*, 219 N. C. 134, 12 S. E. (2d) 915.

Sufficiency of Warrant.—A warrant charging that defendant "did unlawfully and willfully operate a motor vehicle on a state highway in a careless and reckless manner and without due regard for the rights and safety of others and their property in violation" of municipal ordinances and contrary to the form of the statute, is held sufficient to charge defendant with reckless driving under this section, since, although the warrant fails to follow the language of the statute in accordance with the better practice, it does charge facts sufficient to enable the court to proceed to judgment, and the charge of violating the municipal ordinances may be treated as surplusage. *State v. Wilson*, 218 N. C. 769, 12 S. E. (2d) 654.

Sufficiency of Evidence for Jury.—The state's evidence tending to show that defendant, driving 60 miles an hour, crashed into the rear of a car driven in the same direction

on its right-hand side of the highway at 20 or 25 miles an hour, that the driver of the other car saw in his rear-view mirror defendant approaching at an excessive speed but that defendant struck the car before its driver could get on the shoulders of the road, together with evidence showing that defendant's car struck the other car with terrific force, is held sufficient to be submitted to the jury upon a warrant charging defendant with reckless driving under this section. *State v. Wilson*, 218 N. C. 769, 12 S. E. (2d) 654.

Stated in *Etheridge v. Etheridge*, 222 N. C. 616, 24 S. E. (2d) 477.

Quoted in *State v. Crews*, 214 N. C. 705, 200 S. E. 378; *Newbern v. Leary*, 215 N. C. 134, 1 S. E. (2d) 384.

Cited in *Hancock v. Wilson*, 211 N. C. 129, 189 S. E. 631; *Bechtler v. Bracken*, 218 N. C. 515, 11 S. E. (2d) 721.

§ 20-141. Speed restrictions. — (a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing.

(b) Where no special hazard exists the following speeds shall be lawful, but any speed in excess of said limits shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:

1. Twenty miles per hour in any business district;

2. Twenty-five miles per hour in any residence district;

3. Thirty-five miles per hour for motor vehicles designed, equipped for, or engaged in transporting property, and thirty miles per hour for such vehicles to which a trailer is attached: Provided the speed of forty miles per hour shall be lawful for three-quarter ton trucks and the speed limit of forty-five miles per hour shall be lawful for one-half ton or pick-up trucks;

4. Forty-five miles per hour under other conditions.

5. Notwithstanding the foregoing prima facie limits it shall be unlawful to drive any vehicle at a speed in excess of sixty (60) miles per hour, except those exempted in § 20-145.

(c) The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care. It shall be unlawful to violate any provision of this section, and upon conviction the violator shall be punished as provided in § 20-180.

(d) Whenever the state highway and public works commission shall determine upon the basis of an engineering and traffic investigation that any prima facie speed hereinbefore set forth is greater than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a highway, said commission shall determine and declare a reasonable and safe prima facie speed limit thereat which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway.

(e) The foregoing provisions of this section

shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident.

(f) Whenever local authorities within their respective jurisdictions determine, upon the basis of an engineering and traffic investigation that the prima facie speed permitted under this article at any intersection is greater than is reasonable or safe under the conditions found to exist at such intersection, such local authority shall determine and declare a reasonable and safe prima facie speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such intersection or upon the approaches thereto.

(g) Local authorities in their respective jurisdictions may, in their discretion, authorize by ordinance higher prima facie speeds than those stated in subsection (b) herein upon through highways or upon highways or portions thereof where there are no intersections or between widely spaced intersections: Provided, signs are erected giving notice of the authorized speed, but local authorities shall not have authority to modify or alter the basic rules set forth in sub-section (a) herein, or in any event to authorize by ordinance a speed in excess of forty-five miles per hour.

(h) No person shall drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with law. Police officers are hereby authorized to enforce this provision by directions to drivers, and in the event of apparent wilful disobedience to this provision and refusal to comply with direction of an officer in accordance herewith, the continued slow operation by a driver shall be a misdemeanor.

(i) The state highway and public works commission shall have authority to designate and appropriately mark certain highways of the state as truck routes, and any truck of a gross weight in excess of three tons for each axle operating on any highway in the state not designated by the state highway and public works commission as a truck route shall at no time exceed a speed limit of twenty miles per hour. Any person violating the provisions of this subsection shall be guilty of a misdemeanor. (1937, c. 297, s. 2; 1937, c. 407, s. 103; 1939, c. 275; 1941, c. 347.)

Cross Reference.—See also, § 20-216.

Editor's Note.—The 1939 amendment added item 5 to subsection (b).

The 1941 amendment added the proviso in the third subparagraph of subsection (b).

For comment on the 1941 amendment, see 19 N. C. Law Rev. 455.

Most of the cases cited below were decided under the corresponding provisions of the former law.

This section applies to criminal actions only and not to civil actions for damages. *Piner v. Richter*, 202 N. C. 573, 163 S. E. 561. See *Jones v. Charlotte*, 183 N. C. 630, 112 S. E. 423.

Regulation of Speed at Night.—The motorist upon a public highway on a dark, misty and foggy night, is required to regulate the speed of his car with a view to his own safety according to the distance the light from his headlights is thrown in front of him upon the highway, and to observe the rule of the ordinary prudent man. *Weston v. Southern R. Co.*, 194 N. C. 210, 139 S. E. 237. See also *Stewart v. Stewart*, 221 N. C. 147, 19 S. E. (2d) 242.

Contributory Negligence at Crossing.—Failure of a driver to keep his car under such control as will enable him to observe the restrictions imposed by this section as to grade

crossings is contributory negligence sufficient to bar recovery against the railroad. *Hinnant v. Atlantic Coast Line R. Co.*, 202 N. C. 489, 163 S. E. 555.

Passing Animals.—See *Gaskins v. Hancock*, 156 N. C. 56, 72 S. E. 80; *Tudor v. Bowen*, 152 N. C. 441, 67 S. E. 1015, cited and applied; *Curry v. Fleer*, 157 N. C. 16, 72 S. E. 626.

Intersecting Streets.—The word "intersecting" has been construed as synonymous with "joining" or "touching" or "entering into." *Manly v. Abernathy*, 167 N. C. 220, 83 S. E. 343; *Fowler v. Underwood*, 193 N. C. 402, 403, 137 S. E. 155.

The words "intersecting highways" include all space made by the junction of frequented streets of a town, though one of the streets enters the other without crossing or going beyond it. *Manly v. Abernathy*, 167 N. C. 220, 83 S. E. 343.

Same—Effect of Exercising Judgment Where Speed Exceeded.—Where one recklessly drives an automobile without signal or warning, in excess of the speed limit fixed by ordinance and the general statute, and thereby injures or kills another at a street intersection of the town, his violating the law in this manner makes him criminally liable for the injury without regard to the exercise of his judgment at the time in endeavoring to avoid the injury or contributory negligence on the part of the one injured or killed. *State v. McIver*, 175 N. C. 761, 94 S. E. 682.

Same—Criminal Liability.—A reckless approach and traverse of an intersection may render one criminally liable for the consequences of his acts in addition to liability under this section. *State v. Gash*, 177 N. C. 595, 597, 99 S. E. 387.

Same—Application to Railroads.—The prior law, similar in phraseology to this section, was held to include railroads within its provisions, and it was therefore a misdemeanor to run an automobile at a greater speed than permitted at intersections while approaching a railroad crossing in a town. *Hinton v. Southern R. Co.*, 172 N. C. 587, 90 S. E. 756.

Same—Effect of Violation upon Recovery from Railroad.—The mere fact that the speed of an automobile exceeded that allowed by law, at the time of collision with a railroad train at a public crossing, does not of itself prevent a recovery by the owner, where there is evidence of negligence on the part of the railroad, because it would, among other things, withdraw the question of proximate cause from the jury. *Shepard v. Norfolk Southern Railroad*, 169 N. C. 239, 84 S. E. 277.

Same—Purpose of Regulation.—Statutory regulation of speed at intersections has for its purpose the protection of those who are in, entering, or about to enter, the intersecting highway. *Etheridge v. Etheridge*, 222 N. C. 616, 618, 24 S. E. (2d) 477.

Application to Approach from Private Drive.—In approaching a highway from a yard the driver of an automobile must have his car under control, and not exceed a speed of ten miles an hour, and also give timely signals of its approach, and evidence of his failure to do so causing an accident to another car being properly driven on the highway, is sufficient actionable negligence to take the case to the jury; and the fact that this negligence did not actually result in a collision of the two cars, but proximately caused the injury in the reasonable effort of the driver of the plaintiff's car to avoid it, does not vary the application of the rule. *Fowler v. Underwood*, 193 N. C. 402, 137 S. E. 155.

Care as to Children.—The law requires more than ordinary care in regard to children. *Moore v. Powell*, 205 N. C. 636, 172 S. E. 327.

This section states several offenses each of which is a separate crime independently of the others. *State v. Mills*, 181 N. C. 530, 106 S. E. 677. See also *State v. Rountree*, 181 N. C. 535, 106 S. E. 669.

Limitation upon Privilege of Driving at Maximum Rate.—The speed limit prescribed by statute at which an automobile driver may go at various places, does not alone excuse those who drive within that specified by the statute, and it is likewise required that they use proper care where other conditions require it within the limitations given. *State v. Whaley*, 191 N. C. 387, 132 S. E. 6.

Motorist may not lawfully drive at speed which is not reasonable and prudent under the circumstances notwithstanding that the speed is less than limit set by this section. *Kolman v. Silbert*, 219 N. C. 134, 12 S. E. (2d) 915.

The trial court's instruction correctly defining "residential district" and charging that the lawful speed therein was 25 miles an hour, but that this limitation did not relieve the driver from further reducing his speed if made necessary by special hazards in order to avoid colliding with

any person or vehicle, is without error, whether the scene of the accident was in a "residential district" as defined by statute and the conflicting evidence as to the speed of the bus being left to the determination of the jury. *Reid v. City Coach Co.*, 215 N. C. 469, 2 S. E. (2d) 578, 123 A. L. R. 140.

The driver of an automobile upon a through highway did not have the right to assume absolutely that a driver approaching the intersection along a servient highway would obey the stop sign before entering or crossing the through highway, ch. 148, Public Laws 1927, § 21, but was required to keep a proper lookout and to keep his car at a reasonable speed under the circumstances in order to avoid injury to life or limb, § 4 of the 1927 act, and the driver of the car along the through highway forfeited his right to rely upon the assumption that the other driver would stop before entering or crossing the intersection when he approached and attempted to traverse it himself at an unlawful or excessive speed, and even when his speed was lawful he remained under duty to exercise due care to ascertain if the driver of the other car was going to violate the statutory requirement in order to avoid the consequences of such negligence, it being necessary to construe the pertinent statutes in pari materia and this result being consonant with such construction. *Groome v. Davis*, 215 N. C. 519, 2 S. E. (2d) 771.

Violation as Constituting Negligence.—It is negligence per se to drive an automobile upon a public highway at a speed greater than that permitted by statute, and where in an action to recover damages for the negligent killing of plaintiff's intestate, a voluntary passenger in the car thus driven, a motion as of nonsuit upon such evidence is properly denied. *Albritton v. Hill*, 190 N. C. 429, 130 S. E. 5.

When Negligence Not Imputed to Passenger.—The negligent driving of the owner of the car or his agent is not attributable to a passenger therein who has no authority over him or control over the car or the manner in which it was being driven at the time his injury was caused, the subject of his action for damages, nor will the principles of law applicable to those engaged in a common purpose apply from the fact that the injured party and the driver of the car were riding together to the same destination. *Albritton v. Hill*, 190 N. C. 429, 130 S. E. 5.

Necessity for Criminal Negligence.—Under an indictment with three counts: assault with a deadly weapon, an automobile; operating a motor vehicle on a public highway while under the influence of intoxicating liquor; and recklessly, and in breach of this section, wherein it was admitted by the State that there was no evidence of intentional assault, and the jury having returned for their verdict that defendant "was guilty of an assault, but not with reckless driving," the admission and the verdict on the last two counts dispelled the element of criminal negligence and criminal intent, and a conviction on the first count will not be sustained. *State v. Rawlings*, 191 N. C. 265, 131 S. E. 632. See also *State v. Rountree*, 181 N. C. 535, 106 S. E. 669.

When Violation Amounts to Manslaughter.—Where one drives his automobile in violation of the statutory requirements, and thus directly, or without an independent intervening sole proximate cause, the death of another results, he is guilty of manslaughter, though the death was unintentionally caused by his act. *State v. Whaley*, 191 N. C. 387, 132 S. E. 6. But the violation also is insufficient unless it was the proximate cause of the death, and a charge disregarding the element of proximate cause is error. *Ibid.*

Ordinance Held in Conflict.—Where one is permitted by the State law to enter upon and go across an intersecting highway at a speed not exceeding ten miles an hour unless due regard to the traffic or to the safety of the public requires a reduction of the speed; but the ordinance in question deprives him of this right by prescribing an arbitrary rule that he shall always and under all circumstances stop his vehicle before entering certain streets, the ordinance is inconsistent with the statute and therefore not enforceable. *State v. Stallings*, 189 N. C. 104, 106, 126 S. E. 187.

Circumstantial Evidence May Be Sufficient.—Though the evidence on the part of plaintiff is not direct, but circumstantial, yet it may be sufficient evidence to be submitted to the jury that defendant was exceeding the speed limit contrary to the law of this section. *Jones v. Bagwell*, 207 N. C. 378, 382, 177 S. E. 170.

Proximate Cause Is for Jury.—Where there is evidence that defendant was driving his automobile on the highway at a speed of sixty-five miles per hour and that the injury in suit was proximately caused by such excessive speed, it is sufficient to be submitted to the jury on the issue of actionable negligence. *Norfleet v. Hall*, 204 N. C. 573, 169 S. E. 143.

Proof of Residential District or Section.—Where there is no definite evidence as to the number of residences at the scene of the action so as to bring the place within the definition of "residential section," as provided by this section, or "residential district," as set out in § 20-38, and no evidence that the speed of the car was a proximate cause of the accident in suit, the evidence is insufficient to be submitted to the jury on the question of defendant's negligence in exceeding the speed limit prescribed in residential districts, there being no evidence that defendant exceeded the speed limit prescribed for highway travel generally. *Fox v. Barlow*, 206 N. C. 66, 173 S. E. 43.

Where the evidence established that the scene of the accident was not in a business district, and there was no evidence that defendants' vehicle was being driven in excess of 20 miles an hour, whether the accident occurred in a residential district was immaterial, since such speed did not violate this section. *Mitchell v. Melts*, 220 N. C. 793, 18 S. E. (2d) 406.

Sufficient Evidence to Overrule Defendant's Motion to Nonsuit in Prosecution for Manslaughter.—Evidence that the defendant was driving his car at a speed of from 50 to 55 miles per hour, on or near the center of the highway, when he collided with another car, resulting in the death of the driver thereof, was held sufficient to overrule defendant's motion to nonsuit in a prosecution for manslaughter, although defendant introduced evidence in sharp conflict. *State v. Webber*, 210 N. C. 137, 185 S. E. 659.

Instruction failing to charge provisions of this section, in civil action, held error. *Barnes v. Teer*, 219 N. C. 823, 15 S. E. (2d) 379.

Speed in excess of statutory limits is prima facie evidence of negligence. *Morris v. Johnson*, 214 N. C. 402, 403, 199 S. E. 390. And an instruction that such speed constitutes negligence per se is reversible error. *Latham v. Elizabeth City Orange Crush Bottling Co.*, 213 N. C. 158, 195 S. E. 372.

A speed in excess of the statutory restrictions is prima facie evidence that the speed is not reasonable or prudent and that it is unlawful, but it does not establish that the speed is unlawful as a matter of law, and is not prima facie proof of proximate cause, and does not make out a prima facie case, and an instruction that such speed constituted prima facie evidence of negligence, and if the jury should so find they should answer the issue of negligence in the affirmative, is erroneous. *Woods v. Freeman*, 213 N. C. 314, 195 S. E. 812. See *Fleeman v. Citizens Transfer, etc., Co.*, 214 N. C. 117, 198 S. E. 596.

An instruction that the jury might find, but were not required to find, that a speed in excess of forty-five miles an hour was unlawful, but that if they should find such speed was unlawful it would constitute negligence per se, is held not prejudicial under the evidence in this case tending to show special hazards in that defendant was driving into a curve on wet pavement with worn, slick tires, at a speed in excess of forty-five miles per hour. *York v. York*, 212 N. C. 695, 194 S. E. 486.

An instruction that the violation of statutes regulating the operation of motor vehicles and the conduct of pedestrians on the highway would constitute negligence per se and would be actionable if the proximate cause of injury, is held without error when it appears that the instruction was applied solely to §§ 20-146 and 20-174 prescribing that vehicles should be operated on the right-hand side of the highway and that warning should be given pedestrians, there being no reference in the charge to a violation of speed restrictions which this section makes merely prima facie evidence that the speed is unlawful. *Williams v. Woodward*, 218 N. C. 305, 10 S. E. (2d) 913.

As to violation of statutory speed limit as constituting negligence per se, see *James v. Carolina Coach Co.*, 207 N. C. 742, 178 S. E. 607; *Norfleet v. Hall*, 204 N. C. 573, 169 S. E. 143; *Exum v. Baumrind*, 210 N. C. 650, 188 S. E. 200. As to evidence establishing negligence per se but not wanton negligence, see *Turner v. Lipe*, 210 N. C. 627, 188 S. E. 108. See also, *Smart v. Rodgers*, 217 N. C. 560, 8 S. E. (2d) 833.

Driving Automobile in Excess of Forty-Five Miles Per Hour Is Only Prima Facie Negligence.—The driving of an automobile upon a highway at a speed in excess of forty-five miles per hour is not negligence per se or as a matter of law, but only prima facie evidence that the speed is unlawful under the provisions of this section. *State v. Webber*, 210 N. C. 137, 185 S. E. 659, citing *State v. Spencer*, 209 N. C. 827, 184 S. E. 835.

Evidence of Excessive Speed Is Not Prima Facie Evidence of Proximate Cause.—Speed in excess of 21 miles per hour in a business district is prima facie evidence that

the speed is excessive and unlawful, but such evidence is not prima facie proof of proximate cause, but is merely evidence to be considered with other evidence in determining actionable negligence. *Templeton v. Kelley*, 215 N. C. 577, 2 S. E. (2d) 696.

A violation of subsection (a) would be negligence per se and if injury proximately result therefrom, it would be actionable. *Tarrant v. Pepsi-Cola Bottling Co.*, 221 N. C. 390, 20 S. E. (2d) 565.

Truck with Trailer Attached.—Where the evidence in a prosecution for manslaughter is not conclusive as to whether the truck operated by the defendant had attached thereto a trailer or semitrailer, and all the evidence shows that the defendant was driving the truck between thirty and thirty-five miles per hour, it was held error for the court to instruct the jury that defendant's speed was limited to thirty miles per hour. *State v. Brooks*, 210 N. C. 273, 186 S. E. 237.

Where it was admitted that when the driver of a truck first saw a cow at a distance of several hundred feet, the truck was then traveling in excess of 30 miles an hour, the limit imposed upon motor vehicles with trailers by this section, it was held that this admission was of significance in determining whether the driver of the truck was negligent in the management of the vehicle in the descent of the hill, if the jury should find, as the witnesses for the plaintiff assert, that the truck was driven to its left side of the road in order to avoid collision with the cow. *Jarman v. Philadelphia-Detroit Lines*, 131 F. (2d) 728, 729.

The burden is upon the State to prove that a truck had a trailer attached thereto in order to reduce the maximum lawful speed at which a vehicle might be lawfully operated from thirty-five miles per hour as prescribed for trucks without trailers, to thirty miles per hour. *State v. Brooks*, 210 N. C. 273, 186 S. E. 237.

Warrant Charging No Offense.—A warrant charging merely that defendant operated his automobile at a designated speed in excess of the maximum prescribed by statute and the applicable municipal ordinance, charges no criminal offense, and defendant's motion in arrest of judgment should be allowed, since under the provisions of this section such speed constitutes merely prima facie evidence that the speed is unlawful. *State v. Crayton*, 214 N. C. 579, 199 S. E. 918.

Applied in *Moore v. Powell*, 205 N. C. 636, 172 S. E. 327; *Hancock v. Wilson*, 211 N. C. 129, 189 S. E. 631; *Gaffney v. Phelps*, 207 N. C. 553, 178 S. E. 231 (speed in entering intersection).

Cited in *State v. Mickle*, 194 N. C. 808, 140 S. E. 150; *Burke v. Carolina Coach Co.*, 198 N. C. 8, 150 S. E. 636; *State v. Palmer*, 197 N. C. 135, 147 S. E. 817; *Rudd v. Holmes*, 198 N. C. 640, 152 S. E. 894; *Lancaster v. B. & H. Coast Line*, 198 N. C. 107, 109, 150 S. E. 716; *Jones v. Bagwell*, 207 N. C. 378, 382, 177 S. E. 170; *Pittman v. Downing*, 209 N. C. 219, 183 S. E. 362; *Taft v. Maryland Cas. Co.*, 211 N. C. 507, 191 S. E. 10; *Pearson v. Luther*, 212 N. C. 412, 193 S. E. 739; *Brown v. Southern Paper Products Co.*, 222 N. C. 626, 24 S. E. (2d) 334; *Reeves v. Staley*, 220 N. C. 573, 18 S. E. (2d) 239; *Swinson v. Nance*, 219 N. C. 772, 15 S. E. (2d) 284 (dis. op.).

§ 20-142. Railroad warning signals must be obeyed.—Whenever any person driving a vehicle approaches a highway and interurban or steam railway grade crossing, and a clearly visible and positive signal gives warning of the immediate approach of a railway train or car, it shall be unlawful for the driver of the vehicle to fail to bring the vehicle to a complete stop before traversing such grade crossing. (1937, c. 407, s. 104.)

§ 20-143. Vehicles must stop at certain railway grade crossings.—The road governing body (whether state or county) is hereby authorized to designate grade crossings of steam or interurban railways by state and county highways, at which vehicles are required to stop, respectively, and such railways are required to erect signs thereat notifying drivers of vehicles upon any such highway to come to a complete stop before crossing such railway tracks, and whenever any such crossing is so designated and sign-posted it shall be unlawful for the driver of any vehicle to fail to stop within fifty feet, but not closer than

ten feet, from such railway tracks before traversing such crossing. No failure so to stop, however, shall be considered contributory negligence per se in any action against the railroad or interurban company for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff was guilty of contributory negligence: Provided, that all school trucks and passenger busses be required to come to a complete stop at all railroad crossings. (1937, c. 407, s. 105.)

Editor's Note.—Most of the cases treated below were decided under the corresponding provisions of the earlier law, but should be of assistance in the interpretation of the present section.

Duty to Stop May Be Mixed Question of Law and Fact.—A driver of an automobile is not required by this section under all circumstances to stop before driving upon a railroad grade crossing, and whether he is required to do so under the particular circumstances disclosed by the evidence is ordinarily a mixed question of law and fact to be submitted to the jury upon proper instruction from the court. *Keller v. Southern R. Co.*, 205 N. C. 269, 171 S. E. 73.

Necessity for Section.—Although a railroad is a highway (*Hinton v. Southern R. Co.*, 172 N. C. 587, 90 S. E. 756), an amendment of the statute (Acts of 1923) was necessary in order to compel the operator of a motor vehicle to bring it to a full stop before crossing or attempting to cross a railroad track. *State v. Stallings*, 189 N. C. 104, 106, 126 S. E. 187.

Failure to Stop as Negligence Per Se—Contributory Negligence.—The failure of a motorist to stop his automobile before crossing a railroad at a grade crossing on a public highway, as directed by this section, "at a distance not exceeding fifty feet from the nearest rail," does not constitute contributory negligence per se in his action against the railroad company to recover damages to his car caused by a collision with a train standing upon the track, and where the evidence tends only to show that the proximate cause of the plaintiff's injury was his own negligence in exceeding the speed he should have used under the circumstances, a judgment as of nonsuit thereon should be entered on defendant's motion therefor properly entered. *Weston v. Southern R. Co.*, 194 N. C. 210, 139 S. E. 237.

The failure of a motorist to come to a full stop before entering upon a railroad crossing as required by statute is not contributory negligence per se, but such failure is a circumstance to be considered by the jury with the other evidence in the case upon the question. *White v. North Carolina R. Co.*, 216 N. C. 79, 3 S. E. (2d) 310.

Cited in *Leary v. Norfolk Southern Bus Corp.*, 220 N. C. 745, 18 S. E. (2d) 426.

§ 20-144. Special speed limitation on bridges.—It shall be unlawful to drive any vehicle upon any public bridge, causeway or viaduct at a speed which is greater than the maximum speed which can with safety to such structure be maintained thereon, when such structure is sign-posted as provided in this section.

The state highway and public works commission, upon request from any local authorities, shall, or upon its own initiative may conduct an investigation of any public bridge, causeway or viaduct, and if it shall thereupon find that such structure cannot with safety to itself withstand vehicles traveling at the speed otherwise permissible under this article, the commissioner shall determine and declare the maximum speed of vehicles which such structure can withstand, and shall cause or permit suitable signs stating such maximum speed to be erected and maintained at a distance of one hundred feet beyond each end of such structure. The findings and determination of the commission shall be conclusive evidence of the maximum speed which can with safety to any such structure be maintained thereon. (1937, c. 407, s. 106.)

Cross Reference.—As to power of state highway and pub-

lic works commission to fix maximum load limits on bridges, see § 136-72.

§ 20-145. When speed limit not applicable.

—The speed limitations set forth in this article shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances when traveling in emergencies. This exemption shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others. (1937, c. 407, s. 107.)

§ 20-146. Drive on right side of highway.

—Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway, and shall drive a slow-moving vehicle as closely as possible to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway and except when overtaking and passing another vehicle subject to the limitations applicable in overtaking and passing, set forth in §§ 20-149 and 20-150. (1937, c. 407, s. 108.)

Editor's Note.—Most of the cases annotated were decided under the corresponding provisions of the former law.

For discussion of the subject matter of statutes similar to this and succeeding sections, see 2 N. C. Law Rev. 178; 5 N. C. Law Rev. 248.

Proximate Cause.—A violation of this section is negligence per se, but such negligence is not actionable unless there is a causal relation between the breach and the injury. *Grimes v. Carolina Coach Co.*, 203 N. C. 605, 608, 166 S. E. 599. See *Stovall v. Ragland*, 211 N. C. 536, 190 S. E. 899.

Burden on Plaintiff to Establish Negligence.—Where plaintiff's evidence leaves in speculation and conjecture the determinative fact of whether defendant's car was being driven on the wrong side of the highway at the time of the collision, defendant's motion to nonsuit is properly granted, the burden being on plaintiff to establish the negligence of defendant. *Cheek v. Barnwell Warehouse, etc., Co.*, 209 N. C. 569, 183 S. E. 729.

Negligence Per Se.—An instruction that the violation of statutes regulating the operation of motor vehicles and the conduct of pedestrians on the highway would constitute negligence per se and would be actionable if the proximate cause of injury, is held without error when it appears that the instruction was applied solely to this section and § 20-174 prescribing that vehicles should be operated on the right-hand side of the highway and that warning should be given pedestrians, there being no reference in the charge to a violation of speed restrictions which § 20-141 makes merely prima facie evidence that the speed is unlawful. *Williams v. Woodward*, 218 N. C. 305, 10 S. E. (2d) 913.

Applied in *Hancock v. Wilson*, 211 N. C. 129, 189 S. E. 631; *Newbern v. Leary*, 215 N. C. 134, 1 S. E. (2d) 384. See also, *State v. Toler*, 195 N. C. 481, 142 S. E. 715; *State v. Durham*, 201 N. C. 724, 161 S. E. 398; *Queen City Coach Co. v. Lee*, 218 N. C. 320, 11 S. E. (2d) 341.

Cited in *Barnes v. Teer*, 219 N. C. 823, 15 S. E. (2d) 379 (dis. op.).

§ 20-147. Keep to the right in crossing intersections or railroads.—In crossing an intersection of highways or the intersection of a highway by a railroad right-of-way, the driver of a vehicle shall at all times cause such vehicle to travel on the right half of the highway unless such right side is obstructed or impassable. (1937, c. 407, s. 109.)

§ 20-148. Meeting of vehicles.—Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other

at least one-half of the main-traveled portion of the roadway as nearly as possible. (1937, c. 407, s. 110.)

Editor's Note.—The cases cited below were decided under the corresponding provisions of the former law.

Assumption that Vehicle Will Turn to Right.—When the driver of one of the automobiles is not observing the rule of this section, as the automobiles approach each other, the other may assume that before the automobiles meet the driver of the approaching automobile will turn to his right, so that the two automobiles may pass each other in safety. *Shirley v. Ayers*, 201 N. C. 51, 53, 158 S. E. 840. See also *James v. Carolina Coach Co.*, 207 N. C. 742, 178 S. E. 607; *Hancock v. Wilson*, 211 N. C. 129, 189 S. E. 631.

Ordinarily, a motorist has the right to assume that the driver of a vehicle approaching on the same side or on his left-hand side will yield half of the highway or turn out in time to avoid a collision, but this right is not absolute. It may be qualified by the particular circumstances existing at the time. *Brown v. Southern Paper Products Co.*, 222 N. C. 626, 628, 24 S. E. (2d) 334.

Quoted in *Robinson v. Standard Transportation Co.*, 214 N. C. 489, 199 S. E. 725.

Cited in *Hobbs v. Mann*, 199 N. C. 532, 155 S. E. 163; *Guthrie v. Gocking*, 214 N. C. 513, 199 S. E. 707; *Queen City Coach Co. v. Lee*, 218 N. C. 320, 11 S. E. (2d) 341.

§ 20-149. Overtaking a vehicle.—(a) The driver of any such vehicle overtaking another vehicle proceeding in the same direction shall pass at least two feet to the left thereof, and shall not again drive to the right side of the highway until safely clear of such overtaken vehicle.

(b) The driver of an overtaking motor vehicle not within a business or residence district, as herein defined, shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction. (1937, c. 407, § 111.)

Editor's Note.—The cases cited below were decided under the corresponding provisions of the former law.

Purpose of Section.—This section was enacted for the protection of the public upon the roads and highways of the State, and its violation is negligence per se entitling the person injured to his damages when there is a causal connection between the negligent act and the injury complained of. *Wolfe v. Independent Coach Line*, 198 N. C. 140, 150 S. E. 876.

The violation of this section is negligence and if such negligence was the proximate cause of plaintiff's injuries, the defendant, nothing else appearing, is liable to the plaintiff in this action. *Stovall v. Ragland*, 211 N. C. 536, 539, 190 S. E. 899.

A violation of subsection (a) would be negligence per se and if injury proximately result therefrom, it would be actionable. *Tarrant v. Pepsi-Cola Bottling Co.*, 221 N. C. 390, 20 S. E. (2d) 565.

Evidence Sufficient to Raise Issue of Last Clear Chance.

—Where the evidence tended to show that plaintiff, in order to avoid striking a chicken standing on the hard surface of the highway, drove his automobile gradually to the left, so that the car was traveling in about the center of the highway at the time of the accident in suit, and that a bus belonging to defendant was traveling in the same direction and hit plaintiff's car when the bus attempted to pass, it was held that, conceding plaintiff was negligent in driving to the left without giving any signal or ascertaining if the car could be driven to the left in safety, defendant's motion to nonsuit was erroneously granted, since the pleadings and evidence are sufficient to raise the issue of the last clear chance upon the evidence tending to establish defendant's negligence in failing to keep a safe distance between the vehicles and in failing to take the precautions and give the signals required by this section for passing cars on the highway. *Morris v. Seashore Transp. Co.*, 208 N. C. 807, 182 S. E. 487.

Quoted in *Leary v. Norfolk Southern Bus Corp.*, 220 N. C. 745, 18 S. E. (2d) 426 (dis. op.).

§ 20-150. Limitations on privilege of overtaking and passing.—(a) The driver of a vehicle shall not drive to the left side of the center of a highway, in overtaking and passing another vehicle proceeding in the same direction, unless such

left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety.

(b) The driver of a vehicle shall not overtake and pass another vehicle proceeding in the same direction upon the crest of a grade or upon a curve in the highway where the driver's view along the highway is obstructed within a distance of five hundred feet.

(c) The driver of a vehicle shall not overtake and pass any other vehicle proceeding in the same direction at any steam or electric railway grade crossing nor at any intersection of highway unless permitted so to do by a traffic or police officer.

(d) The driver of a vehicle shall not drive to the left side of the center line of a highway upon the crest of a grade or upon a curve in the highway where such center line has been placed upon such highway by the state highway and public works commission, and is visible. (1937, c. 407, s. 112.)

Editor's Note.—Most of the cases cited below were decided under the corresponding provisions of the former law.

Negligence Per Se.—It is negligence per se for the operator of a motor vehicle to overtake and pass another vehicle traveling in the same direction at a railroad grade crossing. *Murray v. Atlantic Coast Line R. Co.*, 218 N. C. 392, 11 S. E. (2d) 326.

Sufficient Evidence to Submit Question of Negligence to Jury.—Evidence that the driver of a truck, in attempting to pass cars going in the same direction, pulled out in the center of the road and hit the car which plaintiff was driving in the opposite direction, causing damage to the car and injury to plaintiff, was held sufficient to be submitted to the jury on the question of the actionable negligence of the driver to the truck. *Joyner v. Dail*, 210 N. C. 663, 188 S. E. 209.

Cited in *State v. Palmer*, 197 N. C. 135, 147 S. E. 817; *Cook v. Horne*, 198 N. C. 739, 153 S. E. 315; *Queen City Coach Co. v. Lee*, 218 N. C. 320, 11 S. E. (2d) 341.

§ 20-151. Driver to give way to overtaking vehicle.—The driver of a vehicle upon a highway about to be overtaken and passed by another vehicle approaching from the rear, shall give way to the right in favor of the overtaking vehicle on suitable and audible signal being given by the driver of the overtaking vehicle, and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle. (1937, c. 407, s. 113.)

Editor's Note.—The cases treated below were decided under the corresponding provisions of the earlier law, but should be of assistance in the interpretation of the present section.

Degree of Care in Observing Traffic in Rear.—The driver of an auto-truck along a public highway is not held to the same degree of care in observing those who may wish to pass him coming from the rear, as in front, and is not required to turn to the right for such purpose, unless he is apprised by the one who wishes to pass, by proper signal, of his intention to do so. *Dreher v. Divine*, 192 N. C. 325, 135 S. E. 29.

Duty to Turn to Right.—The driver of an automobile upon the signal of a faster car approaching from the rear, must turn to the right so that the other may pass to his left, when the conditions existing there at the time are reasonably safe to permit the other to pass. *Dreher v. Divine*, 192 N. C. 325, 135 S. E. 29.

When Question One of Reasonable Prudence.—Where the driver of an automobile violates the statute by turning to the right to avoid a motorcycle traveling in the same direction upon a public road, and collides therewith, and action is brought to recover damages therefor, and the evidence is conflicting as to whether the motorcycle was unexpectedly turned out in the wrong direction, resulting in the injury, the question of proximate cause depends upon whether the driver of the automobile acted with reasonable prudence under the circumstances, to avoid the injury, or whether the collision was caused by the wrongful and unexpected act of the one on the motorcycle. *Cooke v. Jerome*, 172 N. C. 626, 90 S. E. 767.

Duty of Passer from Rear.—The driver of an automobile who wishes to pass another ahead of him, must keep his automobile under control, so as to avoid a collision if the driver ahead of him apparently does not hear his signals or is not aware of his intention to pass, or the condition of the road makes it unsafe not only to himself, but to those who are driving from the opposite direction. *Dreher v. Divine*, 192 N. C. 325, 135 S. E. 29.

Proof of Violation in Trial for Resulting Crime.—See *State v. Jessup*, 183 N. C. 771, 111 S. E. 523; *State v. Rountree*, 181 N. C. 535, 106 S. E. 669, 676.

Same—Violation as Evidence of Intent to Assault.—Since the intentional driving of a motor vehicle on the wrong side of the road in disregard of the statute is *malum prohibitum*, not *malum in se*, the performance of this unlawful act is not evidence of a specific intent to commit an assault. *State v. Rawlings*, 191 N. C. 265, 267, 131 S. E. 632.

Act Must Have Been Likely to Cause Harm.—One who violated the provisions of this section, not intentionally or recklessly, but merely through a failure to exercise due care and thereby proximately caused the death would not be culpably negligent unless in the light of the attendant circumstances his negligent act was likely to result in death or bodily harm. *State v. Stansell*, 203 N. C. 69, 74, 164 S. E. 580.

Questions for Jury.—Where there was evidence that the plaintiff, desiring to pass a truck on the highway going in the same direction, blew his horn, and that the driver of the truck heard the signal, but instead of driving to the right of the center of the road to allow the plaintiff to pass on the left, drove to the left and stopped or came almost to a stop, that the plaintiff, thinking that the truck was going to stop, and having his car under control, attempted to pass on the right, when the truck suddenly turned to the right, forcing the plaintiff to turn to the right to avoid hitting the truck, causing the plaintiff's car to run off the embankment on the right of the road, resulting in the injury in suit: Held, the evidence should have been submitted to the jury upon issues of negligence, contributory negligence and damages. *Stevens v. Rostan*, 196 N. C. 314, 145 S. E. 555.

§ 20-152. Following too closely.—(a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, with regard for the safety of others and due regard to the speed of such vehicles and the traffic upon and condition of the highway.

(b) The driver of any motor truck, when traveling upon a highway outside of a business or residence district, shall not follow another motor truck within one hundred feet, but this shall not be construed to prevent one motor truck overtaking and passing another. (1937, c. 407, s. 114.)

Editor's Note.—The first case annotated below was decided under the corresponding provisions of the former law.

Charge to Jury.—Where the court, in its charge on contributory negligence, does not call attention to this section, an exception to the charge will not be sustained in the absence of a special request for such instructions. *Alexander v. Southern Public Utilities Co.*, 207 N. C. 438, 441, 177 S. E. 427.

Negligence Per Se.—A violation of subdivision (a) would be negligence per se, and, if injury proximately results therefrom, it would be actionable. *Murray v. Atlantic Coast Line R. Co.*, 218 N. C. 392, 11 S. E. (2d) 326.

Cited in *Hobbs v. Mann*, 199 N. C. 532, 155 S. E. 163; *Smith v. Carolina Coach Co.*, 214 N. C. 314, 199 S. E. 90.

§ 20-153. Turning at intersection.—(a) Except as otherwise provided in this section, the driver of a vehicle intending to turn to the right at an intersection shall approach such intersection in the lane for traffic nearest to the right-hand side of the highway, and in turning shall keep as closely as practicable to the right-hand curb or edge of the highway, and when intending to turn to the left shall approach such intersection in the lane for the traffic to the right of and nearest to the center of the highway, and in turning shall pass beyond the center of the intersection, passing as closely as practicable to the right thereof before turning such vehicle to the left.

(b) For the purpose of this section, the center

of the intersection shall mean the meeting point of the medial lines of the highways intersecting one another.

(c) Local authorities in their respective jurisdiction may modify the foregoing method of turning at intersections by clearly indicating by buttons, markers or other directions signs within an intersection the course to be followed by vehicles turning thereat, and it shall be unlawful for any driver to fail to turn in a manner as so directed when such direction signs are authorized by local authorities. (1937, c. 407, s. 115.)

A violation of subsection (a) is negligence per se and if injury proximately results therefrom, violation is actionable. *Tarrant v. Pepsi-Cola Bottling Co.*, 221 N. C. 390, 20 S. E. (2d) 565.

§ 20-154. Signals on starting, stopping or turning.—(a) The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement.

(b) The signal herein required shall be given by means of the hand and arm in the manner herein specified, or by any approved mechanical or electrical signal device, except that when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible, both to the front and rear, the signal shall be given by a device of a type which has been approved by the department.

Whenever the signal is given the driver shall indicate his intention to start, stop, or turn by extending the hand and arm from and beyond the left side of the vehicle as hereinafter set forth.

Left turn—hand and arm horizontal, forefinger pointing.

Right turn—hand and arm pointed upward.

Stop—hand and arm pointed downward.

All signals to be given from left side of vehicle during last fifty feet traveled. (1937, c. 407, s. 116.)

In General.—One driving an automobile upon a public highway is required by provision of this section to give specific signals before stopping or turning thereon, and the failure of one so driving to give the signal required by statute is negligence, and when the proximate cause of injury, damages may be recovered therefor by the one injured. *Murphy v. Asheville-Knoxville Coach Co.*, 200 N. C. 92, 93, 156 S. E. 550.

Person Observing No Vehicles in Either Direction Is under No Obligation to Give Signal.—The plaintiff having first looked in both directions, and having observed no automobile or other vehicle approaching from either direction, was under no obligation, by virtue of this section to give any signal of his purpose to turn to his left and enter the driveway to his home. He was therefore not negligent as a matter of law in failing to give a signal before he turned to his left and crossed the highway for the purpose of entering the driveway to his home. *Stovall v. Ragland*, 211 N. C. 536, 539, 190 S. E. 899.

Question for Jury.—Whether defendant observed the rule of the road by ascertaining, first, if such turn would affect the operation of any other vehicle, and, second, by giving the required signal, under this section, held to raise an issue of fact for the jury. *Mason v. Johnston*, 215 N. C. 95, 1 S. E. (2d) 379.

Violation of Section as Negligence Per Se.—The violation of this section requiring a motorist desiring to stop on the highway to first ascertain if he can stop in safety, and,

where the movement of another vehicle may be thereby affected, to give the statutory signal for stopping, is negligence per se. *Holland v. Strader*, 216 N. C. 436, 5 S. E. (2d) 311.

“One driving an automobile upon a public highway is required by provision of this section to give specific signals before stopping or turning thereon, and the failure of one so driving to give the signal required by statute is negligence, and when the proximate cause of injury, damages may be recovered therefor by the one injured.” *Bechtler v. Bracken*, 218 N. C. 515, 523, 11 S. E. (2d) 721.

Proximate Cause.—See *Templeton v. Kelley*, 216 N. C. 487, 5 S. E. (2d) 555; *Leary v. Norfolk Southern Bus Corp.*, 220 N. C. 745, 759, 18 S. E. (2d) 426 (dis. op.).

Whether the violation of a safety statute is a proximate cause of injury is ordinarily a question of fact for the determination of the jury. *Holland v. Strader*, 216 N. C. 436, 5 S. E. (2d) 311.

Cited in *Smith v. Carolina Coach Co.*, 214 N. C. 314, 199 S. E. 90; *Newbern v. Leary*, 215 N. C. 134, 1 S. E. (2d) 384.

§ 20-155. Right-of-way.—(a) When two vehicles approach or enter an intersection and/or junction at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right except as otherwise provided in § 20-156.

(b) The driver of a vehicle approaching, but not having entered an intersection and/or junction, shall yield the right-of-way to a vehicle within such intersection and turning therein to the left across the line of travel of such first mentioned vehicle: Provided, the driver of the vehicle turning left has given a plainly visible signal of intention to turn as required in § 20-154.

(c) The driver of any vehicle upon a highway within a business or residence district shall yield the right-of-way to a pedestrian crossing such highway within any clearly marked cross-walk, or any regular pedestrian crossing included in the prolongation of the lateral boundary lines of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices. (1937, c. 407, s. 117.)

Instruction.—Under this section where damages are sought for defendant's negligent driving at a street intersection and there is evidence tending to show that the defendant was approaching the intersection at an unlawful rate of speed and did not slow up before the happening of the collision with another car; an instruction correctly charging the rule of the right of way if both cars approached the intersection simultaneously and the rule that if one of the cars was already in the intersection it was the duty of the driver of the other car to slow down and permit it to pass will not be held for error. *Piner v. Richter*, 202 N. C. 573, 163 S. E. 561.

Applied in *Wooten v. Smith*, 215 N. C. 48, 200 S. E. 921.

Cited in *Leary v. Norfolk Southern Bus Corp.*, 220 N. C. 745, 18 S. E. (2d) 426; *Swinson v. Nance*, 219 N. C. 772, 15 S. E. (2d) 284 (dis. op.).

§ 20-156. Exceptions to the right-of-way rule.—(a) The driver of a vehicle entering a public highway from a private road or drive shall yield the right-of-way to all vehicles approaching on such public highway.

(b) The driver of a vehicle upon a highway shall yield the right-of-way to police and fire department vehicles and public and private ambulances when the latter are operated upon official business and the drivers thereof sound audible signal by bell, siren or exhaust whistle. This provision shall not operate to relieve the driver of a police or fire department vehicle or public or private ambulance from the duty to drive with due regard for the safety of all persons using the highway, nor shall it protect the driver of any such

vehicle from the consequence of any arbitrary exercise of such right-of-way. (1937, c. 407, s. 118.)

Cited in Swinson v. Nance, 219 N. C. 772, 15 S. E. (2d) 284 (dis. op.).

§ 20-157. What to do on approach of police or fire department vehicles.—(a) Upon the approach of any police or fire department vehicle giving audible signal by bell, siren or exhaust whistle, the driver of every other vehicle shall immediately drive the same to a position as near as possible and parallel to the right-hand edge or curb, clear of any intersection of highways, and shall stop and remain in such position unless otherwise directed by a police or traffic officer until the police or fire department vehicle shall have passed.

(b) It shall be unlawful for the driver of any vehicle other than one on official business to follow any fire apparatus traveling in response to a fire alarm closer than one block or to drive into or park such vehicle within one block where fire apparatus has stopped in answer to a fire alarm. (1937, c. 407, s. 119.)

Cited in State v. Payne, 213 N. C. 719, 197 S. E. 573; Leary v. Norfolk Southern Bus Corp., 220 N. C. 745, 18 S. E. (2d) 426.

§ 20-158. Vehicles must stop at certain through highways.—(a) The state highway and public works commission, with reference to state highways, and local authorities, with reference to highways under their jurisdiction, are hereby authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto. No failure so to stop, however, shall be considered contributory negligence per se in any action at law for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff in such action was guilty of contributory negligence.

(b) This section shall not interfere with the regulations prescribed by towns and cities.

(c) Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than ten dollars or imprisoned not more than ten days. (1937, c. 407, s. 120; 1941, c. 83.)

Editor's Note.—The 1941 amendment struck out former subsections (b) and (d) and relettered the remaining subsections.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 455.

Failure to come to a complete stop before entering a through street intersection is not negligence per se, but only evidence of negligence to be considered with other facts in the case, such holding being a necessary corollary to the provision of this section, that failure to stop before entering a through street intersection should not be considered contributory negligence per se, but only evidence to be considered with the other facts in the case upon the issue of contributory negligence. *Sebastian v. Horton Motor Lines*, 213 N. C. 770, 197 S. E. 539; *Reeves v. Staley*, 220 N. C. 573, 18 S. E. (2d) 239.

This rule is unaffected by a municipal ordinance making such failure to stop unlawful, since this section prevails over the ordinance. *Swinson v. Nance*, 219 N. C. 772, 15 S. E. (2d) 284.

Negligence of Car Approaching on Through Highway.—

The driver of an automobile upon a through highway did not have the right to assume absolutely that a driver approaching the intersection along a servient highway would obey the stop sign before entering or crossing the through highway, ch. 148, Public Laws 1927, § 21, but was required to keep a proper lookout and to keep his car at a reasonable speed under the circumstances in order to avoid injury to life or limb, § 4 of the 1927 Act, and the driver of the car along the through highway forfeited his right to rely upon the assumption that the other driver would stop before entering or crossing the intersection when he approached and attempted to traverse it himself at an unlawful or excessive speed, and even when his speed was lawful he remained under duty to exercise due care to ascertain if the driver of the other car was going to violate the statutory requirement in order to avoid the consequences of such negligence, it being necessary to construe the pertinent statutes in pari materia and this result being consonant with such construction. *Groome v. Davis*, 215 N. C. 510, 2 S. E. (2d) 771.

Right of Way.—While the failure to stop before attempting to cross a through street intersection in violation of a municipal ordinance is negligence per se, a vehicle traveling along the through street does not have the right of way at the intersection if a vehicle from the cross street is already in the intersection before the vehicle traveling along the through street is near enough the intersection to constitute an immediate hazard. *Pearson v. Luther*, 212 N. C. 412, 193 S. E. 739.

Proximate Cause Must Be Shown Beyond a Mere Chance.—Where a conviction of involuntary manslaughter is sought for the failure to observe a positive duty imposed by statute with reference to the driving of automobiles upon the State highways, the question of proximate cause must be shown beyond a mere chance or casualty. *State v. Satterfield*, 198 N. C. 682, 153 S. E. 155.

The manifest object of this section is to protect the public by requiring the driver of an automobile upon the public highways of the State to stop and ascertain the circumstances and conditions at highway intersections, particularly with reference to traffic, with a view of determining whether in the exercise of due care he may go upon the intersecting highway with reasonable safety to himself and others, and where the defendant in a prosecution for manslaughter fails to stop, but has knowledge of the conditions and has an unobstructed view of the highway for a long distance, and there is no evidence tending to show that he had violated any other statute or that he was negligent in any other respect, the evidence alone that he had violated the statute in the respect stated is insufficient to take the case to the jury, there being no evidence that the violation of the statute was a proximate cause of the death or in causal relation thereto, and defendant's motion as of nonsuit, made in apt time, should have been granted. *State v. Satterfield*, 198 N. C. 682, 153 S. E. 155.

Instruction as to negligence held error since it was counter to the provision of this section. *Stephens v. Johnson*, 215 N. C. 133, 1 S. E. (2d) 367.

Applied in *Jones v. Bagwell*, 207 N. C. 378, 177 S. E. 170.

Cited in *Leary v. Norfolk Southern Bus Corp.*, 220 N. C. 745, 18 S. E. (2d) 426.

§ 20-159. Passing street cars.—(a) The driver of a vehicle shall not overtake and pass upon the left any street car proceeding in the same direction, whether actually in motion or temporarily at rest, when a travelable portion of the highway exists to the right of such street car.

(b) The driver of a vehicle overtaking any railway, interurban or street car stopped or about to stop for the purpose of receiving or discharging any passenger, shall bring such vehicle to a full stop not closer than ten feet to the nearest exit of such street car and remain standing until any such passenger has boarded such car or reached the adjacent sidewalk, except that where a safety zone has been established, then a vehicle may be driven past any such railway, interurban or street car at a speed not greater than ten miles per hour and with due caution for the safety of pedestrians. (1937, c. 407, s. 121.)

§ 20-160. Driving through safety zone prohibited.—The driver of a vehicle shall not at any

time drive through or over a safety zone as defined in part one of this article. (1937, c. 407, s. 122.)

Cross Reference.—As to definition of safety zone, see § 20-38, subsec. (2).

§ 20-161. Stopping on highway.—(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway: Provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred feet in both directions upon such highway: Provided further, that in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway bridge: Provided further that in the event that a truck, trailer or semi-trailer be disabled upon the highway that the driver of such vehicle shall display, not less than two hundred feet in the front or rear of such vehicle, a warning signal; that during the hours from sunup to sundown a red flag shall be displayed, and after sundown red flares or lanterns. These warning signals shall be displayed as long as such vehicle is disabled upon the highways.

(b) Whenever any peace officer shall find a vehicle standing upon a highway in violation of the provisions of this section, he is hereby authorized to move such vehicle or require the driver or person in charge of such vehicle to move such vehicle to a position permitted under this section.

(c) The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position. (1937, c. 407, s. 123.)

The word "park" means the permitting of such vehicles to remain standing on a public highway or street, while not in use. *State v. Carter*, 205 N. C. 761, 763, 172 S. E. 415.

To "park" means something more than a mere temporary or momentary stoppage on the road for a necessary purpose. *Stallings v. Buchan Transport Co.*, 210 N. C. 201, 203, 185 S. E. 643.

Thus where the driver of a truck with a trailer stopped on the highway at night on the right-hand side, with lights burning, because two automobiles in front of him were interlocked in a wreck, and at the time of the collision the truck and trailer had been standing still only a fraction of a minute, and it remained parked for about five minutes thereafter, it was held that at the time of the collision the truck was not parked on the highway within the meaning of this section, and the length of time it remained still after the collision is immaterial to plaintiff's right to recover; since it was not the intention of those who drafted the statute to make it a violation of law for a driver of a heavy truck and trailer to stop on his right-hand side of the highway before driving around or by two cars interlocked in a collision on the highway, and around which a number of people were working. *Id.*

Starting and stopping on a highway in accordance with the exigencies of the occasion is an incident to the right of travel, and the word "park" and the words "leave standing" as used in this section are modified by the words "whether attended or unattended" so that they are synony-

mous, and neither term includes a mere temporary stop for a necessary purpose when there is no intent to break the continuity of the travel. *Peoples v. Fulk*, 220 N. C. 635, 18 S. E. (2d) 147.

The stopping of a bus on the hard surface of a highway outside of a business or residential district for the purpose of taking on a passenger is not parking or leaving the vehicle standing within the meaning of the terms as used in this section, *Peoples v. Fulk*, 220 N. C. 635, 18 S. E. (2d) 147; even though the shoulders of the highway at the scene are of sufficient width to permit the bus to be stopped thereon. *Leary v. Norfolk Southern Bus Corp.*, 220 N. C. 745, 18 S. E. (2d) 426.

"I cannot authoritatively define 'parking' in a dissenting opinion, but it seems to me clear that a car is parked when those in charge stop it upon a highway and intentionally leave it upon the concrete to pursue some activity other than that concerned with the car and its operation, however commendable it may be." *Beck v. Hooks*, 218 N. C. 105, 114, 10 S. E. (2d) 608 (dissenting opinion).

To Be Actionable Negligence Must Be Proximate Cause of Injury.—Negligence in parking an automobile on a public highway in violation of this section, to be actionable, must be a proximate cause of the injury in suit, and where the plaintiff fails to show by his evidence that such violation was a proximate cause of his injury, a judgment as of nonsuit is properly allowed. *Burke v. Carolina Coach Company*, 198 N. C. 8, 150 S. E. 636.

The parking of a car on the hard surface of a highway at night without a tail light in violation of statute is sufficient to sustain the jury's affirmative answer upon the issue of actionable negligence, and the question of contributory negligence in failing to see the parked car under the circumstances in time to have avoided the collision is also properly submitted to the jury. *Lambert v. Caronna*, 206 N. C. 616, 175 S. E. 303.

Exception in Subsection (c) Is Question for Jury.—Where there is evidence tending to show that the defendant had parked his truck upon the hard surface of a highway in violation of this section, resulting in injury to the plaintiff, and the defendant claims that under the facts it came within the exception, subsection (c), under the statute and the facts disclosed by the record the matter should have been submitted to the jury under proper instructions, and the granting of defendant's motion as of non-suit was error. *Smithwick v. Colonial Pine Co.*, 200 N. C. 519, 157 S. E. 612.

Charge to Jury.—The charge of the court as to subsection (a) of this section, will not be held for error for the failure to instruct the jury upon the provision in subsection (c), where the defendant's only evidence in excuse of parking was that he had a flat tire, such evidence being insufficient to bring defendant within the exception. *Lambert v. Caronna*, 206 N. C. 616, 175 S. E. 303.

Section Not Violated Where Disabled Truck Is Parked on Shoulder of Highway.—See *State v. McDonald*, 211 N. C. 672, 676, 191 S. E. 733.

Evidence Disclosing Contributory Negligence of Plaintiff.—Conceding defendant was negligent in parking the car on the hard surface in violation of this section, the evidence discloses contributory negligence of plaintiff as a matter of law in attempting to pass the parked car without first ascertaining that he could pass the car in safety. *McNair v. Kilmer & Co.*, 210 N. C. 65, 185 S. E. 481.

Cited in *White v. Chappell*, 219 N. C. 652, 14 S. E. (2d) 843 (dis. op.).

§ 20-162. Parking in front of fire hydrant, fire station or private driveway.—No person shall park a vehicle or permit it to stand, whether attended or unattended, upon a highway in front of a private driveway or within fifteen feet in either direction of a fire hydrant or the entrance to a fire station, nor within twenty-five feet from the intersection of curb lines or if none, then within fifteen feet of the intersection of property lines at an intersection of highways; provided, that local authorities may by ordinance decrease the distance within which a vehicle may park in either direction of a fire hydrant. (1937, c. 407, s. 124; 1939, c. 111.)

§ 20-163. Motor vehicle left unattended; brakes to be set and engine stopped.—No person having control or charge of a motor vehicle shall allow such vehicle to stand on any highway unattended without first effectively setting the brakes

thereon and stopping the motor of said vehicle, and, when standing upon any grade, without turning the front wheels of such vehicle to the curb or side of the highway. (1937, c. 407, s. 125.)

§ 20-164. Driving on mountain highways.—The driver of a motor vehicle traversing defiles, canyons or mountain highways shall hold such motor vehicle under control and as near the right-hand side of the highway as reasonably possible, and upon approaching any curve where the view is obstructed within a distance of two hundred feet along the highway, shall give audible warning with a horn or other warning device. (1937, c. 407, s. 126.)

§ 20-165. Coasting prohibited.—The driver of a motor vehicle when traveling upon a down grade upon any highway shall not coast with the gears of such vehicle in neutral. (1937, c. 407, s. 127.)

The violation of this section is negligence per se, and, if injury to the violator proximately result therefrom, it would bar his right to recover therefor. *Dillon v. Winston-Salem*, 221 N. C. 512, 519, 20 S. E. (2d) 845.

§ 20-166. Duty to stop in event of accident.—(a) The driver of any vehicle involved in an accident resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident, and any person violating this provision shall upon conviction be punished as provided in § 20-182.

(b) The driver of any vehicle involved in an accident resulting in damage to property and in which there is not involved injury or death of any person, shall immediately stop such vehicle at the scene of the accident, and any person violating this provision shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court.

(c) The driver of any vehicle involved in any accident resulting in injury or death to any person or damage to property shall also give his name, address, operator's or chauffeur's license number and the registration number of his vehicle to the person struck or the driver or occupants of any vehicle collided with, and shall render to any person injured in such accident reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person, and it shall be unlawful for any person to violate this provision, and such violator shall be punishable as provided in § 20-182.

(d) The driver of any vehicle involved in any accident resulting in injuries or death to any person, or property damage to an apparent extent of twenty-five dollars (\$25.00) or more, shall, within twenty-four hours, file or cause to be filed a report of such accident with the department, except that when such accident occurs within a city such report shall be made within twenty-four hours to the police department of such city. Every police department shall forward on the fifth day of each month every such report received during the previous calendar month, or a copy thereof, so filed with it to the main office of the department. All accident reports shall be made on forms approved by the department. With respect to any such accident involving a collision between any common carrier and another vehicle, such common carrier shall also make a report of the accident to

the department, such report to be filed on or before the tenth day of the month following the accident.

(e) Where a person required to report an accident by the preceding subsection is physically incapable of making such report, and there is another occupant in the vehicle at the time of the accident, such occupant shall make the report.

The department may require drivers, or common carriers involved in accidents, to file supplemental reports, and may require witnesses of accidents to render reports to it upon forms furnished by it whenever the original report is insufficient in the opinion of the department.

All accident reports together with all supplemental reports above mentioned shall be without prejudice and shall be for the use of the department, and shall not be used in any manner whatsoever as evidence, or for any other purpose in any trial, civil or criminal, arising out of such accident: Provided, however, that all reports made by state, city or county police shall be subject to inspection by members of the general public at all reasonable times. The department shall be required to furnish, upon demand of any court, a properly executed certificate stating that a specific accident report has or has not been filed with the department solely to prove a compliance with this section.

(f) The department shall prepare and shall upon request supply to police, coroners, sheriffs and other suitable agencies, or individuals, forms for accident reports calling for sufficiently detailed information to disclose with reference to a highway accident the cause, conditions then existing, and the persons and vehicles involved.

The department shall receive accident reports required to be made by this section and may tabulate and analyze such reports and publish annually, or at more frequent intervals, statistical information based thereon as to the number, cause and location of highway accidents.

Based upon its findings after such analysis, the department may conduct further necessary detailed research to more fully determine the cause and control of highway accidents. It may further conduct experimental field tests within areas of the state from time to time to prove the practicability of various ideas advanced in traffic control and accident prevention.

(g) Every person holding the office of coroner in this state shall, on the tenth day of each month, report to the department the death of any person during the preceding calendar month as the result of an accident involving a motor vehicle and the circumstances of such accident. (1937, c. 407, s. 128; 1939, c. 10, ss. 1, 1½; 1943, c. 439.)

Editor's Note.—The 1939 amendatory act clarified inconsistencies between this section and § 20-182. See 17 N. C. Law Rev. 349.

The 1943 amendment increased the amount named in line four of subsection (d) from ten dollars to twenty-five dollars.

Evidence Sufficient for Jury.—Where all the evidence tended to show that the car of the prosecuting witness was struck by a car which was traveling at the time of the accident with its left wheels over the center line of the highway, that an occupant in the car of the prosecuting witness was injured, and that the car which collided with her car failed to stop after the collision, in violation of this section, and the state's circumstantial evidence, including marks on the highway leading uninterruptedly from the point of collision to a car parked at defendant's place of

business, which defendant admitted to be his, the condition of defendant's car, a hub cap and other automobile parts found at the scene of the collision which were missing from defendant's car, and other circumstances tending to show efforts on the part of defendant to conceal the identity of his car as the one involved in the collision, together with testimony by defendant that no one else had driven his car on the evening in question, it was held sufficient to have been submitted to the jury on the question of defendant's guilt, and his motions for judgment as of nonsuit were held properly refused. *State v. King*, 219 N. C. 667, 14 S. E. (2d) 803.

Instruction.—In a prosecution for "hit and run driving" an instruction that defendant was charged with the violation of one of the motor vehicle statutes designed for the protection of life and property, cannot be held for error, the statement not being related to any fact in issue or any evidence introduced in the case, and containing no inference as to the guilt or innocence of defendant, it further appearing that the court correctly charged upon the presumption of innocence and the burden of proof. *State v. King*, 219 N. C. 667, 14 S. E. (2d) 803.

Cited in *State v. Midgett*, 214 N. C. 107, 198 S. E. 613; *State v. Newton*, 207 N. C. 323, 177 S. E. 184; *Leary v. Norfolk Southern Bus Corp.*, 220 N. C. 745, 18 S. E. (2d) 426.

§ 20-167. Vehicles transporting explosives. —

Any person operating any vehicle transporting any explosive as a cargo or part of a cargo upon a highway shall at all times comply with the provisions of this section.

(a) Said vehicle shall be marked or placarded on each side and the rear with the word "Explosives" in letters not less than eight inches high, or there shall be displayed on the rear of such vehicle a red flag not less than twenty-four inches square marked with the word "Danger" in white letters six inches high.

(b) Every said vehicle shall be equipped with not less than two fire extinguishers, filled and ready for immediate use, and placed at a convenient point on the vehicle so used.

(c) The commissioner is hereby authorized and directed to promulgate such additional regulations governing the transportation of explosives and other dangerous articles by vehicles upon the highways as he shall deem advisable for the protection of the public. (1937, c. 407, s. 129.)

Cross Reference.—As to provision that vehicles transporting motor fuels shall be labelled, see § 119-41.

Cited in *Latham v. Elizabeth City Orange Crush Bottling Co.*, 213 N. C. 158, 195 S. E. 372.

§ 20-168. Drivers of state, county and city vehicles subject to provisions of this article.—The provisions of this article applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by this state or any political sub-divisions thereof, or of any city, town or district, except persons, teams, motor vehicles and other equipment while actually engaged in work on the surface of the road, but not when traveling to or from such work. (1937, c. 407, s. 130.)

Cited in *Babbs v. Eury*, 206 N. C. 679, 175 S. E. 100.

§ 20-169. Powers of local authorities.—Local authorities, except as expressly authorized by § 20-141, subsection (g) and § 20-158, shall have no power or authority to alter any speed limitations declared in this article or to enact or enforce any rule or regulations contrary to the provisions of this article, except that local authorities shall have power to provide by ordinances for the regulation of traffic by means of traffic or semaphores or other signaling devices on any portion of the highway where traffic is heavy or continuous

and may prohibit other than one-way traffic upon certain highways, and may regulate the use of the highways by processions or assemblages and except that local authorities shall have the power to regulate the speed of vehicles on highways in public parks, but signs shall be erected giving notices of such special limits and regulations. (1937, c. 407, s. 131.)

For application of former statute prohibiting ordinance in conflict, see *State v. Freshwater*, 183 N. C. 762, 111 S. E. 161.

§ 20-170. This article not to interfere with rights of owners of real property with reference thereto.—Nothing in this article shall be construed to prevent the owner of real property used by the public for purposes of vehicular travel by permission of the owner, and not as matter of right from prohibiting such use nor from requiring other or different or additional conditions than those specified in this article or otherwise regulating such use as may seem best to such owner. (1937, c. 407, s. 132.)

§ 20-171. Traffic laws apply to persons riding animals or driving animal-drawn vehicles.—Every person riding an animal or driving any animal drawing a vehicle upon a highway shall be subject to the provisions of this article applicable to the driver of a vehicle, except those provisions of the article which by their nature can have no application. (1939, c. 275.)

Part 11. Pedestrians' Rights and Duties.

§ 20-172. Pedestrians subject to traffic control signals.—Pedestrians shall be subject to traffic control signals at intersections as heretofore declared in this article, but at all other places pedestrians shall be accorded the privileges and shall be subject to the restrictions stated in part eleven of this article. (1937, c. 407, s. 133.)

Duty to Charge Sections in Civil Actions.—It is the duty of the court to charge the duty of drivers to pedestrians, imposed by this and the following sections, in an action for damages for their violation and this error is not cured by a general charge as to the use of necessary prudence, and is reversible even in the absence of a prayer for more specific instructions. *Bowen v. Schnibben*, 184 N. C. 248, 114 S. E. 170.

§ 20-173. Pedestrians' right-of-way at crosswalks.—(a) Where traffic control signals are not in place or in operation the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within any marked cross-walk or within any unmarked cross-walk at an intersection, except as otherwise provided in part eleven of this article.

(b) Whenever any vehicle is stopped at a marked cross-walk or at any unmarked cross-walk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle. (1937, c. 407, s. 134.)

Cited in *Leary v. Norfolk Southern Bus Corp.*, 220 N. C. 745, 18 S. E. (2d) 426.

§ 20-174. Crossing at other than crosswalks.—(a) Every pedestrian crossing a roadway at any point other than within a marked cross-walk or within an unmarked cross-walk at an intersection shall yield the right-of-way to all vehicles upon the roadway.

(b) Any pedestrian crossing a roadway at a point where a pedestrian tunnel or overhead pedes-

trian crossing has been provided shall yield the right-of-way to all vehicles upon the roadway.

(c) Between adjacent intersections at which traffic control signals are in operation pedestrians shall not cross at any place except in a marked cross-walk.

(d) It shall be unlawful for pedestrians to walk along the traveled portion of any highway except on the extreme left-hand side thereof, and such pedestrians shall yield the right-of-way to approaching traffic.

(e) Notwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway. (1937, c. 407, s. 135.)

Crossing between Adjacent Intersections at Which Traffic Control Signals Are in Operation.—It is unlawful for a pedestrian to cross a street between intersections at which traffic lights are maintained unless there is a marked cross-walk between the intersections at which he may cross and on which he has the right of way over vehicles, and his failure to observe the statutory requirement is evidence of negligence but not negligence per se. *Templeton v. Kelley*, 216 N. C. 487, 5 S. E. (2d) 555. See also, *Templeton v. Kelley*, 215 N. C. 577, 2 S. E. (2d) 696.

Walking on Traveled Portion of Highway.—Evidence established contributory negligence in that it disclosed that deceased was walking on the traveled portion of the highway otherwise than on his extreme left-hand side thereof, as required by this section. *Miller v. Lewis, etc., Motor Freight Corp.*, 218 N. C. 464, 11 S. E. (2d) 300.

Where the evidence failed to sustain plaintiff's allegation that his intestate was walking along the edge of the highway on his left side at the place provided by law and was struck by a board projecting from defendants' truck, defendants' motion to nonsuit was properly allowed for failure of plaintiff to establish negligence proximately causing the fatal injury. *Pack v. Auman*, 220 N. C. 704, 18 S. E. (2d) 247.

Warning Should Be Given Pedestrians.—An instruction that the violation of statutes regulating the operation of motor vehicles and the conduct of pedestrians on the highway would constitute negligence per se and would be actionable if the proximate cause of injury, is held without error when it appears that the instruction was applied solely to § 20-146 and this section prescribing that vehicles should be operated on the right-hand side of the highway and that warning should be given pedestrians, there being no reference in the charge to a violation of speed restrictions which § 20-141 makes merely prima facie evidence that the speed is unlawful. *Williams v. Woodward*, 218 N. C. 305, 10 S. E. (2d) 913.

§ 20-175. Pedestrians soliciting rides.—No person shall stand in the travel portion of the highway for the purpose of soliciting a ride from the driver of any private vehicle. (1937, c. 407, s. 136.)

Part 12. Penalties.

§ 20-176. Penalty for misdemeanor.—(a) It shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of this article unless such violation is by this article or other law of this state declared to be a felony.

(b) Unless another penalty is in this article or by the laws of this state provided, every person convicted of a misdemeanor for the violation of any provision of this article shall be punished by a fine of not more than one hundred dollars (\$100.00) or by imprisonment in the county or municipal jail for not more than sixty days, or by both such fine and imprisonment: Provided, that upon conviction for the following offenses—operating motor vehicles without displaying registration

number plates issued therefor; permitting or making any unlawful use of registration number plates, or permitting the use of registration by a person not entitled thereto, and violation of §§ 20-116, 20-117, 20-118, 20-122, 20-123, 20-124, 20-125, 20-126, 20-127, 20-128, 20-129, 20-130, 20-131, 20-132, 20-133, 20-134, 20-142, 20-143, 20-144, 20-146, 20-147, 20-148, 20-150, 20-151, 20-152, 20-153, 20-154, 20-155, 20-156, 20-157, 20-159, 20-160, 20-161, 20-162, 20-163, 20-165—the punishment therefor shall be a fine not to exceed fifty dollars (\$50.00) and not less than ten dollars (\$10.00), or imprisonment not to exceed thirty days for each offense. (1937, c. 407, s. 137.)

Editor's Note.—The cases cited below were decided under the corresponding provisions of the former law.

In addition to being liable to punishment under these statutes, it is possible for a person to be so negligent in the violation in disregarding the rights of others as to be guilty of other crimes at the same time. For example, although it is a misdemeanor to violate the statute regulating the law of the road as to speed under the motor vehicle law, one may also be guilty of murder, manslaughter or assault and battery if he is so reckless in the violation that he runs down and kills or injures another, if the elements essential to constitute such crimes are present in the violation. See *State v. Gush*, 177 N. C. 595, 99 S. E. 337; *State v. McIver*, 175 N. C. 761, 94 S. E. 682. And evidence of violation of this chapter is admissible upon such trials. *State v. Suddeth*, 184 N. C. 753, 114 S. E. 828.

Strict Construction of Penal Provisions.—Inasmuch as this article contains provisions of a highly penal nature, and, although it is within the police power, the courts will not, by construction, extend its penal provisions unless the case comes within the letter of the law, and within its meaning and palpable design. *Security Finance Co. v. Hendry*, 189 N. C. 549, 553, 127 S. E. 629; *Carolina Discount Corp. v. Landis Motor Co.*, 190 N. C. 157, 160, 129 S. E. 414.

Cited in *State v. Mickle*, 194 N. C. 808, 140 S. E. 150; *Lancaster v. B. & H. Coach Line*, 198 N. C. 107, 150 S. E. 716.

§ 20-177. Penalty for felony.—Any person who shall be convicted of a violation of any of the provisions of this article herein or by the laws of this state declared to constitute a felony shall, unless a different penalty is prescribed herein or by the laws of this state, be punished by imprisonment in the state prison for a term not less than one year nor more than five years, or by a fine of not less than five hundred dollars nor more than five thousand dollars, or by both fine and imprisonment. (1937, c. 407, s. 138.)

§ 20-178. Penalty for bad check.—When any person, firm, or corporation shall tender any uncertified check for payment of any tax or fees found to be due by him under the provisions of this article, and such check shall have been returned to the commissioner unpaid on account of insufficient funds of the drawer of said check in the bank upon which same is drawn, then in that event an additional tax shall be imposed equal to ten per cent of the fees due, and in no case shall the increase of said tax, because of said failure, be less than one dollar (\$1.00), and the said additional tax shall not be waived or diminished by the commissioner. (1937, c. 407, s. 139.)

§ 20-179. Penalty for driving while under the influence of intoxicating liquor or narcotic drugs.—Every person who is convicted of violation of § 20-138, relating to habitual users of narcotic drugs or driving while under the influence of intoxicating liquor or narcotic drugs, shall be punished by imprisonment in the county or municipal jail for not less than thirty days nor more

than one year, or by fine of not less than fifty dollars (\$50.00) nor more than one thousand dollars (\$1,000.00), or by both such fine and imprisonment. On a second or subsequent conviction for the same offense he shall be punished by imprisonment for not more than two years or fined not more than one thousand dollars (\$1,000.00), or by both fine and imprisonment, in the discretion of the court. (1937, c. 407, s. 140.)

Cross Reference.—As to mandatory revocation of license for driving under influence of liquor or drugs, see § 20-17, paragraph 2.

Sentence Not Excessive.—A sentence to the county jail for a term of six months, and to be assigned to work on the public roads, upon defendant's plea of *nolo contendere* to a warrant charging him with the operation of an automobile upon the public highways while under the influence of intoxicating liquor, is not excessive. *State v. Parker*, 220 N. C. 416, 17 S. E. 475.

§ 20-180. Penalty for reckless driving.—Every person convicted of reckless driving under section 20-140 shall be punished by imprisonment in the county or municipal jail for a period of not more than six months, or by fine of not more than five hundred dollars (\$500.00), or by both such fine and imprisonment, and on a second or subsequent conviction of such offense shall be punished by imprisonment for not more than one year or by a fine of not less than fifty dollars nor more than one thousand dollars (\$1,000.00), or by both such fine and imprisonment. (1937, c. 407, s. 141.)

Cross Reference.—As to revocation of license for 2 convictions on reckless driving charges, see § 20-17, paragraph 6.

Penalty Not Excessive.—Upon conviction of reckless driving, sentence of defendant to six months in the county jail to be assigned to work the roads under the direction of the state highway and public works commission is within the limitations prescribed by this section and therefore cannot be held excessive. *State v. Wilson*, 218 N. C. 769, 12 S. E. (2d) 654.

§ 20-181. Penalty for failure to dim, etc., beams of headlamps.—Any person operating a motor vehicle on the highways of this state, who shall fail to shift, depress, deflect, tilt or dim the beams of the head lamps thereon whenever another vehicle is met on such highways shall, upon conviction thereof, be fined not more than ten (\$10.00) dollars or imprisoned for not more than ten (10) days. (1939, c. 351, s. 3.)

Cross Reference.—As to conviction not being ground for revocation of operator's or chauffeur's license, see § 20-18.

§ 20-182. Penalty for failure to stop in event of accident involving injury or death to a person.—Every person convicted of wilfully violating § 20-166, relative to the duties to stop in the event of accidents, except as otherwise provided, involving injury or death to a person, shall be punished by imprisonment for not less than one nor more than five years, or in the state prison for not less than one nor more than five years, or by fine of not less than five hundred dollars or by both such fine and imprisonment. The commissioner shall revoke the operator's or chauffeur's license of the person so convicted. In no case shall the court have power to suspend judgment upon payment of costs. (1937, c. 407, s. 142.)

Cross Reference.—As to mandatory revocation of license in event of failure to stop and render aid in case of accident, see § 20-17, paragraph 4.

Cited in *State v. King*, 219 N. C. 667, 14 S. E. (2d) 803.

§ 20-183. Duties and powers of law enforcement officers.—It shall be the duty of the law enforcement officers of the state and of each county, city, or other municipality to see that the provisions of this article are enforced within their respective jurisdictions, and any such officer shall have the power to arrest on sight or upon warrant any person found violating the provisions of this article. Such officers within their respective jurisdictions shall have the power to stop any motor vehicle upon the highways of the state for the purpose of determining whether the same is being operated in violation of any of the provisions of this article. (1937, c. 407, s. 143.)

Art. 4. State Highway Patrol.

§ 20-184. Patrol under supervision of department of motor vehicles.—The commissioner of motor vehicles, under the direction of the governor, shall have supervision, direction and control of the state highway patrol. The commissioner shall establish in the department of motor vehicles a division of highway safety and patrol, prescribe regulations governing said division, and assign to the division such duties as he may deem proper. (1935, c. 324, s. 2; 1939, c. 387, s. 1; 1941, c. 36.)

§ 20-185. Personnel; appointment; salaries.—The state highway patrol shall consist of one person to be designated as major, and such additional subordinate officers and men as the commissioner of motor vehicles, with the approval of the governor and advisory budget commission, shall direct. Members of the state highway patrol shall be appointed by the commissioner with the approval of the governor, and shall serve at the pleasure of the governor and commissioner. The major, other officers, and members of the state highway patrol shall be paid such salaries as may be established by the division of personnel of the budget bureau. (1929, c. 218, s. 1; 1931, c. 381; 1935, c. 324, s. 1; 1937, c. 313, s. 1; 1941, c. 36.)

§ 20-186. Oath of office; bond.—Each member of the highway patrol shall subscribe and file with the commissioner of motor vehicles an oath of office for the faithful performance of his duties, and shall give a bond with good surety payable to the state of North Carolina in a sum not less than one thousand dollars (\$1000.00) and not more than two thousand five hundred dollars (\$2500.00) to be fixed by the commissioner of motor vehicles, conditioned as well for the faithful discharge of his duty as patrolman as for his diligently endeavoring to collect faithfully and pay over all sums of money received. The bond shall be duly approved and filed in the office of the insurance commissioner, and copies of the bond certified by the insurance commissioner shall be received and read in evidence in all actions and proceedings where the original might be. (1929, c. 218, s. 2; 1937, c. 339, s. 1; 1941, c. 36.)

See § 128-9.

§ 20-187. Orders and rules for organization and conduct.—The commissioner of motor vehicles is authorized and empowered to make all necessary orders, rules and regulations for the organization, assignment, and conduct of the members of the state highway patrol. Such orders, rules and regulations shall be subject to the approval of the

governor. (1929, c. 218, ss. 1, 3; 1931, c. 381; 1933, c. 214, ss. 1, 2; 1939, c. 387, s. 2; 1941, c. 36.)

§ 20-188. Duties of highway patrol.—The state highway patrol shall be subject to such orders, rules and regulations as may be adopted by the commissioner of motor vehicles, with the approval of the governor, and shall regularly patrol the highways of the state and enforce all laws and regulations respecting travel and the use of vehicles upon the highways of the state and all laws for the protection of the highways of the state. To this end, the members of the patrol are given the power and authority of peace officers for the service of any warrant or other process issuing from any of the courts of the state having criminal jurisdiction, and are likewise authorized to arrest without warrant any person who, in the presence of said officers, is engaged in the violation of any of the laws of the state regulating travel and the use of vehicles upon the highways, or of laws with respect to the protection of the highways, and they shall have jurisdiction anywhere within the state, irrespective of county lines.

The state highway patrol shall have full power and authority to perform such additional duties as peace officers as may from time to time be directed by the governor, and such officers may at any time and without special authority, either upon their own motion or at the request of any sheriff or local police authority, arrest persons accused of highway robbery, bank robbery, murder, or other crimes of violence.

The state highway patrol shall be required to perform such other and additional duties as may be required of it by the commissioner of motor vehicles in connection with the work of the department of motor vehicles, and such other and additional duties as may be required of it from time to time by the governor. (1929, c. 218, s. 4; 1933, c. 214, ss. 1, 2; 1935, c. 324, s. 3; 1939, c. 387, s. 2; 1941, c. 36.)

§ 20-189. Patrolman assigned to governor's office.—The commissioner of motor vehicles, at the request of the governor, shall assign and attach one member of the state highway patrol to the office of the governor, there to be assigned such duties and perform such services as the governor may direct. The salary of the state highway patrolman so assigned to the office of the governor shall be paid from appropriations made to the office of the governor and shall be fixed in an amount to be determined by the governor and the advisory budget commission. (1941, cc. 23, 36.)

§ 20-190. Uniforms; furnishing motor vehicles.—The department of motor vehicles shall adopt some distinguishing uniform for the members of said state highway patrol, and furnish each member of the patrol with an adequate number of said uniforms and each member of said patrol force when on duty shall be dressed in said uniform. The department of motor vehicles shall likewise furnish each member of the patrol with a suitable motor vehicle, and necessary arms, and provide for all reasonable expense incurred by said patrol while on duty. (1929, c. 218, s. 5; 1941, c. 36.)

§ 20-191. Establishment of district headquarters.—The department of motor vehicles shall supply

at its various district offices, or at some other point within the district if it shall be deemed advisable, suitable district headquarters, and the necessary clerical assistance for the major of the force at his headquarters in Raleigh and at the several district headquarters. (1929, c. 218, s. 6; 1937, c. 313, s. 1; 1941, c. 36.)

§ 20-192. Shifting of patrolmen from one district to another.—The major of the state highway patrol under such rules and regulations as the department of motor vehicles may prescribe shall have authority from time to time to shift the forces from one district to another, or to consolidate more than one district force at any point for special purposes. (1929, c. 218, s. 7; 1937, c. 313, s. 1; 1941, c. 36.)

§ 20-193. Fees for service of process by patrolmen to revert to county.—All fees for arrests or service of process that may be taxed in the bill of costs for the various courts of the state on account of the official acts of the members of the state highway patrol shall be remitted to the general fund in the county in which the said cost is taxed. (1929, c. 218, s. 8.)

§ 20-194. Expense of administration.—All expenses incurred in carrying out the provisions of this article shall be paid out of the maintenance funds of the state highway and public works commission. (1929, c. 218, s. 9; 1941, c. 36.)

§ 20-195. Co-operation between patrol and local officers.—The commissioner of motor vehicles with the approval of the governor, through the division of highway safety and patrol, shall encourage the co-operation between the highway patrol and the several municipal and county peace officers of the state for the enforcement of all traffic laws and the proper administration of the Uniform Drivers' License Law, and arrangements for compensation of special services rendered by such local officers out of the funds allotted to the division of highway safety and patrol may be made, subject to the approval of the director of the budget. (1935, c. 324, s. 5; 1939, c. 387, s. 3; 1941, c. 36.)

Editor's Note.—The 1939 amendment inserted the words "with the approval of the governor" in the second and third lines.

§ 20-196. State-wide radio system authorized; use of telephone lines in emergencies.—The commissioner of motor vehicles, through the division of highway safety and patrol is hereby authorized and directed to set up and maintain a state-wide radio system, with adequate broadcasting stations so situate as to make the service available to all parts of the state for the purpose of maintaining radio contact with the members of the state highway patrol and other officers of the state, to the end that the traffic laws upon the highways may be more adequately enforced and that the criminal use of the highways may be prevented.

If the director of the budget shall find that the appropriation provided for the department is not adequate to take care of the entire cost of the radio service herein provided for, after providing for the administration of other provisions of this law, the state highway and public works commission, upon the order of the director of the budget approved by the advisory budget commission, shall make available such additional sum as the said

budget commission may find to be necessary to make the installation and operation of such radio service possible; and the sum so provided by the state highway and public works commission shall constitute a valid charge against the appropriation item of betterments for state and county roads.

The commissioner of motor vehicles is likewise authorized and empowered to arrange with the various telephone companies of the state for the use of their lines for emergency calls by the members of the state highway patrol, if it shall be found practicable to arrange apparatus for temporary contact with said telephone circuits along the highways of the state.

In order to make this service more generally useful, the various boards of county commissioners and the governing boards of the various cities and towns are hereby authorized and empowered to provide radio receiving sets in the offices and vehicles of their various officers, and such expenditures are declared to be a legal expenditure of any funds that may be available for police protection. (1935, c. 324, s. 6; 1941, c. 36.)

Art. 5. Enforcement of Collection of Judgments against Irresponsible Drivers of Motor Vehicles.

§ 20-197. Certain words defined.—The following words, as used in this article, shall have the following meanings:

(a) The singular shall include the plural; the masculine shall include the feminine and neuter, as requisite.

(b) "Person" shall include individuals, partnerships, corporations, receivers, referees, trustees, executors and administrators; and shall also include the owner of any motor vehicle as requisite; but shall not include the State or any political subdivisions thereof.

(c) "Motor Vehicle" shall include trailers, motorcycles and tractors. (1931, c. 116, s. 13.)

§ 20-198. Suspension of driver's license and registration certificates for failure to pay tort judgment. — In the event of the failure of any person, firm or corporation, to satisfy any judgment which shall have hereafter become final, by expiration, without appeal, of the time within which appeal might have been perfected, or by final affirmance, on appeal, rendered against him, by a court of competent jurisdiction in this State, within thirty days thereafter for damages on account of personal injuries, or deaths, or damage to property in excess of one hundred dollars (\$100.00) resulting from the ownership, maintenance, use or operation of a motor vehicle, the said operator's license and all of the registration certificates of the said person, firm or corporation shall be forthwith suspended by the commissioner of motor vehicles of North Carolina, upon receiving a certified copy or transcript of such final judgment, from the court in which the same was rendered, showing such judgment or judgments to have been still unsatisfied more than thirty days after the same became final, as aforesaid, and shall remain so suspended and shall not be renewed, nor shall any motor vehicle be thereafter registered in the name of the said person, firm or corporation while any such judgment remains unstayed, unsatisfied and subsisting and until every such judgment is satisfied or dis-

charged, or until the said person gives proof of his ability to respond in damages, as hereinafter required, for future accidents. It shall be the duty of the Clerk of the Superior Court in any county in which any such judgment is rendered, to forward immediately after the expiration of said thirty days, as aforesaid, to the Commissioner of motor vehicles, a certified copy of such judgment or a transcript thereof as aforesaid. (1931, c. 116, s. 1; 1941, c. 36.)

Editor's Note.—See 13 N. C. Law Rev. 223.

This article is patterned after the Safety Responsibility Act sponsored by the American Automobile Association. One important point of difference is that under this article the license may be renewed either by paying the judgment or establishing financial responsibility for future accidents, while the American Automobile Association Act uses the conjunctive "and" instead of "or". See 9 N. C. Law Rev. 384 et seq.

§ 20-199. Proof of ability to respond in damages; surety bond; withdrawal of license to operate automobile.—The proof of the ability of any person, firm or corporation to respond in damages for any liability incurred may be established by the execution of a bond of a surety company, duly authorized to transact business within this State or a bond, with at least two individual sureties, each owning real estate within this State, which real estate shall be scheduled in the bond and which bond shall be approved by a Clerk of the Superior Court. The said bond to be conditioned for any liability thereafter incurred resulting from the ownership, maintenance, use or operation thereafter of a motor vehicle for personal injury to or death of any one person in the amount of at least five thousand dollars (\$5,000.00) and, subject to the aforesaid limit for any one person injured or killed, of at least ten thousand dollars (\$10,000.00) for personal injury to or the death of two or more persons in any one accident, and for damage to property in the amount of at least one thousand dollars (\$1,000.00) resulting from any one accident. Additional evidence of ability to respond in damages, as required by this article, shall be furnished the commissioner of motor vehicles at any time upon his demand.

Provided, however, anything in this article to the contrary notwithstanding, that

(1) When five thousand dollars (\$5,000.00) has been credited upon any judgment or judgments rendered in excess of that amount for personal injury to or the death of one person as the result of any one accident; or

(2) When, subject to the limit of five thousand dollars (\$5,000.00) for any one person so injured or killed, the sum of ten thousand dollars (\$10,000.00) has been credited upon any judgment or judgments rendered in excess of that amount for personal injury to or the death of more than one person as the result of any one accident; or

(3) When one thousand dollars (\$1,000.00) has been credited upon any judgment or judgments rendered in excess of that amount for damage to property as the result of any one accident; resulting from the ownership, maintenance, use or operation of a motor vehicle, then and in such event, such payment or payments shall be deemed a satisfaction of such judgment or judgments for the purpose of this article only.

If any such motor vehicle owner or operator shall not be a resident of this State, the privilege of operating any motor vehicle in this State and the privilege of operation within the State of any motor vehicle owned by him shall be withdrawn while any final judgment against him as aforesaid, shall be unstayed, unsatisfied and subsisting for more than thirty (30) days, as aforesaid, and shall not be renewed, nor shall any operator's or chauffeur's license be issued to him or any motor vehicle registered in his name until every such judgment shall be stayed, satisfied or discharged as herein provided, and until such person shall have given proof of his ability to respond in damages for future accidents. (1931, c. 116, s. 2; 1941, c. 36.)

Editor's Note.—The discrimination against non-residents provided for in the last paragraph of this section presents a constitutional problem which will undoubtedly come before the courts, but much authority would sustain it. See *La Tourette v. McMaster*, 248 U. S. 465, 39 S. Ct. 160, 63 L. Ed. 362, upholding discrimination between residents and non-residents in granting licenses to act as insurance brokers. The practical difficulty is to understand what the non-resident would be doing with a North Carolina automobile license unless he sojourned in the state for some substantial part of each year. 9 N. C. Law Rev. 385.

Individual Sureties May Be Given.—The provision made in this section for the bond of a surety company, "or a bond with at least two individual sureties," etc., indicates the legislative intent as to giving individual sureties in certain cases. *State v. Sasseen*, 206 N. C. 644, 648, 175 S. E. 142.

Cited in *State v. Gullledge*, 208 N. C. 204, 209, 179 S. E. 883.

§ 20-200. Proof of ability by insurance carrier's certificate.—Proof of ability to respond in damages, when required by this article, may be evidenced by the written certificate or certificates of any insurance carrier duly authorized to do business within the State, that it has issued to or for the benefit of the person named therein a motor vehicle liability policy or policies in the form hereinafter prescribed, which, at the date of the certificate or certificates, is or are in full force and effect, and designating therein by explicit description or by other adequate reference, all motor vehicles to which the policy or policies apply. The commissioner of motor vehicles shall not accept any certificate or certificates unless the same shall cover all motor vehicles then registered in this State in the name of the person furnishing such proof. Additional certificates, as aforesaid, shall be required as a condition precedent to the registration of any additional motor vehicle or motor vehicles in the name of such person required to furnish proof as aforesaid. Said certificate or certificates shall certify that the motor vehicle liability policies therein cited shall not be cancelled or expire except as hereinafter provided. If such person be a non-resident, a certificate, as aforesaid, of an insurance carrier authorized to transact business in the State in which the motor vehicle or motor vehicles described in such certificate is registered, or if none be described, then in the State in which the insured resides, shall be accepted if (a) such carrier shall execute a power of attorney authorizing the commissioner of motor vehicles to accept service of notice or process in any action arising out of a motor vehicle accident in this State, and (b) its governing executive authority shall duly adopt a resolution providing that its

policies shall be deemed to be varied to comply with the law of this State relating to the terms of motor vehicle liability policies issued therein, and (c) such carrier shall agree to accept as final and binding any final judgment duly rendered in any action arising out of a motor vehicle accident in any court of competent jurisdiction in this State: Provided, however, that the provisions of this section shall be operative as to such insurance carriers (organized and existing under the laws of such State and not licensed to transact business in this State) only to the extent and under the same terms and conditions that under the laws of such State where such motor vehicle is registered or in which the insured resides, like recognition, if a law of like effect is in force and effect, is granted to certificates of insurance carriers, organized and existing under and by virtue of the laws of this State. If, under the laws of such State, in which a law of like effect is in force and effect, certificates of insurance carriers organized and existing under or by virtue of the laws of this State are not accepted, the certificates of insurance carriers of such State shall not be accepted under the provisions of this article.

The commissioner of motor vehicles shall be notified by the insurance carrier or sureties of the cancellation or expiration of any motor vehicle liability policy or bond certified under the provisions of the article at least ten (10) days before the effective date of such cancellation or expiration and until such notice is duly given, such policy shall continue in full force and effect.

The commissioner of motor vehicles shall require proof of ability to respond in damages, within the limits herein specified, from and after the effective date of this article, of all taxicab, jitney and for-hire operators not covered or embraced within the provisions of the present law or such laws as may be enacted at this session of the General Assembly affecting other motor vehicle operators transporting passengers or property upon the highways for compensation. (1931, c. 116, s. 3; 1941, c. 36.)

Cross Reference.—As to power of municipality to require insurance or surety bond of vehicles operated for hire in city, see § 160-200, paragraph 35.

Application to taxicab, jitney and "for hire" operators.—A person engaged in operating an automobile for the transportation of persons for hire, and against whom no judgment has been recovered for damages resulting from his ownership or operation of an automobile, is not required under the provisions of the last paragraph of this section to prove his ability to respond in damages for future accidents as a condition precedent to obtaining a license to operate an automobile. *Nichols v. Maxwell*, 232 N. C. 38, 161 S. E. 712; *Kirk v. Maxwell*, 202 N. C. 41, 161 S. E. 714.

§ 20-201. Bond to satisfy execution.—A bond, filed by or on behalf of any person under the provision of this article shall be held by the commissioner of motor vehicles to satisfy, in accordance with the provisions of this article, any execution issued against such person on a judgment for damages, as aforesaid, arising out of the ownership, maintenance, use or operation of a motor vehicle, as aforesaid. If such a judgment rendered against the principal on the surety company bond or real estate individual bond, given under the provisions of this article, shall not be satisfied within thirty (30) days after it has become final as hereinbefore provided, the judgment creditor may, for his own use and benefit and at

his sole expense, bring an action or actions in the name of the State against the company or persons executing such bond. (1931, c. 116, s. 4; 1941, c. 36.)

§ 20-202. Abstracts of operating record furnished on request.—The commissioner of motor vehicles shall upon request furnish any insurance carrier, person, or surety a certified abstract of the operating record of any person subject to the provisions of this article, which abstract shall fully designate the motor vehicles (if any), registered in the name of such person, and if there shall be no record of any conviction of such person of a violation of any provision of any statute relating to the operating of a motor vehicle or of any injury or damage caused by such person as herein provided, the commissioner of motor vehicles shall so certify. The commissioner of motor vehicles shall collect for each such certificate the sum of one dollar. (1931, c. 116, s. 5; 1941, c. 36.)

§ 20-203. Commissioner to furnish other information on request.—The commissioner of motor vehicles shall furnish any person who may have been injured in person or property by any motor vehicle, upon written request, with all information of record in his office pertaining to the evidence of the ability of any operator or owner of any motor vehicle to respond in damages. (1931, c. 116, s. 6; 1941, c. 36.)

§ 20-204. Return by operator of licenses, number plates upon request of commissioner.—Any operator or any owner, whose operator's license or certificate of registration shall have been suspended as herein provided, or whose policy of insurance or surety bond shall have been cancelled or terminated, or who shall neglect to furnish additional evidence of ability to respond in damages upon request of the commissioner of motor vehicles, shall immediately return to the commissioner of motor vehicles his operator's license, certificate of registration and the number plates issued thereunder. If any person shall wilfully fail to return to the commissioner of motor vehicles the operator's license, certificate or certificates of registration and the number plates issued thereunder as provided herein, the commissioner of motor vehicles shall forthwith direct any State policeman or other police officer to secure possession thereof and to return the same to the office of the commissioner of motor vehicles. Any person wilfully failing to return such operator's license or such certificate or certificates and number plates shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) and such penalty shall be in addition to any penalty imposed for any violation of the Motor Vehicle Laws of North Carolina. (1931, c. 116, s. 7; 1941, c. 36.)

§ 20-205. Cancellation or return of bond by commissioner.—The commissioner of motor vehicles shall cancel such bond or return such proof of insurance to the person furnishing the same at any time after three years shall have elapsed since the filing of such bond or proof or the making of such deposit: Provided, that no suit or judgment against him for damages as aforesaid arising from the ownership, maintenance, use or

operation hereafter of a motor vehicle shall then be pending or outstanding and unstayed or unsatisfied, as aforesaid; and the affidavit of such person, showing fulfillment of these requirements shall be sufficient proof thereof in the absence of evidence to the contrary before the commissioner. (1931, c. 116, s. 8; 1941, c. 36.)

§ 20-206. Fraudulent transfer of registration certificate.—If any owner's certificate of registration has been suspended under the provisions of this article, such certificate shall not be transferred nor the motor vehicle in respect of which such certificate was issued, registered in another name, whether the commissioner of motor vehicles has reasonable grounds to believe that such transfer of registration is proposed for the purpose or will have the effect of defeating the purpose of this article. Provided, however, that such transfer of registration shall be permitted upon the furnishing of proof of financial responsibility to the commissioner of motor vehicles by such transferee whenever the commissioner shall deem it necessary in furtherance of the purpose of this section. (1931, c. 116, s. 9; 1941, c. 36.)

§ 20-207. Present policies of automobile insurance unaffected.—Nothing in this article contained shall be held to apply to or affect policies of automobile insurance against liability which may now or hereafter be required by special act, and such policies, if endorsed to conform to the requirements of this article, shall be accepted as proof of financial responsibility when required under this article; nor shall anything in this article contained be held to apply to or affect policies insuring solely the insured named in the policy against liability resulting from the maintenance, operation or use by other persons in the insured's employ or in his behalf of motor vehicles not owned by the insured. (1931, c. 116, s. 10.)

§ 20-208. Fraudulent proof of ability to respond in damages.—Any person who shall forge, or without authority, sign any evidence of ability to respond in damages as required by the commissioner of motor vehicles in the administration of this article and any nonresident who shall operate a motor vehicle in this State from whom the privilege of operating any motor vehicle has been withdrawn as provided in § 20-199, shall be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) or imprisoned not more than thirty days, or both. (1931, c. 116, s. 11; 1941, c. 36.)

§ 20-209. Motor vehicle liability policy.—"Motor vehicle liability policy," as used in this article, shall be taken to mean a policy of liability insurance issued by an insurance carrier authorized to transact business in this State or issued by an insurance carrier authorized to transact business in the State in which the motor vehicle or motor vehicles therein described is registered, or if none be described, then in the State in which the insured resides, to the person therein named as insured, which policy shall either (1) designate, by explicit description or other adequate reference, all motor vehicles with respect to which coverage is intended to be granted by said policy, and shall insure the insured named therein and any other person using or responsi-

ble for the use of any such motor vehicle with the consent, express or implied, of such insured against loss from the liability imposed by law upon such insured or upon such other person for injury to or death of any person, other than such insured and such person or persons as may be covered, as respects such injury or death, by any workmen's compensation law, and/or for damage to property, except property of others in charge of the insured or of his employees or other agents growing out of the ownership, maintenance, use or operation of any such motor vehicle within the continental limits of the United States of America; or which policy shall, in the alternative, (2) insure the person therein named as insured against loss from the liability imposed by law upon such insured for injury to or death of any person, other than such insured and such person or persons as may be covered as respects such injury or death by any workmen's compensation law, and/or for damage to property, except property of others in charge of the insured or of his employees or other agents, and except a motor vehicle registered in the name of such insured, growing out of the maintenance, operation or use by such insured of any motor vehicle, and occurring while such insured is personally in control, as driver or occupant, of such motor vehicle within the continental limits of the United States of America; and which policy, in either alternative, shall provide insurance to the amount or limit of five thousand dollars (\$5,000.00), exclusive of interest and costs, on account of injury to or death of any one person, and, subject to the same limit as respects injury to or death of any one person, of ten thousand dollars (\$10,000.00), exclusive of interest and costs, on account of any one accident resulting in injury to or death of more than one person; and of one thousand dollars (\$1,000.00) for damage to property of others, as herein provided, resulting from any one accident; or a binder pending the issuance of any such policy, or an endorsement to an existing policy both as hereinafter provided: Provided, however, that this section shall not be construed as preventing an insurance carrier from granting in a "motor vehicle liability policy" any lawful coverage in excess of or in addition to the coverage herein provided for or from embodying in such policy and agreements, provisions or stipulations not contrary to the provisions of this article and not otherwise contrary to law. And: Provided, further, that separate concurrent policies, whether issued by one or several carriers, covering, respectively, (a) personal injury or death, as aforesaid, and (b) property damage, as aforesaid, shall be termed "a motor vehicle liability policy," within the meaning of this article.

Except as in section 20-207 provided, no motor vehicle liability policy shall be issued or delivered in this State until a copy of the form of policy shall have been on file with the Commissioner of Insurance for at least thirty (30) days, unless sooner approved in writing by such Commissioner, nor if within said period of thirty (30) days such Commissioner shall have notified the carrier in writing that in his opinion, specifying the reasons therefor, the form of policy does not comply with the provisions of this article. The Commissioner of Insurance shall approve any

form of policy which specifies the name, address and business, if any, of the insured, the coverage afforded by the policy, the premium charged therefor, the policy period, and the limits of liability, and contains an agreement that the insurance thereunder is provided in accordance with the coverage defined in this section, as respects personal injury and death or property damage or both, and is subject to all the provisions of this article.

Every such motor vehicle liability policy shall be subject to the following provisions, whether or not contained therein:

(a) The liability of the insurance carrier under a motor vehicle liability policy shall become absolute whenever loss or damage covered by such policy occurs, and the satisfaction by the assured of a final judgment for such loss or damage shall not be a condition precedent to the right or obligation of the carrier to make payment on account of such loss or damage. No such policy shall be cancelled or annulled as respects any loss or damage, by any agreement between the carrier and the insured after the said insured has become responsible for such loss or damage, and any such cancellation or annulment shall be void.

The policy may provide that the insured, or any other person covered by the policy, shall reimburse the insurance carrier for payments made on account of any loss or damage claim or suit involving a breach of the terms, provisions or conditions of the policy; and further, if the policy shall provide for limits in excess of the limits specified in this section, the insurance carrier may plead against any plaintiff, with respect to the amount of such excess limits of liability, any defenses which it may be entitled to plead against the insured, and any such policy may further provide for the prorating of the insurance thereunder with other applicable valid and collectible insurance.

(b) The policy, the written application therefor, if any, and any rider or endorsement which shall not conflict with the provisions of this article shall constitute the entire contract between the parties.

(c) The insurance carrier shall, upon the request of the insured, deliver to the insured for filing, or at the request of the insured shall file direct, with the commissioner of motor vehicles an appropriate certificate in conformity with the provisions of § 20-200.

(d) Any carrier authorized to issue motor vehicle liability policies may, pending the issue of such a policy, execute an agreement, to be known as a "binder;" or may, in lieu of such a policy, issue an endorsement to an existing policy. Every such binder or endorsement shall be subject to the provisions of this section and shall be construed to provide indemnity or insurance in like manner and to the same extent as a motor vehicle liability policy. (1931, c. 116, s. 12; 1941, c. 36.)

§ 20-210. Rules and regulations.—The commissioner of motor vehicles shall make rules and regulations necessary for the administration of this article. (1931, c. 116, s. 14; 1941, c. 36.)

§ 20-211. Reliance on other security unaffected.—Nothing herein shall be construed as preventing

the plaintiff in any action at law from relying for security upon the other processes provided by law. (1931, c. 116, s. 15.)

Art. 6. Giving Publicity to Highway Traffic Laws through the Public Schools.

§ 20-212. State highway commission to prepare digest.—The state highway and public works commission shall cause to be prepared a digest of the traffic laws of the State suitable for use in the public schools of the State and have published in pamphlet form and delivered on or before the first day of August, one thousand nine hundred and twenty-seven, to the State Superintendent of Public Instruction, a sufficient number of said pamphlets to supply at least one copy each to all of the public high school teachers of the State. (1927, c. 242, s. 1; 1933, c. 172, s. 17.)

§ 20-213. State superintendent of public instruction to distribute pamphlet.—The State Superintendent of Public Instruction shall cause to be delivered to the superintendents or principals of the various high schools of the State sufficient number of said pamphlets to supply one to each of the teachers engaged for said schools. (1927, c. 242, s. 2.)

§ 20-214. Pamphlets brought to attention of children.—The superintendents or principals, or other persons in charge of the public high schools of the state, shall cause the contents of said pamphlets to be brought to the attention of all the children in attendance upon the said high schools in the form of lessons of at least one each week until the entire contents of said pamphlet shall have been read and explained. (1927, c. 242, s. 3.)

§ 20-215. Practice to be continued; highway commission to supply additional copies yearly.—This practice shall be continued during each school year and the state highway and public works commission is directed annually on or before the first Monday of August, to supply, as hereinbefore provided, such additional copies of the said pamphlet having the same revised from time to time to meet any amendments of the traffic laws of the State, as the State Superintendent of Public Instruction may ascertain and report to the state highway and public works commission to be necessary. (1927, c. 242, s. 4.)

Art. 7. Miscellaneous Provisions Relating to Motor Vehicles.

§ 20-216. Driving regulations; frightened animals; crossings.—A person operating or driving a motor vehicle shall, on signal by raising the hand, from a person riding, leading, or driving a horse or horses or other draft animals, bring such motor vehicle immediately to a stop, and, if traveling in the opposite direction, remain stationary so long as may be reasonable to allow such horse or other animal to pass, and, if traveling in the same direction, use reasonable caution in thereafter passing such horse or other animal: Provided, that in case such horse or other animal appears badly frightened, and the person operating such motor vehicle is so signaled to do, such person shall cause the motor of the motor vehicle to cease running so long as shall be reasonably necessary to prevent accident and in-

sure the safety of others; and it shall also be the duty of any male chauffeur or driver of any motor vehicle and other male occupants thereof over the age of sixteen years while passing any horse, horses or other draft animals which appear frightened, upon the request of the person in charge thereof and driving such horse or horses or other draft animals, to give such assistance as would be reasonable to insure the safety of all persons concerned and to prevent accident. (1917, c. 140, s. 15; C. S. 2616.)

Passing Animals.—The laws with respect to passing animals, with the exception of establishing a speed limit, are to a great extent an embodiment of general principles of law applicable to motor vehicles when operated on the highway and in places where their use is likely to be a source of danger to others. *Gaskins v. Hancock*, 156 N. C. 56, 72 S. E. 80; *Tudor v. Bowen*, 152 N. C. 441, 67 S. E. 1015, cited and applied; *Curry v. Fleer*, 157 N. C. 16, 72 S. E. 626.

When the law prescribed a maximum speed limit for the running of motor vehicles upon the highways in approaching animals it did not contemplate or intend that the specified limits were always permissible; for one driving a machine of this character was charged with notice of things which he observed or could have observed in the exercise of proper care, having regard to the nature of the vehicle he was operating and its tendency to frighten animals; and not infrequently it might have become his duty to move at a much slower speed, or stop altogether if conditions so require. *Curry v. Fleer*, 157 N. C. 16, 72 S. E. 626.

Cited in Goss v. Williams, 196 N. C. 213, 145 S. E. 169; *York v. York*, 212 N. C. 695, 194 S. E. 486.

§ 20-217. Motor vehicles to stop for school busses in certain instances.—Every person using, operating, or driving a motor vehicle upon or over the roads or highways of the state of North Carolina, or upon or over any of the streets of any of the incorporated towns and cities of North Carolina, upon approaching from any direction on the same highway any school bus transporting school children to or from school, while such bus is stopped and engaged in receiving or discharging passengers therefrom upon the roads or highways of the state or upon any of the streets of any of the incorporated towns and cities of the state, shall bring such motor vehicle to a full stop before passing or attempting to pass such bus and shall remain stopped until said passengers are received or discharged at that place and until the "stop signal" of such bus has been withdrawn or until such bus has moved on.

The provisions of this section are applicable only in the event the school bus bears upon the front and rear thereof a plainly visible sign containing the words "school bus" in letters not less than five inches in height.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed fifty dollars, or imprisoned not to exceed thirty days. (1925, c. 265; 1943, c. 767.)

Editor's Note.—The 1943 amendment rewrote the first paragraph and inserted the second paragraph.

This section applies to passing a school bus from either direction, from the rear or from the front. *State v. Webb*, 210 N. C. 350, 186 S. E. 241.

§ 20-218. Standard qualifications for school bus drivers; speed limit.—No person shall drive or operate a school bus over the public roads of North Carolina while the same is occupied by children unless said person shall be fully trained in the operation of motor vehicles, and shall furnish to the superintendent of the schools of the county in which said bus shall be operated a certificate from

the highway patrol of North Carolina, or from any representative duly designated by the commissioner of motor vehicles, and the chief mechanic in charge of school busses in said county showing that he has been examined by a member of the said highway patrol and said chief mechanic in charge of school busses, in said county and that he is a fit and competent person to operate or drive a school bus over the public roads of the state.

It shall be unlawful for any person to operate or drive a school bus loaded with children over the public roads of North Carolina at a greater rate of speed than thirty-five miles per hour.

Any person violating paragraph two of this section shall, upon conviction, be fined not more than fifty dollars (\$50.00) or imprisoned not more than thirty days. (1937, c. 397, ss. 1-3; 1941, c. 21; 1943, c. 440.)

Cross Reference.—As to selection and employment of school bus drivers, see § 115-378.

Editor's Note.—The 1941 amendment inserted the provision in paragraph one requiring an examination by the chief mechanic.

The 1943 amendment inserted in the first paragraph the words "or from any representative duly designated by the commissioner of motor vehicles."

§ 20-218.1. Jurisdiction over violations by persons over fifteen years of age.—No juvenile court or domestic relations court of this state shall have jurisdiction over any offense involving violation of any of the motor vehicle laws or of any of the laws relating to the operation of motor vehicles on the highways of this state when such offense has been committed by a person over fifteen years of age. Any such offense shall be within the jurisdiction of the court or courts which would have jurisdiction if the offender were over sixteen years of age. (1943, c. 760.)

§ 20-219. Refund to counties of costs of prosecuting theft cases.—Whenever the Motor Vehicle Department of the State has caused to be instituted criminal prosecutions in the Superior Court of any county of the State for violation of the automobile theft laws, and the county wherein such case was tried has incurred court costs incident thereto, upon certificate of the Clerk of the Superior Court of said county showing an itemized statement thereof, and that the same has been paid, upon the approval of the commissioner of motor vehicles and the Attorney General, the sum or sums so paid shall be refunded to said county, the same to be paid from the highway maintenance fund from receipts from the motor vehicle registration title fees.

This section shall apply to costs incurred in the prosecution of automobile theft cases only. (1929, c. 275; 1941, c. 36.)

Art. 8. Sales of Used Motor Vehicles Brought into State.

§ 20-220. Dealers required to register vehicles with department of revenue and furnish bond.—Every dealer in used, or second-hand, motor vehicles who is a nonresident of the state of North Carolina or who does not have a permanent place of business in this State, and every person, firm or corporation who bring any used, or second-hand, motor vehicles into the state of North Carolina for the purpose of sale or re-sale, except as a trade-in on a new motor vehicle or another used car, shall,

before offering the same for sale, within ten days from the date of entry of said motor vehicle into the limits of the state of North Carolina, register such motor vehicle with the department of revenue on a form to be provided by said department and under such rules and regulations as may be promulgated by said department from time to time, and shall, before said used or second-hand car is offered for sale, or sold, execute a bond with two good sufficient sureties, or with a surety company duly authorized to do business in the state of North Carolina as a surety or sureties thereon, payable to the state of North Carolina, for the use and benefit of the purchaser and his vendees, conditioned to pay all loss, damages and expenses that may be sustained by the purchaser, and/or vendees, that may be occasioned by reason of the failure of the title of such vendor or by reason of any fraudulent misrepresentations or breaches of warranty as to freedom from liens, quality, condition, use or value of the motor vehicle being sold. Said bond shall be in the full amount of the sale price of each of such motor vehicles, but in no event to exceed the sum of one thousand (\$1,000.00) dollars for any one motor vehicle, and shall be filed with the department of revenue of the state of North Carolina by the vendor and be approved by it as to amount, form and as to the solvency of the surety or sureties, and for which service by said department, in registering said vehicle, the vendor shall pay the regular registration fee charged for the registration of motor vehicles and in addition thereto a fee of ten (\$10.00) dollars for each bond so filed and approved, which sums shall be paid into the state treasury to the credit of the general fund and expended as provided by law. (1937, c. 62, s. 1.)

Held Unconstitutional by District Court.—As both the bond and the fee required by this section constitute a clear discrimination against used automobiles of foreign origin, the provisions requiring them must be held invalid under the commerce clause of the constitution. *McLain v. Hoey*, 19 F. Supp. 990, 993.

§ 20-221. Titles to all used cars to be furnished upon delivery.—Every person, firm or corporation, upon the sale and delivery of any used or second-hand motor vehicle, shall, at the time of the delivery of said vehicle, deliver to the vendee a certificate of title issued to the vendor by the North Carolina state department of revenue, duly endorsed in order that the vendee may obtain a title therefor. (1937, c. 62, s. 2.)

§ 20-222. Non-compliance defeats right of action; violations a misdemeanor.—No action, nor right of action to recover any such motor vehicle, nor any part of the selling price thereof shall be maintained in the courts of this state by any such dealer or vendor, his successors or assigns, in any case wherein such vendor or dealer shall have failed to comply with the terms and provisions of this article, and, in addition thereto, such vendor or dealer, upon conviction for the violation of any of the provisions of this article, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not less than one hundred (\$100.00) dollars and not more than five hundred (\$500.00) dollars, or by imprisonment for not less than thirty days, or more than six months, or by both such fine and imprisonment. (1937, c. 62, s. 3.)

Cited in *McLain v. Hoey*, 19 F. Supp. 990.

§ 20-223. "Dealers" and "vendors," defined. —The terms "dealers" and "vendors" herein used shall be construed to include every individual, partnership, corporation or trust whose business, in whole or in part, is that of selling used motor vehicles not taken in exchange for vehicles sold in this state, and likewise shall be construed to include every agent, representative, or consignee of any

such dealer as defined above as fully as if same had been herein expressly set out, except that no agent, representative or consignee of such dealer or vendor shall be required to make and file the said bond if such dealer or vendor for whom such agent, representative or consignee acts fully complies in each instance with the provisions of this article. (1937, c. 62, s. 4.)

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Chapter 21. Bills of Lading.

Art. 1. Definitions.

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Art. 1. Definitions.

§ 21-1. General definitions.—In this chapter, unless the context of subject-matter otherwise requires—

"Action" includes counterclaim, set-off, and suit in equity.

"Bill" means bill of lading governed by this chapter.

"Consignee" means the person named in the bill as the person to whom delivery of the goods is to be made.

"Consignor" means the person named in the bill as the person from whom the goods have been received for shipment.

"Goods" means merchandise or chattels in course of transportation or which have been or are about to be transported.

"Holder" of a bill means a person who has both actual possession of such bill and a right of property therein.

"Order" means an order by indorsement on the bill.

"Person" includes a corporation or partnership, or two or more persons having a joint or common interest.

"To purchase" includes to take as mortgagee and to take as pledgee. (1919, c. 65, s. 42; C. S. 280.)

Editor's Note.—This chapter is based upon and closely follows the Federal Bills of Lading Act. However, the

Sec.

- 21-22. Liability for nonreceipt or misdescription of goods loaded by shipper.
- 21-23. Liability for nonreceipt or misdescription of goods.
- 21-24. Attachment or levy upon goods for which an order bill has been issued.
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Art. 4. Negotiation and Transfer of Bills.

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Art. 5. Criminal Offenses.

- 21-42. Issuing false bills or violating chapter made felony.

North Carolina statutes depart in phraseology from the federal act wherever such a change is necessary to adopt the statutes to intrastate commerce. See § 21-4 providing that bills of lading issued in intrastate commerce shall be governed by this chapter.

§ 21-2. Definition of straight bill.—A bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill. (1919, c. 65, s. 2; C. S. 284.)

Cross Reference.—As to bills of lading in evidence, see § 8-41.

§ 21-3. Definition of order bill.—A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill. Any provision in such a bill or in any notice, contract, rule, regulation, or tariff that it is nonnegotiable shall be null and void, and shall not affect its negotiability within the meaning of this chapter unless upon its face and in writing agreed to by the shipper. (1919, c. 65, s. 3; C. S. 285.)

Cross Reference.—As to bills of lading in evidence, see § 8-41.

Art. 2. Issue of Bills of Lading.

§ 21-4. Bills governed by this chapter.—Bills of lading issued by any common carrier for the transportation of goods from one point in North Carolina to another shall be governed by this chapter. (1919, c. 65, s. 1; C. S. 280.)

§ 21-5. Order bills must not be issued in sets.—

Order bills issued in North Carolina for transportation of goods from one point to another in North Carolina shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described therein to any one who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts. (1919, c. 65, s. 4; C. S. 286.)

§ 21-6. Duplicate order bills must be so marked.—When more than one order bill is issued in North Carolina for the same goods to be transported to any place in North Carolina, the word “duplicate” or some other word or words indicating that the document is not an original bill, shall be placed plainly upon the face of every such bill except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to any one who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill. (1919, c. 65, s. 5; C. S. 287.)

Cross Reference.—As to duplicate bills of lading in evidence, see § 8-41.

§ 21-7. Straight bill shall be marked “nonnegotiable.”—A straight bill shall have placed plainly upon its face by the carrier issuing it “nonnegotiable” or “not negotiable.”

This section shall not apply, however, to memoranda or acknowledgments of an informal character. (1919, c. 65, s. 6; C. S. 288.)

§ 21-8. Insertion of name of person to be notified.—The insertion in an order bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill or constitute notice to a purchaser thereof of any rights or equities of such person in the goods. (1919, c. 65, s. 7; C. S. 289.)

Editor's Note.—Formerly it was the rule in this state that when goods were shipped under a bill of lading made out to the order of the vendor, the mere insertion of the name of the consignee to be notified, would not bring such consignee into contract relations with the carrier so as to enable him to bring suit against the carrier for delay, damage, etc. *Mfg. Co. v. R. R.*, 149 N. C. 261, 62 S. E. 1091, and likewise in such a case the rule was that title did not pass until the draft was paid, *id.*; *Bank v. R. R.*, 153 N. C. 346, 69 S. E. 261; *Killingsworth v. R. R.*, 171 N. C. 47, 87 S. E. 947. But the law has been changed by legislative enactment. See also sections 21-9 and 21-32 and annotations thereunder.

As to shipment made “Order, notify” see *Watts v. R. R.*, 183 N. C. 12, 110 S. E. 582.

Art. 3. Obligations and Rights of Carriers upon Bills of Lading.

§ 21-9. Obligation of carrier to deliver.—A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by—

1. An offer in good faith to satisfy the carrier's lawful lien upon the goods;
2. Possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods if the bill is an order bill; and
3. A readiness and willingness to sign, when the goods are delivered, an acknowledgment that

they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure. (1919, c. 65, s. 8; C. S. 290.)

Possession of Properly Endorsed Bill is Sufficient.—An order bill of lading indorsed by the shipper, in the possession of the plaintiff is sufficient evidence of the plaintiff's ownership of the bill and of the goods for which the bill was issued. *Temple v. R. R.*, 190 N. C. 439, 440, 129 S. E. 815.

Consignee Must Produce Bill.—The failure or refusal of consignee to produce, upon the carrier's demand, a bill of lading for a prepaid shipment of goods in the carrier's possession is ordinarily a valid defense to an action to recover of the carrier the value of a shipment, which has never been delivered, but the burden is upon the carrier to prove that such demand has been made and not complied with. *Jeans v. Seaboard Air Line R. Co.*, 164 N. C. 224, 80 S. E. 242.

Bill Must Be Properly Endorsed.—Where shipper paid the draft and obtained the bill of lading but failed to have it endorsed by a certain bank as required by the terms of the bill, the carrier was not liable for failure to deliver the goods. *Killingsworth v. R. R.*, 171 N. C. 47, 87 S. E. 947.

§ 21-10. Justification of carrier in delivery.—A carrier is justified, subject to the provisions of §§ 21-11, 21-12 and 21-13, in delivering goods to one who is—

1. A person lawfully entitled to the possession of the goods, or
2. The consignee named in a straight bill for the goods; or
3. A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee. (1919, c. 65, s. 9; C. S. 291.)

§ 21-11. Carrier's liability for misdelivery.—Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to any one having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions 2 and 3 of § 21-10; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

1. Had been requested by or on behalf of a person having a right of property or possession in the goods, not to make such delivery; or
2. Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods. (1919, c. 65, s. 10; C. S. 292.)

§ 21-12. Carrier's liability on order bill not cancelled on delivery.—Except as provided in § 21-27, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier

shall be liable for failure to deliver the goods to any one who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto. (1919, c. 65, s. 11; C. S. 293.)

§ 21-13. Carrier's liability on order bill unmarked to show partial delivery.—Except as provided in § 21-27, and except when compelled by legal process, if a carrier delivers part of the goods for which an order bill had been issued and fails, either—

1. To take up and cancel the bill, or

2. To place plainly upon it a statement that a portion of the goods has been delivered with a description, which may be in general terms, either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill to any one who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto. (1919, c. 65, s. 12; C. S. 294.)

§ 21-14. Altered bills.—Any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same, whether in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor. (1919, c. 65, s. 13; C. S. 295.)

§ 21-15. Lost or destroyed bills.—Where an order bill has been lost, stolen, or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss, theft, or destruction, and upon the giving of a bond, with sufficient surety, to be approved by the court, to protect the carrier or any person injured by such delivery from any liability or loss incurred by reason of the original bill remaining outstanding. The court may also, in its discretion, order the payment of the carrier's reasonable costs and counsel fees: Provided, a voluntary indemnifying bond without an order of court shall be binding on the parties thereto.

The delivery of the goods under an order of the court, as provided in this section, shall not relieve the carrier from liability to a person to whom the order bill has been, or shall be, negotiated for value without notice of the proceedings or of the delivery of the goods. (1919, c. 65, s. 14; C. S. 296.)

§ 21-16. Effect of duplicate bills.—A bill, upon the face of which the word "duplicate," or some other word or words indicating that the document is not an original bill, is placed plainly, shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability. (1919, c. 65, s. 15; C. S. 297.)

§ 21-17. When title or right of carrier excuses liability for non-delivery.—No title to the goods or right to their possession asserted by a carrier for

his own benefit shall excuse him from liability for refusing to deliver the goods according to the terms of the bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien. (1919, c. 65, s. 16; C. S. 298.)

§ 21-18. Interpleader of adverse claimants.—If more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate. (1919, c. 65, s. 17; C. S. 299.)

Cross Reference.—As to interpleader, new parties by order of court, see § 1-73.

§ 21-19. Carrier has reasonable time to determine validity of claims.—If some one other than the consignee or the person in possession of the bill has claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods, either to the consignee or person in possession of the bill or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. (1919, c. 65, s. 18; C. S. 300.)

§ 21-20. Adverse title is no defense except as above provided.—Except as provided in the preceding sections of this article, no right or title of of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a straight bill or by the holder of an order bill against the carrier for failure to deliver the goods on demand. (1919, c. 65, s. 19; C. S. 301.)

§ 21-21. Carriers not to insert "shipper's weight, load and count" when goods loaded by carrier.—When goods are loaded by a carrier, such carrier shall count the packages of goods, if package freight, and ascertain the kind and quantity, if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation or tariff, "shipper's weight, load and count," or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him or, in case of bulk freight and freight not concealed by packages, the description made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein. (1919, c. 65, s. 20; C. S. 302.)

§ 21-22. Liability for nonreceipt or misdescription of goods loaded by shipper.—When package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in

the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also, by inserting in the bill of lading the words "shipper's weight, load, and count," or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and, if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading: Provided, however, where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carrier shall not in such case insert in the bill of lading the words "shipper's weight," or other words of like purport; and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein. (1919, c. 65, s. 21; C. S. 303.)

Editor's Note. — The rule formerly was that when goods were sent "shipper's load and count" the bill of lading was only prima facie evidence that the carrier received the goods described in it. And where the evidence showed that the loading was all done by the shipper the burden was upon the plaintiff to prove that the goods were actually delivered to the carrier. *Peele v. R. R.*, 149 N. C. 390, 393, 63 S. E. 66.

§ 21-23. Liability for nonreceipt or misdescription of goods.—If a bill of lading has been issued by a carrier, or on his behalf by an agent or employee, the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several states and with foreign nations, the carrier shall be liable to—

1. The owner of goods covered by a straight bill, subject to existing right of stoppage in transit; or

2. The holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue. (1919, c. 65, s. 22; C. S. 304.)

Editor's Note.—This section changes the rule which was laid down in the case cited in the preceding section, *Peele v. R. R.*, 149 N. C. 390, 63 S. E. 66. For other cases which are in accord with the *Peele* case, *supra*, see *Williams, Black & Co. v. R. R.*, 93 N. C. 42; *Commercial Bank v. R. R.*, 175 N. C. 415, 95 S. E. 777. These latter cases went to the extent of holding that where the carrier had issued a bill of lading "shippers load and count" the carrier was not liable even to a holder of the bill who had taken it for value and without notice. This old doctrine as laid down in these cases is contrary to the modern theory of the negotiability of order bills of lading.

§ 21-24. Attachment or levy upon goods for which an order bill has been issued.—If goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind

the owner, and an order bill is issued for them, they cannot thereafter, while in the possession of the carrier, be attached by garnishment or otherwise or be levied upon under an execution unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court. (1919, c. 65, s. 23; C. S. 305.)

§ 21-25. Creditor's remedy to reach order bills.—A creditor whose debtor is the owner of an order bill shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such bill or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process. (1919, c. 65, s. 24; C. S. 306.)

§ 21-26. Liens for charges under order bill.—If an order bill is issued the carrier shall have a lien on the goods therein mentioned for all charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill and all other charges incurred in transportation and delivery, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier. (1919, c. 65, s. 25; C. S. 307.)

§ 21-27. Effect of sale.—After goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods themselves to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be an order bill. (1919, c. 65, s. 26; C. S. 308.)

Art. 4. Negotiation and Transfer of Bills.

§ 21-28. Negotiation of order bills by delivery.—An order bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank. (1919, c. 65, s. 27; C. S. 309.)

§ 21-29. Negotiation of order bills by indorsement.—An order bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner. (1919, c. 65, s. 28; C. S. 310.)

§ 21-30. Transfer of bills.—A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A straight bill cannot be negotiated free from existing equities, and the indorsement of

such a bill gives the transferee no additional right. (1919, c. 65, s. 29; C. S. 311.)

In General.—The meaning of this section is that a valid transfer of a bill of lading is effected by the holder when he delivers it to a third party with the intention of transferring the title to the property represented thereby. *Lawshe v. R. R.*, 191 N. C. 473, 475, 132 S. E. 160.

§ 21-31. Who may negotiate an order bill.—An order bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if by the terms of the bill the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery. (1919, c. 65, s. 30; C. S. 312.)

§ 21-32. Rights of person to whom an order bill has been negotiated.—A person to whom an order bill has been duly negotiated acquires thereby—

1. Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and

2. The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him. (1919, c. 65, s. 31; C. S. 313.)

Editor's Note.—See Editor's Note under section 21-8.

In General.—The person to be notified on shipment to order of consignor has, by this section, title for the purpose of a suit to recover damages and the statutory penalty, as fully as if the carrier had contracted with him direct, upon the presentation of the bill of lading properly endorsed and his tender thereof in good faith to the carrier, the statute being remedial of the common law that there was no contractual relation between him and the carrier that would permit recovery for causes accruing before he had paid the draft, and had the bill of lading assigned to him. *Watts v. Norfolk Southern R. Co.*, 183 N. C. 12, 110 S. E. 582.

§ 21-33. Rights of person to whom a bill has been transferred.—A person to whom a bill has been transferred, but not negotiated, acquires thereby as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is a straight bill, such person also acquires the right to notify the carrier of the transfer to him of such bill, and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a straight bill, the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time, with the exercise of reasonable diligence, to communicate with the agent or agents having actual possession or

control of the goods. (1919, c. 65, s. 32; 1919, c. 290; C. S. 314.)

§ 21-34. Right to compel indorsement of negotiable bill.—Where an order bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced. (1919, c. 65, s. 33; C. S. 315.)

§ 21-35. Warranties on sale of bill.—A person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—

1. That the bill is genuine;
2. That he has a legal right to transfer it;
3. That he has knowledge of no fact which would impair the validity or worth of the bill;
4. That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied if the contract of the parties had been to transfer without a bill the goods represented thereby. (1919, c. 65, s. 34; C. S. 316.)

§ 21-36. Indorser not a guarantor.—The indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorser of the bill to fulfill their respective obligations. (1919, c. 65, s. 35; C. S. 317.)

§ 21-37. No warranty implied from accepting payment of a debt.—A mortgagee or pledgee or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt, or from any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described. (1919, c. 65, s. 36; C. S. 318.)

Editor's Note.—The rule which this section lays down is stated by the court in *Mason v. Cotton Co.*, 148 N. C. 492, 497, 498, 62 S. E. 625 and the earlier case of *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251 was discussed and overruled.

§ 21-38. When negotiation not impaired by fraud, accident, mistake, duress, conversion, etc.—The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, loss, theft or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, loss, theft, or conversion. (1919, c. 65, s. 37; C. S. 319.)

§ 21-39. Subsequent negotiation.—Where a person, having sold, mortgaged or pledged goods which are in a carrier's possession and for which an order bill has been issued, or having sold, mortgaged, or pledged the order bill representing such goods, continues in possession of the order bill, the subsequent negotiation thereof by that

person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation. (1919, c. 65, s. 38; C. S. 320.)

§ 21-40. Negotiation defeats vendor's lien.—Where an order bill has been issued for goods no seller's lien or right of stoppage in transit shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transit. Nor shall the carrier be obliged to deliver or be justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation. (1919, c. 65, s. 39; C. S. 321.)

§ 21-41. When rights and remedies under mortgages and liens are not limited.—Except as provided in § 21-40, nothing in this chapter shall limit the rights and remedies of a mortgagee or lien holder whose mortgage or lien on goods would be valid, apart from this chapter, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are

subject to the mortgage or lien, and obtained possession of them. (1919, c. 65, s. 40; C. S. 322.)

Art. 5. Criminal Offenses.

§ 21-42. Issuing false bills or violating chapter made felony.—Any person who, knowingly or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading purporting to represent goods received for shipment in this state, or with intent utters or publishes as true and genuine any such falsely altered, forged, counterfeited, falsely printed or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing, or photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who, with intent to defraud, violates or fails to comply with, or aids in any violation of, or failure to comply with any provision of this chapter, shall be guilty of a felony and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or both. (1919, c. 65, s. 41; 1919, c. 290; C. S. 323.)

Cross Reference.—As to draft attached to bill of lading for intoxicating liquors, etc., see § 18-33.

Chapter 22. Contracts Requiring Writing.

Sec.

- 22-1. Contracts charging representative personally; promise to answer for debt of another.
- 22-2. Contract for sale of land; leases.

Sec.

- 22-3. Contracts with Cherokee Indians.
- 22-4. Promise to revive debt of bankrupt.

§ 22-1. Contracts charging representative personally; promise to answer for debt of another.—No action shall be brought whereby to charge an executor, administrator or collector upon a special promise to answer damages out of his own estate or to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized. (Rev., s. 974; Code, s. 1552; R. C., c. 50, s. 15; 1826, c. 10; 29 Charles II, c. 3, s. 4; C. S. 987.)

Cross References.—As to requirement that promise be in writing to be evidence of new or continuing contract from which statutes may run, see § 1-26. As to requirement for written contract to refrain from business in given territory, see § 75-4.

See 13 N. C. Law Rev., 263, for comment on this section.
Editor's Note.—This and the following sections of this chapter are generally known as the "Statute of Frauds," and are based upon the original English Statute entitled "An Act for the Prevention of Frauds and Perjuries." As the name indicates, its object was to prevent fraud and perjury; and it was designated by Lord Campbell as the most important piece of judicial legislation of which England can boast.

Though the scope of the original English Statute was not confined to provisions with regard to necessity of writing for the enforceability of certain contracts, which were embodied in the first four and the seventeenth sections of the Statute, in modern usage the term "Statute of

Frauds" has assumed an exclusive meaning as to the necessity for certain contracts to be in writing.

An oral contract under the old common law was sufficient for all types of transactions. But the tendencies for the perpetration of fraud and perjury arising from the inherently alluring nature of certain transactions, such as contracts for sale of land, contracts to answer for the debt or default of another, necessitated a legislation which would exclude all but written evidence for the establishment and enforcement of such contracts. How far, and whether at all, the accomplishment of the object of its legislators has justified its existence and whether it has not resulted in a tendency opposite to the motive which impregnated it, is a matter of conjecture.

The purpose of the statute of frauds is to prevent fraud upon individuals charged with participation in transactions coming within its purview, and not upon the public at large. *Allison v. Steele*, 220 N. C. 318, 324, 17 S. E. (2d) 339.

Contracts Within the Statute.—The Supreme Court of the United States has expressed the opinion that the relaxing construction of the Statute of Frauds under which so many cases have been taken out of its operation, which seem to be within its letter, ought not to be extended further than it has already been carried. *Grant v. Naylor*, 4 Cranch 224, 235, 2 L. Ed., 222.

The clause relating to promise to answer for the debt, default, miscarriage, etc., of another does not apply to a promise in respect to debts created at the instance and for the benefit of the promisor. *Davis v. Patrick*, 141 U. S. 479, 35 L. Ed. 826, 12 S. Ct. 58. But it applies only to those by which the debt of one party is sought to be charged upon and collected from another. *Id.*

The question always is what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise. *Id.*

A promise is an original promise not coming within the statute of frauds if the extension of credit is made to

the promisor or if the contract is made for the benefit of the promisor; but if the contract is made with the third person and the promise constitutes a separate and independent contract under which the promisor agrees to pay upon default of the primary debtor, the promise is a collateral agreement and comes within the statute. *Balentine v. Gill*, 218 N. C. 496, 11 S. E. (2d) 456.

Contracts Not within the Statute.—One financially interested in a crop induced the landlord to part with his lien, in order that the tenant might retain possession, and to sign an appeal bond of the tenant, and promised to save the landlord from harm thereon. The landlord was required to pay the bond. It was held that the release of the landlord's lien was sufficient consideration for the promise to save from harm, and the transaction was not within this section. *Jennings v. Keel*, 196 N. C. 675, 146 S. E. 716.

Plaintiff held assignments covering all funds to become due under a building contract, and was entitled to apply such funds to the extinguishment of claims it held for advancements made to carry on the work. Defendant, surety on the contractors' bond, orally agreed that if allowed to use part of the money received by plaintiff, on a payment under the contract, to pay claims for labor and materials so the construction could be carried on without going outside of the funds derived from the work, it would pay the balance due plaintiff from the contractors. It was held that such agreement was not within this section. *National Surety Co. v. Jackson County Bank*, 20 Fed. (2d) 644.

Where a business run in the name of J. W. J. was in charge of W. P. J., J. W. J.'s son, and J. W. J. being desirous of having goods shipped to W. P. J. permitted them to be shipped in the name of J. W. J. & Son., saying to plaintiff, "you won't lose anything by it," and a payment on account was made by "J. W. J. & Son.," this section was held inapplicable. *Noland Co. v. Jones*, 211 N. C. 462, 190 S. E. 720.

What Determines Nature of Promise.—Whether a promise is an original one not coming within the provisions of this section, or a superadded one barred by the statute, does not depend altogether on the form of expression, but the situation of the parties, and whether they understood the promise to be direct or collateral, should also be considered. *Dozier v. Wood*, 208 N. C. 414, 181 S. E. 336.

Oral Agreement of Stockholders to Be Responsible for Merchandise Held to Be an Original Promise.—Defendants agreed orally to be personally responsible for merchandise shipped to a corporation of which they were the main stockholders, and which they later took over. It was held that the agreement was an original promise not coming within the statute of frauds. *Brown v. Benton*, 209 N. C. 285, 183 S. E. 292.

The Same Being True of Agreement to Furnish Merchandise for Use on Farm.—Evidence of defendant's statements to plaintiff merchant at the time plaintiff agreed to furnish certain merchandise for use on defendant's farm is held susceptible of the interpretation that defendant's promise to pay therefor was an original promise not coming within this section, and not a superadded one barred by the statute, and the question of interpretation should have been submitted to the jury. *Dozier v. Wood*, 208 N. C. 414, 181 S. E. 336.

Oral Promise by Administrator.—A promise by the administrator that he would see that a debt of his intestate is paid, or that he would pay it, is void under this section, unless made in writing. *Smithwick v. Shepherd*, 49 N. C. 196.

Out of Representative's Estate.—The agreement, in order not to be enforceable unless in writing, must be to pay out of the representative's own estate. *Norton v. Edwards*, 66 N. C. 367.

Original Undertakings—New Consideration.—The general rule is that a promise to answer for the debt, default or miscarriage of another for which that other remains liable, must be in writing to satisfy this section. It is otherwise when the other does not remain liable. *Mason v. Wilson*, 84 N. C. 51, 53.

In other words, if the promise is an original undertaking, it need not be in writing. For example, where the debtor places in the hands of the promisor property for the payment of the debt, and he converts it into money and promises to pay the debt. And if the promise is supported by a new and independent consideration, whether the old debt subsists or not, the case does not fall within the statute. See *Mason v. Wilson*, supra; *Cooper v. Chambers*, 15 N. C. 261; *Whitehurst v. Hyman*, 90 N. C. 487; *Hickory Novelty Co. v. Andrews*, 188 N. C. 59, 123 S. E. 314; *Taylor v. Lee*, 187 N. C. 393, 121 S. E. 659; *Hasty Mercantile Co. v. Bryant*, 186 N. C. 551, 120 S. E. 200; *Peele*

v. Powell, 156 N. C. 553, 73 S. E. 234. And this is true even where the benefit of the consideration for the promise accrues to a person other than the promisor. *Gainesville, etc., Hospital Ass'n v. Hobbs*, 153 N. C. 188, 69 S. E. 79. But see *Stanly v. Hendricks*, 35 N. C. 86; *Threadgill v. McLendon*, 76 N. C. 24, 26, where it is said that a new consideration does not take the promise out of the operation of the Statute. In connection with the rule set out above, see *Sharp v. Tatham*, 205 N. C. 827, 170 S. E. 654; *Gennett v. Lyerly*, 207 N. C. 201, 176 S. E. 275.

In order for the defendant to fall within the protection of the Statute, it must be shown that the debt is that of a third person who still continues liable for the same. If the debt is an original obligation of the defendant, or if the creditor in accepting the promise of the defendant has released a third person who was the original debtor, the Statute has no application. *Sheppard v. Newton*, 139 N. C. 533, 535, 52 S. E. 143. The Statute does not forbid an oral contract to assume the debt of another who is thereupon discharged of all liability to the creditor, the promisor becoming sole debtor in his stead. *Jenkins v. Holley*, 140 N. C. 379, 53 S. E. 237.

A promise made at the time or before the debt is created, and where credit is given solely to the promisor, or a promise based on a new consideration between the promisor and the creditor, or a promise for the benefit of the promisor where he has a personal and pecuniary interest in the transaction in which a third party is the original obligor, has been held to be an original promise. *Whitehurst v. Padgett*, 157 N. C. 424, 73 S. E. 240.

Similarly a direct and unconditional promise by one to pay for goods furnished to a third party, made prior to the delivery of the goods, upon the faith of which the goods are delivered is an original undertaking. *Morrison v. Baker*, 81 N. C. 76; *Garrett Co. v. Hamill*, 131 N. C. 57, 42 S. E. 448.

In *Hanes Funeral Home v. Spencer*, 214 N. C. 702, 200 S. E. 397, evidence was held ample to support finding that undertaking by defendant's ward to pay expenses for the funeral of the wife of a close friend was an original promise not coming within the purview of this section.

Where the party promising to pay a debt receives a new and original consideration from the debtor for his promise, the statute of frauds, this section, does not apply. *Daniels v. Duck Island, Inc.*, 212 N. C. 90, 193 S. E. 7.

What Constitutes Collateral Promise.—Where there is no benefit to the one promising to answer for the debt of another, and the promise does not create an original obligation, but is a collateral promise, merely superadded to the promise of another, the original promisor remaining liable, the collateral promisor is not liable unless there is a writing, whether the promise is made when the debt is created or not. *Peele v. Powell*, 156 N. C. 553, 73 S. E. 234; *Sheppard v. Newton*, 139 N. C. 533, 52 S. E. 143.

Where the promisor says to the creditor "collect from him (the debtor) and if he fails to pay, I will," the undertaking is a collateral one, and not enforceable unless in writing. *Garrett Co. v. Hamill*, 131 N. C. 57, 42 S. E. 448.

Promise Made to Debtor Not within Statute.—It is held that, where a purchaser agrees by parol in consideration of conveyance to him of property to pay certain debts of his vendor due to a third person, the promise is original and not within the statute. *Stanly v. Hendricks*, 35 N. C. 86; *Rice v. Carter*, 33 N. C. 298.

Intent of Promisor—How Determined.—The intent of the promisor to become bound may be shown by the surrounding circumstances and other transactions or written communications between the creditor and the promisor. *Hickory Novelty Co. v. Andrews*, 188 N. C. 59, 123 S. E. 314.

Where a writing or notation is not a continuing guaranty, each order being a separate and independent transaction, the defendant is bound only for the order upon which his guaranty appears. *Gennett v. Lyerly*, 207 N. C. 201, 176 S. E. 275.

Goods Furnished to Son on Father's Credit.—If goods are furnished to a son upon the promise and credit of the father, the promise need not be in writing; but if the son was the principal debtor and the father merely a surety, the promise must be in writing. *White v. Tripp*, 125 N. C. 523, 34 S. E. 686.

Definiteness of Subject Matter of Contract.—The principle that no contract can be enforced unless the subject matter upon which it is intended by the parties to operate can first be definitely ascertained from its terms, either through an explicit description therein or a reference which points to extrinsic means of identification applies to verbal agreements as well as to those required by this section to be in writing. *Hemphill v. Annis*, 119 N. C. 514, 26 S. E. 152.

Evidence of Guarantor's Obligation.—The obligation of

one as guarantor of payment must be evidenced and established by a written agreement, or some written note or memorandum signed by him or some person authorized to sign for him. *Supply Co. v. Finch*, 147 N. C. 106, 60 S. E. 904; *Hickory Novelty Co. v. Andrews*, 188 N. C. 59, 123 S. E. 314.

What Amounts to Contract of Guaranty.—A telegram that the debtor is a reliable person and that any justifiable claims will be taken care of is insufficient to establish a contract of guaranty or a promise to answer for the debt, etc., of another, in the absence of a promise to pay the debt if the debtor does not pay. *Fain Grocery Co. v. Early*, etc., Co., 181 N. C. 459, 107 S. E. 497.

Parol Assumption of Mortgage Debt Not within the Statute.—A promise by a grantee of mortgaged land to assume and pay the amount of the mortgage is not a promise to pay the debt of another required by this section to be in writing, but is a direct obligation of the grantee supported by sufficient consideration. *Parlier v. Miller*, 186 N. C. 501, 119 S. E. 898.

Agreement to Prevent Sale of Land.—An agreement in consideration of the extension of an option that the defendant will pay a certain mortgage note owned by the plaintiff or otherwise prevent the sale of the land is not a promise to answer for the debt, etc., of another, within this section. *Whedbee v. Ruffin*, 189 N. C. 257, 126 S. E. 616.

Promise to Guarantee Safety of Money.—An oral promise to guarantee the safety of money placed in the promisor's hands for investment is not an agreement to answer for the debt of another within the meaning of this section. *Partin v. Prince*, 159 N. C. 553, 75 S. E. 1080.

A promise by the president of a bank to become personally liable for a deposit when supported by a new and independent consideration constitutes an original undertaking by him, and the agreement does not come within the provisions of this section. *Dillard v. Walker*, 204 N. C. 16, 167 S. E. 636.

The guaranty of payment of a deposit made by the vice-president, director and stockholder of the bank was an original promise to answer for the debt, upon sufficient consideration, and does not come within the provisions of this section, and upon the insolvency of the bank and loss to the depositor the plea of the statute of frauds is not a valid defense. *Garren v. Youngblood*, 207 N. C. 86, 176 S. E. 252.

The president and treasurer of a corporation who has no personal, immediate and pecuniary benefit in the purchase of materials by the corporation is not an original promisor under this section and may not be held personally liable for the purchase price because of verbal promises to answer for the benefit made in his behalf by the secretary for the corporation as his alleged agent. *Gennett v. Lyerly*, 207 N. C. 201, 176 S. E. 275.

An oral guarantee of genuineness or validity of a note and the liability of the maker to pay it, made by the holder upon a transfer of it for value, is not a promise contemplated by this section to be in writing. *Adcock v. Fleming*, 19 N. C. 225; *Ashford v. Robinson*, 30 N. C. 114; *Rowland v. Rorke*, 49 N. C. 337.

Statement of Consideration.—Under this section, the consideration for a promise to answer need not be contained in the writing. *Standard Supply Co. v. Person*, 154 N. C. 456, 70 S. E. 745; *Green v. Thornton*, 49 N. C. 230.

Question for Jury as to Whether Original Promise Covered Second Transaction.—Where evidence tended to show that defendants ordered two or three cars of lumber, both defendants being present and promising to be personally responsible therefor, and after the first car was shipped, one of defendants went to plaintiff and told him to ship another car under the same arrangements, it was sufficient to be submitted to the jury on the question whether the original promise of both defendants, made when both were present, covered the second car as well as the first. *Brown v. Benton*, 209 N. C. 285, 183 S. E. 292.

Cited in Strayhorn v. Aycock, 215 N. C. 43, 200 S. E. 912; *Newburn v. Fisher*, 198 N. C. 385, 387, 151 S. E. 875; *Coxe v. Dillard*, 197 N. C. 344, 148 S. E. 545.

§ 22-2. Contract for sale of land; leases.—All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be

charged therewith, or by some other person by him thereto lawfully authorized. (Rev., s. 976; Code, ss. 1554, 1743; R. C., c. 50, s. 11; 29 Ch. II, c. 3, ss. 1, 2, 3; 1819, c. 1016; 1844, c. 44; 1868, c. 156, ss. 2, 33; C. S. 988.)

- I. In General.
- II. What Constitutes an Interest in or Concerning Land.
- III. Sufficiency of Compliance with Section.
 - A. In General.
 - B. The Signature.
 - C. Statements of Consideration.
- IV. Part Performance.
- V. Pleading and Practice.

Cross Reference.

See also, §§ 43-38 and 47-18.

I. IN GENERAL.

Purpose to Prevent Fraud.—Contracts within the meaning of this section were required to be in writing, to prevent frauds and perjuries. *Winberry v. Koonce*, 83 N. C. 351, 354.

This section will not prevent an unwritten promise from being the basis for an action to cancel a deed where the promise was merely a device to accomplish fraud, and the relief sought is not to enforce the promise or to recover damages for its breach. *Mitchell v. Mitchell*, 206 N. C. 546, 174 S. E. 447.

Executory Contracts.—This section applies to executory and not executed contracts. *Rogers v. Lumber Co.*, 154 N. C. 108, 69 S. E. 788; *Bailey v. Bishop*, 152 N. C. 383, 67 S. E. 968; *Choat v. Wright*, 13 N. C. 289; *Herndon v. Durham*, etc., R. Co., 161 N. C. 650, 77 S. E. 683; *Bailey v. Bishop*, 152 N. C. 383, 67 S. E. 968.

This section applies to executory contracts, and not to those that have been executed. *Kieth Bros. v. Kennedy*, 194 N. C. 784, 140 S. E. 721.

Where a contract was for the sale of an automobile in consideration of the conveyance of certain realty, and the vendor executed a good and sufficient deed, it was held that the contract was executed as to the conveyance of lands under this section. *Keith Bros. v. Kennedy*, 194 N. C. 784, 140 S. E. 721.

Parol Trusts.—That section of the English Statute of Frauds which prohibited the establishment of trusts by parol, has never been reenacted in this State. Hence a parol agreement to purchase land and hold it in trust for another is valid and enforceable. *Newby v. Atlantic*, etc., Realty Co., 182 N. C. 34, 108 S. E. 323.

But a parol agreement to create a trust, entered into after the purchase of property is void under this section. To establish a parol trust the agreement to hold in trust must have been entered into before or at the sale of the property. *Kelly v. McNeill*, 118 N. C. 349, 24 S. E. 738.

Written Agreement to Adopt Minor.—Where intestate made a written agreement with parents of a minor to adopt minor and make her his sole heir in consideration of the parents agreeing to the adoption, such agreement, being in writing, did not come within the provisions of this section. *Chambers v. Byers*, 214 N. C. 373, 377, 199 S. E. 398.

Parol Evidence to Establish Contract of Sale.—Under this section, parol evidence is incompetent to establish agreement to pay purchase price, so as to show that contract was one of sale and not an option, since this is an essential element of a contract of sale and purchase, and an essential element of a contract required to be in writing may not be established by parol. *Kluttz v. Allison*, 214 N. C. 379, 199 S. E. 395.

Effect of Non-Compliance.—The contracts which are not entered into in compliance with this section are not void, but voidable merely at the instance of the party charged. And when such party takes advantage of the provisions of the statute, he repudiates the contract in its entirety and cannot derive any benefit from it. For example a vendee cannot recover the money he has paid the vendor under a parol contract which he has repudiated. *Improvement Co. v. Guthrie*, 116 N. C. 381, 21 S. E. 952. They are enforceable unless the party to be charged takes advantage of the statute. *McCall v. Textile Industrial Inst.*, 189 N. C. 775, 128 S. E. 349, 353.

Rights of Vendee under Parol Contract.—The vendor, in a parol contract to convey land, will not be permitted to evict a vendee who has entered and made improvements, until the latter has been repaid the purchase money and compensated for betterments. *Union Cent. Life Ins. Co. v. Cordon*, 208 N. C. 723, 182 S. E. 496, 497, citing *Vann v. Newsom*, 110 N. C. 122, 14 S. E. 519, and *Eaton v. Doub*, 190 N. C. 14, 22, 128 S. E. 494, 498, 40 A. L. R. 273.

Resulting Trusts.—Resulting trusts, which arise by opera-

tion of law, do not come within the statute of frauds, and may be proved by parol evidence. *Wilson v. Williams*, 215 N. C. 407, 2 S. E. (2d) 19.

Cited in *Peele v. Le Roy*, 222 N. C. 123, 22 S. E. (2d) 244; *Creech v. Creech*, 222 N. C. 656, 24 S. E. (2d) 642.

II. WHAT CONSTITUTES AN INTEREST IN OR CONCERNING LAND.

Parol Transfer of Parol Contract.—A parol transfer of the interest of a purchaser of land under a parol contract is invalid. *Wilkie v. Womble*, 90 N. C. 254, cited in note in 3 L. R. A., N. S., 148.

An agreement to buy and sell land at a profit is not a contract relating to any interest in land which is required to be in writing. It relates only to profits of the land, and is valid even though not in writing. *Newby v. Atlantic, etc., Realty Co.*, 182 N. C. 34, 108 S. E. 323; *Brogden v. Gibson*, 165 N. C. 16, 80 S. E. 966.

The section contemplates those transactions in which there is a conveyance of land from one party to another; not those as to ventures for profits in realty. Id.

Agreement That Is Not One to Sell or Convey Land.—Where plaintiff alleged that his vendor agreed to procure a release of the land from a prior deed of trust upon the payment by the plaintiff of a note given for the balance of the purchase price of the land, and secured by a deed of trust to his vendor, the agreement is not one to sell or convey land, or any interest in or concerning same, and does not come within the provisions of this section. *Hare v. Hare*, 208 N. C. 442, 181 S. E. 246.

A dower interest cannot be surrendered by parol. *Houston v. Smith*, 88 N. C. 312.

Partition.—A contract between tenants in common for the partition in lands is a contract concerning realty, within the meaning of this section. *Medlin v. Steele*, 75 N. C. 154; *Anders v. Anders*, 13 N. C. 529; *Fort v. Allen*, 110 N. C. 183, 14 S. E. 685; *Rhea v. Craig*, 141 N. C. 602, 54 S. E. 408.

A contract to devise real property comes within the provisions of this section, and performance of services by the promisee as consideration for the contract does not take the contract out of the provisions of the section, and the promisee cannot successfully maintain an action for specific performance of the contract. *Grantham v. Grantham*, 205 N. C. 363, 171 S. E. 331.

Crops and Fruit.—Crops which are produced annually are personal chattels, and a sale of them while growing is only a sale of goods, and not a contract or sale of land, or any interest in or concerning land, under this section. *Brittain v. McKay*, 23 N. C. 265, cited in note in 23 L. R. A., N. S., 1219.

Fruits on trees cannot be reserved by the vendor by a parol agreement. *Flynt v. Conrad*, 61 N. C. 190.

Standing Timber.—A contract conveying standing timber is a contract concerning realty. *Drake v. Howell*, 133 N. C. 162, 45 S. E. 539; *Ward v. Gay*, 137 N. C. 397, 49 S. E. 884; *Mizell v. Burnett*, 49 N. C. 249; *Ives v. Railroad*, 142 N. C. 131, 55 S. E. 74.

A contract of the owner of land to sell at a stipulated price all logs which the owner should cut from the tract is not a contract affecting realty within the meaning of this section, since the cutting and delivery of the logs would constitute a conversion of the standing timber from real property into personalty. *Walston v. Lowry*, 212 N. C. 23, 192 S. E. 877.

Guaranty of Acreage.—A vendor's guaranty of the number of acres need not be in writing. *Sterne v. Benbow*, 151 N. C. 460, 66 S. E. 445; *Currie v. Hawkins*, 118 N. C. 593, 24 S. E. 476.

Also an agreement between vendor and purchaser that the latter shall have the land surveyed, and that if it falls short the vendor shall refund pro tanto, need not be in writing. *Sherrill v. Hagan*, 92 N. C. 345.

Equitable Estates.—A parol contract of sale of an equitable estate in land is void. *Holmes v. Holmes*, 86 N. C. 205.

Parol Release of Mortgage.—An agreement to terminate the relationship of a mortgagor and mortgagee does not fall within the intent and meaning of this section. Hence a parol contract to release a part of the mortgaged property is valid and enforceable. *Stevens v. Turlington*, 186 N. C. 191, 119 S. E. 210; *Hemmings v. Doss*, 125 N. C. 400, 402, 34 S. E. 511. This is upon the theory that the mortgagee does not, by the mortgage, acquire an interest in land (but a mere lien in equity), and hence his release does not transfer back an "interest" in land.

Where a mortgagee agreed by parol to release the mortgage to a purchaser of the land from the mortgagor, the mortgagee was held estopped to deny the validity of the agreement under the Statute of Frauds. *Stevens v. Turlington*, 186 N. C. 191, 119 S. E. 210.

A parol lease for three years is not within the statute. It must be for a term exceeding three years. *Smithdeal v. McAdoo*, 172 N. C. 700, 704, 90 S. E. 907.

In order to determine whether a lease is for more than three years or not the computation must be made from the time of making the agreement to lease, and not from the time of its going into effect. Hence a parol agreement of lease for three years to commence in futuro is voidable by the lessor and renders the tenant a tenant at will. *Mauney v. Norvell*, 179 N. C. 628, 103 S. E. 372; *Falkner v. Hunt*, 73 N. C. 571.

Where the owner of land agrees to erect a certain kind of building thereon for a proposed lessee, and makes a parol lease for the rental of the property for three years to take effect upon the completion of the building, the lease for three years to take effect in the future comes within the provisions of the Statute of Frauds, and where in an action thereon the lessee denies the contract of lease and pleads the statute, he may not be held liable unless it was executed in writing, or some memorandum thereof made and signed by the party to be charged therewith or by some other person by him duly authorized. *Sammax Inv. Co. v. Zindel*, 198 N. C. 109, 150 S. E. 704.

Assignment of Lease.—A verbal assignment of an unexpired lease to continue more than three years is void under this section. *Alexander v. Morris*, 145 N. C. 22, 58 S. E. 600.

Negative Easement.—A restriction on the use of land being in effect a negative easement is an interest in land required under this section to be contracted for in writing. *Davis v. Robinson*, 189 N. C. 589, 127 S. E. 697.

Where land in a development is sold by deeds containing certain restrictive covenants, the covenants are in the nature of an easement, and it would seem that ordinarily such easement may not be released by parol agreement. *Moore v. Shore*, 206 N. C. 699, 175 S. E. 117.

Party Walls.—The right to contribution for costs of a party wall is implied in law regardless of the promise; and hence enforceable notwithstanding that the agreement was not in writing. *Reid v. King*, 158 N. C. 85, 73 S. E. 168.

Creation of Mill Dam.—A permanent right to overflow land by the erection and maintenance of a mill dam cannot be created by parol. *Bridges v. Purcell*, 18 N. C. 492.

Judicial Sales.—Judicial sales were not within the contemplation of the legislature at the time of making this enactment. *Tate v. Greenlee*, 15 N. C. 149, 150.

Judgment.—The Statute of Frauds does not require that a judgment constituting a lien on land should be assigned by a written instrument. *Winberry v. Koonce*, 83 N. C. 351.

III. SUFFICIENCY OF COMPLIANCE WITH SECTION.

A. In General.

No special form or instrument is required. A letter, note, bill or draft is sufficient. *Neaves v. North State Min. Co.*, 90 N. C. 412.

But Memorandum Must Show Essential Elements of Valid Contract.—In order to constitute an enforceable contract within the provisions of this section, the written memorandum, though it may be informal, must be sufficiently definite to show the essential elements of a valid contract. It must embody the terms of the contract, names of vendor and vendee, and a description of the land to be conveyed, at least sufficiently definite to be aided by parol. *Smith v. Joyce*, 214 N. C. 602, 604, 200 S. E. 431.

A promissory note for the purchase price signed and given by the purchaser is not such a contract or memorandum thereof. *Burris v. Starr*, 165 N. C. 657, 81 S. E. 929.

The memorandum need not be contained in a single document but may consist of several papers properly connected together. *Smith v. Joyce*, 214 N. C. 602, 604, 200 S. E. 431.

Letters addressed to third party may be used against the writer as a memorandum of it. Such writings are sufficient evidence of the contract to warrant the court in giving effect to it. *Mizell v. Burnett*, 49 N. C. 249, 254; *Nicholson v. Dover*, 145 N. C. 18, 58 S. E. 444, cited in note in 24 L. R. A., N. S., 316.

Series of Letters Construed Together.—A series of letters, telegrams or other papers, documents, etc., signed as required by this section, will be construed together, and when the contract appears to be complete, the omission in some of the writings will be supplied by the others. *Simpson v. Burnett County Lumber Co.*, 193 N. C. 454, 137 S. E. 311.

As to Seal.—The Statute of Frauds does not require a contract for the sale of land to be under the seal of the party to be charged. *Simmons v. Spruill*, 56 N. C. 9; *Stephens v. Midyette*, 161 N. C. 323, 77 S. E. 243.

The admissions of the parties in their pleadings may stand for the writing. *Sandlin v. Kearney*, 154 N. C. 596, 70 S. E. 942.

Time of Making Memorandum.—The written memorandum required by this section need not necessarily be made at the time of the agreement. Even if made thereafter, if otherwise good, it will be valid. *McCall v. Lee*, 182 N. C. 114, 108 S. E. 390; *McGee v. Blankenship*, 95 N. C. 563, cited in note in 22 L. R. A. 273; *Mizell v. Burnett*, 49 N. C. 249; *Winslow v. White*, 163 N. C. 29, 31, 79 S. E. 258.

Contract Partly Written Partly Oral.—A contract for the sale of land may be partly verbal and partly in writing, unless the writing purports to embrace all the contract. Thus where the vendor upon a conveyance by deed, verbally agreed that he would make good any deficiency in the acreage, it was held that this section did not require the agreement as to the quantity to be embraced by the written contract or deed. *McGee v. Craven*, 106 N. C. 351, 356, 11 S. E. 375.

What the Writing Must Contain.—In order that a contract falling within the sphere of this section be enforceable it must appear that there is a writing containing expressly or by implication all the material terms of the alleged agreement which must have been signed as required by the section. *Hall v. Misenheimer*, 137 N. C. 183, 186, 49 S. E. 104; *Gwathmey v. Cason*, 74 N. C. 5.

Memorandum Inconsistent with Contract.—Where the memorandum of a contract partly in parol was inconsistent with the terms of the contract, it was held that the memorandum not being the contract between the parties, the plaintiff suing under the parol contract is not entitled to recover. *Keith v. Bailey*, 185 N. C. 262, 116 S. E. 729.

Even though the contract be informally and awkwardly expressed in the writing, yet if its nature, scope and purpose clearly appear from it, there is a sufficient compliance with the requirements of this section. *Mayer v. Adrian*, 77 N. C. 83; *Farmer v. Batts*, 83 N. C. 387; *Thornburg v. Masten*, 88 N. C. 293; *Gordon v. Collett*, 102 N. C. 532, 537, 9 S. E. 486.

The vendor of lands in substantial conformity with his parol agreement tendered the vendee a deed to the lands, which the latter refused because the amount of the agreed purchase price had been increased, and after the vendor had sold the lands the vendee brought an action for damages. It was held that the deed tendered was a sufficient writing within the statute of frauds to bind the vendor, and the vendee could recover damages sustained by defendant's breach of contract to convey. *Oxendine v. Stephenson*, 195 N. C. 238, 141 S. E. 572.

Sufficiency of Description.—This section does not render void a contract which contains a defective description merely. It only requires that the contract be in writing and signed by the party to be charged. *Improvement Co. v. Guthrie*, 116 N. C. 381, 21 S. E. 952.

A written contract to convey the grantor's entire tract of land consisting of 146 acres was, under the circumstances of the case, held to be sufficiently certain as to the land conveyed, so as to admit parol evidence in regard to the identity of the land without violating the Statute of Frauds. *Norton v. Smith*, 179 N. C. 553, 10 S. E. 14. See *Higdon v. Rice*, 119 N. C. 623, 625, 26 S. E. 256, where it is said that a defective description cannot be aided by parol testimony because that would mean to substitute by parol an essential portion of a contract required by this section to be in writing; though mistakes can be corrected and ambiguities explained by parol.

Where the calls of a deed are sufficiently definite, the locations cannot be changed by parol agreement unless contemporaneous. *Haddock v. Leary*, 148 N. C. 378, 62 S. E. 426.

The following memorandum found in the books of the defendant's intestate was held too vague and uncertain to take the contract out of the Statute: "1841, W. P. to H. C. O. Dr. To 4 loads of Rock, one lot at one year's credit, \$125." *Plummer v. Owens*, 45 N. C. 254, 255.

The memorandum of a sale of standing timber must be sufficiently definite in its essential elements to comply with the requirements of the Statute of Frauds to enable the court to decree specific performance; but latent ambiguities may be explained by parol evidence. *Camp Mfg. Co. v. Jordan*, 292 Fed. 182; see also, *Keith v. Bailey*, 185 N. C. 262, 116 S. E. 729.

When all the circumstances of possession, ownership, and situation of the parties, and of their relation to each other and the property, as they were when the negotiation took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or

memorandum of their agreement. *Gilbert v. Wright*, 195 N. C. 165, 168, 141 S. E. 577; *Norton v. Smith*, 179 N. C. 553, 103 S. E. 14.

Agreement "to buy the vacant lot," from the vendor was held not unenforceable under this section where the evidence showed that it was the only lot owned by the vendor anywhere. *Gilbert v. Wright*, 195 N. C. 165, 141 S. E. 577.

Deed Held to Be a Sufficient Writing.—A deed duly executed and acknowledged and found among the valuable papers of the grantor after his death is a sufficient writing within the meaning of the statute of frauds of a contract of grantor to convey the lands to the grantees in consideration of grantees' taking care of grantor for the remainder of his life. *Austin v. McCollum*, 210 N. C. 817, 188 S. E. 646.

B. The Signature.

What constitutes Signing.—The signing of a paper-writing or instrument is the affixing of one's name thereto with the purpose or intent to identify the paper or instrument, or to give it effect as one's act. *McCall v. Textile, etc., Co.*, 189 N. C. 775, 128 S. E. 349, 353.

Actual Signature—Position Immaterial.—Although the place of the signature upon the writing of the party to be charged is immaterial, and such party need not necessarily "subscribe" the writing, yet there must be a writing in which such party must have put his name with the intention of signing it. Thus where the plaintiff, the purchaser, gave for the purchase price a note to the defendant which was filled in by the latter payable to his own name, it was held that the note was not signed by the defendant, since filling in the note with his own name was not equivalent to signing it. *Burris v. Starr*, 165 N. C. 657, 81 S. E. 929.

This section is satisfied when the writing contains the signature anywhere in the instrument. *Flowe v. Hartwick*, 167 N. C. 448, 83 S. E. 841.

Subscribing or Signing.—This section does not require that the memorandum of sale be "subscribed," it only requires that it be signed. Hence the signing by the auctioneer of the name of the highest bidder on the side of a printed advertisement is a sufficient signing of the contract. *Proctor v. Finley*, 119 N. C. 536, 26 S. E. 128; *Devereux v. McMahon*, 108 N. C. 134, 12 S. E. 902.

Mark Sufficient.—When written by the party to be charged, a mark of an illiterate person is a sufficient signature to fulfill the requirement of the Statute. *Devereux v. McMahon*, 108 N. C. 134, 142, 12 S. E. 902.

The phrase "the party to be charged" does not necessarily refer to the vendor, it may refer to the vendee. The party to be charged, within the meaning of the section is the defendant in the action, whoever he may be. *Hall v. Misenheimer*, 137 N. C. 183, 187, 49 S. E. 104.

In a suit for the specific performance of a contract to convey land the "party to be charged" is the vendor, and hence the contract must have been signed by him. The vendee does not fulfill the condition imposed on him to show that the Statute has been complied with, by a writing by which he alone is bound. *Clegg v. Bishop*, 188 N. C. 564, 125 S. E. 122.

The "party to be charged" under this section is the one against whom the relief is sought; and if the contract is sufficient to bind him, he can be proceeded against, though the others could not be held because, as to them, the Statute is not fully complied with. *Lewis v. Murray*, 177 N. C. 17, 97 S. E. 750.

Thus a contract in writing to sell land, signed by the vendor is good against him, although the correlative obligation to pay the price is not in writing and cannot be enforced against the purchaser. *Mizell v. Burnett*, 49 N. C. 249.

The Statute requires that the writing be signed by the party to be charged. So, if A contract in writing to sell land to B, the former's promise being in writing and signed, but the latter's not, A would be bound to perform, but B would not. *Improvement Co. v. Guthrie*, 116 N. C. 381, 384, 21 S. E. 952; *Mizell v. Burnett*, 49 N. C. 249. See also, *Durham Consol. Land, etc., Co. v. Guthrie*, 116 N. C. 381, 382, 21 S. E. 952.

Member of Corporation or Partner May Sign.—Under the clause "or by some other person by him thereto lawfully authorized" a member of a corporation or a partner is a competent agent to sign for the corporation or partnership. *Neaves v. Mining Co.*, 90 N. C. 412, 415.

Signature of Agent.—If signed by one who is proved or admitted by the principal to have been authorized as agent, it is a sufficient compliance with the Statute if the agent sign his own name instead of that of his principal by him. *Hargrove v. Adcock*, 111 N. C. 166, 171, 16 S. E. 16.

Where the agent is the one by whom the contract or the memorandum is signed, the authority of the agent to sign it for his principal need not have been given in writing. And even a subsequent ratification of an unauthorized signing will suffice. *Johnston v. Sikes*, 49 N. C. 70.

It is not necessary that the name of the principal or his relation to the transaction shall appear upon the writing itself or in the form of the signature. *Neaves v. Mining Co.*, 90 N. C. 412, 415.

Ordinance, Resolution or Vote.—An ordinance, resolution or vote of a municipal corporation, accepting a lease or contract tendered, does not constitute a signing within the meaning of the Statute. *Wade v. New Bern*, 77 N. C. 460.

C. Statement of Consideration.

Whether oral or in writing.—The contract must have a consideration to support it. *Draughan v. Bunting*, 31 N. C. 10; *Stanly v. Hendricks*, 35 N. C. 86, 87; *Combs v. Harshaw*, 63 N. C. 198; *Haun v. Burrell*, 119 N. C. 544, 547, 26 S. E. 111. But if in writing, the consideration need not appear in the writing, and may be shown by parol. *Nichols v. Bell*, 46 N. C. 32; *Haun v. Burrell*, 119 N. C. 544, 547, 26 S. E. 111; *Peele v. Powell*, 156 N. C. 553, 557, 73 S. E. 234; *Bateman v. Hopkins*, 157 N. C. 470, 73 S. E. 133; *Lewis v. Murray*, 177 N. C. 17, 19, 97 S. E. 750.

But see *Hall v. Misenheimer*, 137 N. C. 183, 49 S. E. 104, where it is said that a memorandum of a contract for the sale of land is not good as against the vendee unless it shows the price to be paid.

IV. PART PERFORMANCE.

In General.—The doctrine which prevails in many states, that a part or even a full performance of the stipulation of an unwritten agreement for the disposition of an interest in land exempts such agreement from the operation of the Statute of Frauds, is not recognized in this state under this section which declares such agreements to be void and of no effect. *Kivett v. McKeithan*, 90 N. C. 106, 108; *Ellis v. Ellis*, 16 N. C. 342. In such a case, however, the party who has advanced the purchase price or has made improvements shall be refunded his advances. *Kivett v. McKeithan*, supra; *Barnes v. Brown*, 71 N. C. 507; *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143; *Smithdeal v. McAdoo*, 172 N. C. 700, 703, 90 S. E. 907. But see the dissenting opinion of Judge Douglas, in *Luton v. Badham*, supra. See also *Dunn v. Moore*, 38 N. C. 364; *Albee v. Griffin*, 22 N. C. 9; *Plummer v. Owens*, 45 N. C. 254, 255, where cases were held not within statute.

V. PLEADING AND PRACTICE.

General Issue or General Denial.—A party may rely on the Statute of Frauds under the general issue or a general denial. *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143; *Winders v. Hill*, 144 N. C. 614, 57 S. E. 456.

A denial of the contract as alleged is equivalent to a plea of the Statute. *McCall v. Textile Ind. Inst.*, 189 N. C. 775, 128 S. E. 349, 353.

But see *Curtis v. Piedmont, etc., Min. Co.*, 109 N. C. 401, 13 S. E. 944, where it is held that in an action on a contract for lumber the defendant in order to avail himself of the defense of the Statute of Frauds should plead it specifically. See also, *Ebert v. Disher*, 216 N. C. 36, 3 S. E. (2d) 301.

Demurrer.—The Statute of Frauds cannot be taken advantage of by demurrer, since that admits the contract. The contract is valid and binding unless the invalidity, by

reason of the Statute, is set up by the answer. *Hemmings v. Doss*, 125 N. C. 400, 402, 34 S. E. 511; *Stevens v. Midyette*, 161 N. C. 323, 77 S. E. 243.

Record on Appeal.—Where upon appeal, the insufficiency of letters to constitute a valid contract under this section is sought to be raised, the contents of the letters must appear upon the record. *Layton v. Godwin*, 186 N. C. 312, 119 S. E. 495.

Oral Arbitration.—An oral agreement of arbitration as to real property cannot be enforced. *Fort v. Allen*, 110 N. C. 188, 14 S. E. 685.

Issues as to title of land cannot be shown by parol. *Cox v. Ward*, 107 N. C. 507, 12 S. E. 379; *Presnell v. Garrison*, 122 N. C. 595, 29 S. E. 839.

Discharge by Matter in Pais.—A written contract for the sale of land can be discharged by matter in pais. *Miller v. Pierce*, 104 N. C. 389, 10 S. E. 554, cited in note in 19 L. R. A., N. S., 881.

§ 22-3. Contracts with Cherokee Indians.—All contracts and agreements of every description made with any Cherokee Indian, or any person of Cherokee Indian blood within the second degree, for an amount equal to ten dollars or more, shall be void, unless some note or memorandum thereof be made in writing and signed by such Indian or person of Indian blood, or some other person by him authorized, in the presence of two witnesses, who shall also subscribe the same: Provided, that this section shall not apply to any person of Cherokee Indian blood or any Cherokee Indian who understands the English language and who can speak and write the same intelligently. (Rev., s. 975; Code, s. 1553; R. C., c. 50, s. 16; 1907, c. 1004, s. 1; C. S. 989.)

Defense Concluded by Judgment.—While, under this section, there may be defenses available against a contract, if they are not availed before a judgment is rendered, the judgment is res adjudicata. *Rogers v. Kimsey*, 101 N. C. 560, 563, 8 S. E. 159.

One Party White.—This section applies as well where the contract is between two Indians as where one of the parties is white. *Lovingood v. Smith*, 52 N. C. 601; *State v. Ta-Cha-Na-Tah*, 64 N. C. 614, 616.

§ 22-4. Promise to revive debt of bankrupt.—No promise to pay a debt discharged by any decree of a court of competent jurisdiction, in any proceeding in bankruptcy, shall be received in evidence unless such promise is in writing and signed by the party to be charged therewith. (Rev., s. 978; 1899, c. 57; C. S. 990.)

Editor's Note.—See 13 N. C. Law Rev. 60, for possible construction of this section.

Whether this section is applicable to a promise made subsequent to the filing of the petition in bankruptcy but before the order of discharge is entered, quære. *Westall v. Jackson*, 218 N. C. 209, 10 S. E. (2d) 674.

Chapter 23. Debtor and Creditor.

Art. 1. Assignments for Benefit of Creditors.

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- 23-1. Debts mature on execution of assignment; no preferences.
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 23-31. Petition; contents; verification.
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Art. 1. Assignments for Benefit of Creditors.

§ 23-1. Debts mature on execution of assignment; no preferences.—Upon the execution of any voluntary deed of trust or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once, and no such deed of trust or deed of assignment shall contain any preferences of one creditor over another, except as hereinafter stated. (Rev., s. 967; 1893, c. 453; 1909, c. 918, s. 1; C. S. 1609.)

Cross References.—As to homestead and exemptions, see § 1-369 and notes. As to preferences in the absence of assignment, see notes to § 39-15—analysis line, "Rights and Remedies of Creditors."

Definition.—An assignment for the benefit of creditors has been defined by the U. S. Supreme Court as "an assignment whereby a debtor, generally an insolvent, transfers to another his property, in trust to pay his debts or apply the property upon their payment." Black Law Dict.

What Constitutes an Assignment.—The Supreme Court has held that where a person, who is insolvent, makes an assignment of practically all his property to secure a pre-existing debt, there being also other creditors, such instrument will be treated as an assignment for the benefit of creditors and subject to the statutes relating thereto, and neither the omission of a small part of the debtor's property nor a defeasance clause in the instrument will change this result. *Bank v. Tobacco Co.*, 188 N. C. 177, 178, 124 S. E. 158; *Powell Brothers v. Lumber Company*, 153 N. C. 52, 57, 68 S. E. 926; *Nat'l Bank v. Gilmer*, 116 N. C. 684, 22 S. E. 2; *Nat'l Bank v. Gilmer*, 117 N. C. 416, 23 S. E. 333; *Glauston v. Jacobs*, 117 N. C. 427, 23 S. E. 335; *Cooper v. McKinnon*, 122 N. C. 447, 29 S. E. 417; *Pearre v. Folb*, 123 N. C. 239, 31 S. E. 475; *Brown v. Nimocks*, 124 N. C. 417, 32 S. E. 743; *Taylor v. Lauer*, 127 N. C. 157, 37 S. E. 197; *Odom v. Clark*, 146 N. C. 544, 60 S. E. 513.

Same—Deed to Secure Advancements. — Where the purpose of a deed is to secure payment not only of pre-existing debts but also of debts to be contracted for advancements to aid grantors in carrying on their business then said deed is not a voluntary deed of assignment for the benefit of creditors, within the meaning of this and the following section. *Commissioner of Banks v. Turnage*, 202 N. C. 485, 486, 163 S. E. 451.

Sec.

- 23-34. Where no suggestion of fraud, discharge granted.
 23-35. Continuance granted for cause.
 23-36. Where fraud in issue, discharge only after trial.
 23-37. If fraud found, debtor imprisoned.
 23-38. Effect of order of discharge.

Art. 5. General Provisions under Articles 2, 3, and 4.

- 23-39. Superior court tries issue of fraud.
 23-40. Insolvent released on giving bond.
 23-41. Surety in bond may surrender principal.
 23-42. Creditor liable for jail fees.
 23-43. False swearing; penalty.
 23-44. Powers of trustees hereunder.
 23-45. Jail bounds.

Art. 6. Practice in Insolvency and Certain Other Proceedings.

- 23-46. Unlawful to solicit claims of creditors in proceedings.
 23-47. Violation of preceding section a misdemeanor.

Art. 7. Bankruptcy of Taxing, etc., Districts, Counties, Cities, Towns and Villages.

- 23-48. Local units authorized to avail themselves of provisions of bankruptcy law.

Same—Mortgage.—Where a mortgage is made of the entirety of a large estate for pre-existing debts (omitting only an insignificant remnant of property) the mortgage is in effect an assignment for the benefit of creditors secured therein. *National Bank v. Gilmer*, 117 N. C. 416, 23 S. E. 333; *Nat'l Bank v. Gilmer*, 116 N. C. 684, 22 S. E. 2.

Same—Chattel Mortgages.—A chattel mortgage, attempted to be executed by an insolvent corporation owing other creditors, to secure a pre-existing debt on practically all of its property, will be treated as an assignment and void, unless the requirements of the statute have been complied with, and no lien otherwise on the property described therein can be thereby created. *Banking, etc., Co. v. Tobacco Co.*, 188 N. C. 177, 124 S. E. 158.

But a chattel mortgage on a stock of goods, securing the purchase price, cannot be deemed an assignment for the benefit of creditors where the secured debt is contemporaneous with the contract of purchase, as a part of one continuous transaction. *Cowan v. Dale*, 189 N. C. 684, 128 S. E. 155.

A chattel mortgage of an insolvent corporation, executed and registered before the appointment of a receiver for it, will not be construed under the provisions of this section as in effect an assignment for the benefit of creditors in the absence of the fact that the property covered by the mortgage constitutes practically all of the property of the insolvent. *Vanderwal v. Vanco Dairy Co.*, 200 N. C. 314, 315, 156 S. E. 512.

By Whom Made—Corporations.—The U. S. Supreme Court has held that a corporation, through its proper officers, may make an assignment for the benefit of creditors. *Potts v. Wallace*, 146 U. S. 689, 13 S. Ct. 196, 36 L. Ed. 1135.

Same—Partnership.—In *Tracy v. Tuffly*, 134 U. S. 206, 10 S. Ct. 527, 33 L. Ed. 879, it is held that a partnership, whether general or limited, may, through its proper officers, make an assignment for the benefit of creditors.

Same—Trustees.—In accordance with the rule that trustees must unite to pass any title to property jointly held by them, where there are two or more trustees of the property of insolvents, all should join therein. *Wilber v. Almy*, 12 How. 180, 13 L. Ed. 944.

Applies to Sureties.—The provision that all debts of the maker become due at once applies to the sureties upon a note of the assignor. *Pritchard v. Mitchell*, 139 N. C. 54, 51 S. E. 783.

Effect of Void Assignment.—If a deed of assignment for the benefit of creditors becomes void as to creditors its

primary and essential purpose is defeated, and it is totally invalid. The assignee does not take the property for his own benefit, but for the benefit of the creditors, and while he holds the legal title they are really the equitable owners to the extent of their claims. Whatever defeats their interest defeats the object of the trust and, consequently, the trust itself. *Cooper v. McKinnon*, 122 N. C. 447, 450, 29 S. E. 417.

Same—Fraud Need Not Be Shown.—A voluntary conveyance, declared invalid for not complying with the provisions of this and the following sections, is not only void as to bona fide unsecured creditors, but inter partes; and hence it would be unnecessary for such creditors to show fraud in its procurement in order to set it aside. *Powell Brothers v. Lumber Company*, 153 N. C. 52, 68 S. E. 926.

What Constitutes a Preference.—No preference is given either at common law or in equity, or by statute, for clerk hire in a store for services rendered prior to the appointment of a receiver for the owner, on application of creditors. *Mascot Stove Mfg. Co. v. Turnage*, 183 N. C. 137, 110 S. E. 779.

Same—When Certain Creditors Omitted.—An assignment for the benefit of creditors, omitting certain other creditors, is invalid as a preference. *Taylor v. Lauer*, 127 N. C. 157, 37 S. E. 197.

Effect of Subsequent Bankruptcy.—Where an assignment for the benefit of creditors was made under this section more than four months before the debtor was adjudged a bankrupt under the federal law, the assignment was valid and whatever was done under it was valid. The court of bankruptcy cannot take retroactive cognizance of trusts beyond four months and hence will merely administer the estate as it exists at the time of the adjudication. In re *Carver*, 113 Fed. 138, 139.

Assignment Irrevocable.—It has been held in *Baring v. Dabney*, 19 Wall. 1, 22 L. Ed. 90, that a voluntary assignment for the benefit of creditors, if assented to by the creditors, or a considerable portion of them, becomes irrevocable.

Former Provisions.—This section formerly contained the following paragraph: "A schedule of all preferred debts shall be filed under oath by the assignor in the office of the clerk of the superior court of the county in which such assignment is made, stating the names of the preferred creditors, the amount due each, when the debt was made, and the circumstances under which the said debt was contracted, and the said schedule shall be filed within five days of the registration of such deed of assignment."

The object of the act was to give the creditors a convenient opportunity of ascertaining the nature of the preferences, and to put such information, verified by the oath of the assignor, in such form and place as to be equally accessible to all. The provision was construed as mandatory. *Brown & Co. v. Nimocks*, 124 N. C. 417, 420, 32 S. E. 743; *Frank v. Heiner*, 117 N. C. 79, 23 S. E. 42; *Glanon v. Jacobs*, 117 N. C. 427, 23 S. E. 335; *National Bank v. Gilmer*, 117 N. C. 416, 424, 23 S. E. 333.

For other cases construing this provision, see *Cooper v. McKinnon*, 122 N. C. 447, 29 S. E. 417; *Brannock v. Brannock*, 32 N. C. 428, 429.

§ 23-2. Trustee to file schedule of property.—

Upon the execution of such deed of trust, the trustee, whether named therein or appointed as hereafter provided for, shall file with the clerk of the superior court of the county in which said deed of trust is registered, within ten days after the registration thereof, and inventory under oath, giving a complete, full and perfect account of all property that has come into his hands or to the hands of any person for him, by virtue of such deed of trust, and when further property of any kind not included in any previous return comes to the hands or knowledge of such trustee he shall return the same as hereinbefore prescribed within ten days after the possession or discovery thereof. (Rev., s. 968; 1893, c. 453, s. 2; C. § 1610.)

Section Mandatory.—An assignment for the benefit of creditors is void unless the formalities of this section are complied with as to filing an inventory of the property, and will be set aside at the suit of a creditor whose debt is not therein provided for. *Odum v. Clark*, 146 N. C. 544, 60 S. E. 513.

If the provisions of this section are not complied with, the deeds of trust are void. *Virginia Trust Co. v. Pharr Estates*, 206 N. C. 894, 175 S. E. 186.

Cited in *Flowers v. American, etc., Chemical Co.*, 199 N. C. 486, 154 S. E. 736.

§ 23-3. Trustee to recover property conveyed fraudulently or in preference.—It is the duty of the trustee to recover, for the benefit of the estate, property which was conveyed by the grantor or assignor in fraud of his creditors, or which was conveyed or transferred by the grantor or assignor for the purpose of giving a preference. A preference, under this section, shall be deemed to have been given when property has been transferred or conveyed within four months next preceding the registration of the deed of trust or deed of assignment in consideration of the payment of a pre-existing debt, when the grantee or transferee of such property knows or has reasonable ground to believe that the grantor or assignor was insolvent at the time of making such conveyance or transfer. (1909, c. 918, s. 2; C. S. 1611.)

Editor's Note.—For a discussion of preference under the Bankruptcy Act, see *Wilson v. Taylor*, 154 N. C. 211, 70 S. E. 286.

General Effect of Section.—On proper consideration of this section, its terms and purpose, it is clear that the legislature intended to prohibit and avoid, as a wrongful preference, any and every disposition of real or personal property, absolute or conditional, by which a creditor, in consideration of an existent or antecedent debt and within four months of a general assignment by his debtor, acquires title to such debtor's property or any interest therein or lien thereon, when he knew or had reasonable ground to believe that his grantor or assignor was insolvent at the time the transfer or conveyance was made. *Wooten v. Taylor*, 159 N. C. 604, 76 S. E. 11; *Teague v. Howard Grocery Co.*, 175 N. C. 195, 198, 95 S. E. 173.

Preferences Valid at Common Law.—A debtor unable to pay his indebtedness in full, has an undoubted right, in the absence of a statute, to make preferences in the distribution of his property among the creditors, when the appropriation is absolute and with no reservation for his own benefit to the injury of creditors unprovided for. *Guggenheimer v. Brookfield*, 90 N. C. 232, 234.

At common law a debtor may, in the exercise of the power arising from the ownership of property, if acting conscientiously and without collusion, prefer certain of his creditors to the detriment or exclusion of the others. *United States Rubber Co. v. American Oak Leather Co.*, 181 U. S. 434, 21 S. Ct. 670, 45 L. Ed. 938.

Real and Personal Property Included.—This section requiring the trustee in a general assignment for creditors to recover property "conveyed or transferred by the grantor or assignor" in preference, within the four months period, includes within their meaning both real and personal property, and the general methods by which the title is passed or interest therein created and extends to an executed contract of sale. *Teague v. Howard Grocery Co.*, 175 N. C. 195, 95 S. E. 173.

The Four Months' Period.—The four months' period mentioned in this section is to be counted from the time the transfer or conveyance was made, and not from the time of its registration. *Wooten v. Taylor*, 159 N. C. 604, 76 S. E. 11.

Effect of Preference in Deed.—A deed of general assignment for the benefit of creditors, by expressly making a prior mortgage of the grantor's property, wherein an unlawful preference is given, subject thereto, will not, of itself, prevent a recovery of the property conveyed in the mortgage by the trustee in the deed in trust for the general creditors. *Wooten v. Taylor*, 159 N. C. 604, 76 S. E. 11.

A chattel mortgage on a stock of goods to secure the purchase price, the mortgagor retaining possession is not a preference within this section. *Cowan v. Dale*, 189 N. C. 684, 128 S. E. 155.

Judgment Not a Preference Prohibited by This Section.—A judgment duly rendered by a court of competent jurisdiction against a debtor assigning his property to a trustee for the benefit of creditors is not a transfer or conveyance of property by the assignor, although the judgment is rendered within four months prior to the assignment to the trustee, and the judgment is not a preference prohibited by this section, and will not be declared void upon suit of the trustee. *Pritchett v. Tolbert*, 210 N. C. 644, 188 S. E. 71.

Execution on Personalty Prior to Registration of Deed of Assignment Creates Prior Lien.—Where a valid judgment

is rendered within four months prior to an assignment for benefit of creditors by the judgment debtor, and execution is issued thereon and personal property of the debtor levied upon prior to the registration of the deed of assignment, the judgment is a lien upon the personal property levied upon prior to the title of the trustee in the deed of assignment. *Pritchett v. Tolbert*, 210 N. C. 644, 188 S. E. 71.

Meaning of Insolvent.—Insolvent means unable to meet liabilities after converting all of the property or assets belonging to the person or estate into money, at market prices, and applying the proceeds, with the cash previously on hand, to the payment of them. *Silver Valley Mining Company v. North Carolina Smelting Company*, 119 N. C. 417, 418, 25 S. E. 954.

Same—Applied to Corporation.—A corporation is not insolvent, so as to render a mortgage of its property fraudulent, so long as it has property sufficient, if converted into money at market prices, to meet its liabilities. *Silver Valley Mining Company v. North Carolina Smelting Company*, 119 N. C. 417, 25 S. E. 954.

Debtor Whose Assets Exceed His Indebtedness.—Where a solvent debtor conveys practically all of his property to secure a pre-existing debt, having other creditors at the time, it does not create a preference within the intent and meaning of this section. *Flowers v. American, etc., Chemical Co.*, 199 N. C. 456, 154 S. E. 736.

Right and Duty to Defend Suits.—It is the duty of assignees for the benefit of creditors, who have once accepted the trust, not only to appear, but so far as the nature of the transaction and the facts and circumstances of the case will admit or warrant, to defend suits to set aside the assignments. *Chittenden v. Brewster*, 2 Wall. 191, 17 L. Ed. 839.

§ 23-4. Substitute for incompetent trustee appointed in special proceeding.—When a trustee named in a deed of assignment for the benefit of creditors has died or resigned or has in any way become incompetent to execute the trust, the clerk of the superior court of the county wherein said deed of assignment has been registered is authorized and empowered, in a special proceeding in which all persons interested have been made parties, to appoint some discreet and competent person to act as such trustee and to execute all the trusts created in the original deed of assignment, according to its true intent and as fully as if originally appointed trustee therein. (1915, c. 176, s. 1; C. S. 1612.)

Cross Reference.—As to appointment of successor to incompetent trustee, generally, see § 45-9.

§ 23-5. Insolvent trustee removed unless bond given; substitute appointed.—Upon the complaint of any creditor of the assignor or trustee in such deed of trust, alleging under oath that the trustee named therein is insolvent, and asking that he be required to give bond or be removed, it is the duty of the clerk of the superior court of the county in which such deed of trust is registered, upon a notice of not more than ten days to such trustee, to hear the complaint. If upon such hearing the clerk is satisfied that such trustee is insolvent, he shall remove such trustee and appoint some competent person to execute the provisions of such deed of trust, unless such insolvent trustee shall file with the clerk a good and sufficient bond, to be approved by him, in a sum double the value of the property in the deed of trust, payable to the state of North Carolina, and conditioned that such trustee shall faithfully execute and carry into effect the provisions of said deed of trust. (Rev., s. 969; 1893, c. 453, s. 3; C. S. 1613.)

In General.—While formerly it was entirely competent for a debtor to assign his property to an insolvent person who was otherwise qualified to execute the provisions of the deed of trust for the benefit of creditors, the policy of the law has since been declared by this section to throw greater safeguards around such transactions by requiring every trustee of this kind to give bond when proper application for

that purpose is made to the clerk. *Preiss v. Cohen*, 112 N. C. 278, 282, 17 S. E. 520.

§ 23-6. Trustee removed on petition of creditors; substitute appointed.—Upon the written petition of one-fourth of the number of the creditors of the grantor or assignor whose claims aggregate more than fifty per cent of the total indebtedness of said grantor or assignor, the clerk of the superior court of the county in which said deed of trust or deed of assignment is registered, upon a notice of not more than ten days to said trustee of said petition, shall remove said trustee and appoint some competent person to execute the provisions of such deed of trust or deed of assignment. (1909, c. 918, s. 3; C. S. 1614.)

§ 23-7. Substituted trustee to give bond.—Upon the removal or resignation of any trustee it is the duty of the clerk to require the person appointed to execute the provisions of such deed of trust, before entering upon his duties, to file with the clerk a good and sufficient bond, to be approved by him in a sum double the value of the property in said deed of trust, payable to the state of North Carolina, and conditioned that such person shall faithfully execute and carry into effect the provisions of said deed of trust. (Rev., s. 970; 1893, c. 453, s. 3; 1909, c. 918, s. 4; 1915, c. 176, s. 2; C. S. 1615.)

§ 23-8. Only perishable property sold within ten days of registration.—It is unlawful for any trustee, whether named in such deed of trust or appointed by a clerk of the superior court, to sell any part of the property described in such deed of trust within ten days from the registration thereof, unless such property or some part thereof be perishable, in which case he may sell such property as is perishable, according to the powers conferred upon him in said deed of trust. (Rev., s. 971; 1893, c. 453, s. 4; C. S. 1616.)

§ 23-9. Creditors to file verified claims with clerk; false swearing misdemeanor.—All creditors of the maker of such deed of trust shall, before receiving payment of any amount from the said trustee, file, with the clerk of the superior court a statement under oath that the amount claimed by him is justly due, after allowing all credits and offsets, to the best of his knowledge and belief. Any creditor who shall knowingly swear falsely in such statement shall be guilty of a misdemeanor. (Rev., ss. 972, 3617; 1893, c. 453, ss. 6, 7; C. S. 1617.)

Creditors Claiming Estoppel.—Creditors, who claim under a deed of trust and file their claims to share in the proceeds of sale, cannot be heard to impeach its provisions. *Chard v. Warren*, 122 N. C. 75, 29 S. E. 373.

§ 23-10. Priority of payments by trustee.—The trustee, after paying the necessary costs of the administration of the trust, shall pay as speedily as possible (1) all debts which are a lien upon any of the trust property in his hands, to the extent of the net proceeds of the property upon which such debt is a lien; (2) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before registration of said deed of trust or deed of assignment, and (3) all other debts equally ratable. (1909, c. 918, s. 5; C. S. 1618.)

No Discrimination Except as Provided.—Except for the

two classes mentioned in this section all discrimination among creditors is forbidden. *Wooten v. Taylor*, 159 N. C. 604, 608, 76 S. E. 11.

§ 23-11. Trustee to account quarterly; final account in twelve months.—The trustee, whether named in the deed of trust or appointed by a clerk of a superior court, shall within three months from the registration of such deed of trust, and at each succeeding period of three months, file with the clerk of the superior court of the county in which the same is registered an account under oath, stating in detail his receipts and disbursements and his action as trustee, and within twelve months he shall file his final account of his administration of his trust. The clerk may upon good cause shown extend the time within which the quarterly and final accounts herein provided for are to be filed. (Rev., s. 973; 1893, c. 453, s. 5; C. S. 1619.)

§ 23-12. Trustee violating duties guilty of misdemeanor.—If any trustee in a deed of trust for the benefit of creditors shall fail to file his inventory as required by law, or shall knowingly make any false statement in such inventory, or shall knowingly fail to include any property therein, or shall sell any part of the property described in the deed of trust within ten days unless such property so sold be perishable, or shall fail to file either of the quarterly accounts or the final accounts as required by law, or shall knowingly make any false statement in such quarterly or final account, or shall knowingly fail to include any property, money or disbursement in such quarterly or final account, he shall, in either case, be guilty of a misdemeanor. (Rev., s. 3689; 1893, c. 453, s. 8; C. S. 1620.)

Art. 2. Petition of Insolvent for Assignment for Creditors.

§ 23-13. Petition; schedule; inventory; affidavit.—Every insolvent debtor may present a petition in the superior court, praying that his estate may be assigned for the benefit of all his creditors, and that his person may thereafter be exempt from arrest or imprisonment on account of any judgment previously rendered or of any debts previously contracted. On presenting such petition, every insolvent shall deliver therewith a schedule containing an account of his creditors and an inventory of his estate, which inventory shall contain—

1. A full and true account of his creditors, with the place of residence of each, if known, and the sum owing to each creditor, whether on written security, on account, or otherwise.

2. A full and true inventory of his estate, real and personal, with the encumbrances existing thereon, and all books, vouchers and securities relating thereto.

3. A full and true inventory of all property, real and personal, claimed by him as exempt from sale under execution.

He shall annex to his petition and schedule the following affidavit, which must be taken and subscribed by him before the clerk of the superior court, and must be certified by such officer:

I, do swear (or affirm) that the account of my creditors, with the places of their residence, and the inventory of my estate, which

are herewith delivered, are in all respects just and true; that I have not at any time or in any manner disposed of or made over any part of my estate for the future benefit of myself or my family, or in order to defraud any of my creditors; and that I have not paid, secured to be paid, or in any way compounded with any of my creditors, with a view that they, or any of them, should abstain or desist from opposing my discharge: so help me, God. (Rev., s. 1930; Code, ss. 2942, 2943, 2944; 1868-9, c. 162, ss. 1, 2, 3; C. S. 1621.)

Cross References.—As to prohibiting imprisonment for debt, see Const., Art. I, §§ 16, 17. As to provisional remedies by arrest and bail, see § 1-409 et seq. See also, § 1-311 as to execution against the person.

Constitutional Provisions.—The Constitution gives, in express terms, to the Legislature the power to regulate the manner in which a debtor shall surrender his property for the use of his creditors, and he must pursue the regulations which may be thus prescribed, in order to secure his person from arrest for his debt. *Crain v. Long*, 14 N. C. 371.

When Debtor Not under Arrest.—A petitioner not under arrest must show that he has complied with the provisions of this section and obtain an order of discharge under sections 23-14, 23-15. *Howie v. Spittle*, 156 N. C. 180, 72 S. E. 207.

Facts Set Out.—Defendant having filed the schedule of his property, it was not only proper, but necessary, that he should set out the facts showing what right, title, estate and interest he held in the real estate. *Edwards v. Sorrell*, 150 N. C. 712, 716, 64 S. E. 898.

Defendant in Alienation Suit.—A suit by one charging the defendant with alienating the affections of his wife, and arresting and holding him for bail under the affidavits required, is one entitling the defendant to the benefit of this section for the relief of insolvent debtors. *Edwards v. Sorrell*, 150 N. C. 712, 64 S. E. 898.

§ 23-14. Clerk to give notice of petition.—On receiving the petition, schedule and affidavit, the clerk of the superior court shall make an order requiring all the creditors of such insolvent to show cause before said officer, within thirty days after publication of the order, why the prayer of the petitioner should not be granted, and shall post a notice of the contents of the order at the courthouse door and three other public places in the county where the application is made for four successive weeks; or, in lieu thereof, shall publish the same for three successive weeks in any newspaper published in said county, or in an adjoining county. (Rev., s. 1931; Code, ss. 2945, 2946; 1868-9, c. 162, ss. 4, 5; C. S. 1622.)

§ 23-15. Order of discharge and appointment of trustee.—If no creditor oppose the discharge of the insolvent, the clerk of the superior court before whom the hearing of the petition is had shall enter an order of discharge and appoint a trustee of all the estate of such insolvent. (Rev., s. 1932; Code, s. 2947; 1868-9, c. 162, s. 6; C. S. 1623.)

§ 23-16. Terms and effect of order of discharge.—The order of discharge shall declare that the person of such insolvent shall forever thereafter be exempted from arrest or imprisonment on account of any judgment, or by reason of any debt due at the time of such order, or contracted for before that time, though payable afterwards. But no debt, demand, judgment or decree against any insolvent, discharged under this chapter, shall be affected or impaired by such discharge, but the same shall remain valid and effectual against all the property of such insolvent acquired after his discharge and the appointment of a trustee; and the lien of any judgment or decree upon the property of such insolvent shall not be in any manner

affected by such discharge. (Rev., s. 1933; Code, s. 2950; 1868-9, c. 162, s. 9; C. S. 1624.)

Cross Reference.—See cross reference note under § 23-13.

Property Subsequently Acquired Liable.—This section protects from future arrests for the same debt such as have surrendered their property; though after-acquired property may be subject to execution and sale, in proper cases. *Burgwyn v. Hall*, 108 N. C. 439, 13 S. E. 222. See also *Brown v. Long*, 22 N. C. 138 which holds that the subsequently acquired property of a discharged debtor may be reached in equity.

§ 23-17. Suggestion of fraud by opposing creditor.—Every creditor opposing the discharge of the insolvent may suggest fraud and set forth the particulars thereof in writing, verified by his oath; but the insolvent shall not be compelled to answer the suggestions of fraud in more than one case, though as many creditors as choose may make themselves parties to the issues in such cases. (Rev., s. 1934; Code, s. 2948; 1868-9, c. 162, s. 7; C. S. 1625.)

In Bastardy Proceeding.—A mother of a bastard child, to whom an allowance has been made in bastardy proceedings, is such a creditor of the father of her child as to permit her to oppose the insolvent's discharge by suggesting fraud in answer to his petition. *State v. Parsons*, 115 N. C. 730, 20 S. E. 511.

Same—As to Fine and Costs.—When defendant in bastardy proceedings has been ordered to pay a fine and costs and allowance to the mother, only the State can suggest fraud as to the fine and costs. *State v. Parsons*, 115 N. C. 730, 20 S. E. 511.

Answer Does Not Suggest Fraud.—One who has another arrested and held to bail for alienating the affections of his wife does not raise an issue or suggestion of fraud under this section by answering the petition for discharge, and denying a statement therein made by petitioner that he is advised by counsel that, owing to the condition of the title to certain lands scheduled, an execution could not issue against it, as such statement is surplusage. *Edwards v. Sorrell*, 150 N. C. 712, 64 S. E. 898.

All Creditors Notified May Be Joined.—Where a debtor is arrested under different ca. sa.'s at the instance of several creditors, if he applies for his discharge as an insolvent debtor, and fraud is suggested in answer to his application, he has a right to require that all the creditors he may notify shall join in the trial of one issue, and the court will so direct. *Williams v. Floyd*, 27 N. C. 649.

Same—Where Privilege Waived.—But this is for the ease of the debtor, and he may waive the privilege by joining issue with each creditor, and then a verdict in his favor in one case will not discharge him from the responsibility in the case of another creditor. *Williams v. Floyd*, 27 N. C. 649.

Art. 3. Trustee for Estate of Debtor Imprisoned for Crime.

§ 23-18. Persons who may apply for trustee for imprisoned debtor.—When any debtor is imprisoned in the penitentiary for any term, or in a county jail for any term more than twelve months, application by petition may be made by any creditor, the debtor, or by his wife, or any of his relatives, for the appointment of a trustee to take charge of the estate of such debtor. (Rev., s. 1943; Code, s. 2974; 1868-9, c. 162, s. 40; C. S. 1626.)

§ 23-19. Superior court appoints; copy of sentence to be produced.—The application must be made to the superior court of the county where the debtor was convicted; and upon producing a copy of the sentence of such debtor, duly certified by the clerk of the court, together with an affidavit of the applicant that such debtor is actually imprisoned under such sentence, and is indebted in any sum, the clerk or the judge may immediately appoint a trustee of the estate of such debtor. (Rev., s. 1944; Code, s. 2975; 1868-9, c. 162, ss. 41, 42; C. S. 1627.)

§ 23-20. Duties of trustee; accounting; oath.—The trustee of the imprisoned debtor shall pay his debts pro rata. After paying such debts, the trustee shall apply the surplus, from time to time, to the support of the wife and children of the debtor, under the direction of the superior court. When the imprisoned debtor is lawfully discharged from his imprisonment, the trustee shall deliver to him all the estate, real and personal, of such debtor, after retaining a sufficient sum to satisfy the expenses incurred in the execution of the trust and lawful commissions therefor. The trustee shall make his returns and have his accounts audited and settled by the clerk of the superior court of the county where the proceeding was had, in like manner as provided for personal representatives. Before proceeding to the discharge of his duty, the trustee shall take and subscribe an oath, well and truly to execute his trust according to his best skill and understanding. The oath must be filed with the clerk of the superior court. (Rev., ss. 1945, 1946, 1947; Code, ss. 2976, 2978, 2979; 1868-9, c. 162, ss. 43, 45, 46; C. S. 1628.)

§ 23-21. Court may appoint several trustees.—The court has power, when deemed necessary, to appoint more than one person trustee under this chapter; but in reference to the rights, authorities and duties conferred herein, all such trustees shall be deemed one person in law. (Rev., s. 1948; Code, s. 2980; 1868-9, c. 162, s. 47; C. S. 1629.)

§ 23-22. Court may remove trustee and appoint successor.—In case of the death, removal, resignation or other disability of a trustee, the court making the appointment may from time to time supply the vacancy; and all proceedings may be continued by the successor in office in like manner as in the first instance. (Rev., s. 1949; Code, s. 2981; 1868-9, c. 162, s. 48; C. S. 1630.)

Art. 4. Discharge of Insolvent Debtors.

§ 23-23. Insolvent debtor's oath.—Prisoners in order to be entitled to discharge from imprisonment under the provisions of this article shall take the following oath:

I,, do solemnly swear (or affirm) that I have not the worth of fifty dollars in any worldly substance, in debts, money or otherwise whatsoever, and that I have not at any time since my imprisonment or before, directly or indirectly, sold or assigned, or otherwise disposed of, or made over in trust for myself or my family, any part of my real or personal estate, whereby to have or expect any benefit, or to defraud any of my creditors: so help me, God. (Rev., s. 1918a; Code, s. 2972; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, c. 797, c. 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 31; 1881, c. 76; C. S. 1631.)

Constitutional.—This section does not contravene the constitutional provision in regard to homestead and personal property exemptions as the prisoner can discharge himself from custody by paying the fine and costs or by complying with the provisions of this article and taking the oath prescribed. *State v. Williams*, 97 N. C. 414, 416, 2 S. E. 370.

Liberal Construction.—In *Wood v. Wood*, 61 N. C. 538, it is stated that ch. 59 of the Rev. Code (the provisions of which are contained in this and the following sections) has always received a liberal interpretation.

Debtor Must Follow Provisions.—The Constitution gives, in express terms, to the Legislature, the power to regulate the manner in which a debtor shall surrender his property

for the use of his creditors, and he must pursue the regulations which may be thus prescribed, in order to secure his person from arrest for his debts. *Crain v. Long*, 14 N. C. 371. *Griffin v. Simmons*, 50 N. C. 145, 148.

Cited in Moorefield v. Roseman, 198 N. C. 805, 806, 153 S. E. 399.

§ 23-24. Persons imprisoned for nonpayment of costs in criminal cases.—The following persons may be discharged from imprisonment upon complying with this article and § 153-194:

Every person committed for the fine and costs of any criminal prosecution. (Rev., s. 1915; Code, s. 2967; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 26; 1933, c. 228, s. 9; C. S. 1632.)

Editor's Note.—Prior to Public Laws 1933, c. 228, sec. 9, this section contained a provision which read as follows: "Every putative father of a bastard committed for failure to give bond, or to pay any sum of money ordered to be paid for its maintenance." This provision was omitted by the amendment.

Purpose.—This section was manifestly intended to be construed as permitting a defendant convicted in a criminal proceeding, or found to be the father of a bastard child, to file a petition before the clerk designating the time when he wished to apply for a discharge. *State v. Parsons*, 115 N. C. 730, 733, 20 S. E. 511.

Construed with Sections 153-191 and 153-194.—This section does not repeal those enacted much later, (sections 153-191, 153-194,) but the latter modify it. *State v. Manuel*, 20 N. C. 144, 146. All three sections being reenacted into the Revised at the same time, they must be construed together. *State v. Morgan*, 141 N. C. 726, 729, 53 S. E. 142.

Where Workhouse Established.—One committed for the fine and costs of a criminal prosecution, after remaining in jail twenty days, may be discharged upon complying with provisions of the next section. *State v. Davis*, 82 N. C. 610; *State v. Williams*, 97 N. C. 414, 2 S. E. 370, and this is so, although a workhouse has been established by the county commissioners in accordance with the provisions of sec. 153-209. *State v. Williams*, 97 N. C. 414, 2 S. E. 370.

Where Three Indictments Exist.—There were three indictments against a prisoner to one of which he pleaded guilty, and judgment was suspended on the payment of costs, and he was found guilty on the other two, on one of which he was sentenced to imprisonment for ten days. After remaining in jail for the term of his imprisonment and twenty days additional, the prisoner took the oath prescribed and applied for his discharge; it was held, that he was entitled to his discharge in all three cases. *State v. McNeely*, 92 N. C. 829.

Placed in Custody of Sheriff.—An order in bastardy proceedings, placing the defendant in custody of the sheriff was, by necessary implication, an order to imprison upon failure to pay the fine, allowance and costs; and the defendant was properly discharged under this section. *State v. Burton*, 113 N. C. 655, 18 S. E. 657.

Cited in State v. Bradshaw, 214 N. C. 5, 197 S. E. 564.

§ 23-25. Petition; before whom; notice; service.—Every such person, having remained in prison for twenty days, may apply by petition to the court where the judgment against him was entered, praying to be brought before such court at a time and place to be named in the petition, and to be discharged upon taking the oath hereinbefore prescribed. The applicant shall cause ten days notice of the time and place of filing the petition to be served on the sheriff or other officer by whom he was committed. In cases of conviction before a justice of the peace the clerk of the superior court of the county where the convicted person confined for costs is, may administer the oath and discharge the prisoner. (Rev., s. 1916; Code, ss. 2968, 2969; 1891, c. 195; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 28; 1874-5, c. 11; 1868-9, c. 162, s. 27; 1873-4, c. 90; C. S. 1633.)

A Proceeding in the Cause.—The application of an insol-

vent confined for the nonpayment of costs is a proceeding in the cause in which he was convicted, and should be made by petition to the court wherein the judgment against him was entered. *State v. Miller*, 97 N. C. 451, 1 S. E. 776.

Where Clerk Refuses to Give Oath.—If the clerk should refuse to allow the prisoner to take the oath, the remedy is by an appeal to the judge holding the courts of that district and it is intimated that it is irregular for the judge of an adjoining district to release the prisoner on a writ of habeas corpus. *State v. Miller*, 97 N. C. 451, 1 S. E. 776.

Twenty Day Provision Mandatory.—Whether a defendant has property or not, he must remain in jail the twenty days, or pay the fine and costs, since the officers could not waive the imprisonment, nor had the judge the power to dispense with it. *State v. Davis*, 82 N. C. 610, 613.

Neither the judge nor solicitor has the right to allow a defendant in bastardy proceedings to take the insolvent's oath and obtain his discharge without remaining in prison for twenty days. *State v. Bryan*, 83 N. C. 611.

Effect of Discharge.—The discharge of a debtor from prison, under this section, does not protect the debtor from arrest at the instance of any other creditor than the one at whose suit he was in prison, though such other creditor had notice of the debtor's application to be discharged. *Griffin v. Simmons*, 50 N. C. 145.

§ 23-26. Warrant issued for prisoner.—The clerk of the superior court, or justice of the peace, before whom such petition is presented shall forthwith issue a warrant to the sheriff, or keeper of the prison, requiring him to bring the prisoner before the court, at the time and place named for the hearing of the case, which warrant every such sheriff or keeper shall obey. (Rev., s. 1917; Code, s. 2970; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 29; C. S. 1634.)

§ 23-27. Proceeding on application.—At the hearing of the petition, if the prisoner has no visible estate, and takes and subscribes the oath or affirmation prescribed in this article, the clerk of the superior court, or justice of the peace, before whom he is brought, shall administer the oath or affirmation to him, and discharge him from imprisonment; of which an entry shall be made in the docket of the court, and, where the proceeding is before a justice of the peace, the justice shall return the petition and orders thereon into the office of the clerk of the superior court to be filed. (Rev., s. 1918; Code, s. 2971; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 30; C. S. 1635.)

Cross Reference.—See generally the annotations under § 23-24.

Improperly Discharged.—Where a debtor arrested and imprisoned for fraud did not tender the oath required by section 23-23, nor surrender his homestead and personal property exemptions, nor file the petition, nor give the notice required by section 23-25, he was improperly discharged upon an affidavit that he had theretofore made an assignment of all his property for the benefit of creditors and that he was at the date of the affidavit insolvent and not worth more than the exemptions allowed him by law as set apart to him. *Raisin Fertilizer Co. v. Grubbs*, 114 N. C. 470, 19 S. E. 597.

§ 23-28. Suggestion of fraud.—The chairman of the board of commissioners, and every officer interested in the fee bill taxed against such prisoner, may oppose his taking the insolvent debtor's oath above prescribed, and file particulars of the suggestion in writing, in the court where the same shall stand for trial as prescribed in this chapter in other cases of fraud or concealment. (Rev., s. 1919; Code, s. 2973; 1868-9, c. 162, s. 32, C. S. 1636.)

§ 23-29. Persons taken in arrest and bail proceedings, or in execution.—The following persons also are entitled to the benefit of this article as hereinafter provided:

1. Every person taken or charged on any order of arrest for default or bail, or on surrender of bail in any action.

2. Every person taken or charged in execution of arrest for any debt or damages rendered in any action whatever. (Rev., s. 1920; Code, s. 2951; 1868-9, c. 162, s. 10; C. S. 1637.)

Cross Reference.—As to arrest and bail, see §§ 1-409 to 1-439.

Construed with Sections 1-417 and 1-419.—This section should be construed with sections 1-417 and 1-419, and, so construed, the remedies given by this section are in addition to those given by the other sections mentioned. *Edwards v. Sorrell*, 150 N. C. 712, 64 S. E. 898.

Broad Terms.—The terms of this section are as broad and sweeping as they well can be. They do not, in any view of them as to the purpose intended, imply limitation or discrimination. They plainly embrace "every person" taken or charged to be arrested by virtue of "any order of arrest," not specially for a tort, or for fraud, or other particular cause of action as to which a person may be arrested, but for any cause of action, no matter what may be its nature, if the person is arrested in a case wherein he may lawfully be so arrested. They, in plain, strong terms, embrace any such arrest made or ordered to be made in any action whatever—that is, an action in which a person—a party—may be so arrested. *Burgwyn v. Hall*, 108 N. C. 489, 492, 13 S. E. 222.

Same—Tort Actions Included.—The benefits of the statute extend as well to those arrested for torts as for debt, and the debt growing out of one is no more a debt and no more entitled to an extraordinary process for its collection than the other. *Burgwyn v. Hall*, 108 N. C. 489, 13 S. E. 222.

Any Cause Specified in Section 1-410.—The provisions of this section extend to and embrace every person arrested or to be arrested in a civil action on account of any cause of action specified in sec. 1-410. *Burgwyn v. Hall*, 108 N. C. 489, 496, 13 S. E. 222.

Nonresidents Included.—The benefits of the section are not confined to residents of this State. There is no provision in it, or any other statute, within our knowledge, that in terms or by reasonable implication declares that a nonresident shall not be discharged from arrest in a civil action, if he makes the complete surrender of his estate as prescribed. *Burgwyn v. Hall*, 108 N. C. 489, 496, 13 S. E. 222.

Where Motion to Vacate Denied.—Where a party is under arrest in a civil action and his motion to vacate the arrest has been denied, he may seek his discharge under the provisions of this section. *Wing v. Hooper*, 98 N. C. 482, 4 S. E. 463.

Effect on Exemptions.—A judgment debtor against whose person execution has been issued cannot be discharged except by payment, or giving notice and surrender of all property in excess of \$50, and the effect of the execution against the person is to deprive him of his homestead and his personal property exemption over and above \$50. *Oakley v. Lasater*, 172 N. C. 96, 89 S. E. 1063.

Meaning of "Debtor and Creditor."—The term "debtor and creditor," employed generally and without precision in the statute as to persons arrested in civil actions, must be taken as meaning and applying to the plaintiff and defendant in the action in which the defendant shall be so arrested. They imply the plaintiff's claiming and suing for damages for which the defendant is liable to him. Such interpretation is allowable and reasonable, with a view to effectuate the intention of the statute as to persons so arrested. *Burgwyn v. Hall*, 108 N. C. 489, 494, 13 S. E. 222.

§ 23-30. When petition may be filed.—Every person taken or charged as in the preceding section specified may, at any time after his arrest or imprisonment, petition the court from which the process issued on which he is arrested or imprisoned, for his discharge therefrom, on his compliance with this chapter. (Rev., s. 1921; Code, s. 2952; R. C., c. 59, s. 3; 1868-9, c. 162, s. 11; C. S. 1638.)

Persons Included.—This section in broadest terms em-

braces "every person taken or charged as in the preceding section specified." *Burgwyn v. Hall*, 108 N. C. 489, 493, 13 S. E. 222.

Cause of Action Immaterial.—The debtor is entitled to be discharged upon the honest surrender of his property in the way prescribed, whether the cause of action on account of which he was arrested was a fraudulent debt, or a tort, or of other nature as to which he might be arrested. *Burgwyn v. Hall*, 108 N. C. 489, 493, 13 S. E. 222.

§ 23-31. Petition; contents; verification.—The petition shall set forth the cause of the imprisonment, with the writ or process and complaint on which the same is founded, and shall have annexed to it a just and true account of all his estate, real and personal, and of all charges affecting such estate, as they exist at the time of filing his petition, together with all deeds, securities, books or writings whatever relating to the estate and the charges thereon; and also what property, real and personal, the petitioner claims as exempt from sale under execution, and shall have annexed to it an oath or affirmation, subscribed by the petitioner and taken before any person authorized by law to administer oaths, to the effect following:

I,, the within named petitioner, do swear (or affirm) that the within petition and account of my estate, and of the charges thereon, are, in all respects, just and true; and that I have not at any time or in any manner disposed of or made over any part of my property, with a view to the future benefit of myself or my family, or with an intent to injure or defraud any of my creditors: so help me, God. (Rev., s. 1922; Code, ss. 2953, 2954; R. C., c. 59, s. 3; 1868-9, c. 162, ss. 12, 13; C. S. 1639.)

§ 23-32. Notice; length of notice and to whom given.—Twenty days notice of the time and place at which the petition will be filed, together with a copy of such petition and the account annexed thereto, shall be personally served by such debtor on the creditor or creditors at whose suit he is arrested or imprisoned, and such other creditors as the debtor may choose, or their personal representatives or attorneys. If the person to be notified reside out of the state, and has no agent or attorney in the state, the notice may be served on the officer having the claim to collect, or by two weekly publications in any newspaper in the state. (Rev., s. 1923; Code, s. 2955; R. C., c. 59, ss. 3, 20; 1773, c. 100, s. 8; 1868-9, c. 162, s. 14; C. S. 1640.)

Effect of Notice.—The party arrested and so seeking relief must notify the creditors or plaintiff at whose suit he is arrested, but he may or may not notify other creditors of his application to surrender his property and be discharged from arrest, and only such creditors as may be so notified will be affected by his discharge. *Burgwyn v. Hall*, 108 N. C. 489, 492, 13 S. E. 222.

§ 23-33. Who may suggest fraud.—Every creditor upon whom the notice directed in § 23-32 is served may suggest fraud upon the hearing of the petition, and the issues made up respecting the fraud shall stand for trial as in other cases. (Rev., s. 1924; Code, s. 2956; R. C., c. 59, s. 13; 1822, c. 1131, s. 4; 1835, c. 12; 1868-9, c. 162, s. 15; C. S. 1641.)

Petitioner May Demand Oath and Jury Trial.—A petitioner is entitled to insist that suggestions of fraud, made by a creditor, shall be verified by the oath of the creditor and tried by a jury; and it is error in a judge to decide upon such suggestions, without submitting them in an issue to a jury. *Purvis v. Robinson & Co.*, 49 N. C. 96. See also, *State v. Carroll*, 51 N. C. 458, 459.

§ 23-34. Where no suggestion of fraud, discharge granted.—If no creditor suggests fraud or opposes the discharge of the debtor, the justice of the peace or the clerk of the superior court before whom the petition is heard shall forthwith discharge the debtor, and, if he surrenders any estate for the benefit of his creditors, shall appoint a trustee of such estate. The order of discharge and appointment shall be entered in the docket of the court, and if granted by a justice of the peace a copy thereof shall be certified by him to the clerk of the superior court, where the same shall be recorded, and filed. (Rev., s. 1925; Code, s. 2957; R. C., c. 59, s. 1; 1773, c. 100; 1808, c. 746, s. 2; 1810, c. 797, c. 802; 1830, c. 33; 1838, s. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 16; C. S. 1642.)

Proper Remedy to Secure Damages.—The proper remedy of the party seeking to establish and secure his damages for tort is to have a trustee appointed, under this section, to hold and distribute among creditors when and as soon as all debts are ascertained. *Burgwyn v. Hall*, 108 N. C. 489, 13 S. 22, 222.

§ 23-35. Continuance granted for cause.—When it appears to the court that any debtor, who may have given bond for his appearance under this chapter, is prevented from attending court by sickness or other sufficient cause, the case shall be continued to another day, or to the next term, when the same proceedings shall be had as if the debtor had appeared according to the condition of his bond, and in the event of his death in the meantime, his bond shall be discharged. (Rev., s. 1926; Code, s. 2959; R. C., c. 59, s. 10; 1822, c. 1131, s. 1; 1868-9, c. 162, s. 18; C. S. 1643.)

Cross Reference.—As to the insolvent's bond, see § 23-40 and annotations.

When Sickness Excuses.—The extreme sickness of the principal would excuse his nonappearance, and entitle him and his surety to a continuance if that appeared to the court. But where it was not made to appear, the court could not properly continue it. *Buis v. Arnold*, 53 N. C. 233, 234.

Sickness of Surety No Excuse.—Under this section the sickness of the surety is no excuse for the default of the principal. *Speight v. Wooten*, 14 N. C. 327.

§ 23-36. Where fraud in issue, discharge only after trial.—After an issue of fraud or concealment is made up, the debtor shall not discharge himself as to the creditors in that issue, except by trial and verdict in the same, or by a discharge by consent. (Rev., s. 1927; Code, s. 2962; R. C., c. 59, s. 17; 1868-9, c. 162, s. 21; C. S. 1644.)

When Applicable.—The provisions of this section only apply to cases where the defendant is in lawful custody and by virtue of an authority competent to order it. *Houston & Co. v. Walsh*, 79 N. C. 35, 36.

§ 23-37. If fraud found, debtor imprisoned.—If, on the trial, the jury finds that there is any fraud or concealment, the judgment shall be that the debtor be imprisoned until a full and fair disclosure and account of all his money, property or effects be made by the debtor. (Rev., s. 1928; Code, s. 2961; R. C., c. 59, s. 14; 1822, c. 1131, s. 4; 1835, c. 12; 1868-9, c. 162, s. 20; C. S. 1645.)

Must Surrender Whole Property.—An insolvent debtor included in his schedule "all his interest in certain property assigned to S. C." On an issue found, the jury found the deed assigning such property fraudulent. It was held, that the debtor should be imprisoned until he should make a surrender of the whole of such property. *Hutton v. Self*, 28 N. C. 285.

Not in Execution as to Others.—A debtor convicted of fraudulent concealment of his effects, upon an issue be-

tween him and A, and ordered into custody thereupon, according to this section, is not in execution at the suit of B, another creditor, in whose case no such concealment was found or suggested. *Folsom v. Gregory*, 12 N. C. 233.

§ 23-38. Effect of order of discharge.—The order of discharge under the last four articles of this chapter, whether granted upon a nonsuggestion of fraud, upon the finding of a jury in favor of the debtor, or otherwise, shall be in like terms and have like effect as prescribed in § 23-16; except that the body of such debtor shall be free from arrest or imprisonment at the suit of every creditor, and as to him only, to whom the notice required may have been given; and the notices, or copies thereof, shall in all cases be filed in the office of the superior court clerk. (Rev., s. 1929; Code, s. 2960; R. C., c. 59, s. 11; 1822, c. 1131, s. 4; 1835, c. 12; 1868-9, c. 162, s. 19; C. S. 1646.)

Debt Not Discharged.—The discharge of the principal, under the insolvent debtor's law, is not a discharge of the debt. *Norment v. Alexander*, 32 N. C. 71.

Protects against Those Notified.—The discharge of an insolvent protects him from arrest by those creditors only who had notice of his intention to apply for a discharge. *Crain v. Long*, 14 N. C. 371; *Norment v. Alexander*, 32 N. C. 71; *Rountree v. Waddill*, 52 N. C. 309, 312.

Art. 5. General Provisions under Articles 2, 3, and 4.

§ 23-39. Superior court tries issue of fraud.—In every case where an issue of fraud is made up as provided in this chapter, the case shall be entered in the trial docket of the superior court, and stand for trial as other causes; and upon a finding by the jury in favor of the petitioner the judge shall discharge the debtor; if the finding is against the petitioner he shall be committed to jail until he makes full disclosure. (Rev., s. 1935; Code, s. 2949; 1868-9, c. 162, s. 8; C. S. 1647.)

In General.—Upon the suggestion of fraud an issue is raised which should be entered upon the trial docket of the superior court and stand for trial as other causes. *State v. Parsons*, 115 N. C. 730, 20 S. E. 511.

When Issue Can Be Made Up.—When one who applies to take the insolvent debtor's oath, upon rendering a schedule, sets forth in his schedule that he has made a deed in trust of certain property to satisfy certain creditors, and surrenders all his interests in the property mentioned in such deed, it is still competent for the opposing creditor to have an issue made up whether the said deed is not fraudulent, and if found fraudulent by a jury, to cause the debtor to be imprisoned until he surrenders the property itself. *Adams v. Alexander*, 23 N. C. 501.

When Jury Finds Deed Fraudulent.—Where an insolvent debtor, in filing his schedule, only surrenders his interest in certain property, conveyed by a deed in trust, and the jury, upon an issue, find the deed fraudulent, he must be imprisoned until he makes a surrender of the whole property so conveyed. *Hutton v. Self*, 28 N. C. 285.

§ 23-40. Insolvent released on giving bond.—Every debtor entitled under the provisions of this chapter to discharge as an insolvent may, at the time of filing his application for a discharge or at any time afterwards, tender to the sheriff or other officer having his body in charge, a bond, with sufficient surety, in double the amount of the sum due any creditor or creditors at whose suit he was taken or charged, conditioned for the appearance of such debtor before the court where his petition is filed, at the hearing thereof, and to stand to and abide by the final order or decree of the court in the case. If such bond be satisfactory to the sheriff, he shall forthwith release such debtor from custody. (Rev., s. 1936; Code, s.

2958; R. C., c. 59, s. 27; 1868-9, c. 162, s. 17; C. S. 1648.)

Cross Reference.—As to giving bond in surety company, see § 109-17.

When Bond May Be Given.—The insolvent may give bond during the pendency of and until the final determination of the proceedings. Howie v. Spittle, 156 N. C. 180, 182, 72 S. E. 207.

Sufficient Compliance.—A condition "to appear and claim the benefit of the act, etc., and not depart without leave," is substantially the same as that prescribed by the act. Mooring v. James, 13 N. C. 254.

Who Prepares Bond.—Whether it is the duty of the officer or the defendant to prepare the bond to be given for the defendant's appearance. Quære? Winslow v. Anderson, 20 N. C. 2.

Return Day Must Be Certain.—The bond for the defendant's appearance, under this section connected with the execution, is in the nature of process to compel an appearance, and the return day thereof must be certain. Winslow v. Anderson, 20 N. C. 2.

Where Date in Bond Erroneous.—Where a bond was conditioned for the defendant's appearance at the next term of court to be held upon a stated day, and, at the next term which sat at a date earlier than that mentioned in the bond, the defendant did not appear, it was error to take a judgment against him and his surety for default since there was no default of appearance according to the bond. Winslow v. Anderson, 20 N. C. 2.

Amount of Bond.—A bond given under this section for the appearance of an insolvent to court, is good if it is for double the original debt, exclusive of interest and costs, and judgment, on motion, may be rendered on it. Williams v. Yarbrough, 13 N. C. 12.

Defendant Cannot Object to Bond.—A defendant who has given bond under this section cannot object to the informality of the bond, and pray a discharge on account thereof. Page v. Winningham, 18 N. C. 113.

Where Ca. Sa. Voidable.—Where a defendant gave bond under the insolvent act, and while he is at large by virtue thereof, he is not entitled to his discharge on account of the fact that the ca. sa. is voidable; nor can he move, under such circumstances, to quash the proceedings on that account. Bryan v. Brooks, 51 N. C. 580.

Defendant Bound to Attend.—The defendant in a ca. sa. bond, given under this section is bound to attend at every term until the cause is finally disposed of. Arrington v. Bass, 14 N. C. 95.

When Condition in Bond Broken.—Where the defendant in the ca. sa. appeared at the return day of the writ, and upon an issue being made up, the cause was continued, and afterwards the defendant made a default; it was held, that the condition of the bond was broken, and the plaintiff entitled to judgment. Mooring v. James, 13 N. C. 254.

§ 23-41. Surety in bond may surrender principal.—The surety in any bond conditioned for the appearance of any person under this chapter may surrender the principal, or such principal may surrender himself, in discharge of the bond, to the sheriff or other officer of any court where such principal is bound to appear, in the manner provided in the chapter entitled Civil Procedure, article Arrest and Bail. (Rev., s. 1937; Code, s. 2963; R. C., c. 59, s. 23; 1793, c. 100, s. 7; 1793, c. 380, s. 1; 1822, c. 1131, s. 3; 1868-9, c. 162, s. 22; C. S. 1649.)

Cross References.—As to exoneration of bail in arrest and bail, see § 1-433. As to arrest of defendant by bail, see § 1-435. As to surrender of defendant by bail, see § 1-434.

Right of Person Surrendered.—A person who is surrendered in discharge of his bail is entitled to the benefit of this chapter for the relief of insolvent debtors. Smallwood v. Wood, 19 N. C. 356.

Where Surrender to Be Made.—Sureties to a ca. sa. bond taken under this section to protect themselves by a surrender of their principal, must make it in the court to which the ca. sa. is returnable, or to the sheriff of that county; where the writ issues to another county, a surrender to the sheriff of it is a nullity. Mooring v. James, 13 N. C. 254.

Invalid Surrender.—Where a prisoner was brought into open court by his bail, and it was announced, publicly, that he was surrendered, but was unknown to the sheriff, to the plaintiff, and to the plaintiff's counsel, and he was a stranger to all present, except to the bail and the pre-

siding judge, and upon being ordered in custody, he fled from the court-room and escaped, without having been in the custody of the sheriff, it was held that these facts did not amount to a valid surrender. Roundtree v. Waddill, 52 N. C. 309.

Effect of Judgment against Surety.—When the principal obligor in a bond is regularly called at court, and, failing to appear, judgment is rendered against him and his surety, the surety has no right ex debito justicie to come in on a subsequent day of the term and have the judgment set aside, in order to allow him to make a surrender of his principal. Reynolds v. Boyd, 23 N. C. 106.

§ 23-42. Creditor liable for jail fees.—When any debtor is actually confined within the walls of a prison, on an order of arrest in default of bail or otherwise, the jailer must furnish him with necessary food during his confinement, if the prisoner requires it, for which the jailer shall have the same fees as for keeping other prisoners. If the debtor is unable to discharge such fees, the jailer may recover them from the party at whose instance the debtor was confined. And at any time after the arrest, the sheriff or jailer may give notice thereof to the plaintiff, his agent or attorney, and demand security of him for the prison fees that accrue after such notice, and if the plaintiff fails to give such security then the sheriff may discharge the debtor out of custody. (Rev., s. 1938; Code, s. 2965; R. C., c. 69, s. 5; 1773, c. 100, ss. 8, 9; 1821, c. 1103; 1868-9, c. 162, s. 24; C. S. 1650.)

Common Law Provision.—By the common law an imprisoned debtor was obliged to support himself, and, if unable to do so, was dependent upon the humanity of the jailer or of others. Veal v. Flake, 32 N. C. 417, 420.

Effect of Section.—Where a man has been arrested and the issue has been continued from term to term, and his sureties have from time to time surrendered him and the issue has been decided against him and he has been committed to prison in all these cases, at the instance of the creditor, it was held, that under this section the creditor is responsible to the jailer for his fees or allowance for the food furnished to the prisoner during the whole time he was confined in jail. Veal v. Flake, 32 N. C. 417.

Where Prison Bounds Allowed.—When a debtor is committed to prison, and is permitted to take the prison bounds, the jailer is not under any obligation, while he continues in the bounds, to furnish him provisions for his support, nor, of course, can the creditor, at whose suit he is confined, be compelled to reimburse the jailer for any sum so expended. Phillips v. Allen, 35 N. C. 10.

Sheriff Cannot Bring Action.—The action against the creditor for the jail fees of an insolvent debtor, given by this section to the jailer, cannot be maintained by the sheriff as the jailer's principal. Bunting v. McIlhenny, 61 N. C. 579.

§ 23-43. False swearing; penalty.—If any insolvent or imprisoned debtor takes any oath prescribed in this chapter falsely and corruptly, and upon indictment for perjury is convicted thereof, he shall suffer all the pains of perjury, and he shall never after have any of the benefits of this chapter, but may be sued and imprisoned as though he had never been discharged. (Rev., ss. 1940, 3614; Code, s. 2964; R. C., c. 59, s. 25; 1793, c. 100, s. 10; 1868-9, c. 162, s. 23; C. S. 1651.)

Cross Reference.—As to punishment for perjury, see § 14-209.

§ 23-44. Powers of trustees hereunder.—Any trustee appointed under the last four articles of this chapter, as therein contemplated, is hereby declared a trustee of the estate of the debtor, in respect to whose property such trustee is appointed for the benefit of creditors, and is invested from the time of appointment with all the powers and authority, and subject to the control, obligations and responsibilities prescribed by law

in relation to personal representatives over the estates of deceased persons; but all debts shall be paid by the trustees pro rata. (Rev., s. 1941; Code, s. 2977; R. C., c. 59, ss. 21, 22; 1773, c. 100, ss. 5, 6; 1827, c. 44; 1830, c. 26, s. 2; 1868-9, c. 162, s. 44; C. S. 1652.)

§ 23-45. Jail bounds.—Any imprisoned debtor may take the benefit of the prison bounds by giving security, as required by law, except as follows:

1. A debtor against whom an issue of fraud is found.

2. Any debtor who, for other cause, is adjudged to be imprisoned until he makes a full and fair disclosure or account of his property. (Rev., s. 1942; Code, s. 2966; R. C., c. 59, s. 27; 1818, c. 964; 1868-9, c. 162, s. 25; C. S. 1653.)

Cross Reference.—As to regulations regarding prison bounds, see § 153-54.

Art. 6. Practice in Insolvency and Certain Other Proceedings.

§ 23-46. Unlawful to solicit claims of creditors in proceedings. — It shall be unlawful for any individual, corporation, or firm or other association of persons, to solicit of any creditor any claim of such creditor in order that such individual, corporation, firm or association may represent such creditor or present or vote such claim, in any bankruptcy or insolvency proceeding, or in any action or proceeding for or growing out of the appointment of a receiver, or in

any matter involving an assignment for the benefit of creditors. (1931, c. 208, s. 1.)

Cross Reference.—As to restrictions on appearance for creditor in insolvency proceedings, etc., see § 84-9.

Editor's Note.—See 9 N. C. Law Rev. 348.

§ 23-47. Violation of preceding section a misdemeanor.—Any individual, corporation, or firm or other association of persons violating any provision of § 23-46 shall be guilty of a misdemeanor. (1931, c. 208, s. 3.)

Art. 7. Bankruptcy of Taxing, etc., Districts, Counties, Cities, Towns and Villages.

§ 23-48. Local units authorized to avail themselves of provisions of bankruptcy law. — With the approval of the local government commission of North Carolina and with the consent of the holders of such percentage or percentages of its indebtedness as may be required by Public Act Number three hundred two of the Seventy-fifth Congress, First Session, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July first, one thousand eight hundred ninety-eight and Acts amendatory thereof and supplementary thereto," approved August sixteenth, one thousand nine hundred thirty-seven, as amended, any taxing district, local improvement district, school district, county, city, town or village in the state of North Carolina is authorized to avail itself of the provisions of said act of congress as said act now exists or may be hereafter amended. (1939, c. 203.)

Editor's Note.—For comment on this enactment, see 17 N. C. L. Rev. 343.

Chapter 24. Interest.

Sec.

24-1. Legal rate is six per cent.

24-2. Penalty for usury; corporate bonds may be sold below par.

24-3. Time from which interest runs.

24-4. Obligations due guardians to bear compound interest; rate of interest.

Sec.

24-5. Contracts, except penal bonds, and judgments to bear interest; jury to distinguish principal.

24-6. Judgment by default final, clerk ascertains.

24-7. Interest from verdict to judgment added as costs.

§ 24-1. Legal rate is six per cent.—The legal rate of interest shall be six per cent per annum for such time as interest may accrue, and no more. (Rev., s. 1950; Code, s. 3835; 1895, c. 69; 1876-7, c. 91; C. S. 2305.)

Editor's Note.—The distinction between the "legal rate" of interest, and the "lawful rate" of interest, which is maintained in some states, and which appears in some of the older cases of this State, *Burwell v. Burgwyn*, 100 N. C. 389, 392, 6 S. E. 409, has not been preserved. Legal rate of interest implied the maximum rate at which interest could be charged upon an obligation in the absence of stipulation as to the rate; and a lawful rate of interest implied that rate of interest which could be lawfully stipulated without incurring the penalty of law. The former was six per cent, the latter eight. See *Burwell v. Burgwyn*, 100 N. C. 389, 392, 6 S. E. 409. This distinction is now abolished; as the maximum rate at which interest may be charged, with or without stipulation of the rate, cannot exceed six per centum per annum, under the provisions of this and the succeeding section.

This section declares the policy of the state with regard to usury. *Pinnix v. Maryland Cas. Co.*, 214 N. C. 760, 767, 200 S. E. 874.

Definition.—Interest is the compensation allowed by law,

or fixed by the parties, for the use or forbearance of money, as damages for its detention. *Brown v. Hialts*, 15 Wall. 177, 185, 21 L. Ed. 128.

Interest is not costs in any sense, and, when allowed, it should be decreed as damages, and be added to the damages awarded. The "*Wanata*," etc. v. *Avery et al.*, 95 U. S. 600, 615, 24 L. Ed. 461.

Within the Province of Legislature.—It is within the exclusive province of the lawmaking power to prescribe upon what conditions and at what rate interest can be allowed or contracted for, and what shall be a forfeiture of the right to collect it. *Moore v. Beaman*, 112 N. C. 558, 564, 17 S. E. 676.

Where Interest Rate Not Specified.—Where the statute providing for recovery of taxes does not specify the rate of interest to be employed, it is likely that the "legal rate," six per cent per annum, applies. See 12 N. C. Law Rev. 39.

A contract will be declared usurious when it appears that it was the purpose and intent of the lender to charge and receive a greater rate of interest than that allowed by law under this section. *Polikoff v. Finance Service Co.*, 205 N. C. 631, 172 S. E. 356.

Insurance Companies Not Authorized to Charge Interest in Excess of Legal Rate.—Section 58-32 dealing with loans by insurance companies secured by insurance policies does not authorize insurance companies to charge interest in

excess of the legal rate prescribed in this section. *Cowan v. Security Life, etc., Co.*, 211 N. C. 18, 188 S. E. 812.

Applied in *Hackney v. Hood*, 203 N. C. 486, 166 S. E. 323.

§ 24-2. Penalty for usury; corporate bonds may be sold below par.—The taking, receiving, reserving or charging a greater rate of interest than six per centum per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives or corporation by whom it has been paid, may recover back twice the amount of interest paid in an action in the nature of action for debt. In any action brought in any court of competent jurisdiction to recover upon any such note or other evidence of debt, it is lawful for the party against whom the action is brought to plead as a counterclaim the penalty above provided for, to wit, twice the amount of interest paid as aforesaid, and also the forfeiture of the entire interest. Nothing contained in this section or in § 24-1, however, shall be held or construed to prohibit private corporations from paying a commission on or for the sale of their coupon bonds, nor from selling such bonds for less than the par value thereof. (Rev., s. 1951; Code, s. 3836; 1895, c. 69; 1903, c. 154; 1876-7, c. 91; C. S. 2306.)

- I. General Considerations.
- II. Substance Controls Nature of Transaction.
 - A. General Doctrine.
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 - A. Summary of Law and Conclusions.
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- IV. Rights of Subsequent Purchasers.
 - A. Summary of Law.
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- V. Usury Laws as Affecting Corporations.
- VI. Pleading and Practice.

Cross References.

As to party seeking to recover on any usurious contract not allowed costs, see § 6-25. As to usurious loans on household and kitchen furniture or assignments of wages made a misdemeanor, see § 14-391. As to applicability of usury provisions to pawnbrokers, see § 91-7. As to limitation of actions to recover penalty and forfeiture of interest for usury, see § 1-53.

I. GENERAL CONSIDERATION.

Editor's Note.—The former statute (Rev. Code, ch. 114; Rev. Stat., ch. 117) denounced a usurious contract as void as to the whole debt, principal and interest. This section, it will be noted, makes it void, not as to principal, but as to the interest only. *Pinnix v. Maryland Cas. Co.*, 214 N. C. 760, 766, 200 S. E. 874.

See 12 N. C. Law Rev., 279, for note in reference to this section.

At Common Law and in This Country.—At common law the taking of any interest was an indictable offense (11 Am. & Eng. Enc., 379); hence, interest is now purely statutory, being chargeable in such cases and to such extent only as is expressly allowed by statute. The penalties for usury were formerly much severer in this State, and are still so in some other jurisdictions, notably in New York, where in certain cases the charging of interest above six per cent has been recently made indictable. The entire subject of the rate of interest and penalties for usury rests in legislative discretion, and the courts have no power other than to interpret and execute the legislative will. *Smith v. Building, etc., Association*, 119 N. C. 249, 255, 26 S. E. 41.

Effect of Usury Formerly and Now.—By the former law, the taint of usury made the contract void both as to principal and interest into whose hands it might come, and so likewise any appearance, shift or device whereupon or whereby an illegal rate of interest was received or taken was declared to be void. By the preceding section six per cent. is fixed as the legal rate of interest, and in case more than the rate allowed is taken, received, reserved, or

charged, the contract is not invalidated as to the principal, but the entire interest carried by the note or other evidence of debt, or otherwise agreed to be paid thereon, is, under this section, forfeited; and in case such greater rate has been paid, a remedy is given to the party paying the same to recover by action of debt twice the amount of the interest paid. *Moore v. Woodward*, 83 N. C. 531, 532.

The forfeiture provided by this section will be enforced against the usurer, when he seeks to recover upon the usurious contract or transaction. His debt will be stripped of all its interest-bearing quality, and he will be permitted to recover only the principal sum loaned. If a sum in excess of interest at the legal rate has not only been charged by the lender, but has also been paid by the borrower for the use of money, then the person, or his legal representative, or the corporation by whom the same has been paid, may recover twice the amount paid in an action in the nature of action for debt. *Sloan v. Ins. Co.*, 189 N. C. 690, 128 S. E. 2; *Waters v. Garriss*, 188 N. C. 305, 124 S. E. 334; *Ripple v. Mortgage, etc., Corp.*, 193 N. C. 422, 425, 137 S. E. 156.

In *Moore v. Beaman*, 111 N. C. 328, 332, 16 S. E. 177, it was said that the provisions of the law forbidding usury are very clear and explicit. No one can possibly misunderstand them. If moved by avarice a party deliberately violates this law, he has no ground to complain that his punishment has been in the very respect which caused him to sin, and that in grasping after illegitimate interest he has lost also the legitimate interest which the law would have given a law-abiding citizen.

A note otherwise valid is not rendered void either as to principal or interest by the taint of usury, but is subject only to the penalties and forfeitures of this section, one of which is the forfeiture of all interest when usury is properly pleaded and proven. *Pinnix v. Maryland Cas. Co.*, 214 N. C. 760, 200 S. E. 874, overruling in this respect, *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 695, 24 L. R. A. 280; *Ripple v. Mortgage, etc., Corp.*, 193 N. C. 422, 137 S. E. 156, approving *Ector v. Osborne*, 179 N. C. 667, 103 S. E. 388, 13 A. L. R. 1207.

Our statute is copied from the national banking act, and has gone into the laws of many states in exactly the same form. *Pinnix v. Maryland Cas. Co.*, 214 N. C. 760, 765, 200 S. E. 874.

The usury statute will be strictly construed, and usury must be pleaded. *Dixon v. Smith*, 204 N. C. 480, 168 S. E. 683.

Purpose of Statute—Distinction between the New and the Old Statute.—Both the former and the present statutes were enacted in restraint of excessive interest for the same general policy, and especially on the idea of protecting the borrower against the oppression of the lender, the chief difference being that a violation under the old statute invalidated the contract, working a forfeiture of the sum lent as well as of the interest, whereas the present law leaves the contract valid for the principal, but makes the interest forfeitable. *Moore v. Woodward*, 83 N. C. 531, 533.

Created for the Benefit of Borrower.—Statutes prohibiting charging usury or an illegal rate of interest are enacted for the benefit of the borrower. *Ector v. Osborne*, 179 N. C. 667, 103 S. E. 388.

Duty of Court to Carry out Legislative Intent.—The forfeiture of the entire unpaid interest and recovery back of twice the interest paid is in the nature of a penalty intended to induce an observance of the statute, and it is the duty of the courts so to expound and apply the law as to carry out the legislative intent. *Moore v. Woodward*, 83 N. C. 531, 533.

Enforceability in the Absence of Penalty.—Even in the absence of a penalty on charging usurious interest, such as contained in this section, a rate of interest above the one prescribed by law would not be enforceable. *Hughes v. Boones*, 102 N. C. 137, 9 S. E. 286.

Four Requisites of Usurious Transaction.—In order to constitute a usurious transaction, four requisites must appear: (1) there must be a loan, express or implied; (2) there must be an understanding between the parties that the money lent shall be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid, as the case may be; and (4) there must exist a corrupt intent to take more than the legal rate for the use of the money loaned. * * * A profit greater than the lawful rate of interest, intentionally exacted as a bonus for the loan of money, imposed upon the necessities of the borrower in a transaction where the treaty is for a loan and the money is to be returned at all events, is a violation of the usury laws, it matters not what form or disguise it may assume. *Doster v. English*, 152 N. C. 339, 341, 67 S. E. 754, approved in *Monk v. Goldstein*, 172

N. C. 516, 519, 90 S. E. 519; *Loan, etc., Co. v. Yokley*, 174 N. C. 573, 575, 94 S. E. 102; *Ector v. Osborne*, 179 N. C. 667, 103 S. E. 388.

Forbearance of Indebtedness or Loan of Money Essential.—It is universally held that in order that a transaction shall fall within the prohibition of the statutes against usury it is essential that there should be a contract for the forbearance of an existing indebtedness or a loan of money. *Struthers v. Drexel*, 122 U. S. 487, 7 S. Ct. 1293, 30 L. Ed. 1216. See 29 Am. and Eng. Enc., p. 464, sec. 4, and note 5, where a large number of cases are cited in support of the text. There is no exception to this universal rule, that there must be an extension of credit and an illegal compensation for it, knowingly taken, in order to constitute usury. This is recognized in the earliest cases on the subject up to the present time. *Smithwick v. Whitley*, 152 N. C. 366, 367, 67 S. E. 914.

Intent to Charge Usurious Interest.—Where the lender of money intentionally charges the borrower a greater rate of interest than the law allows, and his purpose stands clearly revealed on the face of the instrument, a corrupt intent to violate the usury law on the part of the lender is shown. *Riley v. Sears*, 154 N. C. 509, 70 S. E. 997.

Effect of Charging and Collecting Usury.—Where a usurious rate of interest on money has been paid by the borrower of money, the statutory penalty is double the amount of the usury, but where it is only charged, and not collected, the statute eliminates the usury and forfeits the interest on the amount of the loan. *Ragan v. Stephens*, 178 N. C. 101, 100 S. E. 196.

Where Person Is Not Entitled to Statutory Penalty.—Where a debtor seeks the aid of a court of equity on the ground that his debt is tainted with usury, he may have the usurious element, if any, eliminated from his debt only upon his paying the principal of his debt, with interest at the legal rate. In such case he is not entitled to the benefit of the statutory penalties for usury. *Smith v. Bryant*, 209 N. C. 213, 215, 183 S. E. 276.

And where there is no evidence that any holder of the note executed by plaintiffs has charged or received interest thereon in excess of six per cent, in an action on the note plaintiffs may not invoke the forfeiture of interest for usury. *Id.*

And where the creditors of the mortgagor seek to enjoin the foreclosure of a deed of trust on their creditor's property, and pray for an accounting to ascertain the amount of the debt upon allegations that usurious interest was charged thereon, upon sale of the property under orders of the court, the mortgagee is entitled to the principal amount of his debt, plus six per cent interest thereon, since the plaintiffs, seeking equitable relief, must do equity, and the mortgagee is entitled to the amount of the debt, plus the legal interest, unaffected by the forfeiture or penalty for usury. *Kenny Co. v. Hinton Hotel Co.*, 208 N. C. 295, 180 S. E. 697.

The statutory penalty for usury may not be recovered against the payee of notes secured by deed of trust upon evidence showing that a certain sum was paid the trustee in the deed of trust, but not paid to or received by the payee of the notes. *Hunter v. McClung Realty Co.*, 210 N. C. 91, 185 S. E. 461.

Insurance Companies Subject to Penalty.—An insurance company which charges, retains, or receives interest on a loan made by it in this State, to a policyholder or other person, at a rate in excess of six per centum per annum, is subject to the penalties prescribed by this section notwithstanding the provisions of § 58-32 as to the premiums paid on policies. *Cowan v. Security Life, etc., Co.*, 211 N. C. 18, 22, 188 S. E. 812.

Payment Necessary for Recovery—Payment by Renewal of Note.—Before the plaintiff can maintain the action he must pay the usury in money or money's worth. It is well settled that the penalty is not incurred by the charging of usurious interest; it is by taking the usury that the party incurs the penalty, and no action lies therefor until it is paid. *Godfrey v. Leigh*, 28 N. C. 390; *Stedman v. Bland*, 26 N. C. 296; *Rushing v. Bivens*, 132 N. C. 273, 43 S. E. 798. A renewal of the note does not constitute such payment of the original debt. *Ragan v. Stephens*, 178 N. C. 101, 100 S. E. 196.

Recovery after Payment—Former Rule.—Formerly, the debtor although he could defeat the claim of the creditor to recover usurious interest, he could not, after having paid it, recover it back. *Merchant Bank v. Luterloh*, 81 N. C. 143, 149. But this doctrine is now changed by the express terms of this section.

See also, *Ward v. Sugg*, 113 N. C. 489, 495, 18 S. E. 717.

Recovery of Double the Entire Interest.—Under the clear terms of this section the plaintiff is entitled to recover back double the entire interest paid, not merely double the

usurious excess. *Taylor v. Parker*, 137 N. C. 418, 419, 49 S. E. 921.

Waiver.—The borrower may waive his rights under this section. *Ector v. Osborne*, 179 N. C. 667, 103 S. E. 388.

Same—Consent Judgment.—By consent judgment entered in an action upon a note, wherein usury was set up by the defendant, and the parties have agreed upon a compromise in a certain sum, signed and entered by the court, the defendant waives his right under our usury law, and may not thereafter maintain the defense that a note he had given the plaintiff, in the amount of the judgment, was tainted with the usury of the first transaction. *Ector v. Osborne*, 179 N. C. 667, 103 S. E. 388.

Entire Interest Declared a Forfeiture.—The statute makes the "taking, receiving, reserving or charging usury," when knowingly done, i.e., intentionally done, and not by a mere error of calculation, a forfeiture (not merely forfeitable) of the entire interest which the note carries with it, or which has been agreed to be paid thereon. *Ward v. Sugg*, 113 N. C. 489, 494, 18 S. E. 717.

All interest is forfeited when usury is knowingly exacted. *Guaranty Bond, etc., Co. v. Fair Promise A. M. E. Zion Church*, 219 N. C. 395, 14 S. E. (2d) 37.

Mere Entry Does Not Constitute Charging.—The mere entry on account and subsequent presentation of a usurious claim is not a "charging" within the meaning of that statute. *Grant v. Morris & Sons*, 81 N. C. 150.

Recovery of Penalty Where Plaintiff in Pari Delicto.—A borrower who has paid usurious interest may, under this section recover of the lender twice the amount of usurious interest so paid, notwithstanding that he is in pari delicto in the transaction. *Hollowell v. Building, etc., Association*, 120 N. C. 286, 26 S. E. 781.

Overpayment by Mistake.—In an action to recover for overpayment of interest, made by mistake, recovery can not be had for the forfeiture of double the interest as a penalty for usury, since, upon the allegation of such overpayment by mistake, no legal implications arise that the plaintiff is suing for the forfeiture. *Gillam v. Life Insurance Company*, 121 N. C. 369, 28 S. E. 470.

Usurious Interest Accused upon Bonds Other Than the One Sued upon.—In an action of claim and delivery for certain property conveyed by a chattel mortgage, the defendant can set up the defense of usury upon the allegation that the sole consideration of the bond secured by the mortgage was usurious interest, which had accrued upon certain other bonds executed by the defendant to the plaintiff. *Moore v. Woodward*, 83 N. C. 531.

Promise of Interest Void—Note Valid.—A note executed and delivered as evidence of the promise of the maker to pay to the payee or his order a sum of money which has been loaned by the payee to the maker, is not void, although the payee has, knowingly, taken, received, reserved, or charged interest on the note at a greater rate than six per cent per annum, which is the legal rate in this State; only the promise, in such case, to pay interest is void. *Federal Reserve Bank v. Jones*, 205 N. C. 648, 650, 172 S. E. 185.

Identity with Provisions of National Bank Act.—Our penalties for usury are identical with those prescribed in the National Bank Act, U. S. Rev. St., sec. 5198. *Smith v. Building and Loan Association*, 119 N. C. 249, 255, 26 S. E. 41.

Effect of Repeal of Old Law.—A contract absolutely void under the old law for being usurious, is not validated by the repeal of that law and the enactment of this section which does not invalidate the principal of a usurious contract. *Pond v. Horne*, 65 N. C. 84.

Cited in Bundy v. Commercial Credit Company, 198 N. C. 339, 341, 151 S. E. 626; *McNeill v. Suggs*, 199 N. C. 477, 154 S. E. 729; *Fletcher v. Parlier*, 206 N. C. 904, 905, 173 S. E. 343.

II. SUBSTANCE CONTROLS NATURE OF TRANSACTION.

A. The General Doctrine.

Form of Transaction Cannot Conceal Its Usurious Nature.—An express or implied loan, upon the understanding that the money shall be returned at a greater interest rate than the statute allows, whatever the form of the transaction, and with corrupt intent on the part of the lender, is usury under this section, the corrupt intent consisting in "taking, receiving, reserving, or charging" a greater rate than that allowed by law. *Loan & Trust Co. v. Yokley*, 174 N. C. 573, 94 S. E. 102.

Where a transaction is in reality a loan of money, whatever may be its form, and the lender charges for the use of his money a sum in excess of interest at the legal rate,

by whatever name the charge may be called, the transaction will be held to be usurious. The law considers the substance and not the mere form or outward appearance of the transaction in order to determine what it in reality is. If this were not so, the usury laws of the State would easily be evaded by lenders of money who would exact from borrowers with impunity compensation for money loaned in excess of interest at the legal rate. *Ripple v. Mortgage, etc., Corp.*, 193 N. C. 422, 424, 137 S. E. 156.

The courts do not hesitate to look beneath the forms of transactions alleged to be usurious in order to determine whether or not such transactions are in truth and in reality usurious. In *Bank v. Wysong*, 177 N. C. 380, 99 S. E. 199, Justice Walker, speaking of a transaction alleged to be usurious, says: "This kind of usurious agreement has been cast in various forms, but the courts have invariably stripped it of its flimsy disguises, and decided according to its substance, and its tendency and effect, when the purpose and intent of the lender is unmistakable." *Ripple v. Mortgage, etc., Corp.*, 193 N. C. 422, 424, 137 S. E. 156.

Where there is negotiation for a loan of money, and the borrower agrees to return the amount advanced at all events, it is a contract of lending; and however the transaction may be shaped or disguised, if a profit or return beyond the legal rate of interest is intended to be made out of the necessities or improvidence of the borrower, or otherwise, the contract is usurious. *McRackan v. Bank*, 164 N. C. 24, 26, 80 S. E. 184; *Loan Co. v. Yokley*, 174 N. C. 573, 576, 94 S. E. 102.

The nature and terms of the contract determine its character and purpose, and if usurious in itself it must be so understood to have been intended by the parties, and they cannot be heard to the contrary. So the parties to a contract usurious upon its face, understandingly entered into, must be deemed to have intended to provide for the payment of a rate of interest in excess of that allowed by law, and that is itself a usurious contract. *Burwell v. Burgwyn*, 100 N. C. 389, 392, 6 S. E. 409.

In construing a transaction with regard to our usury statutes the courts will look to its substance and not to its form. *Pratt v. Mortgage Company*, 196 N. C. 294, 145 S. E. 396.

B. Specific Instances.

Between Bank and Its Customer.—Where the bank has followed an arrangement made by its depositor that the latter keep a certain per cent. of the money borrowed upon his own paper and paper of its customers upon which he remains responsible, and which is good and collectible by the bank without trouble to it, and thus collects on the series of transactions a rate of interest in excess of the legal rate, the interest thus received is usurious and comes within the intent and meaning of the statute forbidding it. *English Lumber Co. v. Wachovia Bank & Trust Co.*, 179 N. C. 211, 102 S. E. 205.

Where an association charges a stockholder certain fines under § 54-15, such fines cannot be alleged as interest paid on the loan from the corporation. *Moore v. Mutual Building, etc., Ass'n*, 203 N. C. 592, 166 S. E. 597.

Sum Deducted Must Be Reserved as Interest.—Where the borrower executed notes for the principal sum borrowed and notes for the interest on the principal notes from the time of their execution until their respective maturities, and the lender paid the borrower the principal sum borrowed less an amount deducted and retained by the lender, in the absence of an agreed fact or a finding by the court that the sum deducted was reserved by the lender as interest, the transaction did not constitute usury, and therefore the notes were not tainted with usury in the hands of the purchaser. *Ray v. Atlantic Life Ins. Co.*, 207 N. C. 654, 178 S. E. 89.

Conditional Sale.—An action to recover alleged usurious interest paid cannot be maintained upon evidence disclosing that the transaction alleged was not a loan but was a sale with deferred payment secured by conditional sale contract. *Hendrix v. Harry's Cadillac Co.*, 220 N. C. 84, 16 S. E. (2d) 456.

Loan by Finance Corporation for Purchase of Automobiles.—Where a finance corporation loans money for the purchase of automobiles sold in this State to be paid for at a greater rate of interest than six per cent., the transaction is a usurious one coming within the inhibition of our statute and the penalty it imposes, though the contract is couched in the language of bargain and sale in order to evade our usury law. *Ripple v. Mortgage, etc., Corp.*, 193 N. C. 422, 137 S. E. 156.

A junior mortgagee enjoining the sale under a senior lien, is entitled to have the senior debt stripped of usury and the amount of the debt ascertained at the amount advanced

plus interest thereon at the legal rate of six per cent, this being the relief to which the mortgagor would be entitled, and equity requiring that the same rule should be applicable to the junior lienor. *Pinnix v. Maryland Cas. Co.*, 214 N. C. 760, 200 S. E. 874.

Name of Charge Immaterial.—Any charges made by a building and loan association against a borrowing member, in excess of the legal rate of interest, whether such charges are called "fines," "dues" or "interest," are usurious. *Hollowell v. Building, etc., Association*, 120 N. C. 286, 26 S. E. 781.

Stipulation That Laws of Another State Should Apply.—Where the court finds that the stipulation in a contract that the laws of another state should apply was made in bad faith for the purpose of evading the usury laws of this State, and that defendant charged and received payment of usurious interest, the findings are sufficient to support a judgment in plaintiff's favor that he recover of defendant twice the amount of usurious interest paid as determined by this section. *Polikoff v. Finance Service Co.*, 205 N. C. 631, 172 S. E. 356.

Usury in Fact Made Payable in This State.—Where in fact a contract for the payment of usurious interest, in violation of section 24-1 was made payable in this State, the fact that it appeared from the face of the contract that it was payable in another state, does not relieve it of its usurious charge of interest contrary to the statute of this State. *Ripple v. Mortgage, etc., Corp.*, 193 N. C. 422, 137 S. E. 156.

Building and Loan Associations.—See section 54-22 and notes thereto.

Sum Paid to Trust Company Held to Be a Reasonable Brokerage Fee.—\$2,600 paid to a trust company for its services in handling ninety \$1,000 bonds bearing interest at the legal rate was held not to constitute usury, but a reasonable brokerage fee. *McCubbins v. Virginia Trust Co.*, 80 F. (2d) 984.

III. EQUITABLE DOCTRINES AS AFFECTING RIGHTS OF PARTIES.

A. Summary of Law and Conclusions.

Editor's Note.—The operation of the equitable doctrines whose primary purpose is to attenuate the hardships of technical rules of law, among which doctrines the relief granted by the equity courts against the enforcements of forfeitures occupies a foremost ground, and the effect upon the prevailing usury laws of the changes made in the essence of this section, have created no little diversity of opinion as to the determination of the rights of parties to a usurious transaction in proceedings of equitable nature.

The legal situation may be presented from two different angles: (a) where the lender seeks to enforce the usurious contract in an equitable proceeding, as where he seeks to foreclose a mortgage, (1) under the former law which made both the principal and the interest of a usurious transaction absolutely void, (2) under the present law, which declares only the interest void; (b) where the borrower seeks the aid of the court in the nature of an equitable interposition, as where he seeks to prevent the foreclosure of a usurious mortgage, (1) under the former law, (2) under the present law.

Under situation (a), (1) the cases are uniform that the lender can enforce neither the principal nor the interest of his usurious claim. *McBrayer v. Roberts*, 17 N. C. 75. This it is believed, on the ground that the law invalidating the principal and the interest of a usurious transaction is a positive statutory law which takes precedence over the equitable doctrine of relief against forfeitures, and also on the ground that a court of equity will not give its aid to a person who has exacted an unconscionable usurious bargain.

Situation (a), (2), also presents no difficulty. Here, as in the preceding situation, the court in equitable proceedings follows the exact terms of the statute, and allows the lender the recovery of his principal and disallows that of his interest.

Situation (b) is the one which presents the most difficulty. Under situation (b), (1), the court affected by the established equitable maxim that "he who seeks equity must do equity" declared that a borrower as a condition to the grant to him of equitable relief, must pay not only the principal but also the legal rate of interest thus saving harmless the lender from the terms of a positive statutory penalty. This conclusion has also been reached by many cases under the present law, with the result of abrogating a statutory rule which in no ambiguous terms declares the entire interest void and forfeited, by the operation of a mere equitable maxim. And this is the law in this state at the present. *Miller v. Dunn*, 183 N. C. 397,

124 S. E. 746, being the latest judicial utterance upon the subject. The justification of the holding seems to lie in the fact that the remedy to recover under this section is an independent action at law. It is submitted, (1) that the whole spirit of code procedure is to prevent unnecessary delays, and a circuitry of action to which the doctrine of the case would lead would frustrate that spirit; (2) that an equitable maxim cannot supersede a statutory rule which, in unequivocal terms, declares that the debtor shall not be compelled to pay any interest when usury has been exacted. These conclusions are supported by adjudicated cases, see *Moore v. Beaman*, 112 N. C. 558, 564, 17 S. E. 676; *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717; and seem sound upon principle and policy.

Under the following headline will appear the state of authorities upon the subject, which will exemplify the classification of situations presented above, and will indicate the diversity of opinions which the court has entertained upon the point at different times.

B. Exposition of Authorities.

Lender Precluded Even in Equity.—A court of equity is bound by the statute of usury, and, although upon the bill of the borrower, aid will be extended only upon the terms of his repaying the sum lent with interest, yet the lender can have no relief whatever, and his bill to foreclose a usurious mortgage will be dismissed. *McBrayer v. Roberts*, 17 N. C. 75.

Same—Borrower in Equity.—When the borrower comes in equity, he will be made to do equity, by paying the sum borrowed and the lawful interest, as the price of assistance. But when the lender asks aid of equity, he must ask it on a contract not tainted by an unlawful and corrupt ingredient. *McBrayer v. Roberts*, 17 N. C. 75, 77.

One who goes into a court of equity to seek relief from a usurious contract, will be required to pay legal interest. *Cook v. Patterson*, 103 N. C. 127, 9 S. E. 402.

It is well settled that the penalty for usury, provided for in this section, is not applicable in injunction proceedings—equitable in nature, the principle being that he who seeks equity must do equity. *Jonas v. Home Mtg. Co.*, 205 N. C. 89, 92, 170 S. E. 127, citing *Waters v. Garriss*, 188 N. C. 305, 308, 124 S. E. 334.

Where in a legal action the defendant, a borrower of money, seeks an equitable relief and alleges usury, it is required that he pay the principal sum due with the legal rate of interest, the only forfeiture which he can enforce being the interest in excess of the legal interest rate. *North Carolina Mtg. Corp. v. Wilson*, 205 N. C. 493, 171 S. E. 783.

Equitable Principle Not Applicable in Legal Proceedings.—The principle that a court of equity will eliminate an usurious rate of interest from the debt when the suit is brought by the debtor for the penalty, upon his paying the principal sum and the legal rate of interest, does not apply to an action at law involving no equitable principle. *Cuthbertson v. Bank*, 170 N. C. 531, 87 S. E. 333; *Cheek v. Iron Belt Building, etc., Association*, 127 N. C. 121, 37 S. E. 150.

The principle of equity that a debtor, seeking the aid of a court of equity, will have the usurious element eliminated from his debt only upon his paying the principal and legal rate of interest, the only forfeiture enforced against the creditor being the excess of the legal rate (*Churchill v. Turnage*, 122 N. C. 426, 30 S. E. 122; *Owens v. Wright*, 161 N. C. 127, 76 S. E. 735; *Simonton v. Lanier*, 71 N. C. 498), such as in a case to enjoin the foreclosure of a mortgage or to grant other equitable relief, does not apply when the plaintiff is seeking legal relief. *Cuthbertson v. Peoples Bank*, 170 N. C. 531, 332, 87 S. E. 333.

Tender and Payment of Correct Interest.—Upon the principle that "he who seeks equity must do equity," the plaintiff in his suit to enjoin the foreclosure of a mortgage upon the ground of usury, must tender the correct amount of the mortgage debt with the legal rate of interest thereon, the remedy to recover under the usury statute being an independent action at law. *Miller v. Dunn*, 188 N. C. 397, 124 S. E. 746.

Where the plaintiff seeks injunctive relief from the foreclosure of a mortgage on his lands on the ground of usury, his remedy being by an action at law under this section, he must, under the rules of equity, offer to repay the principal sum due and the legal rate of interest thereon, under the equitable principle that "he who asks equity must do equity," and he may not resist the foreclosure of the mortgage on the sole ground that he has been charged a usurious rate of interest, contrary to the provisions of the statute on the subject. *Waters v. Garriss*, 188 N. C. 305, 124 S. E. 334.

A junior mortgagee seeking equitable relief against fore-

closure of a senior mortgage because of usury should be required to tender, or at least, offer to pay the principal sum due, with legal interest thereon at six per cent. *Pinnix v. Maryland Cas. Co.*, 214 N. C. 760, 770, 200 S. E. 874.

Equitable Maxim Can Not Change the Statutory Rule.—It is entirely immaterial whether the plaintiff creditor has sought his relief by a proceeding which formerly would have been termed a suit in equity or an action at law. The distinction between these modes of procedure is expressly abolished. The plaintiff can not, by skillfully selecting one prayer for relief instead of another, avoid the penalty which the law imposes upon the transaction, which is the basis of his action. *Moore v. Beaman*, 112 N. C. 558, 560, 17 S. E. 676.

There are some authorities to the effect that when the debtor brings the action and invokes the equitable jurisdiction of the court, as by an injunction to prevent a sale under a mortgage, the court will only grant relief upon payment of the principal with legal interest. This is put upon the principle "who asks equity must do equity," but the principle "he who asks equity must do equity," has no application to a case where the right is conferred by statute, that the debtor shall be compelled to pay no interest when usury has been contracted for. *Moore v. Beaman*, 112 N. C. 558, 565, 17 S. E. 676.

Under the usury act in force up to 1866 whenever usury was reserved the entire contract was void, and neither principal nor interest could be recovered. *Ehringhaus v. Ford*, 25 N. C. 522. In *Ballinger v. Edwards*, 39 N. C. 449, this was construed to apply only on the law side of the docket, and when the debtor had to seek the aid of a court of equity he was compelled to pay the principal with legal interest. This section, while reducing the penalty to the loss of interest, seems to have expressly intended to change the doctrine laid down in *Ballinger v. Edwards*. *Moore v. Beaman*, 112 N. C. 558, 565, 17 S. E. 676.

An usurious contract is regarded by the settled law of every court as an oppression, practiced or attempted by the lender upon the borrower. A court of equity can not therefore be invoked to aid such a contract in whole or in part, or to redress the oppressor, because the meditated injury has, by the artifice of the intended victim, been made to recoil upon himself. Oppression can not demand help even against fraud. The court is not at liberty to array its imagined wisdom against the legislative will, or to defeat public policy by a recourse to the code of honor or morality. *Moore v. Beaman*, 112 N. C. 558, 565, 17 S. E. 676.

That this section may work a hardship in any case gives the courts no authority to disregard the statute or explain it away. When the Legislature has constitutional authority to make the statute and its meaning is plain, with no limitation making it apply only when the action is brought by the creditor, the courts have not the power to restrict it. *Moore v. Beaman*, 112 N. C. 558, 565, 17 S. E. 676.

There is no exception in the statute, and, equity as a separate jurisdiction being abolished, there is no ground upon which the court can interpolate any exception. Indeed, it will be a virtual repeal of the usury law if a creditor, by dexterously securing himself by a mortgage with power of sale, can secure himself against the "forfeiture of all interest" which the statute law visits, without exception, upon every "note or other evidence of debt" which is in any way tainted with usury. *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717; *Smith v. Bldg., etc., Assn.*, 119 N. C. 249, 253, 26 S. E. 41. It would be an anomaly under this statute for the court to rule that the debtor must pay the principal debt, "with interest," when the statute provides that, if he does, the debtor can immediately sue to "recover back double the interest so paid." *Roberts v. Ins. Co.*, 118 N. C. 429, 24 S. E. 780. *Churchill v. Turnage*, 122 N. C. 426, 432, 30 S. E. 122.

Where the payee withholds from the borrower a part of the face amount of the note, the same being a device to evade the usury laws, the borrower is entitled in equity to have the note credited with the amount so withheld upon the maturity of the note as against the payee under this section. *Federal Reserve Bank v. Jones*, 205 N. C. 648, 172 S. E. 185.

IV. RIGHTS OF SUBSEQUENT PURCHASERS.

A. Summary of Law.

Editor's Note.—In this connection two important principles of law clash in the determination of the rights of the bona fide subsequent purchasers for value without notice of a negotiable instrument. The criterion of negotiability of an instrument presupposes that it shall be transferable free from all defenses which may exist between the origi-

nal parties to the instrument, and is adhered to upon the consideration of promoting mediums of credit, commerce and industry. On the other hand public policy demands that debtors should enjoy full immunity from the imposition of usurious transactions. Should the doctrine of negotiability prevail, that policy and the statute by which it is given expression would be frustrated by a transfer of the obligation to a holder in due course. To this end the impregnability of the incidents of negotiability have been lenified by an exception to the effect that where the evidence of obligation is void in itself or is made so by statute, the defenses which are available against the payee are also available against the holder. And since both the principal and the interest of a usurious obligation were rendered void in this State by the express terms of the former statute, the case presented no difficulty, and the judicial decisions invariably declared that the holder in due course was in no better position than the payee of the obligation, and that his recourse was against the usurious lender. See *Faison v. Grandy & Sons*, 126 N. C. 827, 829, 36 S. E. 276; *Ward v. Sugg*, 113 N. C. 489, 492, 18 S. E. 717.

Since the establishment of the rule that usury does not render void the principal of the obligation but merely avoids the interest, there has been some question as to the applicability of the old rule to the new situation. See the dissenting opinion of Mr. Justice Burwell, in *Ward v. Sugg*, 113 N. C. 489, 496, 18 S. E. 717. But the holding of the cases, as will be illustrated by the succeeding citations, have been decidedly uniform in declaring that the statute makes void the entire interest, and hence the transferee of the instrument can recover only that which his transferor (the lender) could have recovered, viz., the principal without the interest.

B. Exposition of Authorities.

Holder in Due Course Occupies No Better Position than the Lender.—As to usurious contracts, the law regards the maker, not as in *pari delicto*, but as acting "in chains" (1 Story Eq. Juris., sec. 302), and to permit his contract, which is deemed exacted under duress, to come under the general rule in favor of innocent holders for value of commercial paper, would be to nullify the protecting statute. The recourse of the holder is against the payee and endorser, who is more likely by far to be able to respond than the maker. *Ward v. Sugg*, 113 N. C. 489, 494, 18 S. E. 717.

Prior to this section, a usurious contract worked a forfeiture of both the interest and the debt, and it was stated in *Coor v. Spicer*, 65 N. C. 401, that under the operation of such a statute, innocent and meritorious holders were obliged to suffer. *Faison v. Grandy & Sons*, 126 N. C. 827, 829, 36 S. E. 276.

A note tainted with usury retains the taint in the hands of a subsequent holder. The forfeiture of interest is the decree of the law. *Faison v. Grandy*, 126 N. C. 827, 36 S. E. 276.

In *Glenn v. Farmer's Bank*, 70 N. C. 191, 205, Rodman, J., says: "It is admitted law that notes vitiated by an usurious or gaming consideration can not be enforced in the most innocent hands, but are always and under all circumstances void." *Ward v. Sugg*, 113 N. C. 489, 492, 18 S. E. 717.

Same—Contrary Rule Would Render Statute Nugatory—Remedy of Holder against Lender.—If, by passing the note off before maturity and for value, the endorsee may recover on it, the statute is useless, as the protection intended and the penalty and prohibition are alike rendered nugatory. The victim would have no recourse but to suffer in silence. The usury would be collected in spite of the law which had declared the "entire interest forfeited" ab initio, by the fact of "charging or reserving" it. On the other hand, the innocent endorsee has his recourse against the payee who has endorsed the note to him (*Daniel on Neg. Inst.*, sec. 807), a recourse which would more surely protect him, being against the party who has money to loan, not to borrow. *Ward v. Sugg*, 113 N. C. 489, 493, 18 S. E. 717.

Same—Principle as Applied to Mortgage Obligations.—The only case that seems to mitigate against the otherwise uniform tenor of the decisions on this subject is *Coor v. Spicer*, 65 N. C. 401, which holds that a mortgage given to secure a usurious bond might be enforced in the hands of an innocent purchaser for value. The case recognizes the general rule, but takes mortgages out of it upon the supposed wording of sec. 39-20. Aside from the fact that this is held expressly otherwise in the later case of *Moore v. Woodward*, 83 N. C. 531, an examination of sec. 39-20 will show that *Coor v. Spicer*, was a palpable inad-

vertence. That statute in fact does not purport to protect the innocent holder of a mortgage note which is tainted with usury but the "purchaser of the estate or property" at sale under the mortgage, who buys without notice of the usurious taint in the debt secured. It would be a fraud for the mortgagor to stand by and let him purchase without giving him notice, but the maker can give no notice usually to the assignee of the note. *Ward v. Sugg*, 113 N. C. 489, 493, 18 S. E. 717.

"Shall Be a Forfeiture" Construed.—The Supreme Court has expressly held that the words, "shall be a forfeiture," in this section makes void the agreement as to interest. *Ward v. Sugg*, 113 N. C. 489, 491, 18 S. E. 717.

But see the dissenting opinion of Judge Burwell, in *Ward v. Sugg*, 113 N. C. 489, 496, 18 S. E. 717, to the effect that the statute does not render the usurious interest void so as to prevent an innocent purchaser of the obligation from recovering from the obligor the interest at the legal rate.

V. USURY LAWS AS AFFECTING CORPORATIONS.

Corporation Embraced within Usury Laws.—In the absence of special legislation, corporations are embraced in the usury laws just as natural persons are, and there is no special legislation affecting this point. *Commissioners v. Atlantic, etc., R. Co.*, 77 N. C. 289, 292.

Same—Conflict of Laws.—The statute of the State of New York, forbidding corporations to plead usury as a defense, can not govern a corporation of this State sued in this State, although the bonds in question were delivered in New York and made payable there. *Commissioners v. Atlantic, etc., R. Co.*, 77 N. C. 289.

Where such bonds express a rate of interest illegal in this State, and also in New York, and were issued in payment of a precedent debt and secured by a mortgage on the corporation's property, they could legally bear no greater rate of interest than that allowed in this State. *Commissioners v. Atlantic and N. C. R. R. Co.*, 77 N. C. 289.

Same—Exception.—In *Commissioners v. Atlantic, etc., Co.*, 77 N. C. 289, it was held that a corporation can not legally sell its bonds, bearing the highest legal rate of interest, at a discount for the purpose of borrowing money. Such a sale is in effect a loan, and is usurious. *Ed. Note.*—But the doctrine of this case is abrogated by the latter part of this section which allows such a course.

Provisions of Corporate Charter Construed.—In *Simonton v. Lanier*, 71 N. C. 498, 502, the plaintiff contended that the following language in his alleged act of incorporation, "May discount notes and other evidences of debt, and lend money upon such terms and rates of interest as may be agreed upon," confers the right to exact the rate of interest here agreed upon, although greater than the legal rate. It was held that the statute nowhere confers an express power to exceed the legal rate of interest and that the operative words, "any rate of interest that may be agreed on," mean any rate of interest not greater than the legal rate.

Building and Loan Associations.—See section 54-22 and notes thereto.

VI. PLEADING AND PRACTICE.

Definiteness of Allegations.—In an action brought to recover money alleged to be due on a contract entered into between the parties, wherein the plea of usury is set up in the answer and a recovery is sought under this section for double the amount of the interest paid, the recovery sought is in the nature of a penalty; and when the facts are known or readily obtainable the law requires a definite statement in the pleading as to the time and amount, before allegations in such action are held to be sufficient, and when such statement is not made no amendment to the pleadings should be allowed. *Riley v. Sears*, 154 N. C. 509, 70 S. E. 997.

Borrower May Use Lender as Witness.—To the end that the defense may be ample and complete, if the borrower in his discretion should resort to his remedy under this section he is authorized to examine the lender as a witness. *Merchants Bank of Fayetteville v. Lutterloh*, 81 N. C. 143, 148.

Statute of Limitations.—An action to recover the penalty for usury, under this section, is barred after the lapse of two years from the accrual of the cause of action in the absence of disability or nonresidence affecting the running of the statute. *Smith v. Finance Co.*, 207 N. C. 367, 177 S. E. 183.

Same—Nonresident Creditor.—An action against a non-resident creditor for the statutory penalty for charging usury, who has no agent here upon whom process may be served, is not barred by the statute of limitations, nor does the fact in this case that one of the plaintiffs is a

nonresident and the other has changed his residence affect the matter. *Cuthberton v. Peoples Bank*, 170 N. C. 531, 87 S. E. 333.

Statute of Limitations a Part of Plaintiff's Case.—Under sec. 1-53, a period of two years is allowed for the exercise of the right of the plaintiff to recover usurious interest paid by him; and under that provision it was held that it was a part of the plaintiff's right to allege and prove that the usury was paid within two years, and that the defendant need not specially plead the limitations as in the case of the ordinary statute of limitation. See *Roberts v. Insurance Co.*, 118 N. C. 429, 24 S. E. 780; *Rogers v. Bank*, 108 N. C. 574, 13 S. E. 245.

When Counterclaim Available.—While a counterclaim for usury may be set up in an action on a note under this section, such counterclaim may not be set up in an action in ejectment based on title to the property under foreclosure of the deed of trust securing the note. *North Carolina Mtg. Corp. v. Wilson*, 205 N. C. 493, 171 S. E. 783.

Usury Question of Law When Facts Not in Dispute.—What constitutes usury is a question of law to be determined by the court when the facts are not in dispute. *Grant v. Morris & Sons*, 81 N. C. 150.

When Question for Jury.—Where, in an action upon a note, the defendant pleads the usury statute, and the evidence is sufficient to sustain a verdict that the excess of interest was a proper charge made for negotiating the loan, the question should be submitted to the jury. *Loan, etc.*, Co. v. *Yokley*, 174 N. C. 573, 574, 94 S. E. 102.

Where the plea of the usury under this section is made by the plaintiff in the action to enjoin the defendant from the sale of land securing a mortgage note, and there is a dispute as to whether the charge made was usurious, and as to the amount due under the mortgage, it is reversible error for the trial judge to assume the correctness of the plaintiff's contentions as a fact, and take the case from the jury accordingly. *Miller v. Dunn*, 188 N. C. 397, 124 S. E. 746.

The fact that a sum borrowed was made payable to the borrowers and an attorney with allegations and evidence that the attorney under instructions from the lender deducted a certain sum therefrom before the borrowers could obtain the money, together with the "item of expense" set out in the deed of trust securing the loan, is held sufficient to have been submitted to the jury on the question of usury. *Jonas v. Home Mtg. Co.*, 205 N. C. 89, 170 S. E. 127.

Evidence Properly Submitted to Jury.—Where the plaintiff alleged usury and the defendant contended that the transaction was within the commission for the sale of bonds exception to the usury law it was held that as the evidence was conflicting it was properly submitted to the jury, and was sufficient to support its verdict in plaintiff's favor. *Sherrill v. Hood*, 208 N. C. 472, 181 S. E. 330.

New Note Must Be in the Nature of a Compromise in Order to Constitute a Waiver of Right to Plead Usury.—A usurious contract is not purged of the usury by the execution of renewals or by a change in the form of the contract, or by the giving of a separate note for the usurious charge, and in order for an agreement as to the total debt and the execution of a new note therefor to constitute a waiver of the right to plead usury, the new amount arrived at must be agreed to by the debtor as just and due the creditor, taking into consideration his claim of usury, and be in the nature of a compromise and settlement and be a novation rather than a renewal. *Hill v. Lindsay*, 210 N. C. 694, 188 S. E. 406.

Thus where it was found that the parties agreed upon the total amount of the debt after an accounting involving the credit of sums obtained from the sale of collateral given for the debt, but not involving the question of usury, and that the debtor executed a new note for the balance thus arrived at, it was held insufficient to support the court's conclusion of law that the debtor waived the right to claim usury, the transaction being a renewal rather than a novation. *Id.*

By Whom May Be Plead.—The plea of usury is open to the parties and their privies, and may be made when, by the transaction, the debtor's estate is wrongfully depleted, and ordinarily by one having the legal right to protect the estate, as a receiver of an insolvent corporation against which a usurious contract is sought to be enforced. *Riley v. Sears*, 154 N. C. 509, 70 S. E. 997.

Same—Rights of Trustee in Bankruptcy.—A right of action to recover the penalty for a usury charge is in the nature of an action for debt, and is a wrongful detention of, or injury to, the estate of the bankrupt which passes to his trustee in bankruptcy. *Ripple v. Mortgage, etc., Corp.*, 193 N. C. 422, 137 S. E. 156.

As a Defense.—Where the payee of a promissory note or

bond brings action thereon and the defendant sets up a deduction on account of usury, within the plain intent and meaning of this section the plaintiff will not be entitled to recover the usurious charge. *Pugh v. Scarboro*, 200 N. C. 59, 156 S. E. 149.

A claim of forfeiture of all interest for usury may be properly set up as a defense in the creditor's action on the debt without a tender of the debt with legal interest, tender required only when the debtor seeks affirmative equitable relief such as enjoining the collection of the debt or the foreclosure of the security therefor. *Virginia Trust Co. v. Lambeth Realty Corp.*, 215 N. C. 526, 2 S. E. (2d) 544.

Setting Aside Fraudulent Conveyance.—In a creditor's action to establish its debt and to have a subsequent conveyance by the debtor set aside as fraudulent as to creditors, the fact that plaintiff's debt is tainted with usury entitles defendant debtor to invoke the forfeiture of interest, but does not defeat plaintiff's action, or estop plaintiff from asserting the equitable remedy of setting aside the fraudulent conveyance under the doctrine that he who seeks equity must come into court with clean hands. *Virginia Trust Co. v. Lambeth Realty Corp.*, 215 N. C. 526, 2 S. E. (2d) 544.

Restraining Foreclosure.—The holder of a second mortgage, able and willing to pay the amount of the debt secured by the first mortgage, but alleging usury, under this section, is entitled to have a restraining order against foreclosure continued until determination of the issue of usury. *Wilson v. Union Trust Co.*, 200 N. C. 788, 158 S. E. 479.

Effect of Consent Judgment.—Where a controversy between the parties as to the amount of the debt has been settled by a consent judgment such judgment is conclusive and final as to any matter determined and cannot be impeached collaterally in another proceeding under this section. *Rector v. Suncrest Lbr. Co.*, 52 F. (2d) 946.

Failure to Instruct as to Double Recovery Is Prejudicial.—The plaintiff in his action to recover for usurious rate of interest paid and received by the lender is entitled under this section to recover double the amount of the interest so paid and received, and an instruction to the jury that fails to give him this right is prejudicial to him and is reversible error. *Bundy v. Commercial Credit Co.*, 200 N. C. 511, 512, 157 S. E. 860.

§ 24-3. Time from which interest runs.—Interest is due and payable on instruments, as follows:

1. All bonds, bills, notes, bills of exchange, liquidated and settled accounts shall bear interest from the time they become due, provided such liquidated and settled accounts be signed by the debtor, unless it is specially expressed that interest is not to accrue until a time mentioned in the said writings or securities.

2. All bills, bonds, or notes payable on demand shall be held and deemed to be due when demandable by the creditor, and shall bear interest from the time they are demandable, unless otherwise expressed.

3. All securities for the payment or delivery of specific articles shall bear interest as moneyed contracts; and the articles shall be rated by the jury at the time they become due.

4. Bills of exchange drawn or indorsed in the state, and which have been protested, shall carry interest, not from the date thereof, but from the time of payment therein mentioned. (Rev., s. 1952; Code, ss. 44, 45, 46, 47; R. C., c. 13; 1786, c. 248; 1828, c. 2; C. S. 2307.)

Cross References.—As to negotiable instruments, interest runs from date of instrument in absence of a stipulation to the contrary, see § 25-23, subsec. 2. As to money due as owelty, see § 46-11. As to commission in lieu of interest where advancement has been made as agricultural lien, see § 44-57.

Debts Payable on Demand.—Where money is payable on demand, interest does not accrue until a demand is made; but, when no time is appointed, the money is payable immediately without a demand, and hence interest accrues immediately. *Freeland v. Edwards*, 3 N. C. 49, 2 Am. Dec. 620; *Lewis v. Lewis*, 3 N. C. 32.

Same—Interest Payable from Time Principal Demanded.—In the absence of a special agreement as to interest or as to time of payment, interest is payable on a debt from the time the principal is demanded. *Crawford v. Bank*, 61

N. C. 136; *Bank v. Hart*, 67 N. C. 264; *McRae v. Malloy*, 87 N. C. 196.

Same—Necessity of Demand.—A person holding money belonging to another is not liable for interest thereon, except from the date of demand. *Hyman v. Gray*, 49 N. C. 155; *Neal v. Freeman*, 85 N. C. 441.

Same—Coupons or Installments of Interest Demand.—Coupons or installments of interest bear interest from the time of a demand of payment made after their maturity. *Burroughs v. Commissioners*, 65 N. C. 234.

Same—Commencement of Action.—Where interest runs from the date of demand, and no demand has been made, interest will be allowed from the date of commencement of suit. *Porter v. Grimsley*, 98 N. C. 550, 4 S. E. 529.

Bond Payable without Interest.—Where a note or bond is made payable without interest at a certain date, interest does not run thereon except from the time when it should have been paid. *Dowd v. Railroad*, 70 N. C. 468.

Coupons, when detached from the bond to which they were annexed, bear interest from the time when they were due and payable. *Burroughs v. Commissioners*, 65 N. C. 234.

A premium note for life insurance at six per cent. interest draws that rate from its date unless otherwise specified. *Owens v. Insurance Co.*, 173 N. C. 373, 92 S. E. 168.

Order of County Treasurer for Payment of Money.—Where A brought an action upon an order of a county treasurer, signed by the chairman of the board of county commissioners, it was held under this section that he was entitled to recover interest upon the amount of the order from the time of the demand of payment. *Yellowly v. Commissioners*, 73 N. C. 164.

Unliquidated Demands.—Unliquidated damages as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained. *Tilghman v. Proctor*, 125 U. S. 136, 160, 8 S. Ct. 894, 31 L. Ed. 664.

When interest is recoverable on amount of verdict, it will run from the date of the verdict, unless it can be legally determined before then. *Ludford v. Combs*, 195 N. C. 851, 141 S. E. 541.

§ 24-4. Obligations due guardians to bear compound interest; rate of interest.—Guardians shall have power to lend any portion of the estate of their wards upon bond with sufficient security, to be repaid with interest annually, and all the bonds, notes or other obligations which he shall take as guardian shall bear compound interest, for which he must account, and he may assign the same to the ward on settlement with him. On loans made out of the estate of their wards, guardians may lend at any rate of interest not less than four per cent per annum and not more than the maximum legal rate. This section shall in no way limit or affect the power of guardians to make other investments which are now or may hereafter be authorized or permitted by the laws, statutory or otherwise, of the state of North Carolina. (Rev., s. 1953; Code, s. 1592; R. C., c. 54, s. 23; 1762, c. 69; 1816, c. 925; 1868-9, c. 201, s. 29; 1943, c. 728; C. S. 2308.)

Editor's Note.—The 1943 amendment added the second and third sentences.

Security in Addition to That of Borrower.—The policy of this section is to require an investment by a guardian to be secured by the bond or note of some person in addition to the borrower. *Watson v. Holton*, 115 N. C. 36, 20 S. E. 183.

This in *Boyett v. Hurst*, 54 N. C. 167, where the guardian lends the money of his ward to a trading firm composed of two partners, who both became insolvent at the same time, and from the same causes, no security having been taken besides the names of the two partners, it was held that the guardian was accountable for the money thus loaned, notwithstanding at the time of this loan the partners were considered as entirely solvent and their failure was sudden and unexpected.

A guardian will be held liable for any loss resulting from a loan made without taking any security, however solvent the debtor may have been when the loan was made. *Bane v. Nicholson*, 203 N. C. 104, 106, 164 S. E. 750.

A guardian's primary duty is to invest the trust fund, and he will be chargeable with interest in the absence of

proof that it remained in his hands unemployed without his fault. *Wilson v. Lineberger*, 88 N. C. 416.

Guardian Accountable for Loss.—A guardian will be held liable for any loss resulting from a loan made without taking any security, however solvent the debtor may have been when the loan was made. *Collins v. Gooch*, 97 N. C. 186, 1 S. E. 653.

Compound Interest Defined.—Compound interest is interest upon interest, where accrued interest is added to the principal sum, and that whole treated as a new principal, for the calculation of the interest for the next period. *Black Law Dict.*, p. 636.

Calculation of Compound Interest.—The rule for compounding interest on notes due guardians is "to make annual rests," making the aggregate of principal and interest due at the end of a particular year a new principal, bearing interest thenceforward for another year. *Little v. Anderson*, 71 N. C. 190; *Ford v. Vandyke*, 33 N. C. 227.

Bonds in Settlement with the Ward.—The bonds, upon which the guardian has lent the ward's money, may be transferred by him to the ward in settlement with him, and the guardian does not have to pay the ward in money. *Cobb v. Fountain*, 187 N. C. 335, 337, 121 S. E. 614.

Applied in *Robinson v. Ham*, 215 N. C. 24, 200 S. E. 903.

§ 24-5. Contracts, except penal bonds, and judgments to bear interest; jury to distinguish principal.—All sums of money due by contract of any kind, excepting money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest; and the principal sum due on all such contracts shall bear interest from the time of rendering judgment thereon until it is paid and satisfied. In like manner, the amount of any judgment or decree, except the costs, rendered or adjudged in any kind of action, though not on contract, shall bear interest till paid, and the judgment and decree of the court shall be rendered according to this section. (Rev., s. 1954; Code, s. 530; R. C., c. 31, s. 90; 1786, c. 253; 1789, c. 314, s. 4; 1807, c. 721; C. S. 2309.)

Editor's Note—Correction of Punctuation in the Caption.—The caption of this section was incorrectly punctuated prior to the Consolidated Statutes, and gave rise to at least one litigation. The comma which now appears after the word "bonds" did not then exist, consequently, the excepting clause embraced "judgments" as well as penal bonds. But the court in *In re Chisholm's Will*, 176 N. C. 211, 96 S. E. 1031, disregarded the error and held that, though the caption of a statute may be called in aid of construction, it can not control the text when it is clear, and gave expression to the contents of the section. This error was subsequently corrected in the Consolidated Statutes.

At common law a judgment did not carry interest when an execution of sci. fa. was issued upon it. In an action upon the judgment the plaintiff could recover interest by way of damages for the detention of the money. The statute was passed for the purpose of amending the law in this respect. *Collais v. McLeod*, 30 N. C. 221. The intent was that the principal should bear interest because it was just and right that it should, and that the technical rule of the common law should no longer stand in the way. *McNeill v. Railroad*, 138 N. C. 1, 4, 50 S. E. 458.

This section is not exclusive in prescribing instances in which interest is recoverable, and in proper instances interest may be recovered upon transactions not coming within the statute. *Anderson Cotton Mills v. Royal Mfg. Co.*, 221 N. C. 500, 20 S. E. (2d) 818.

Application to Liquidated Demands Only.—The rule that all moneys due by contract, except those due on penal bonds, shall bear interest applies whenever a recovery is had for the breach of a contract and the amount is ascertained from the terms of the contract itself or from evidence relative to the inquiry, and due by one party to the contract to another; and it does not obtain as a matter of law where the interest sought does not come within the provisions of the statute and is by way of unliquidated damages, and there has been no adequate default on the part of the debtor in reference to withholding the principal sum, or a part of it. *Bond v. Pickett Cotton Mills*, 166 N. C. 20, 81 S. E. 936.

As to interest on amount awarded for the taking of lands under eminent domain, see *Yancey v. North Carolina State Highway, etc., Comm.*, 221 N. C. 185, 19 S. E. (2d) 439.

Interest from the Time Money Should Have Been Paid.—The theory upon which the plaintiff recovers is that the defendant has received the money wrongfully and the law implies a promise to repay it. The action was originally equitable in its character and founded upon the theory that in good conscience the defendant should repay the money wrongfully received, and from this duty the law implied a promise so to do. We see no reason why the amount should not draw interest. *Revisal, sec. 1954* [this section]; *Barlow v. Norfleet*, 72 N. C. 535; *Farmer v. Willard*, 75 N. C. 401. The cases cited by defendant were actions in tort, wherein the jury may or may not allow interest, as they see proper. In this lies the distinction." *Lumber Co. v. Atlantic Coast Line R. Co.*, 141 N. C. 171, 192, 53 S. E. 823, 6 L. R. A. (N. S.) 225.

From Time Due.—When a real estate man is entitled to recover a reasonable amount for his services rendered in securing a tenant for a building, the sum fixed by the verdict will, as a matter of law, draw interest from the time the same was due and payable. *Thomas v. Piedmont Realty, etc., Co.*, 195 N. C. 591, 143 S. E. 144.

After demand by a depositor or creditor of a bank for the payment of the amount due and refusal of the bank to make payment, the bank is liable for the amount of the claim plus interest at the rate of six per centum per annum. *Hackney v. Hood*, 203 N. C. 486, 166 S. E. 323.

Purpose of Requiring Jury to Distinguish Principal and Interest.—The evident design of this section is to allow the plaintiff interest on the principal sum recovered in a judgment from the time of its rendition; and the direction to the jury to distinguish between the principal and interest was intended to provide for those cases in which the whole sum is assessed in damages, so as to enable the clerk or the sheriff to compute the interest on the principal sum. But where the principal and interest are discriminated on the record, or it can be collected from an inspection of it what the principal sum was, it is equally within the spirit of the act that interest should be calculated on that. *DeLoach v. Worke*, 10 N. C. 36, 40.

Judgment Bears Interest from First Day of Term.—Where a consent judgment for a recovery of a certain sum is made a lien on lands, and by its terms payable ninety days from its rendition, it bears interest from the first day of the term, the time given being merely for the purpose of raising the money for its payment; and where the only question submitted to the court is whether interest is chargeable from the date it was payable to a further period beyond, interest for such extended period at the rate of 6 per cent should be allowed. *In re Chisholm's Will*, 176 N. C. 211, 96 S. E. 1031.

Verdict or Contract—Judgment Should Include Interest.—Where the controversy is made to depend upon whether a written agreement of a certain date to subscribe to plaintiff's enterprise in a sum certain was binding upon the defendant corporation, the affirmative answer of the jury to the issue carries with it interest on the subscription from the date it was due, as a matter of law, and judgment should be rendered accordingly, and not from the date of its rendition as in tort. *Chatham v. Mecklenburg Realty Co.*, 174 N. C. 671, 94 S. E. 447.

Interest on Value of Permanent Improvements on Land.—Where it has been ascertained by the verdict of the jury, upon a trial free from error, that the plaintiff is entitled to recover of the defendant the value of permanent improvements he has put upon the defendant's land under a parol agreement that the latter would convey a part of the lands in consideration thereof, void under the statute of frauds, to the extent that the improvements have enhanced the value of the land, interest is properly allowed in the judgment from the time of the defendant's breach, on the amount ascertained to be due at that time; and objection that the jury may have included the interest in their verdict is untenable when it appears that nothing was said by counsel or court in respect to it, the presumption being to the contrary. *Perry v. Norton*, 182 N. C. 585, 586, 109 S. E. 641.

Interest on Contracts and Torts Distinguished.—Where a verdict is given in an action on contract in plaintiff's favor for moneys due by the defendant to his intestate, interest is also given the plaintiff on the amount of the recovery as a matter of law, when not incorporated in the verdict. When in tort the matter of interest is awarded or not according as the jury may find. *Thomas v. Watkins*, 193 N. C. 630, 137 S. E. 818.

In Tort Actions Judgment for Damages Bears Interest.—Although the allowance of interest, in an action for damages for conversion of property, is discretionary with the

jury, yet, after the verdict, the judgment for the damages assessed bears interest by virtue of this section, and this is so, although the verdict is for a certain sum "without interest." *Stephens v. Koonce*, 103 N. C. 266, 9 S. E. 315.

Interest is not allowable as a matter of law in case of tort. Its allowance as damages rests in the discretion of the jury. *Lincoln v. Claflin*, 7 Wall. 132, 19 L. Ed. 106.

Conversion of Funds.—In an action for damages for conversion, the verdict being for the value of the property at the time of the conversion, interest can only begin from the time of the judgment. However, the jury may allow interest on the amount of the damages from the time of the conversion. *Lance v. Butler*, 135 N. C. 419, 47 S. E. 483.

The rule in this State is that interest, as interest, is allowed only when expressly given by statute, or by the express or implied agreement of the parties. *Devereux v. Burgwin*, 33 N. C. 490; *Lewis v. Rountree*, 79 N. C. 122. The only statute upon the subject is that contained in this section, which provides that all sums of money due by contract of any kind whatsoever, excepting such as may be due on penal bonds, shall bear interest, etc., but there is no provision made for actions of trover or trespass de bonis asportatis. In such cases, in order to compel the wrongdoer to make full compensation to the injured party, the jury may, in their discretion, and as damages, allow interest upon the value of the property from the time of its conversion or seizure, and it has been usual for them to do so. But there is no rule which gives it as a matter of law and right. *Patapasco v. Magee*, 86 N. C. 350, 355.

Judgment against State Agency.—This section has no application to a judgment against the state highway and public works commission. *Yancey v. North Carolina State Highway, etc., Comm.*, 222 N. C. 106, 22 S. E. (2d) 256.

Judgment Bears Interest Though Nothing Is Said.—By virtue of this section a judgment bears interest from the time of its rendition until paid, though nothing is said therein about interest. *McNeill v. Railroad*, 138 N. C. 1, 50 S. E. 458.

Statement in Judgment That It Shall Bear Interest.—It is best always that the court in its judgment should state fully the amount to be raised by the execution, both principal and interest; but the plaintiff will not forfeit his right to interest by the failure to do this, when enough appears on the face of the judgment to enable the officer to compute the amount justly due. All he is required to know is the amount of the principal, and then the statute makes that amount bear interest to the time of payment. *McNeill v. Railroad*, 138 N. C. 1, 3, 50 S. E. 458.

This section was held directory so far as it provided that the judgment must itself state that it shall bear interest from the date of rendition until it is paid. It is perfectly clear that such a statement in the judgment is not essential to effectuate the intent of the Legislature, which is to allow interest on judgments. *McNeill v. Railroad*, 138 N. C. 1, 3, 50 S. E. 458.

Compromise Judgment in a Will Contest Case.—Where, in a will contest, a compromise judgment was entered whereby legatees named in the will were to receive certain amounts in settlement of their legacies which were ordered to be paid by the administrator cum testamento thereafter to be appointed, the judgment was not such a judgment as, under this section would draw interest from its date. *Moore v. Pullen*, 116 N. C. 284, 21 S. E. 195.

Interest on Damages in Condemnation Proceedings.—Interest is not allowed on a judgment rendered in the superior court for damages awarded by the jury to the owner for taking his lands in condemnation; for while the jury may award interest in their verdict, the owner may not complain when such has not been done, in the absence of a special request for instructions with relation to it, and the absence of evidence tending to show he is entitled to it. *Raleigh, etc., R. Co. v. Mecklenburg Mfg. Co.*, 166 N. C. 168, 82 S. E. 5.

On Declared Dividend.—Where a receiver declares a dividend which he wrongfully withholds, interest should run from the time the dividend is declared. *Armstrong v. American Exchange Nat. Bank*, 133 U. S. 433, 470, 10 S. Ct. 450, 33 L. Ed. 747.

Interest on Surety Bond.—The surety bond of a clerk of the Superior Court is fixed as to amount in the sum of five thousand dollars, and to that extent a surety is responsible for the defalcation of his principal, including 6 per cent interest from the time of notice given it, except from judgment thereon, when a different principal applies and the surety is liable for 6 per cent interest on the judgment until it is paid. *Lee v. Martin*, 188 N. C. 119, 123 S. E. 631.

The measure of the surety's liability is that of the principal, provided such liability does not exceed the penal sum

of the bond, and where a bank gives a bond to an agency of the State to protect such agency's deposit, upon the insolvency of the bank with assets insufficient to pay depositors in full, the State agency may not hold the surety liable for interest from the time action on the bond is instituted, since in such circumstances the bank is not liable for interest, but the surety is liable for interest only from date of judgment against it on the bond on the amount for which the bank is liable to the State agency as of that date. *State v. United States Guarantee Co.*, 207 N. C. 725, 178 S. E. 550.

Interest Imposed by Law in Nature of Damages.—A debt draws interest from the date it becomes due, and when interest is not made payable on the face of the instrument, payment of interest will be imposed by law in the nature of damages for the retention of the principal of the debt. *Security Nat. Bank v. Travelers' Ins. Co.*, 209 N. C. 17, 182 S. E. 702.

Under this section money due by contract, except money due on penal bonds, bears interest as a matter of law. *Anderson Cotton Mills v. Royal Mfg. Co.*, 221 N. C. 500, 20 S. E. (2d) 818.

Facts Not Excusing Payment of Interest by Insurance Company.—Where under the terms of a policy of insurance payment is to be made to the beneficiary immediately upon receipt of due proof of death of insured, the failure of the insurer to make payment until more than a year after receipt of such due proof entitles the beneficiaries to interest on the amount from the date of insurer's receipt of due proof, and payment of interest will not be excused because payment by insurer was delayed by reason of the fact that the trust agreement under which the policy was assigned was changed without notice to insurer by adding an individual trustee, and the fact that the corporate trustee became insolvent before payment and a substituted trustee appointed and insurer did not have notice of such substitution until a much later date, insurer having had the use of the money during the period of delay. *Security Nat. Bank v. Travelers' Ins. Co.*, 209 N. C. 17, 182 S. E. 702.

Cited in *Bell v. Danzer*, 187 N. C. 224, 232, 121 S. E. 448.

§ 24-6. Judgment by default final, clerk ascertainment.—When a suit is instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, and the defendant does not plead to issue thereon, upon judgment, the clerk of the court shall ascertain the interest due by law, without a writ of inquiry, and the amount shall be included in the final judgment of the court as damages, which judgment shall be rendered therein in the manner prescribed by § 24-5. (Rev., s. 1956; Code, s. 531; R. C., c. 31, s. 91; 1797, c. 475; C. S. 2310.)

This section dispenses with a jury and directs the clerk to compute the interest preparatory to a final judgment by default in suits "instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account," contemplating the rendition of such judgment upon written instruments which themselves specify the precise sum to be paid, and need only an estimate of accrued interest. *Rogers v. Moore*, 86 N. C. 86, 87.

Courts' Power to Correct Mistake in Calculation.—A judgment by default upon a speciality, for the want of a plea, entered by the clerk in court, upon his calculation of interest, was held to be an office judgment, and that the court possessed the power to correct a mistake in the clerk's calculation of interest at any time upon motion. *Griffin v. Hinson*, 51 N. C. 154.

§ 24-7. Interest from verdict to judgment added as costs.—When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment is finally entered shall be computed by the clerk and added to the costs of the party entitled thereto. (Rev., s. 1955; Code, s. 529; C. S. 2311.)

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Art. 1. General Provisions.

§ 25-1. Definitions.—In this chapter, unless the context otherwise requires—

“Acceptance” means an acceptance completed by delivery or notification.

“Action” includes counterclaim and setoff.

“Bank” includes any person or association of persons carrying on the business of banking, whether incorporated or not.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

“Bill” means bill of exchange, and “note” means negotiable promissory note.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

“Holder” means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

“Indorsement” means an indorsement completed by delivery.

“Instrument” means negotiable instrument.

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“Issue” means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

“Person” includes a body of persons, whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “writing” includes print. (Rev., s. 2340; 1899, c. 733, s. 191; C. S. 2976.)

Cross Reference.—As to terms “bearer” and “holder,” see note to § 25-15.

Editor's Note.— Especial attention is called to the fact that the purpose in enacting this statute was to bring about, insofar as possible, a uniformity of the law of the various states upon the subject. This being true, if the purpose is to be realized to the fullest extent, uniformity of interpretation is as essential as uniformity in the statutory provisions. Hence, an investigation of the decisions of the other states which interpret the N. I. L. is not only proper but almost indispensable, and such decisions are more persuasive as authority than is usually the case with the decisions of other states. While it would be impossible in a work of this nature to incorporate all the holdings of the courts of other states upon the subject, some of these deci-

sions have been inserted in this chapter where it is thought they may be of great value in construing the law, or where no decision of the Supreme Court of North Carolina covers the special point.

Some of the North Carolina cases herein annotated were decided under the Law Merchant before the N. I. L. was adopted, but should be of aid in construing this law.

Section quoted in defining bearer and holder in Steinhilper v. Basnnett, 153 N. C. 293, 69 S. E. 220.

Cited in Pickett v. Fulford, 211 N. C. 160, 189 S. E. 488.

§ 25-2. Person primarily liable on instrument.—The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable. (Rev., s. 2342; 1899, c. 733, s. 192; C. S. 2977.)

Cross Reference.—As to liability of parties, see §§ 25-66 to 25-75.

A surety on an instrument comes squarely within the definition of a person whose liability is primary, for he is, by the terms of the instrument, absolutely required to pay the same. Rouse v. Wooten, 140 N. C. 557, 559, 53 S. E. 430. See also Taft v. Covington, 199 N. C. 51, 153 S. E. 597; Dry v. Reynolds, 205 N. C. 571, 172 S. E. 351.

Joint makers upon the face of a negotiable instrument are deemed to be primarily liable thereon, and in an action upon the note the burden is upon the defendants to prove any matter in release, if brought within three years. Roberson Co. v. Spain, 173 N. C. 23, 91 S. E. 361. See also Taft v. Covington, 199 N. C. 51, 153 S. E. 597.

When a promissory note sued on has the signatures of two of the defendants on its face as joint makers and the other defendant's signature on the back as endorser, the statute makes them each liable to the payee and, nothing else appearing, those signing as makers are primarily liable, with the right of contribution among themselves, while the endorser is secondarily liable. Raleigh Trust Co. v. York, 199 N. C. 624, 155 S. E. 263.

Indorser.—If a note, whether negotiable or not, is indorsed at the same time the note itself is made, the indorser ought to be held as original promisor or maker of the note. But where the note is indorsed after its delivery to the payee, the indorser is to be held as an indorser or guarantor depending upon whether the note is negotiable or not. Lily v. Baker, 88 N. C. 151, 154.

A married woman may now make executory contracts as binding as if she were a feme sole, § 52-2, with certain restrictions, § 52-12, and when she has executed a note as co-maker with her husband, a holder in due course for value, may accordingly enforce collection thereof against her as a person primarily liable on the note, and absolutely required to pay it. Taft v. Covington, 199 N. C. 51, 153 S. E. 597.

Parol Evidence as to Character of Signing.—As between the payee of a negotiable note and the signers thereof, a person signing his name on the face of the note may prove by parol evidence that to the knowledge of the payee he signed the same as surety and not maker. Davis v. Alexander, 207 N. C. 417, 177 S. E. 417.

Cited in Mayers v. Bank, 198 N. C. 542, 152 S. E. 628.

§ 25-3. What constitutes reasonable time.—In determining what is reasonable time or an unreasonable time regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case. (Rev., s. 2343; 1899, c. 733, s. 193; C. S. 2978.)

Cross Reference.—As to failure to present bill for acceptance within a reasonable time, see § 25-48.

As Dependent upon Circumstances.—What constitutes reasonable time will vary under the facts and circumstances of different cases, and this statute expresses as definite a rule as could well be established or considered desirable. Manufacturing Co. v. Summers, 143 N. C. 102, 108, 55 S. E. 522.

Though it be inconvenient to have several rules, applicable to different classes of persons, it is more so to have one applied to all, which is wholly unsuited to the habits, transactions, and experience of the greater number. It is impossible to lay down a rule in the abstract which is equally just in its bearing on all persons to be affected by it; it must depend upon the circumstances of the case, and must be determined by the jury, under the directions of the court. Raines v. Grantham, 205 N. C. 340, 343, 171 S. E. 360, citing Brittain v. Johnson, 12 N. C. 293.

Same—Demand and Notice of Default upon Notes.—Four months, when the parties all resided in the same village, is an unreasonable time in making a demand of the maker of a note and giving notice of non-payment to the indorser. Yancey v. Littlejohn, 9 N. C. 525.

But where a demand note was given to raise money for marketing a crop to be negotiated when needed, a negotiation forty-four days after the date of making was not an unreasonable time. Colona v. Parksley Nat. Bank, 120 Va. 812, 92 S. E. 979.

Same—Presentation of Check.—The holder of a check upon a bank located in the town of his residence may present it for payment on the day after the same is drawn, and his omission to present it sooner is no defense to the drawee bank, unless he had information of its precarious condition. First National Bank v. Alexander, 84 N. C. 30.

Cited in State, etc., Trust Co. v. Hedrick, 198 N. C. 374, 151 S. E. 723.

§ 25-4. When law merchant governs.—In any case not provided for in this chapter the rules of the law merchant shall govern. (Rev., s. 2344; 1899, c. 733, s. 196; C. S. 2979.)

Cross Reference.—As to common law declared to be in force in North Carolina, see § 4-1.

§ 25-5. Acts to be done on Sunday or holiday.—Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday, or on a holiday, the act may be done on the next succeeding secular or business day. (Rev., s. 2839; 1899, c. 733, s. 194; C. S. 2980.)

§ 25-6. Application of chapter.—The provisions of this chapter do not apply to negotiable instruments made and delivered prior to the eighth day of March, one thousand eight hundred and ninety-nine. (Rev., s. 2345; 1899, c. 733, s. 195; C. S. 2981.)

Applied in Barden v. Hornthal, 151 N. C. 8, 65 S. E. 513.

Art. 2. Form and Interpretation.

§ 25-7. Form of negotiable instrument.—An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand or at a fixed or determinable future time; (4) must be payable to the order of a specified person or to bearer; and (5) where the instrument is addressed to a drawee, he must be named, or otherwise indicated therein with reasonable certainty. (Rev., s. 2151; 1899, c. 733, s. 1; C. S. 2982.)

Cross References.—As to certainty of sum, see § 25-8; as to unconditional promise, see § 25-9; as to fixed determinable time, see § 25-10; as to payment to order, see § 25-14; as to payment to bearer, see § 25-15.

Editor's Note.—It is apparent that this section is declaratory of the prior law upon the subject. As to certainty of amount to be paid and time of payment, see First Nat. Bank v. Bynum, 84 N. C. 25; necessity of payment in money, Johnson v. Henderson, 76 N. C. 227.

Effect of Conditions.—A contingent condition has always defeated the negotiability of an instrument. Goodloe v. Taylor, 10 N. C. 458.

Since the passage of this law the court has held that a note, the payment of which was made dependent upon a condition expressed in a separate instrument, a deed, was not negotiable. Pope v. Righter Parey Lumber Co., 162 N. C. 206, 78 S. E. 65.

Necessity for Payment to Order or Bearer.—Subsection four was applied in Johnson v. Lassiter, 155 N. C. 47, 71 S. E. 23.

Where an instrument is expressly made payable to a named person, such a provision clearly imports a lack of negotiability under this section. Bank of United States v. Cuthbertson, 67 F. (2d) 182, 186.

The absence of the words "to bearer" or "to order"

does not render the bonds nonassignable, but nonnegotiable. *Id.*

Form of Instrument.—So long as the requirements of this section are complied with, the form of the instrument is immaterial. Thus it has been held that the fact that the instrument is written in pencil (*Gudger v. Fletcher*, 29 N. C. 372, although decided prior to section this holding would seem to be applicable), or that it is under seal (*First Nat. Bank v. Michael*, 96 N. C. 53, 1 S. E. 855, which case was also decided prior to N. I. L. but is apparently applicable, see section 25-12) does not affect the negotiability.

To illustrate further, it has been held that a certificate of deposit containing words of negotiability (*Johnson v. Henderson*, 76 N. C. 227, though decided prior to N. I. L., this case is applicable under it), or a due bill (*Purtell v. Morehead*, 19 N. C. 239) or a mortgage note for a specified sum, payable on a certain future day, though it provided that the whole principal sum should become payable at the option of the mortgagee upon a default in an installment, (*Thorpe v. Minderman*, 123 Wis. 149, 101 N. W. 417, decided under the N. I. L. of Wisconsin, which is identical with this section) is negotiable.

Although county warrants are transferable by indorsement and the indorsee or holder may sue upon them in his own name, they are not negotiable in the sense that the holder in due course is protected by the N. I. L. (*Wright v. Kinney*, 123 N. C. 618, 619, 31 S. E. 874).

The provisions therein that a bond should be payable to bearer, or if registered to the registered holder only, and provisions for an extension of time, upon application of the maker, in the discretion of trustee in the deed of trust securing it, does not change its negotiable character. (*Thomas v. De Moss*, 202 N. C. 646, 163 S. E. 759).

A municipal bond payable to bearer, and otherwise complying as to form with the provisions of this section, is a negotiable instrument, and as such when in the hands of a holder in due course as defined by § 25-58 is not subject to defenses which would otherwise ordinarily be available to the municipal corporation by which the bond was issued. (*Bankers' Trust Co. v. Statesville*, 203 N. C. 399, 407, 166 S. E. 169).

A bond indemnifying a bank from any loss which it might sustain by reason of its taking over the assets and discharging the liabilities of another bank, the bond being payable to the liquidating bank and not to its order, is not a negotiable instrument within the meaning of this section. (*North Carolina Bank, etc., Co. v. Williams*, 201 N. C. 464, 160 S. E. 484).

Holders of negotiable mortgage notes are necessary parties plaintiff in an equitable action to reform the deed of trust and the notes. (*First Nat. Bank v. Thomas*, 204 N. C. 599, 169 S. E. 189).

Unsigned Travelers' Cheque.—A travelers' cheque not signed or countersigned by the purchaser or holder is not a negotiable instrument, since it is not an unconditional promise to pay to the order of a specified person or bearer, the promise to pay being conditioned upon the cheque being countersigned with the signature appearing at the top of the cheque. (*Venable v. American Exp. Co.*, 217 N. C. 548, 8 S. E. (2d) 804).

Cited in *Peoples Building & Loan Assn. v. Swaim*, 198 N. C. 14, 16, 150 S. E. 668; *Dixon v. Smith*, 204 N. C. 480, 168 S. E. 683; *Stein v. Levins*, 205 N. C. 302, 305, 171 S. E. 96.

§ 25-8. What constitutes certainty as to sum.

—The sum payable is a sum certain within the meaning of this chapter, although it is to be paid (1) with interest; or (2) by stated installments; or (3) by stated installments with a provision that upon default in payment of any installment the whole shall become due; or (4) with exchange, whether at a fixed rate or at the current rate; or (5) with costs of collection or an attorney's fee in case payment shall not be made at maturity. But a provision incorporated in the instrument to pay counsel fees for collection is not enforceable, but does not affect the other terms of the instrument or the negotiability thereof. (Rev., ss. 2152, 2346; 1899, c. 733, ss. 2, 197; 1905, c. 327; C. S. 2983.)

Editor's Note.—In *First Nat'l Bank v. Bynum*, 84 N. C. 25, decided before this section was enacted, it was held that a provision for attorneys' fees and exchange made the note non-negotiable because of uncertainty of the amount to be

paid. This, according to the specific terms of the section, is, of course, no longer the law.

Although the first sentence of this section appears in the uniform N. I. L., the second sentence was inserted by the legislature of this State so that, in accordance with the uniform law, the stipulation for attorney fees does not destroy the negotiability of the instrument although the provision is not enforceable. It is the evident policy of the legislature to prevent any stipulation permitting "collection fees", as being against public policy. See *Turner v. Boger*, 126 N. C. 300, 302, 35 S. E. 592, and citations. An application of the operation of this paragraph will be found in *Security Finance Co. v. Hendry*, 189 N. C. 549, 177 S. E. 629.

Since the provision in an instrument is invalid it does not affect the amount in suit in determining the jurisdiction of a justice court. (*Bank v. Appalachian Land, etc., Co.*, 128 N. C. 193, 38 S. E. 813).

Since attorney fees are not collectible under this section an agent with special authority to pay a note due out of funds held by him is limited to a payment of the principal sum, interests and costs that have accrued at the time of payment. (*Hooper v. Trust Co.*, 190 N. C. 423, 130 S. E. 49).

Same—Foreign Contract for Attorney's Fees.—The validity of a provision in a note for attorneys' fees executed and payable in Georgia, must be determined by the laws of North Carolina Exchange Bank v. Land Co., 128 N. C. 193, 38 S. E. 813. And because of this section, the courts of North Carolina will not enforce such a provision. (*Security Finance Co. v. Hendry*, 189 N. C. 549, 177 S. E. 629).

§ 25-9. When promise is unconditional.—An unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional. (Rev., s. 2153; 1899, c. 733, s. 3; C. S. 2984.)

Cross Reference.—As to draft with bill of lading attached, see § 21-37 and notes.

Editor's Note.—This section is declaratory of the prior law upon the subject except that very early it was held that a statement of the consideration made the instrument conditional. See *Mason v. Nelson Cotton Co.*, 148 N. C. 492, 62 S. E. 625; and *Bank v. Hatcher*, 151 N. C. 359, 66 S. E. 308, which overruled the early case, *Howard v. Kimball*, 65 N. C. 175, and held in conformity with this section.

Retention of Title in Seller.—A written unconditional promise to pay a specified sum of money at a designated time is a negotiable instrument, and the negotiability is not affected because the title to goods sold for which the note was given is retained in the seller until payment shall have been made; or stipulations are made in the instrument for application of the proceeds to the obligor's unqualified promise to pay. See *Branch Banking, etc., Co. v. Leggett*, 185 N. C. 65, 116 S. E. 1.

Particular Fund Provided.—Bonds issued for road building are negotiable, notwithstanding that a fund is provided for their payment. While the specification of a particular fund out of which payment is to be made destroys the negotiability, a fund may be provided for payment, as in this case, without affecting it. (*Commissioners v. Bank*, 157 N. C. 191, 72 S. E. 996).

§ 25-10. What constitutes determinable future time.—An instrument is payable at a determinable future time, within the meaning of this chapter, which is expressed to be payable (1) at a fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect. An instrument is payable at a determinable future time, within the meaning of this chapter, notwithstanding the fact that it contains a provision waiving notice of protest, notice of dishonor, and

an agreement to be bound notwithstanding any extension of time which may be granted. Or, if collaterals have been deposited as security for the payment thereof and the instrument contains a provision that if the value of the securities so deposited has so decreased or declined as to render the holder insecure, the holder may require the maker to deposit other and further collaterals to secure the same, and, upon failure to comply with such demand, to declare the instrument due at once. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect, but an instrument payable at a determinable future time is negotiable, even though it may mature or be declared due upon a contingency happening before such future time. (Rev., s. 2156; 1899, c. 733, s. 4; 1923, c. 72; C. S. 2985.)

Editor's Note.—By the amendment, Public Laws 1923, there was added all that part of the section including and following the third sentence.

In 1 N. C. Law Rev., 299, in an article discussing the statutory changes effected by the Public Laws of 1923, it is said: "C. 72 of the Public Laws of 1923 amends the Negotiable Instruments Law (N. I. L.) s. 4, C. S. s. 2985 [this section] in one important respect in order to conform with banking experience and the recommendation of the Federal Reserve Bank of Richmond. [The Tar Heel Banker, April 1923, p. 14.] There are in common usage today many kinds of provisions in negotiable paper for the purpose of accelerating maturity. Thus the principal amount may be made payable in installments with the provision that upon default in payment of any installment or of interest, the whole shall become due. [sec. 25-8, cl. 3]. Or notes may be issued in a series to fall due on successive dates, and each note stating that if one is dishonored the whole series is payable at once. [Chicago Ry. Equipment Co. v. Merchants Bank, 136 U. S. 268, 10 S. Ct. 999, 34 L. Ed. 349, is an example.] Other examples are found in "chattel notes," [Whitlock v. Lumber Co., 145 N. C. 120, 58 S. E. 909] which contain provisions to protect the seller of goods under a conditional sale. If the note provides that the amount shall be payable at a fixed date, or sooner at the demand of the holder if he deems himself insecure, the courts have generally held that such provisions destroy negotiability. (First Nat'l Bank v. Bynum, 84 N. C. 25.) If the ultimate time of payment can be ascertained from the face of the instrument and payment can be accelerated only by the performance of an act regularly incident to the collection of the paper, it would seem that all these provisions should be upheld. [This is the argument made by Zachariah Chafee, Acceleration Provision in Time Paper, 32 Harv. L. Rev. 746.]

"The amendment makes valid another type of acceleration provision used largely by banks, and which bankers looked upon as valid, although the majority of courts thought otherwise. [Strickland v. National Salt Co., 79 N. J. Eq. 182, 91 Atl. 828; National Salt Co. v. Ingraham, 122 Fed. 40. But see National Salt Co. v. Ingraham (1906) 143 Fed. 805. For further cases see Mr. Chafee's article cited, supra. This article is the best discussion of this subject available, and Mr. Chafee argues for the negotiability of time paper with acceleration provisions.] Suppose that collateral is deposited as security for the payment of a note, which contains a provision that if the value of the securities declines so as to render the holder insecure, the holder may require the maker to deposit other collateral, and upon failure to comply, the holder may declare the instrument due at once. It has been argued that such a provision violates three formal requisites of negotiability, certainty of time, certainty of amount, and the rule against the promise to do anything but pay money. But such a provision makes it more certain that the holder will receive the full face value of the instrument, and under the N. I. L. a note payable "on or before" a certain date is not rendered non-negotiable. [§ 25-10, cl. 2.] Further the purpose of the additional promise is to secure the payment of the money and protect the holder from the risks of the maker's insolvency. The provision makes the note more valuable as a substitute for money, and the amendment brings the law of North Carolina into line with business practice.

"The amendment also provides that provisions waiving notice of protest, notice of dishonor and agreements to be bound notwithstanding any extension of time, shall not affect negotiability. It seems that this merely makes more

certain what was already understood to be the law. (Sections 25-116, 25-117, 25-118, 25-166. See First Nat'l Bank v. Johnston (1915) 169 N. C. 526, 86 S. E. 360.)" (The citations which here appear in the brackets are footnotes of the Article as it reads in the Law Review, with changes made to the proper General Statute section numbers where appropriate.)

Acceleration.—Acceleration of the maturity of a note, or of notes in a series, as the result of the failure of the maker to pay interest, or to pay one of the notes of said series, when same becomes due, according to the tenor of the note or notes, by virtue of an agreement to that effect appearing on the face of the note, or notes, does not make the note, or notes of the series, payable upon a contingency, and therefore non-negotiable within the meaning of this section. New Bern Banking, etc., Co. v. Duffy, 153 N. C. 62, 68 S. E. 915; Walter v. Kilpatrick, 191 N. C. 458, 132 S. E. 148.

Section applied as to retaining title to the goods for which the note was given, in Chicago R. Co. v. Merchants' Bank, 136 U. S. 268, 10 S. Ct. 999, 34 L. Ed. 349. See note of Trust Co. v. Leggett, under section 25-9.

§ 25-11. Additional provisions as affecting negotiability.—An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which (1) authorizes the sale of collateral securities in case the instrument be not paid at maturity; or (2) authorizes a confession of judgment if the instrument be not paid at maturity; or (3) waives the benefit of any law intended for the advantage or protection of obligor; or (4) gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall validate any provision or stipulation otherwise illegal, nor authorize the enforcement of an authorization to confess judgment or a waiver of homestead and personal property exemptions. (Rev., ss. 2154, 2346; 1899, c. 733, ss. 5, 197; 1905, c. 327; C. S. 2986.)

Editor's Note.—All the provisions after the word "illegal" in the last sentence were inserted by the North Carolina Legislature and do not appear in the proposed Uniform Law.

A Procedure Statute.—In so far as this section relates to the enforcement of an authorization to confess judgment, it is merely procedural. Monarch Refrigerating Co. v. Farmers' Peanut Co., 74 F. (2d) 790, 793.

This section and §§ 1-248, 1-249, are mere procedural statutes, regulating the practice of the courts, and can, of course, have no extraterritorial effect or be looked to as limiting the powers of corporations. Id.

Negotiability Not Affected by Mortgage.—The recital on the face of a note, to wit: "This is one of a series of notes secured by deed of trust or mortgage," does not affect the negotiable character of the notes under this section. Walter v. Kilpatrick, 191 N. C. 458, 461, 132 S. E. 148.

Additional Act Destroying Negotiability.—A bond to pay money, and to do something else, "as to feed and clothe a slave," is not negotiable. Knight v. Wilmington R. Co., 46 N. C. 357.

Enforcement of Foreign Homestead Waiver.—A provision in a note for the waiver of homestead exemption will not be enforced by the courts of this State although the note may have been executed by parties in another state. Exchange Bank v. Land Co., 128 N. C. 193, 38 S. E. 813.

Applied in Branch Banking, etc., Co. v. Leggett, 185 N. C. 65, 116 S. E. 1. See note under section 25-9.

§ 25-12. Effect of omissions; seal; designation of particular money.—The validity and negotiable character of an instrument are not affected by the fact that (1) it is not dated; or (2) does not specify the value given, or that any value has been given therefor; or (3) does not specify the place where it is drawn or the place where it is payable; or (4) bears a seal; or (5) designates a particular kind of current money in which payment is to be made. But nothing in this section shall alter or repeal any statute requiring in

certain cases the nature of the consideration to be stated in the instrument. (Rev., s. 2155; 1899, c. 733, s. 6; C. S. 2987.)

Editor's Note.—Prior to this section it was held that a negotiable instrument payable in "current funds" was not negotiable. It was also intimated that one paid in "currency" was not, but that one payable in "legal tender notes" was negotiable.

See the note to the following section.

Statement of Transaction.—A negotiable instrument, setting out the transaction for which the instrument is given, cannot be set aside when a holder in due course takes without notice of the infirmity or defect, where there is nothing in such contract to restrict negotiability in the instrument or to indicate fraud or an existent breach. *Bank v. Hatcher*, 151 N. C. 359, 66 S. E. 308; *Bank v. Michael*, 96 N. C. 53, 1 S. E. 855.

Bonds under Seal Negotiable.—Bonds for the payment of money only, while they retain in other respects the properties and incidents of obligations under seal, are in this State put upon the footing of promissory notes and both are made negotiable securities under the statute. *Pate v. Brown*, 85 N. C. 166, 167.

§ 25-13. When payable on demand.—An instrument is payable on demand (1) when it is expressed to be payable on demand, or at sight or on presentation; or (2) in which no time for payment is expressed. Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand. (Rev., s. 2157; 1899, c. 733, s. 7; C. S. 2988.)

Editor's Note.—In *Freeman v. Ross*, 15 Ga. 252, it was held that a draft in which no time of payment was expressed was due instantly, and after presentment it became an overdue instrument and a holder after that time took with notice of all equities. One who took before presentment took before it was overdue. *Rosewell Mfg. Co. v. Hudson*, 72 Ga. 24. A note payable "after date" without expressing any time is payable on demand. *Morrison v. Morrison*, 102 Ga. 170, 29 S. E. 125. A note payable on or before a certain date is payable on that date. The maker may pay before the date if he likes, but if he wishes he may delay payment until the date named. *James v. Benjamin*, 72 Ga. 185.

Demand Not Necessary.—When an instrument is payable on demand it is not necessary to aver and prove demand, the suit itself is sufficient demand. *Dougherty v. Western Bank*, 13 Ga. 287.

Statute of Limitations.—A promissory note, payable on demand, is due immediately, and the statute of limitations runs from the date. *Caldwell v. Rodman*, 50 N. C. 139. The same is true of a bond when no time is specified for payment of it. *Ervin v. Brook*, 111 N. C. 358, 16 S. E. 240.

§ 25-14. When payable to order.—The instrument is payable to order when it is drawn payable to the order of a specified person, or to him or his order. It may be drawn payable to the order of (1) a payee who is not maker, drawer or drawee; or (2) the drawer or maker; or (3) the drawee; or (4) two or more payees jointly; or (5) one or some of several payees; or (6) the holder of an office for the time being. When the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty. (Rev., s. 2158; 1899, c. 733, s. 8; C. S. 2989.)

Editor's Note.—See 13 N. C. Law Rev. 80.

Negotiability.—Unless a note is payable "to the order of a special person or to bearer" it is not negotiable. *Johnson v. Lassiter*, 155 N. C. 47, 71 S. E. 23. So a note payable to a specific person or his order is negotiable. *Insurance Co. v. Jones*, 191 N. C. 176, 179, 131 S. E. 587.

§ 25-15. When payable to bearer.—The instrument is payable to bearer (1) when it is expressed to be so payable; or (2) when it is payable to a person named therein or to bearer; or (3) when it is payable to the order of a fictitious or nonexistent person, and such fact was

known to the person making it so payable; or (4) when the name of the payee does not purport to be the name of any person; or (5) when the only or last indorsement is an indorsement in blank. (Rev., s. 2159; 1899, c. 733, s. 9; C. S. 2990.)

The terms bearer and holder are of the same import, and where either is employed in an instrument it may be negotiated by delivery. *Pryor v. American Trust Co.*, 15 Ga. App. 822, 84 S. E. 312.

Fictitious Payee.—A negotiable instrument payable to a fictitious payee does not make one whose name is identified as that appearing on the instrument payee, but the intention of the maker in inserting the name governs. *Norton v. City Bank (Va.)* 294 Fed. 839.

Effect of Indorsement upon Negotiability.—An indorsement in blank of a non-negotiable instrument does not make it negotiable. *Johnson v. Lassiter*, 155 N. C. 47, 71 S. E. 23.

§ 25-16. No formal language required.—The negotiable instrument need not follow the language of this chapter, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof. (Rev., s. 2160; 1899, c. 733, s. 10; C. S. 2991.)

§ 25-17. Presumption as to date.—Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance or indorsement, as the case may be. (Rev., s. 2161; 1899, c. 733, s. 11; C. S. 2992.)

§ 25-18. Antedated and postdated.—The instrument is not invalid for the reason only that it is antedated or postdated, provided that this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery. (Rev., s. 2162; 1899, c. 733, s. 12; C. S. 2993.)

When Postdated Check Subject to Payment.—Since postdated checks are payable at the time of their date and not before, the drawee cannot accept them and charge them against funds of the drawer prior to that time. The drawer does not undertake to have the funds in the drawee's hands until the time it bears date. *Smith v. Maddox-Rucker Bkg. Co.*, 8 Ga. App. 288, 68 S. E. 1092.

Status of Postdated Check before Maturity.—A postdated check is payable on or after the day of its date; but in the meantime it is negotiable, and the drawer cannot be charged by garnishment as debtor of the payee unless it affirmatively appears at the time of the judgment that the check is due and is still the property of the payee. *Wilson v. McEachern*, 9 Ga. App. 584, 71 S. E. 946.

§ 25-19. When date may be inserted.—When an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him the date so inserted is to be regarded as the true date. (Rev., s. 2163; 1899, c. 733, s. 13; C. S. 2994.)

§ 25-20. When blanks may be filled.—Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as

a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument after completion be negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time. (Rev., s. 2164; 1899, c. 733, s. 14; C. S. 2995.)

When a principal verbally authorizes an agent to fill up with a specific sum a blank in a bond, left with him for that purpose, and then to deliver it in its completed form and obtain money on it, and another person, acting in good faith and with no knowledge of these facts, advances money on such bond, such principal is estopped from setting up the defense of want of authority in the agent and denying his liability on the bond.

Liability Where Amount Left Blank.—Humphreys v. Finch, 97 N. C. 303, 1 S. E. 870; Phillips v. Hensley, 175 N. C. 23, 94 S. E. 673; McArthur v. McLeod, 51 N. C. 476.

Who May Fill Blank.—A bill of exchange drawn and issued in blank for the name of the payee may be filled up by a bona fide holder with his own name, and will bind the drawer. Lawrence v. Mabry, 13 N. C. 473, 475.

One taking before the blanks are filled takes with notice, and must at his peril ascertain the real authority of the person intrusted to complete the instrument. Guerrant v. Guerrant, 7 Va. Law Reg. 639.

Must Be Filled in Reasonable Time.—The blanks in a negotiable instrument must be filled in in a reasonable time. Brown v. Thomas, 120 Va. 763, 92 S. E. 977.

§ 25-21. Incomplete instrument not delivered.—Where an incomplete instrument has not been delivered it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder as against any person whose signature was placed thereon before delivery. (Rev., s. 2165; 1899, c. 733, s. 15; C. S. 2996.)

Acknowledgment after Completion.—If the maker of a sealed note, blank as to the payee's name, acknowledges it to be his bond after the insertion of the payee's name, and delivery, it is valid and its maker is liable thereon. Wester v. Bailey, 118 N. C. 193, 24 S. E. 9.

§ 25-22. Delivery necessary; when effectual; when presumed.—Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery in order to be effectual must be made either by or under the authority of the party making, drawing or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved. (Rev., s. 2166; 1899, c. 733, s. 16; C. S. 2997.)

Cross Reference.—As to necessity of delivery in negotiation, see § 25-35.

Presumption of Delivery to Holder in Due Course.—Where a negotiable municipal bond is in the hands of a holder in due course, it is conclusively presumed that a valid delivery of the bonds had been made so far as the

rights of the holder are concerned. Bankers' Trust Co. v. Statesville, 203 N. C. 399, 166 S. E. 107.

Presumption of Delivery to Payee.—Whenever a bill or note is found in the hands of the payee it will be presumed that it was delivered to him, but the presumption may be rebutted. Pate v. Brown, 85 N. C. 166, 167.

Delivery to Other than Payee.—It is not necessary that delivery be made to the payee. If the delivery is made to another but shows that the maker intended to part with control, and that it was for the payee's benefit, such delivery is sufficient to bind the maker. Irvin v. Harris, 182 N. C. 647, 109 S. E. 867.

Parol Proof of Conditional Delivery—Contemporaneous Parol Agreements.—It seems to be the rule that as against any person not a holder in due course a contemporaneous parol agreement may be shown to prove that the delivery was conditional, and that there was no contract on the failure of the condition. The instrument cannot be varied by such agreements. See, Robertson v. Virginia Nat. Bank, 135 Va. 166, 115 S. E. 536. Ed. Note.

Therefore it is competent to prove a collateral agreement, as between the immediate parties, making a note non-payable upon a contingency which would deprive the note of all consideration even though the note is under seal. Farrington v. McNeill, 174 N. C. 420, 422, 93 S. E. 957.

But in an action upon a note the defendants were not permitted to set up the defense that as a part of the contemporaneous parol agreement they were given further time, until certain lands had been sold, for such would be in contradiction of the written instrument. Cherokee County v. Meroney, 173 N. C. 653, 92 S. E. 616.

§ 25-23. Construction, where instrument is ambiguous.—Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

3. Where the instrument is not dated it will be considered to be dated as of the time it was issued.

4. Where there is conflict between the written and printed provisions of the instrument the written provisions prevail.

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note the holder may treat it as either at his election.

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon. (Rev., ss. 1952, 2341; 1899, c. 733, s. 17; C. S. 2998.)

Cross Reference.—As to how indorsement made, see § 25-36; as to liability of indorser, see §§ 25-69, 25-70.

Editor's Note.—See 13 N. C. Law Rev. 81.

Note without Interest.—A note given for a specified amount "without interest" will be construed to bear interest after maturity. Dowd v. Railroad, 70 N. C. 468.

Figures Not Material.—The figures are not a material part of an instrument as the words control. State v. Lott, 62 W. Va. 310, 58 S. E. 621.

The indorsement may be on any part of the note, even the face or under the maker's name. Colona v. Parksley Nat. Bank, 120 Va. 812, 92 S. E. 979.

§ 25-24. Signature must appear; trade or assumed name.—No person is liable on the instru-

ment whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name. (Rev., s. 2167; 1899, c. 733, s. 18; C. S. 2999.)

Name in Body of Instrument Not Necessary.—It is not necessary that the name of the obligor appear in the note, it is sufficient that he sign it. *Howell v. Parsons*, 89 N. C. 230.

Maker Must Show Lack of Consideration.—Where, between the original parties, the maker sets up the want of consideration for a note he has made to the payee, as a defense in an action thereon, the burden is upon him to introduce evidence to establish his defense, and his failure to do so will entitle the payee to a judgment in his favor. *Merchants Nat. Bank v. Andrews*, 179 N. C. 341, 102 S. E. 500; *Piner v. Brittain*, 165 N. C. 401, 81 S. E. 462.

Instruments under Seal.—The lack of consideration cannot benefit a maker of a bond under seal because the law conclusively presumes that it was made upon good and sufficient consideration. *Angier v. Howard*, 94 N. C. 27; *Wester v. Bailey*, 118 N. C. 193, 194, 24 S. E. 9.

§ 25-25. Signature by agent; how authority shown.—The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose, and the authority of the agent may be established as in other cases of agency. (Rev., s. 2168; 1899, c. 733, s. 19; C. S. 3000.)

In General.—This provision is an expression and affirmation of the better considered decisions on the subject. *Midgett v. Basnight*, 172 N. C. 18, 91 S. E. 353.

Authority of Agent Necessary.—The power to bind the principal by the making of negotiable paper is an important one, and not lightly to be inferred. It should be conferred directly, unless by necessary implication the duties of the agent cannot be performed without the exercise of the power, or where, as otherwise expressed, the power is practically indispensable to accomplish the object of the agency, and the person dealing with the agent must, subject to the principals heretofore stated, see to it that his authority is adequate. *Bank v. Hay*, 143 N. C. 326, 337, 55 S. E. 811.

Extent of Power.—Power to make restricted indorsements will not authorize a general indorsement in blank. *Exchange Bank v. Thrower*, 118 Ga. 433, 45 S. E. 316.

A general power to discount bills of exchange confers on the agent power to indorse. *Merchants Bank v. Central Bank*, 1 Ga. 418.

Agent by Implication.—The indorsement by an agent is valid although the power to indorse was conferred in a vague way, and the agency is one by implication. *Midgett v. Basnight*, 173 N. C. 18, 91 S. E. 353.

Written Authority Not Necessary.—Authority to indorse a promissory note for another may be orally conferred. *Conner v. Hodges*, 7 Ga. App. 153, 66 S. E. 546; *Taylor v. Johnson*, 18 Ga. App. 161, 89 S. E. 77.

Necessity for Proof.—The fact that a signature is by a duly authorized agent does not prove itself, but the facts must be established by proper testimony. *Midgett v. Basnight*, 173 N. C. 18, 91 S. E. 353.

§ 25-26. Liability of person signing as agent.—Where the instrument contains, or a person adds to his signature, words indicating that he signed for or on behalf of the principal or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent or as filling a representative character, without disclosing his principal, does not exempt him from personal liability. (Rev., s. 2169; 1899, c. 733, s. 20; C. S. 3001.)

Sufficient Disclosure of Principal.—Where a negotiable instrument is made by an agent for its principal, the agent, in order to exempt himself from liability, must not only name the principal, but must sufficiently show that the signature is that of the principal though done by an agent. A mere description of the relation is not sufficient to relieve the agent of liability. *Graham v. Campbell*, 56 Ga. 258; *Lester v. McIntosh*, 101 Ga. 675, 29 S. E. 7.

If the principal is distinctly indicated and the contract is in his name, the agent is not liable if he has the power to bind the principal. No form is indicated, all that is required is that the parties and intent be made plain. *Merchants Bank v. Central Bank*, 1 Ga. 418; *Rawlings v. Robson*, 70 Ga. 595.

Agreement as to Personal Liability.—Where an administrator signs a note in the name of the estate and thereunder writes his name as administrator, and at the time of the execution of the note the parties agree that he should not be personally liable thereon, the payee may not hold the administrator personally liable thereon, in view of this section. *Bank of Spruce Pines v. Vance*, 205 N. C. 103, 170 S. E. 119.

Proof of Principal by Parol.—As between themselves it may be shown that it was the intent of the parties that the principal and not the agent be bound, and that the instrument was given and accepted as such. *Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665; *Ocilla Southern R. Co. v. Morton*, 13 Ga. App. 504, 79 S. E. 480.

But where the principal is not sufficiently described parol evidence cannot be introduced to charge him. The reason for this rule is that for a party to be bound his name must appear on the instrument. *Burkhalter v. Perry*, 127 Ga. 438, 56 S. E. 631; *Bedell v. Scarlett*, 75 Ga. 56.

Applicability to Fiduciaries.—See 9 N. C. L. Rev. 444.

§ 25-27. Effect of signature by procuration.—A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent so signing acted within the actual limits of his authority. (Rev., s. 2170; 1899, c. 733, s. 21; C. S. 3002.)

Signature of Attorney.—An attorney to whom a note is sent for collection has, prima facie, no authority to indorse the same in the name of his client, and the purchaser should inquire as to the extent of the attorney's authority. *Sherrill v. Weisiger Clothing Co.*, 114 N. C. 436, 438, 19 S. E. 365.

§ 25-28. Effect of forged signature.—When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority. (Rev., s. 2171; 1899, c. 733, s. 23; C. S. 3003.)

Cross Reference.—As to liability of acceptor in case of forged signature, see § 25-68.

Editor's Note.—When a signature is forged no title can be acquired through it. *Hillman v. Cornett*, 137 Va. 200, 119 S. E. 74. Such infirmity inheres in the factum of the instrument and by the terms of the statute renders it inoperative; and this is true even where the instrument is in the hands of a bona fide holder for value. *Pettyjohn v. National Exch. Bank*, 101 Va. 111, 43 S. E. 203. The same rule applies whether it is the signature of the maker or the indorser that is attacked.

Where the name of the maker of the instrument is forged, the instrument is neither a bill nor a check, since the statute provides that a forged signature is wholly inoperative. *Seymour v. Peoples Bank*, 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682.

A bank is presumed to know the signature of its customers and if it pays a forged check it cannot charge the amount to the account of the depositor, unless the depositor is negligent. *Yarborough v. Trust Co.*, 142 N. C. 377, 55 S. E. 296.

In case of drafts presented for payment by an agent, the bank must be assured of the agency to hold another as principal. Letters of instruction to the agent are not sufficient to show power to draw drafts on the principal. *Bank v. Hay*, 143 N. C. 326, 55 S. E. 811.

Where the clerk of the superior court executed a check to the person named in a court order, and the brother of the payee of the check, by fraudulently representing himself to be the payee, took the check to plaintiff and endorsed it in plaintiff's presence by forging the name of his brother, whereupon plaintiff endorsed the check by writing "O. K." and signing his name, plaintiff is not entitled

to recover the amount of the check from the clerk individually or in his official capacity, plaintiff's negligence in endorsing the check without attempting to ascertain the identity of the person representing himself to be the payee barring any right to recover. *Keel v. Wynne*, 210 N. C. 426, 187 S. E. 571.

In the case of *McKaughan v. Trust Co.*, 182 N. C. 543, 109 S. E. 355, it is held that when one forges a deed and under the forgery obtains a check payable to a third party and he indorses the check in the name of the third party, paying an outstanding debt to the drawer with a part of the funds so obtained, in an action against the bank the drawer can only recover the difference between the amount of the check and the amount paid to the drawer. This case is discussed and criticised in 1 N. C. Law Rev. 40, where it is suggested that the check was payable to a fictitious person in which case the bank would not be liable, for the funds went into the hands of the person intended by the drawer, still it is said that if the drawer should recover at all he should recover all, for the funds that were paid him were for a prior debt and he became purchaser for value without notice.

The defense of forgery is personal, and an indorser cannot plead the forgery of the signature of the maker nor can he plead forgery of signatures of subsequent indorsers. *Produce Co. v. Bieberback*, 176 Mass. 577, 58 N. E. 162. Nor can a maker avoid liability because of forgery of the signature of a co-maker. *Bum v. Farrell*, 135 Iowa, 670, 113 N. W. 539.

There seems to be a conflict of authority as to whether or not a forgery may be ratified, see 36 L. R. A. (N. S.) 1006 (notes). The doctrine of estoppel seems to be generally applied, see 36 L. R. A. (N. S.) 1017 (notes), also 8 C. J. p. 763, sec. 1030. That North Carolina will apply the doctrine that a forgery may be ratified is indicated in *Yarborough v. Trust Co.*, 142 N. C. 377, 55 S. E. 296.

Cited in *United States v. National City Bank*, 28 F. Supp. 144.

Art. 3. Consideration.

§ 25-29. Presumption of consideration.—Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value. (Rev., s. 2172; 1899, c. 733, s. 24; C. S. 3004.)

Editor's Note.—See 13 N. C. Law Rev. 52.

In *Planter's Bank v. Yelverton*, 185 N. C. 314, 117 S. E. 299, this section is construed with §§ 25-35 and 25-55 and it is held that one taking without indorsement takes subject to equities between the original parties, and the presumption of consideration may be rebutted.

Maker Must Show Lack of Consideration.—Where, between the original parties, the maker sets up the want of consideration for a note he has made to the payee as a defense, in an action thereon the burden is upon him to introduce evidence to establish his defense, and his failure to do so will entitle the payee to a judgment in his favor. *Merchants Nat. Bank v. Andrews*, 179 N. C. 341, 102 S. E. 500. *Piner v. Brittain*, 165 N. C. 401, 81 S. E. 462. See also *Bank of Lewiston v. Harrington*, 205 N. C. 244, 170 S. E. 916.

Where there is evidence tending to show that the president of a bank had received from the defendant an exchange of notes for the former's benefit, and that the defendant in the bank's action on the note admits its execution and delivery, it is prima facie evidence that the note was given for a consideration and defendant must show failure of consideration when relied upon by him. *American Trust Co. v. Anagnos*, 196 N. C. 327, 145 S. E. 619.

When Holder Must Show Consideration.—While a valuable consideration is essential to the support of negotiable instruments it is not necessary in an action upon them for the plaintiff to aver and prove such consideration; yet when evidence has been introduced by the defendant to rebut the presumption which they raise, the burden is thrown upon the plaintiff to satisfy the jury by a preponderance of evidence that there was a consideration. *Campbell v. McCormac*, 90 N. C. 491. *Hunt v. Eure*, 188 N. C. 716, 718, 125 S. E. 484.

Instruments under Seal.—The lack of consideration cannot benefit a maker of a bond under seal because the law conclusively presumes that it was made upon good and sufficient consideration. *Angier v. Howard*, 94 N. C. 27. *Wester v. Bailey*, 118 N. C. 193, 194, 24 S. E. 9.

Presumption of Sanity of Maker.—There is a rebuttable presumption that a promisor was sane at the time of the execution of a note, and on that question the burden of showing the contrary, as a general rule, is upon the de-

fendant or the person alleging it. *Jones v. Winstead*, 186 N. C. 536, 538, 120 S. E. 89.

Burden of Proof.—Whenever a prima facie case is made out as provided by this section, in favor of the plaintiff, it is upon the defendant to go forward with his proof, or take the risk before the jury of an adverse verdict, but the burden of proof and the burden of the issue remains upon the plaintiff throughout the trial. *Stein v. Levins*, 205 N. C. 302, 305, 171 S. E. 96.

Quoted in *White v. Johnson & Sons*, 205 N. C. 773, 774, 172 S. E. 370.

Cited in *Peoples Building & Loan Assn. v. Swaim*, 198 N. C. 14, 16, 150 S. E. 668; *Taft v. Covington*, 199 N. C. 51, 56, 153 S. E. 597; *Lister v. Lister*, 222 N. C. 555, 24 S. E. (2d) 342.

§ 25-30. What constitutes consideration.—Value is any consideration sufficient to support a simple contract. An antecedent or preëxisting debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time. (Rev., s. 2173; 1899, c. 733, s. 25; C. S. 3005.)

Rule Prior to This Act.—Many of the courts have heretofore denied that an indebtedness was sufficient consideration to constitute one a holder for value within the meaning of the law merchant. This statute on this question, however, changes the rule. *Manufacturing Co. v. Summers*, 143 N. C. 102, 107, 55 S. E. 522.

Necessity for Adequate Consideration.—When the parties are competent to contract, relief will not be given on grounds of inadequacy of consideration unless the inequality is so gross as to amount to fraud. *Jones v. Degge*, 84 Va. 685, 5 S. E. 799; *Mathews v. Crockett*, 82 Va. 394.

Pre-Existing Debt.—An extension of time by a creditor to his principal debtor is a sufficient consideration to support the indorsement of a note renewing the original debt. *Hollingshead v. Bank*, 104 Ga. 250, 30 S. E. 728; *Colley v. Summers Parrot Helve Co.*, 119 Va. 439, 89 S. E. 906.

The provisions of this section that a preëxisting debt is sufficient consideration for a promissory note does not apply when the note in question is not negotiable within the meaning of the negotiable instrument law, and the debt was not contracted by the maker, and where the nonnegotiable note is given by a widow for the defalcation of her husband without consideration, it must be alleged and shown that she knowingly accepted profit, advantage or benefit from the transaction. *Peoples Building and Loan Association v. Swaim*, 198 N. C. 14, 150 S. E. 668.

Dower.—The relinquishment of a right of dower is a valid consideration for a promissory note. *Trust Co. v. Benbow*, 135 N. C. 303, 47 S. E. 435.

Note to Secure Mortgage.—A note given by incorporators of a land company to secure the holder of a mortgage for the purchase price carries sufficient consideration. *Johnson v. Rodeger*, 119 N. C. 446, 25 S. E. 1021.

Assignment of Contract for Carrying Mail.—See note under § 25-33.

Cited in *New Bern Oil. etc., Co. v. National Bank*, 28 Fed. (2d) 554; *American Trust Co. v. Anagnos*, 196 N. C. 327, 145 S. E. 619; *Pridgen v. Baugh & Sons Co.*, 30 Fed. (2d) 353.

§ 25-31. What constitutes a holder for value.—Where value has at any time been given for the instrument the holder is deemed a holder for value in respect to all parties who became such prior to that time. (Rev., s. 2174; 1899, c. 733, s. 26; C. S. 3006.)

Drafts with Bill of Lading Attached.—Where a bank for a valuable consideration takes an assignment of a bill of lading with draft attached, the consignee of the goods takes them subject to the rights of the holder of the bill of lading for the amount of the draft, and he cannot retain the price of the goods on account of a debt due him from the consignor. *Willard Mfg. Co. v. Tierney*, 133 N. C. 630, 631, 45 S. E. 1026.

Deposit of Draft for Collection.—If drafts, deposited by the customer for his credit, returned unpaid, are charged back to the customer's account, and returned to him, this constitutes only an agency for collection. *Davis v. Lumber Co.*, 130 N. C. 174, 176, 41 S. E. 95; *Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218. But if the drawer was in debt to the bank, and the draft was discounted by it and the proceeds applied in discharge of such balance, the bank became the owner of the draft, and a purchaser for value to the extent of the goods described in the bills of lading. *Latham v. Spragins*, 162 N. C. 404, 408, 78 S. E. 282.

Transfer to a Creditor.—The transfer of a negotiable note by the holder to his creditor before maturity for an antecedent debt constitutes the transferee a holder for value. *American Exch. Nat. Bank v. Seagroves*, 166 N. C. 608, 82 S. E. 947.

Held as Collateral.—One who holds a negotiable note as collateral for the payment of a debt may maintain an action thereon in his own name, but not one who holds "for collection," for the latter is not "the party in interest." *Third National Bank v. Exum*, 163 N. C. 199, 79 S. E. 498.

Possession is prima facie evidence that the holder is a holder for value, and the burden of proof is on one seeking to impeach the title. *Fent v. Miller*, 17 Gratt. (58 Va.) 47, 82; *Wilson v. Fagin*, 11 Gratt. (56 Va.) 477; *Duerson v. Alsop*, 27 Gratt. (63 Va.) 229; *Board v. Randolph*, 89 Va. 619, 16 S. E. 722; *Piedmont Bank v. Hatcher*, 94 Va. 229, 26 S. E. 505.

§ 25-32. When lien on instrument constitutes holder for value.—Where the holder has a lien on the instrument arising either from contract or by implication of law he is deemed a holder for value to the extent of his lien. (Rev., s. 2175; 1899, c. 733, s. 27; C. S. 3007.)

Assignment to Secure Debt.—When a negotiable note is transferred before maturity as collateral security for a pre-existing debt, the assignee is such holder for value that he takes free from equities of which he had no notice, to the extent of the debt secured. See *Brooks v. Sullivan*, 129 N. C. 190, 39 S. E. 822. The law was previously otherwise. *Holderby v. Blum*, 22 N. C. 51; *Harris v. Horner*, 21 N. C. 455, 30 Am. Dec. 182; *Potts v. Blackwell*, 56 N. C. 449.

Holder as Collateral Security.—An interpleader, where a note has been attached, who claims as a holder in due course, and makes it appear that the note was taken as collateral security to another note, is a holder in due course only to the extent of his lien. The balance is subject to attachment. *Sugg v. St. Mary's Oil Engine Co.*, 193 N. C. 815, 138 S. E. 169.

A bank taking a warehouse receipt as collateral security is a holder in due course to the extent of its lien. *Lacy v. Indemnity Co.*, 189 N. C. 24, 126 S. E. 316.

Same—Payment of Original Debt.—If a promissory note, before its maturity, is pledged as collateral security for a particular debt, and such debt is afterward paid, the holder of the collateral note has no right to collect it, but so long as any part of the secured debt remains unpaid the holder of the security note may collect enough to pay his claims thereby secured. *Bank v. Tuck*, 96 Ga. 456, 23 S. E. 467.

Fertilizer Notes Where Grade Misrepresented.—A note given for the purchase price of fertilizer reciting that there is no warranty is subject to the defense of lack of consideration, and if it appears that the fertilizer was not the grade as shown by the analysis on the sack, the plaintiff is not entitled to recover on the note. *Swift v. Etheridge*, 190 N. C. 162, 129 S. E. 453.

Against Holder in Due Course.—A total absence of consideration is a matter of defense by the maker against the original payee. *Swift & Co. v. Aydtlett*, 192 N. C. 330, 135 S. E. 141.

Burden to Show Want of Consideration.—In *Conservatory v. Dickerson*, 158 N. C. 207, 73 S. E. 990, it is said that although notes, as simple contracts, require a consideration to support them, it has been long settled that they import a consideration, prima facie, so as to throw on the maker the burden to show a want of consideration. *McArthur v. McLeod*, 51 N. C. 476; *Campbell v. McCormac*, 90 N. C. 491. In the latter case it was said that "It is wholly unnecessary to establish that a promissory note was given upon a consideration; and the burden of proof rests upon the other party to establish the contrary and to rebut the presumption of validity and value which the law raises." *Piner v. Brittain*, 165 N. C. 401, 81 S. E. 462.

Not Applicable to Non-negotiable Paper.—Whether the provisions of this section should be extended to non-negotiable instruments so as to make the rule uniform is a matter which is addressed to the legislative discretion. *Hunt v. Eure*, 188 N. C. 716, 125 S. E. 484.

Stated in Hardy v. Mitchell, 156 N. C. 76, 72 S. E. 95.

Cited in New Bern Oil, etc., Co. v. National Bank, 28 Fed. (2d) 554.

§ 25-33. Effect of want of consideration.—Absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense pro tanto, whether the failure is an

ascertained and liquidated amount or otherwise. (Rev. s. 2176; 1899, c. 733, s. 28; C. S. 3008.)

A contract for carrying mail is not assignable, and in an action on a note given in part consideration of such assignment this may be shown as a failure of consideration, except as against a holder for value, in due course, without notice. *Peoples Bank, etc., Co. v. Duncan*, 194 N. C. 692, 140 S. E. 610.

Presumption of Consideration May Be Rebutted.—While the execution and delivery of a note under seal raises the presumption of consideration, such presumption, in view of this section, is rebuttable as against any person not a holder in due course. *Lentz v. Johnson & Sons*, 207 N. C. 614, 178 S. E. 226.

Parol Evidence Rule Not Violated.—The rule which prohibits the introduction of parol evidence to vary, modify or contradict the terms of a written instrument, is not violated by showing failure of consideration. *Virginia Trust Co. v. Asheville*, 207 N. C. 164, 166, 176 S. E. 257.

Failure of consideration is a valid defense to a note under seal by reason of the fact the presumption arising from a seal upon a negotiable instrument is rebuttable. *Patterson v. Fuller*, 203 N. C. 788, 791, 167 S. E. 74.

Quoted in White v. Johnson & Sons, 205 N. C. 773, 774, 172 S. E. 370.

Cited in New Bern Oil, etc., Co. v. National Bank, 28 Fed. (2d) 554; *Owens v. Carstarphen*, 197 N. C. 424, 425, 149 S. E. 374; *Taft v. Covington*, 199 N. C. 51, 56, 153 S. E. 597.

§ 25-34. Liability of accommodation party.—An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. (Rev., s. 2177; 1899, c. 733, s. 29; C. S. 3009.)

Failure of Maker to Conform to Agreement.—An accommodation indorser is not relieved from liability upon the ground that the maker agreed in parol to negotiate the note at a certain bank which he failed to do, but negotiated to the plaintiff instead who had notice of the agreement. *Parker v. Sutton*, 103 N. C. 191, 9 S. E. 283; *Parker v. McDowell*, 95 N. C. 219.

Order of Liability on Instrument.—A note, indorsed for the makers accommodation, signed by the principal and surety is a joint and several obligation, and the owner may sue all or either of the obligors, without joining all as defendants. *Bank v. Carr*, 121 N. C. 113, 28 S. E. 186. *Norfolk Nat. Bank v. Griffin*, 107 N. C. 173, 11 S. E. 1049.

Right to Recover from Principal and Prior Parties.—An accommodation indorser of a negotiable note who pays the note has only the right of a surety to be fully indemnified for his payment on account of his principal. *Burton v. Slaughter*, 26 Gratt. (67 Va.) 914; *Call v. Scott*, 4 Call (8 Va.) 402.

Agreements for Equal Liability.—Unless agreed among themselves to be held equally liable, accommodation indorsers are held prima facie liable in the inverse order of the indorsement. *Plumely v. First Nat. Bank*, 76 W. Va. 635, 87 S. E. 94.

Indorser for Member of a Partnership.—A note executed by a member of a partnership to a third party who, as surety and for the accommodation of the maker, indorses it and receives no benefit from it, cannot be the subject of an action at law against the indorser by the firm, nor in case of the death of the maker of the note can the surviving partner maintain an action on the note against the accommodation indorser unless the firm be insolvent. *Pafton v. Carr*, 117 N. C. 176, 23 S. E. 182.

Sufficient Interest to Defeat Accommodation Character Illustrated.—Factors to whom the drawee of a draft for the purchase money of a steam engine for ginning cotton was in debt, and who agreed to accept it in order to facilitate their collection from the drawer out of his cotton, did not stand on the footing of accommodation acceptors, but were original contractors. *Saulsbury Co. v. Blandys*, 65 Ga. 45.

Cited in Mayers v. Bank, 198 N. C. 542, 152 S. E. 628; *Taft v. Covington*, 199 N. C. 51, 56, 153 S. E. 597.

Art. 4. Negotiation.

§ 25-35. What constitutes negotiation.—An instrument is negotiated when it is transferred from

one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, and completed by delivery. (Rev., s. 2178; 1899, c. 733, s. 30; C. S. 3010.)

Form Immaterial.—No form of indorsement is necessary to negotiate an instrument. In case of a corporation the seal is not necessary. *Sheffield v. Johnson County Sav. Bank*, 2 Ga. App. 221, 58 S. E. 386.

Endorsement Must Be Proven.—A note being made payable to X or order, indorsement by him was necessary to transfer the title and give the plaintiffs, as the holder, the benefit of the presumptions of the negotiable instrument act; and proof of such indorsement by the payee was necessary. *Tyson v. Joyner*, 139 N. C. 69, 51 S. E. 803; *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 447; *Myers v. Petty*, 153 N. C. 462, 464, 69 S. E. 417.

Delivery May Be Actual or Constructive.—Where a negotiable instrument is payable to order, its transfer from one person to another is by indorsement, completed by delivery, actual or constructive. *Cartwright v. Coppersmith*, 222 N. C. 573, 24 S. E. (2d) 246.

A constructive delivery will be held sufficient if made with the intention of transferring the title, but there must be some unequivocal act, more than the mere expression of an intention or desire. *Id.*

Purchaser without Indorsement.—A purchaser of a negotiable instrument for value before maturity, but without indorsement, becomes the holder of the equitable title only, and takes subject to any defense the maker may have against the original payee. *Steinhilper v. Basnight*, 153 N. C. 293, 69 S. E. 220; *Whitman v. York*, 192 N. C. 87, 88, 133 S. E. 427; *Bressee v. Crumpton*, 121 N. C. 122, 28 S. E. 351; *Planters Bank v. Yelverton*, 185 N. C. 314, 117 S. E. 299; *Foxman v. Hanes*, 218 N. C. 722, 12 S. E. (2d) 258.

The introduction of a note in evidence without indorsement raises the presumption of equitable ownership and assignment, and without proof of indorsement the holder is not one in due course. *Woods v. Finley*, 153 N. C. 497, 69 S. E. 502.

Warehouse receipts, indorsed by the owner of the cotton and by the superintendent of the warehouse are negotiable by delivery, and when taken as collateral confer upon the holder the position of a bona fide holder for value. *Lacy v. Globe Indemnity Co.*, 189 N. C. 24, 126 S. E. 316.

Stated in *Tyson v. Joyner*, 139 N. C. 69, 51 S. E. 803.

Cited in *Insurance Co. v. Jones*, 191 N. C. 176, 131 S. E. 587; *Dawson v. Bank*, 197 N. C. 499, 150 S. E. 38; *Dixon v. Smith*, 204 N. C. 480, 168 S. E. 683.

§ 25-36. How indorsement made.—The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement. (Rev., s. 2179; 1899, c. 733, s. 31; C. S. 3011.)

Cross Reference.—As to indorsement by agent, see § 25-25.

In General.—The position of the indorsement is immaterial, it may be on the face or the back of the instrument so long as the intention of the parties can be ascertained. *Quinn v. Sterne*, 26 Ga. 223; *First Nat. Bank v. Messer*, 136 Ga. 226, 71 S. E. 148.

Prerequisite to Indorsement on Additional Paper.—While a lack of room for further indorsements is not a prerequisite to attaching a paper, an essential requirement is that the paper be physically attached or that it should have been when the indorsement was made, and that an assignment or transfer on a separate paper will not suffice. *Midgett v. Basnight*, 173 N. C. 18, 91 S. E. 353; *Commercial Security Co. v. Main St. Pharmacy*, 174 N. C. 655, 94 S. E. 298.

Indorsement by Letter Attached to Note.—Where a note was sent to a bank as security and attached to a letter, in which it is stated that the holder did assign the note to the bank as collateral security, it was held that the signature on the letter was sufficient indorsement. *Colona v. Parksley Nat. Bank*, 120 Va. 812, 92 S. E. 979.

Indorsement with Rubber Stamp.—Where the name of the drawee is stamped on the back of a draft with a rubber stamp, by one having authority to do so and with intent to indorse it, it is a valid indorsement, but does not prove itself. *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 447.

§ 25-37. Effect of indorsement by infant or corporation.—The indorsement or assignment of

the instrument by a corporation, an infant, or married woman passes the property therein, notwithstanding that from want of capacity the corporation, infant, or married woman may incur no liability thereon. (Rev., s. 2180; 1899, c. 733, s. 32; C. S. 3012.)

Editor's Note—Married Women.—In the case of *Vann v. Edwards*, 128 N. C. 425, 39 S. E. 66; 130 N. C. 70, 72, 40 S. E. 853; 135 N. C. 661, 47 S. E. 784, which was decided under the prior law, and was before the Supreme Court three times, it was held that a married woman may dispose of her property without the assent of her husband except in those cases where a written instrument or conveyance is required for that purpose.

The delivery of a note to the indorsee after it has been indorsed in blank by the wife, the owner and the husband, is a sufficient conveyance. But the indorsement may be explained as between the immediate parties. *Coffin v. Smith*, 128 N. C. 252, 38 S. E. 864.

Corporations.—If a corporation indorses a negotiable instrument when it has no power to do so it cannot be bound by subsequent holders. *Savannah Ice Co. v. Canal-Louisiana Bank, etc., Co.*, 12 Ga. App. 818, 79 S. E. 45; but see *Towers Co. v. Inman*, 96 Ga. 506, 23 S. E. 418; *Jacobs Pharmacy Co. v. Southern Banking, etc., Co.*, 97 Ga. 573, 25 S. E. 171, where the corporation receives value.

Infants.—“In stipulating that the indorsement of the instrument by an infant ‘passes the property therein,’ it was meant to provide that the contract of indorsement is not void, and that his indorsee has the right to enforce payment from all parties prior to the infant indorser. The incapacity of the minor cannot be availed of by prior parties. It was not intended to provide that the indorsee should become the owner of the instrument by title indefeasible as against the infant, or to make the act of indorsement an irrevocable one. The act does not concern the right of such an indorser to disaffirm under the rules of the law of infancy. The words ‘passes the property therein,’ if given a meaning that would deny that right in respect of a contract of indorsement, would deprive the infant of the right to reinvest in himself the title to the instrument against a holder who had knowledge of the indorser’s infancy. The quoted words are not qualified so as to save his rights in such an assumed case. It must be admitted that the Legislature did not intend any such radical and grossly inequitable departure from a settled and salutary rule of law.” *Murray v. Thompson*, 136 Tenn. (9 Thomp.) 118, 188 S. W. 578.

§ 25-38. Indorsement must be of entire instrument.—An indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part it may be indorsed as to the residue. (Rev., s. 2181; 1899, c. 733, s. 32; C. S. 3013.)

In General.—An assignment of a note, to enable the assignee to sue thereon, must be made by the payee, and must be for the whole, and not for a part of the sum mentioned in the note. *Martin v. Hayes*, 44 N. C. 423.

§ 25-39. Kinds of indorsement.—An indorsement may be either in blank or special, and it may also be either restrictive or qualified or conditional. (Rev., s. 2182; 1899, c. 733, s. 33; C. S. 3014.)

§ 25-40. Special indorsement; indorsement in blank.—A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery. (Rev., s. 2183; 1899, c. 733, s. 34; C. S. 3015.)

Cross References.—As to right of holder to change blank

indorsement to special. see § 25-41; as to right of holder without indorsement when payable to order, see § 25-55 and annotations.

Indorsement Where Note Payable to Bearer.—Although a note payable to bearer may be transferred by delivery, it may also be transferred by indorsement of the holder, and in such case the indorser incurs the same obligation and liability as an indorser of a note payable to order. *Lilly v. Baker*, 88 N. C. 151.

Right of Indorser in Blank When Instrument Subsequently Acquired by Delivery.—An indorsement "without recourse," but not saying to whom the bill was indorsed was an indorsement in blank, and the bill became payable to bearer; and notwithstanding that subsequent holders afterwards indorsed it in full or specially, yet when it came again to C. by delivery, he had a right to demand payment of the bill from any prior indorser. *French v. Barney*, 23 N. C. 219.

Transfer by Blank Indorsement Presumed.—An indorsement in blank by the payee of a note is presumed to have been intended as a transfer thereof. *Davis v. Morgan*, 64 N. C. 570. And nothing else appearing such indorsement constitutes a transfer of the note. *Coffin v. Smith*, 128 N. C. 252, 38 S. E. 864; but as between the immediate parties parcel evidence is admissible to show a qualified or special contract. *Hoffman v. Moore*, 82 N. C. 313; *Bank v. Pegram*, 118 N. C. 671, 24 S. E. 487; *Mendenhall v. Davis*, 72 N. C. 150; *Hill v. Shields*, 81 N. C. 251.

Title of Attorney Holding for Collection.—A bond indorsed in blank and given to an attorney for collection amounts to an assignment of title, and conveys authority to the attorney to dispose of it as his own. *Parker v. Stallings*, 61 N. C. 590; *Bradford v. Williams*, 91 N. C. 7.

Indorsement to Particular Class Is Special.—The designation of a particular class is sufficient to render an endorsement special, and therefore an indorsement to "any bank, banker or trust company" is a special indorsement precluding the further negotiation of the instrument without the endorsement of one of the class specified. *Edgecombe Bonded Warehouse Co. v. Security Nat. Bank*, 216 N. C. 246, 4 S. E. (2d) 863.

§ 25-41. How blank indorsement changed to special indorsement.—The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement. (Rev., s. 2184; 1899, c. 733, s. 35; C. S. 3016.)

Changing Liability by Filling Blank.—In case of an indorsement in blank any holder may fill in the blank over the signature thus making it payable to himself or some other person. But by filling in over the indorsement the holder cannot change the indorser's liability. *Lilly v. Baker*, 88 N. C. 151.

Time of Filling Blank.—Where a note is indorsed in blank, the holder has the authority to make it payable to himself or to any other person by filling up the blank over the signature, and this may be done at or before the trial. *Johnson v. Hooker*, 47 N. C. 29; *Lilly v. Baker*, 88 N. C. 151. It then becomes a special indorsement. *Tyson v. Joyner*, 139 N. C. 70, 74, 51 S. E. 803.

§ 25-42. When indorsement restrictive.—An indorsement is restrictive which either (1) prohibits the further negotiation of the instrument; or (2) constitutes the indorsee the agent of the indorser; or (3) vests the title in the indorsee in trust for, or to the use of, some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive. (Rev., s. 2185; 1899, c. 733, s. 36; C. S. 3017.)

Cross Reference.—See notes to § 25-43.

§ 25-43. Effect of restrictive indorsement; rights of indorsee.—A restrictive indorsement confers upon the indorsee the right (1) to receive payment of the instrument; (2) to bring any action thereon that the indorser could bring; (3) to transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so. But all subsequent indorsees acquire only the title of the first indorsee under the re-

strictive indorsement. (Rev., s. 2186; 1899, c. 733, s. 37; C. S. 3018.)

Editor's Note.—Prior to the passage of this and the preceding section it was uniformly held in this State that a bank holding a note under a restricted indorsement for collection could not bring suit in its own name, but must bring suit in the name of the indorser. In *Bank v. Exum*, 163 N. C. 199, 79 S. E. 498, decided after this section, the same rule was followed, the court citing prior cases and not referring to this and the preceding section. The case of *Bank v. Rochamora*, 193 N. C. 1, 136 S. E. 259, decided the same question and follows the prior ruling.

In 5 N. C. Law Rev. 369, there appears a discussion and criticism of these cases, citing cases of other states where this section has been adopted with the Negotiable Instrument Law, showing that in most jurisdictions it is held that a bank as endorsee for collection can bring suit in its own name, as it has legal title although holding in trust.

Construing this section of the N. I. L. with the section under civil procedure, which provides that every action must be prosecuted in the name of the real party in interest, we think section 1-57 is mandatory and compelling. We think the decision of *Bank v. Exum*, 163 N. C. 199, 79 S. E. 498, correct in principle and founded on a just and reasonable interpretation of the statutes applicable and cognate. To say a collecting agency, because it is a bank, can sue in its own name would be to say that any attorney or any kind of collecting agent can likewise enter suit by reason of the agency. We do not think our statute allows this construction as to favoritism. The contrary construction would permit the real owner of the instrument to defeat all equities of the maker by simply turning it over to an agent for collection. *Bank v. Rochamora*, 193 N. C. 1, 136 S. E. 259; *Federal Reserve Bank v. Whitford*, 207 N. C. 267, 176 S. E. 584.

In General.—There are general and restrictive indorsements. In case of restrictive indorsement the indorsee can not indorse to one, who will become a holder in due course, and have a right to sue either indorser. A restrictive indorsement restricts the rights of the indorsee to specified steps. *Drew v. Jacobs*, 6 N. C. 138.

Indorsed as Collateral Security.—A note indorsed to a bank is restrictive where the indorsement is unrestricted, if it appears that the note is only indorsed as collateral security, and for collection, or it appears that the indorser had been given depositor's credit for the amount of the note with the right to charge back in case of dishonor. *Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. 365.

Rights of Restricted Endorsee.—A draft or bill which is transferred to a bank by restrictive indorsement, as for deposit or for collection, is taken and held by the bank as agent of the indorser, and for the purpose indicated, and subject to the right of the indorser to arrest payment or divert the proceeds in the hands of any intermediate or subagent who has taken the paper for a like purpose and affected by the restriction. *Boykin v. Bank*, 118 N. C. 566, 24 S. E. 357; *Bank v. Hubble*, 117 N. Y. 384; *Balback v. Frelinghyser*, 15 Fed. 675; *Tyson & Rawles v. Bank*, 77 Md. 412; *Murchinson Nat. Bank v. Oil Mills*, 150 N. C. 718, 721, 64 S. E. 885.

Indorsement Enlarging Liability.—"Demand, notice and protest waived, payment guaranteed by the undersigned" is an indorsement with an enlarged liability. The language makes the holder one in due course and the instrument is taken free from equities and defenses which the maker has against the payee. *Richmond Guano Co. v. Walston*, 191 N. C. 797, 801, 133 S. E. 196.

§ 25-44. Qualified indorsement.—A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument. (Rev., s. 2187; 1899, c. 733, s. 38; C. S. 3019.)

Cross Reference.—As to instrument with indorsement enlarging liability, see notes to § 25-43.

Effect of Indorsement without Recourse.—Notes indorsed by the payee named therein, who wrote above his signature on the back of each note the words, "without recourse," is a qualified indorsement. Its effect is to constitute the indorser a mere assignor of the title to the note, which he held at the date of the indorsement. It does not impair the negotiable character of the note so indorsed. *Bank v. Hatcher*, 151 N. C. 359, 66 S. E. 308; *Evans v. Freeman*, 142

N. C. 61, 54 S. E. 847; *Walter v. Kilpatrick*, 191 N. C. 458, 462, 132 S. E. 148.

Alone, a qualified indorsement is not sufficient notice as to discredit a negotiable instrument, but when combined with other suspicious facts it may become evidence to show infirmities. *Merchants Nat. Bank v. Branson*, 165 N. C. 344, 81 S. E. 410.

Qualifying Words May Precede or Follow Signature.—The words qualifying an endorsement of a negotiable instrument, such as "without recourse" and words of like effect, may either precede or follow the signature of the transferor of title. *Medlin v. Miles*, 201 N. C. 683, 161 S. E. 207.

Qualified Indorser May Be Liable on Warranties.—A negotiable instrument transferred by an endorsement reading "for value received I hereby sell, transfer and assign all my right, title and interest to within note to M." assigns title to the instrument by qualified endorsement, exempting the transferor from all liability as a general endorser, except that he is still chargeable with implied warranties as a seller. *Medlin v. Miles*, 201 N. C. 683, 161 S. E. 207.

§ 25-45. Conditional indorsement.—Where an indorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same or the proceeds thereof subject to the rights of the person indorsing conditionally. (Rev., s. 2188; 1899, c. 733, s. 39; C. S. 3020.)

Cross Reference.—As to indorsement with enlarged liability, see notes to § 25-43.

In General.—An indorsement to "A. B. for sixty days," if conditional is only a guaranty for sixty days, if unconditional it is only to be in force for a limited time. *Johnson v. Olive*, 60 N. C. 213.

§ 25-46. Indorsement of instrument payable to bearer.—Where an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement. (Rev., s. 2189; 1899, c. 733, s. 40; C. S. 3021.)

Cross References.—As to special indorsee indorsing in blank, see notes to § 25-40; as to who is bearer, see § 25-15.

§ 25-47. Indorsement of instrument payable to two or more persons.—Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others. (Rev., s. 2190; 1899, c. 733, s. 41; C. S. 3022.)

Editor's Note.—See 13 N. C. Law Rev. 92.

Cited in *Dawson v. Bank*, 197 N. C. 499, 150 S. E. 38; applied in *Virginia-Carolina Bank v. First, etc., Bank*, 197 N. C. 526, 534, 150 S. E. 34.

§ 25-48. Effect of instrument drawn or indorsed to a person as cashier.—Where an instrument is drawn or indorsed to a person as cashier or other fiscal officer of a bank or corporation it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer. (Rev., s. 2191; 1899, c. 733, s. 42; C. S. 3023.)

§ 25-49. Indorsement, where payee's name misspelled.—Where the name of a payee or indorsee is wrongly designated or misspelled he may indorse the instrument as there described, adding, if he think fit, his proper signature. (Rev., s. 2192; 1899, c. 733, s. 43; C. S. 3024.)

§ 25-50. Indorsement in representative capacity.—Where any person is under obligation to indorse in a representative capacity he may indorse in such terms as to negative personal liability. (Rev., s. 2193; 1899, c. 733, s. 44; C. S. 3025.)

Cross Reference.—As to liability of person signing as agent, see § 25-26.

§ 25-51. Presumption as to time of indorsement.—Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue. (Rev., s. 2194; 1899, c. 733, s. 45; C. S. 3026.)

In General.—Indorsements in blank upon negotiable instruments are presumed to be made contemporaneously with the execution of such instrument. *Southerland v. Freemont*, 107 N. C. 565, 12 S. E. 237.

Indorsement to a Deceased Person.—Where a negotiable instrument has been indorsed to a decedent, and it is found among his papers, the indorsement not bearing a date, he is prima facie presumed to have acquired it in due course.

Cited in *Mansfield v. Wade*, 208 N. C. 790, 182 S. E. 475.

§ 25-52. Presumption as to place of indorsement.—Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated. (Rev., s. 2195; 1899, c. 733, s. 46; C. S. 3027.)

§ 25-53. Continuation of negotiable character.—An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise. (Rev., s. 2196; 1899, c. 733, s. 47; C. S. 3028.)

Cross Reference.—See annotations under § 25-43.

Applied in *Dunlap v. London Guaranty, etc., Co.*, 202 N. C. 651, 163 S. E. 750.

§ 25-54. Striking out indorsement.—The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out and all indorsers subsequent to him are thereby relieved from liability on the instrument. (Rev., s. 2197; 1899, c. 733, s. 48; C. S. 3029.)

Cross Reference.—As to negotiation by prior party, see note to § 25-56.

In General.—An indorser in full, who takes up a bill, is remitted to his former title, and may strike out his indorsement and sue as indorsee those standing before him on the bill, although he may have once made a restrictive indorsement. *French v. Barney*, 23 N. C. 219, 221.

Suit without Striking Subsequent Indorsees.—An indorser of a note may strike out the subsequent indorsers and bring suit, or he may bring suit without striking the subsequent indorsers, as possession is prima facie evidence of payment to the indorsee. *Smith v. St. Lawrence*, 2 N. C. 174.

§ 25-55. Effect of transfer without indorsement.—Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires in addition the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. (Rev., s. 2198; 1899, c. 733, s. 49; C. S. 3030.)

Cross Reference.—As to indorsement in blank, see § 25-40.

In General.—Where a note is payable to order and not to bearer, the indorsement of the payee is necessary to

transfer the legal title; and where this is not done, a subsequent holder is not one in due course, though the instrument may have been indorsed to him for value by an intermediate holder. *Elgin City Banking Co. v. McEachern*, 163 N. C. 333, 79 S. E. 680; *Steinhilper v. Basnight*, 153 N. C. 293, 69 S. E. 220; *Tyson v. Joyner*, 139 N. C. 69, 51 S. E. 803. See also, *Foxman v. Hanes*, 218 N. C. 722, 12 S. E. (2d) 258.

Endorsement is not the only mode by which an interest in notes may be assigned in view of this section. *Dozier v. Leary*, 196 N. C. 12, 144 S. E. 368, applied this rule in a case where a husband transferred his interest in a note executed by him and his wife by a registered paper writing, which was held competent evidence in an action by the transferee for one-half the proceeds of the note.

Payable to Order of Maker.—One making a note payable to her own order and delivering it to another without indorsement does not make the holder a holder in due course. *Planters Bank v. Yelverton*, 185 N. C. 314, 117 S. E. 299.

When Indorsement Must Be Proven.—Where the plaintiff at the trial presented the draft sued on, with the name of the drawee stamped on the back and testified that the draft had been discounted to him by the drawee before maturity for value and without notice, he is only the equitable owner, in the absence of proof that the instrument had been indorsed, and he holds it subject to any valid defense open to the maker, and it was error to exclude evidence tending to show fraud. *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 447.

Indorsing Two Notes Folded Together.—Where two notes are folded together and only one of them is indorsed, the indorsement is operative only to the one indorsed though the intention of the parties was otherwise. *National Bank v. Leonard*, 91 Ga. 805, 18 S. E. 32.

Where Assignee Is Not Holder in Due Course of a Collateral Note.—Where a note is assigned as collateral security for another note, and the assignee holds the collateral note without procuring the endorsement of the assignor until after the collateral note is past due, the assignee is not a holder in due course of the collateral note, and takes same subject to all equities existing in favor of the maker of the collateral note as against the payee who assigned same. *Hare v. Hare*, 208 N. C. 442, 181 S. E. 246.

§ 25-56. When prior party may negotiate instrument.—Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this chapter, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable. (Rev., s. 2199; 1899, c. 733, s. 50; C. S. 3031.)

Editor's Note.—In 1 N. C. Law Rev. 187 there is a discussion of the N. I. L. which includes this and section 25-64. The rule seems to be as laid down in *Adrian v. McCaskill*, 103 N. C. 182, 9 S. E. 284, that one who obtains possession of a negotiable instrument after having formerly indorsed it is restored to his former position and cannot hold indorsers subsequent to his first indorsement. The reason for this rule is clearly to avoid circuitry of action for the subsequent indorsers would eventually hold him liable under his first indorsement.

One who obtains possession of a note or bill after endorsing it is restored to his original position and cannot hold intermediate parties; and one who acquires possession of the instrument from such person, with notice of the fact, cannot hold the intermediate endorser. *Ray v. Livingston*, 204 N. C. 1, 4, 167 S. E. 496.

Art. 5. Rights of Holder.

§ 25-57. Right of holder to sue; payment.—The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. (Rev., s. 2200; 1899, c. 733, s. 51; C. S. 3032.)

Cross References.—As to right of bank, holding for collection, to sue, see § 25-43; as to definition of holder, see § 25-1; as to presumption that holder is holder in due course, see § 25-65.

Holder May Sue without Proof of Endorsing Signatures.—Possession of a note raises the presumption that the possessor is a holder thereof and he may sue thereon without proof of the signatures of the endorsers, since a mere holder of a negotiable instrument may sue thereon in his own

name. *Dillingham v. Gardner*, 219 N. C. 227, 13 S. E. (2d) 478.

§ 25-58. What constitutes holder in due course.—A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it has been previously dishonored, if such was the fact; (3) that he took it for good faith and value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. (Rev., s. 2201; 1899, c. 733, s. 52; C. S. 3033.)

Cross References.—As to defenses which may or may not be set up against a holder in due course, see § 25-63 and notes; as to defective title, see § 25-61; as to presumption in favor of holder, see § 25-65; as to defenses which are good as against a holder in due course, see note to § 25-61.

Indorsement Necessary.—To constitute a holder in due course it is required that the instrument be indorsed. *Bank v. Yelverton*, 185 N. C. 314, 117 S. E. 299; *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 447. See also *Keith v. Henderson County*, 204 N. C. 21, 24, 167 S. E. 481.

Same—Taking Without Notice.—A holder of a note not indorsed to him is not a holder in due course, and it makes no difference if he had no notice of the equities of the parties, he is subject to them nevertheless. *Steinhilper v. Basnight*, 153 N. C. 293, 69 S. E. 220.

Indorsement Implies "Due Course."—The holder of a negotiable instrument duly indorsed is, prima facie, a purchaser for value, in good faith, before maturity, and without notice of any defect in the title of the person negotiating it. *Worth Co. v. International Feed Co.*, 172 N. C. 335, 342, 90 S. E. 295; *Smathers v. Toxaway Hotel Co.*, 163 N. C. 69, 84 S. E. 47.

Admission of Indorsement to Holder.—The admission by the maker of a promissory note that it had been indorsed to the plaintiff in due course raises the presumption prima facie that he is a holder in due course, and the prima facie case is not rebutted by a denial in the pleadings. *Gulf States Steel Co. v. Ford*, 173 N. C. 195, 91 S. E. 844.

The transfer by endorsement to another of a bond indemnifying a bank from any loss which it might sustain by reason of its taking over the assets and discharging the liabilities of another bank, is an assignment of a chose in action, and the assignee is not a holder in due course. *North Carolina Bank, etc., Co. v. Williams*, 201 N. C. 464, 160 S. E. 484.

Defective Title Rebutts Presumption.—The presumption that every holder is a holder in due course does not apply when it is alleged and shown that the negotiable instrument was indorsed by one whose title was defective. *Whitman v. York*, 192 N. C. 87, 93, 133 S. E. 427; *American Exch. Nat. Bank v. Seagraves*, 166 N. C. 608, 82 S. E. 947.

Fraud as Preventing Party from Being Holder in Due Course.—Where the endorser alleged in his answer that he signed the note upon representations made by the maker that the payee was lending the money to the maker to finance the equipment of a law office, that in fact the note was given to cover funds of the payee on deposit in a bank which had been wrongfully converted by the maker, and that the payee had full knowledge of, agreed to, and participated in, the fraudulent scheme to procure the endorser to sign the note by such false representations, the answer was sufficiently broad to allege fraud, and the payee was not a holder in due course under this section. *Mitchell v. Strickland*, 207 N. C. 141, 176 S. E. 468.

Wrongful Procurement by Agent of Holder.—Defendant's evidence tended to show that he executed the note in suit to be used to pay for shares of stock of the corporate payee, that the stock was never delivered to him and consequently the note was never delivered by him, but that the note was procured from his office without his knowledge or consent by the president of the payee who was also a collecting agent for a bank, and who turned the note over to the bank as collateral security for his company's note. Held: If in procuring the note the president of the company was acting as an agent of the company, knowledge of the infirmity, nothing else appearing, would not be imputed to the bank and it would be a holder in due course, while if, in procuring the note, he was acting as agent of the bank it would have imputed knowledge of the infirmity and would not be a holder in due course, and therefore, it being ad-

mitted that he was an agent of the bank, an instruction that the maker could not be held liable if the note had been taken by an agent of the bank, without further elaboration, is error. *National Bank v. Marshburn*, 217 N. C. 688, 9 S. E. (2d) 372.

When Burden Shifts to Holder.—A holder of a note to show that he is a holder in due course without notice must do so by the greater weight of evidence when the maker pleads and shows fraud, infirmity or defective title. *Discount Co. v. Baker*, 176 N. C. 546, 97 S. E. 495; *Myers v. Petty*, 153 N. C. 462, 69 S. E. 417; *Bank v. Branson*, 165 N. C. 344, 81 S. E. 410; *Hooker v. Hardee*, 192 N. C. 229, 134 S. E. 485; *Bank v. Fountain*, 148 N. C. 590, 595, 62 S. E. 738; *Smathers v. Toxaway Hotel Co.*, 168 N. C. 69, 84 S. E. 47.

When a holder of a note admits certain infirmities in the note, in an action to recover on the note, the burden is upon him to show that he is a holder in due course. *Whitman v. York*, 192 N. C. 87, 133 S. E. 427.

The holder of a negotiable note is presumed to be a holder in due course, but, when its execution is proved to have been obtained by fraud, the burden then shifts to him to prove that he took it before maturity, for value and without notice. *Williams v. Green*, 23 Fed. (2d) 796.

Enlarged Liability of Indorser Does Not Affect Negotiability.—A negotiable note indorsed to a holder, bearing an enlarged liability—a guaranty of payment, makes the holder a holder in due course in spite of the enlarged liability of the indorser. *Richmond Guano Co. v. Walston*, 191 N. C. 797, 133 S. E. 196.

Renewal Note after Notice.—A bank purchasing a note after maturity takes it subject to the equities of the parties. A subsequent note taken as a renewal of the first will not cure the defect and such holder cannot enforce payment. *Grace & Co. v. Strickland*, 188 N. C. 369, 124 S. E. 856; *Merchants Nat. Bank v. Howard*, 188 N. C. 543, 125 S. E. 126.

Holder for Collection.—A bank taking a note for collection is not a holder in due course. *Insurance Co. v. Cotton Mill Co.*, 187 N. C. 233, 121 S. E. 439; *Bank v. Rochamora*, 193 N. C. 1, 136 S. E. 259.

Town as Holder in Due Course of Bonds.—Where a bank pledged certain bonds to secure the deposit of a town, the town acquired the bonds for value as security for a pre-existing indebtedness which is sufficient to constitute it a holder in due course within the meaning of this section. *Standard Inv. Co. v. Snow Hill*, 78 F. (2d) 33.

Holder of Note Obtaining Same by Indorsement after Maturity Is Not Holder in Due Course.—*Mansfield v. Wade*, 208 N. C. 790, 182 S. E. 475.

Drafts Charged Back.—The fact that there is a custom among banks to take drafts for collection, and charge them back if they are unpaid, is not sufficient evidence to show that a bank holding a draft is not a holder in due course. *Lumber Co. v. Childerhose*, 167 N. C. 34, 83 S. E. 22; nor will the charging back of a check which is unpaid, make the holder bank a holder for collection, if the back charge was against an account that consisted of deposited checks that were later returned unpaid. *Standard Trust Co. v. Commercial Nat. Bank*, 240 Fed. 303.

Question for Jury.—Whether the execution of notes were induced by fraudulent representations, held, a question for jury. *Clark v. Laurel Park Estates*, 196 N. C. 624, 146 S. E. 584.

Same—Duty to Instruct.—Where there is evidence that the holder of a negotiable instrument had notice of its infirmity, the question is for the jury, and a failure to instruct thereon is reversible error. *Peoples Bank, etc., Co. v. Duncan*, 194 N. C. 692, 140 S. E. 610.

Applied in Wellons v. Warren, 203 N. C. 178, 165 S. E. 545; *Bankers' Trust Co. v. Statesville*, 203 N. C. 399, 166 S. E. 169; *Dyer v. Bray*, 208 N. C. 248, 180 S. E. 83.

Cited in *Mayers v. Bank*, 198 N. C. 542, 544, 152 S. E. 628. See also *Dixon v. Smith*, 204 N. C. 480, 168 S. E. 683.

§ 25-59. When person not deemed holder in due course.—Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. (Rev., s. 2202; 1899, c. 733, s. 53; C. S. 3034.)

Cross Reference.—As to what is reasonable time, see § 25-3 and note.

In General.—A cashier's check negotiated to a holder in another state within five days is negotiated in a reasonable time. *Manufacturing Co. v. Summers*, 143 N. C. 102, 55 S. E. 522.

Cited in *State, etc., Trust Co. v. Hedrick*, 198 N. C. 374, 151 S. E. 723.

§ 25-60. Notice before full amount paid.—Where the transferee has received notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him. (Rev., s. 2203; 1899, c. 733, s. 54; C. S. 3035.)

Cross Reference.—As to what constitutes notice, see § 25-62.

In General.—The title passes to one who takes a negotiable paper without notice of any defect or equities no matter how little he paid, in the absence of fraud. If there is fraud he is only entitled to what he has paid before receiving notice of the fraud. *Bank v. McNair*, 116 N. C. 550, 21 S. E. 389.

Taken as Collateral Security.—Where the original consideration of the paper is illegal or fraudulent, or it is taken as collateral security, the right of recovery is restricted to the consideration actually paid by the indorsee before notice of the fraud. *Dresser v. Missouri, etc., R. Co.*, 93 U. S. 92, 95, 23 L. Ed. 815, or the amount of the debt to which it is collateral. *Kerr v. Cowen*, 17 N. C. 356; *United States Nat. Bank v. McNair*, 116 N. C. 550, 551, 554, 21 S. E. 389.

Cited in *Standing Stone Nat. Bank v. Walser*, 162 N. C. 53, 77 S. E. 1006.

§ 25-61. When title defective.—The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress or force and fear or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud. (Rev., s. 2204; 1899, c. 733, s. 55; C. S. 3036.)

Cross Reference.—As to burden of proof when title defective, see § 25-65.

Editor's Note.—A careful reading of this section will reveal that it applies to "the title of a person who negotiates" and thus has full knowledge of or the means of knowing the circumstances. The question of whether or not fraud, duress, usury, illegality of consideration, etc., will render the instrument unenforceable in the hands of a person in due course without notice presents itself.

In the case of the fraud which is sufficient to avoid an instrument as to such holder there is a considerable amount of conflict. See 8 C. J. sections 1048, 1049, pp. 789, 790. However, it would seem that the better rule is that fraud ordinarily renders the instrument voidable only, and therefore, in accordance with the general rule is not a good defense as against a holder in due course where he proves himself to be such in accordance with section 25-65. See *Discount Co. v. Baker*, 176 N. C. 546, 97 S. E. 495, and citations.

Of course, it might be that upon principle, the rule should be that where one who has been induced through fraud to sign an instrument the actual terms of which he has no knowledge and signs thinking he is signing a different instrument, as for example, where he cannot read and he depended upon the payee to read the terms to him correctly, which the payee did not do, should be allowed to defend against holders in due course, because in such cases the instrument is in fact no more the maker's than if it were forged or altered and this should be placed in the same category. But, be this as it may, where the maker has proved such fraud or deception the burden of proving that the holder is one in due course is upon the holder and he cannot recover if he fails to sustain the burden. See section 25-65; *Discount Co. v. Baker*, supra; *Duncan v. Carson*, 127 Va. 306, 103 S. E. 665, 105 S. E. 62.

As to duress as a defense, see 8 C. J. section 1027, p. 761; illegality of consideration, 8 C. J. sections 1031, 1032, p. 766, gambling transactions, 8 C. J. section 1031, p. 769.

Rights of Holders of Notes Tainted with Usury or Illegality.—The exceptions to the rule of section 25-65 are: (1) **When by statute the paper is void in whole or in part from its inception, as for usury or for gaming or immoral contracts.** In such cases it is void to the same extent into whose hands it may pass, even if acquired before maturity, for value and without notice, and the sole remedy of the holder for the deficiency is against the indorser. *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717, and cases there cited. (2)

[Where the original consideration of the paper is illegal or fraudulent, or it is taken as collateral security, the right of recovery is restricted to the consideration actually paid by the indorsee before notice of the fraud. *Dresser v. Missouri, etc., R. Co.*, 93 U. S. 92, 23 L. Ed. 815, or the amount of the debt to which it is collateral. *Kerr v. Cowen*, 17 N. C. 356. But the exception does not extend further, not even to cases where the note was issued without any consideration, though it may be purchased by the indorsee for less than its face value. *United States Nat. Bank v. McNair*, 116 N. C. 550, 21 S. E. 389, 390.

In the case of an instrument tainted with usury it is void to the extent declared by statute, see § 24-2 and note, and the bona fide holder cannot recover upon the portion which is void.

When Title Subject to Question.—In the absence of an allegation of fraud the intervener's title is not subject to question when suit is brought by a holder in due course. *Moon v. Simpson*, 170 N. C. 335, 87 S. E. 118, 172 N. C. 576, 90 S. E. 578; *Worth Co. v. Feed Co.*, 172 N. C. 335, 90 S. E. 295.

Burden of Proof.—When it is shown or admitted that the title of the person who negotiated the instrument is defective, or there is evidence of the fact, it is necessary for a recovery by one claiming to be the holder in due course to show by the greater weight of the evidence that he is such a holder according to the terms of section 25-58. *Manufacturing Co. v. Summers*, 143 N. C. 102, 108, 55 S. E. 522; *Smathers & Co. v. Toxaway Hotel Co.*, 168 N. C. 69, 84 S. E. 47; *Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738; *Bank v. Branson*, 165 N. C. 344, 81 S. E. 410; *First Nat. Bank v. Warsaw Drug Co.*, 166 N. C. 99, 100, 81 S. E. 993; *Whitman v. York*, 192 N. C. 87, 133 S. E. 427; *Hooker v. Hardee*, 192 N. C. 229, 134 S. E. 485; *Moon v. Simpson*, 170 N. C. 335, 337, 87 S. E. 118.

Cited in *Bank v. Rochamora*, 193 N. C. 1, 136 S. E. 259; *Clark v. Laurel Park Estates*, 196 N. C. 624, 638, 146 S. E. 584.

§ 25-62. What constitutes notice of defect.—To constitute a notice of an infirmity in the instrument or defect in the title of the person negotiating the same the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith. (Rev., s. 2205; 1899, c. 733, s. 56; C. S. 3037.)

In General.—Observable irregularities on the face of the instrument will no longer suffice to affect the rights of a holder in due course. It is necessary that circumstances set out in this section should occur in order to charge the holder with notice. *Holleman v. Trust Co.*, 185 N. C. 49, 115 S. E. 825; *Critchler v. Ballard*, 180 N. C. 111, 112, 104 S. E. 134; *Smathers & Co. v. Toxaway Hotel Co.*, 162 N. C. 346, 78 S. E. 224; *Lacy v. Globe Indemnity Co.*, 189 N. C. 24, 32, 126 S. E. 316; *Smathers & Co. v. Toxaway Co.*, 167 N. C. 469, 470, 83 S. E. 844.

In *Hotchkiss v. National Banks*, 88 U. S. (21 Wall.) 354, 22 L. Ed. 645 it is said: "A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser." *Piedmont Carolina R. Co. v. Shaw*, 223 Fed. 973, 977.

The fact that a note is negotiated by a stranger at a discount and one of the alternative places of payment was not known to the holder, is not sufficient to put him on notice of the defects. *Farthing v. Dark*, 111 N. C. 243, 16 S. E. 337. This case was reported in *Farthing v. Dark*, 109 N. C. 291, 13 S. E. 918, but at that time the court was not advertent to the fact that there was an alternative place of payment.

When a note is signed through fraud of another, and discounted with an indorsee that had notice of this fraud, the indorsee is subject to the equities between the parties. *Grace & Co. v. Strickland*, 188 N. C. 369, 124 S. E. 856.

Notice to Bank Through Officers.—A note payable to an officer of a bank and discounted at the bank through the discount committee does not make the bank subject to the principle of imputed knowledge when the officer is not a member of the discount committee. *Bank v. Howard*, 188 N. C. 543, 125 S. E. 126.

A bank taking a note indorsed to it by its president takes with notice of all equities between the parties, when the president and cashier constitute the discount committee, as

notice to the president constitutes notice to the bank. *Le Duc v. Moore*, 111 N. C. 516, 15 S. E. 888.

Duty to Inquire.—When a person has knowledge of such facts and circumstances which make it incumbent on him to inquire as to the character of the note which he purchased, he will be affected with knowledge of all that the inquiry would disclose. *Bunting v. Ricks*, 22 N. C. 130, 32 Am. Dec. 699; *Hulbert v. Douglas*, 94 N. C. 122. *Loftin v. Hill*, 131 N. C. 105, 110, 42 S. E. 548. But knowledge of the crookedness in business matters of the assignee does not defeat the title of the assignee or make it his duty to inquire relative to the note. *Setzer v. Deal*, 135 N. C. 428, 47 S. E. 466.

Same—Interest Past Due.—The fact that interest is past due does not of itself constitute notice of equities between the parties, but it may be considered by the jury in passing on the issue. *Trust Co. v. Whitehead*, 165 N. C. 74, 80 S. E. 1065.

Statement of Transaction.—A note containing on its face an express statement of the transaction for which it was given, in the absence of further evidence, is not notice of the equities between the parties. *Bank v. Hatcher*, 151 N. C. 359, 66 S. E. 308. See sec. 25-9 and the notes thereto.

Question for the Jury.—Where there is conflicting evidence as to notice the holder had of equities between the parties, issue should be submitted to a jury. *Loftis v. Hill*, 131 N. C. 105, 42 S. E. 548.

Applied in *Standard Inv. Co. v. Snow Hill*, 78 F. (2d) 33. Cited in *New Bern Oil, etc., Co. v. National Bank*, 28 Fed. (2d) 554.

§ 25-63. Rights of holder in due course.—A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. (Rev., s. 2206; 1899, c. 733, s. 57; C. S. 3038.)

Cross Reference.—For discussion of rights of holder taking through a holder in due course, see note to § 25-64.

In General.—One taking a note as a holder in due course can, under this section, enforce his right against all prior parties, except in case of a defective title as provided in section 25-61. *Bank v. McNair*, 116 N. C. 550, 21 S. E. 389; *Davidson v. Powell*, 114 N. C. 575, 19 S. E. 601; *Bank v. Griffin*, 153 N. C. 72, 68 S. E. 919; *Standing Stone Nat. Bank v. Walser*, 162 N. C. 53, 54, 77 S. E. 1006. But see section 25-65 as to burden of proof where defect is shown.

The maker of a note may not set up defenses he may have against the payee of the note in an action by a holder in due course, but where the holder is not a holder in due course without notice, the maker may set up all defenses which he may have as against the payee. *Federal Reserve Bank v. Atmore*, 200 N. C. 437, 157 S. E. 129.

Where the answer sufficiently alleges that the holder was not a holder in due course for value without notice, all defenses which the defendant may have are presentable under the pleadings. *Id.*

Relief from Scheme to Evade Usury Laws.—Where a borrower is entitled to enforce an equity against the payee because of a device to evade the usury laws, this equity cannot be enforced against a holder in due course. *Federal Reserve Bank v. Jones*, 205 N. C. 648, 650, 172 S. E. 185.

Stated in *Standard Inv. Co. v. Snow Hill*, 78 F. (2d) 33. Cited in *Dixon v. Smith*, 204 N. C. 480, 168 S. E. 683; *Mansfield v. Wade*, 208 N. C. 790, 182 S. E. 475.

§ 25-64. When subject to original defenses.—In the hands of any holder other than a holder in due course a negotiable instrument is subject to the same defenses as if it were nonnegotiable. But a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument has all the rights of such former holder in respect of all parties prior to the latter. (Rev., s. 2207; 1899, c. 733, s. 58; C. S. 3039.)

Editor's Note.—The dictum in *Pierce v. Carlton*, 184 N. C. 175, 114 S. E. 13, is to the effect that one who is not a party to the fraud in procuring an instrument but who takes with notice, and then passes the instrument on to a holder in due course, will take a good title and hold as a holder in due course when he reacquires the instrument from the holder in due course. The court cites *Calverts on Negotiable In-*

struments, sec. 805, which recognizes only one exception to the rule that one taking from a holder in due course takes good title, and that is a taking by a fraudulent payee from a holder in due course. Such fraudulent payee can't take as a holder in due course. In 1 N. C. Law Rev. 187 this dictum is criticized and it is contended that one who takes with notice of an infirmity should not be allowed to clear his title by passing it through a holder in due course, for such would open the door to fraud.

In General.—If plaintiff failed to prove that he was a holder in due course, the notes, although in his hands as a holder, other than a holder in due course, are subject to the same defenses as if they were non-negotiable. *Whitman v. York*, 192 N. C. 87, 90, 133 S. E. 427. A past due instrument, lodged with bank as security, is subject to all defenses. *Bank v. Loughran*, 126 N. C. 814, 36 S. E. 281. The transferee of an unindorsed instrument not payable to bearer also takes subject to defenses. *Bresee v. Crumpton*, 121 N. C. 122, 28 S. E. 351.

A holder in due course may transfer a complete title to a third person although the latter when he takes the paper has knowledge of facts which would defeat recovery by the payee. *Wellons v. Warren*, 203 N. C. 178, 181, 165 S. E. 545.

"But this rule is subject to the single exception that if the note were invalid as between the maker and the payee, the payee could not himself, by purchase from a bona fide holder, become successor to his rights, it not being essential to such bona fide holder's protection to extend the principle so far." *Ray v. Livingston*, 204 N. C. 1, 4, 157 S. E. 496.

Holder of Note after Maturity Takes Subject to Equities.—Where the holder of a negotiable note obtained same by endorsement after maturity, he takes same subject to equities, and the maker of the note may establish as against such holder that the note was paid before it was endorsed to and acquired by the holder. *Mansfield v. Wade*, 208 N. C. 790, 182 S. E. 475.

Purchaser after Maturity Takes Free of Agreement of Third Person to Pay Note.—A purchaser for value after maturity takes the note free from an agreement by a third person to pay the note when such third person was never a purchaser or holder of the note and the purchaser has no knowledge of such agreement between the maker and the third person. *Pickett v. Fulford*, 211 N. C. 160, 189 S. E. 488.

Cited in Merchants Nat. Bank v. Howard, 188 N. C. 543, 548, 125 S. E. 126.

§ 25-65. Who deemed holder in due course.—Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. (Rev., s. 2208; 1899, c. 733, s. 59; C. S. 3040.)

Cross References.—As to what constitutes holder in due course, see § 25-58, as to exceptions to this section, see note to § 25-61.

Editor's Note.—There are several exceptions to this section, see note to section 25-61.

Holders to Whom Applicable.—The presumption that the holder is one in due course exists in favor of the holder of a draft payable to order with bill of lading attached. *Manufacturing Co. v. Tierney*, 133 N. C. 630, 635, 45 S. E. 1026; *Mangum v. Mutual Grain Co.*, 184 N. C. 181, 182, 114 S. E. 2.

This presumption does not exist in favor of a holder of an unindorsed note not payable to bearer. *Harlan, J., in Osgood v. Artt*, 17 Fed. 575, says: "... it is ... well settled that the purchaser, if the paper be delivered to him without indorsement, takes by the law merchant only the rights which the payee has, and therefore takes subject to any defense the payor may rightfully assert as against the payee. The purchaser in such case becomes only the equitable owner of the claim or debt evidenced by the negotiable security" *Tyson v. Joyner*, 139 N. C. 69, 72, 51 S. E. 803.

But when a properly negotiated note is found among the papers of a deceased person that is prima facie evidence that the holder is a holder in due course, and until it is alleged and shown by a party liable on the note that it is defective, the evidence is sufficient for the administrator of the holder

to recover thereon. *Insurance Co. v. Jones*, 191 N. C. 176, 131 S. E. 587.

When Presumption Becomes Operative—Proof of Indorsement.—The presumption becomes operative as a matter of course where there is neither allegation nor proof that the title to a negotiable instrument is defective. The holder by indorsement is only required to prove the indorsement in order for him to be deemed prima facie a holder in due course. *Moon v. Simpson*, 170 N. C. 335, 87 S. E. 118.

Rebuttal of Presumption.—The prima facie case is not rebutted by a mere denial in the answer of the ownership of the plaintiff. *Causey v. Snow*, 120 N. C. 279, 26 S. E. 775; *Gulf States Steel Co. v. Ford*, 173 N. C. 195, 196, 91 S. E. 844.

Defective Title—Holder's Burden of Proof.—Where fraud on the part of the payee in the procurement and issuance of the instrument is shown, the burden of proving due course is shifted to the holder. *Myers v. Petty*, 153 N. C. 462, 69 S. E. 417; *Hooker v. Hardee*, 192 N. C. 229, 134 S. E. 485; *Bank v. Sherron*, 186 N. C. 297, 119 S. E. 497; *Bank v. Exum*, 163 N. C. 199, 79 S. E. 498; *Bank v. Branson*, 165 N. C. 344, 349, 81 S. E. 410; *American Exch. Nat. Bank v. Seagroves*, 166 N. C. 608, 610, 82 S. E. 947.

This rule also applies where the holder admits infirmities in the instrument. *Whitman v. York*, 192 N. C. 87, 133 S. E. 427.

The burden rests upon the holder, when the title of a prior holder is shown to be defective, to show lack of knowledge of the defect. *Standard Inv. Co. v. Snow Hill*, 78 F. (2d) 33, 37.

The holder by indorsement must show that the instrument was indorsed before maturity. An indorsement by a rubber stamp is a valid indorsement but does not prove itself. *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 447.

It was competent for the defendant to introduce evidence as to the quality of goods for which a draft was accepted in order that he might show fraud and deception and where such proof was admitted the burden of proving holding in due course devolved upon holder. *Campbell v. Patton*, 113 N. C. 481, 18 S. E. 687; *Manufacturing Co. v. Summers*, 143 N. C. 102, 109, 55 S. E. 522; *Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738; *Park v. Exum*, 156 N. C. 228, 72 S. E. 309; *Standing Stone Nat. Bank v. Walser*, 162 N. C. 53, 62, 77 S. E. 1006; *Fidelity Trust Co. v. Ellen*, 163 N. C. 45, 46, 79 S. E. 263; *Smathers & Co. v. Toxaway Hotel Co.*, 168 N. C. 69, 72, 84 S. E. 47; *Bank v. Branson*, 165 N. C. 344; 81 S. E. 510; *Discount Co. v. Baker*, 176 N. C. 546, 97 S. E. 495.

The credibility of the plaintiff's evidence that he is a holder in due course is for the jury. *Manufacturing Co. v. Summers*, 143 N. C. 102, 55 S. E. 522; *Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738; *Park v. Exum*, 156 N. C. 228, 72 S. E. 309; *Standing Stone Nat. Bank v. Walser*, 162 N. C. 53, 63, 77 S. E. 1006; *Fidelity Trust Co. v. Ellen*, 163 N. C. 45, 46, 79 S. E. 263.

Rule applied in *Merchants Nat. Bank v. Howard*, 188 N. C. 543, 550, 125 S. E. 126.

Interveners Assume Burden of Proving Title.—Where a forwarding bank intervenes and claims title to a draft of a nonresident debtor attached in the hands of a local bank, the burden is on the intervener to show its title to the property attached. *Sterling Mills v. Milling Co.*, 184 N. C. 461, 114 S. E. 756.

Renewal Note Subject to Defenses against the Original.—If a note is negotiated after maturity and then taken up by a renewal note, the renewal note is subject to all the equities the original note was subject to. *Grace v. Strickland*, 188 N. C. 369, 124 S. E. 856.

Section applied in Manufacturing Co. v. Summers, 143 N. C. 102, 109, 55 S. E. 522; *Dyer v. Bray*, 208 N. C. 248, 180 S. E. 83.

Cited in Dixon v. Smith, 204 N. C. 480, 168 S. E. 683; *Mansfield v. Wade*, 208 N. C. 790, 182 S. E. 475; *Pickett v. Fulford*, 211 N. C. 160, 189 S. E. 488.

Art. 6. Liabilities of Parties.

§ 25-66. Liability of maker.—The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse. (Rev., s. 2209; 1899, c. 733, s. 60; C. S. 3041.)

Quoted in White v. Johnson & Sons, 205 N. C. 773, 774, 172 S. E. 370.

Cited in Taft v. Covington, 199 N. C. 51, 56, 153 S. E. 597; *Howell v. Robertson*, 197 N. C. 572, 150 S. E. 32; *Wachovia Bank & Trust Co. v. Black*, 198 N. C. 219, 151 S. E. 269; *Davis v. Alexander*, 207 N. C. 417, 419, 177 S. E. 417.

§ 25-67. Liability of drawer.—The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder. (Rev., s. 2210; 1899, c. 733, s. 61; C. S. 3042.)

Cross Reference.—See note under § 53-71.

Right of Drawer to Arrest Payment.—A drawer of a draft, ordinarily standing towards subsequent parties as a general endorser, may, by appropriate words appearing on the paper, or by agreement dehors the instrument as to persons affected with notice, retain the right to arrest payment. *Murchison Nat. Bank v. Dunn Oil Mills Co.*, 150 N. C. 718, 64 S. E. 885.

Where a draft or bill is transferred to a bank by restrictive indorsement, as for deposit or for collection, the instrument is taken and held by the bank as agent for the indorser, and for the purpose indicated, and subject to the right of the indorser to arrest payment or divert the proceeds in the hands of any intermediate or subagent who has taken the paper for like purpose and affected by the restriction. *Boykin v. Bank*, 118 N. C. 566, 24 S. E. 357; *Bank v. Hubble*, 117 N. Y. 384; *Balbach v. Frelinghuysen*, 15 Fed. 675; *Tyson & Rawles v. Bank*, 77 Md. 412; *Murchison Nat. Bank v. Dunn Oil Mills Co.*, 150 N. C. 718, 64 S. E. 885.

Rights of Holder without Notice of Restrictions.—When a bank to which a draft, appearing on its face to be negotiable, is forwarded by another bank, purchases it for value, without notice of an agreement restricting its negotiation, the drawer may not stop payment of the draft as against the rights of the bank so holding the paper. *Murchison Nat. Bank v. Dunn Oil Mills Co.*, 150 N. C. 718, 64 S. E. 885.

Cited in *Morris v. Cleve*, 197 N. C. 253, 262, 148 S. E. 253.

§ 25-68. Liability of acceptor.—The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits (1) existence of the drawer, the genuineness of his signature and his capacity and authority to draw the instrument; and (2) the existence of the payee and his then capacity to indorse. (Rev., s. 2211; 1899, c. 733, s. 62; C. S. 3043.)

Cross Reference.—As to unlawfulness of bank to handle draft connected with receipt for liquor the sale of which is unauthorized, see § 18-33.

Burden on Acceptor to Prove Signature of Drawer.—When a check drawn against a depositor of a bank is paid by the bank, in an action to recover deposits, the burden is on the bank to show that the check was signed by the depositor as maker. *Yarborough v. Trust Co.*, 142 N. C. 377, 55 S. E. 296.

Where the cashing bank acts in good faith, the drawee cannot recover the amount which it has paid on the forged check. The drawee should know the signature of the drawer, its own depositor, better than the holder. The drawee cannot plead a custom that would entitle it to pay such draft without the signature being genuine. The fact that the cashing bank stamped the check "all prior indorsements guaranteed" makes no difference to the drawee, as that guarantee is only applicable to subsequent holders in due course. *State Bank v. Savings etc., Co.*, 168 N. C. 605, 608, 85 S. E. 5.

When Forgery Known to Drawee.—Where a depositor is aware of forgery and indorses the check, and it is accordingly credited to him without knowledge of such facts on the part of the bank, the bank may return the check to such depositor and rightfully charge his account therewith, without reference to any fraudulent intent on his part. *Woodward v. Savings, etc., Co.*, 178 N. C. 184, 100 S. E. 304.

Mistake Not Grounds for Repudiating Acceptance.—When a bank credits a depositor with the amount of a check drawn upon it by another customer, and there is no want of good faith on the part of the depositor, the act of credit-

ing is equivalent to a payment in money, and the bank cannot recall or repudiate the payment because later it is ascertained that the drawer was without funds to meet the check, though when the payment was made the officials labored under the mistake that there were funds sufficient. *Woodward v. Savings, etc., Co.*, 178 N. C. 184, 100 S. E. 304.

Cited in *Seymour v. Peoples Bank*, 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682.

§ 25-69. When person deemed indorser.—A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. (Rev., s. 2212; 1899, c. 733, s. 63; C. S. 3044.)

In General.—A person indorsing a note at the time it is made should be held as original promisor. If the note is indorsed after delivery to the payee and negotiated, the indorsement binds the indorser as indorser only, but if it is not negotiated he is liable as guarantor. *Lilly v. Baker*, 88 N. C. 151.

Persons placing their names on the back of the note are, therefore, nothing else appearing, indorsers and liable on the note only as indorsers. *Perry v. Taylor*, 148 N. C. 362, 62 S. E. 423; *Houser v. Fayssoux*, 168 N. C. 1, 83 S. E. 692; *Bank v. Wilson*, 168 N. C. 557, 84 S. E. 866; *Meyers v. Battle*, 170 N. C. 168, 86 S. E. 1034; *Barber v. Absher Co.*, 175 N. C. 602, 96 S. E. 43; *Gillam v. Walker*, 189 N. C. 189; 126 S. E. 424. *Dillard v. Farmers Mercantile Co.*, 190 N. C. 225, 227, 129 S. E. 598.

Such "appropriate words" as provided by this section, must appear upon the instrument itself or in some sufficient writing attached thereto and becoming an essential and integral part thereof, and parol evidence is not admissible to show that one signing as endorser is primarily liable on the note. *Waddell v. Hood*, 207 N. C. 250, 176 S. E. 558.

Indorsement as Surety.—When it is set out in the body of a note that indorsers on the back are sureties, they will be held liable as sureties and not as indorsers. *Dillard v. Mercantile Co.*, 190 N. C. 225, 129 S. E. 598.

When Parol Evidence Admissible.—Parol evidence is admissible as between the parties to explain the instrument. For example, "the surety on the face of a note, and an accommodation indorser, may, as between themselves, be shown by parol to be co-sureties by virtue of a verbal understanding to that effect. So, several successive accommodation indorsers of a negotiable instrument may be shown by parol to be co-sureties." *Brandt Suretyship Guaranty*, Vol. 1 (3 ed.), pp. 562-3; *Sykes v. Everett*, 167 N. C. 600, 83 S. E. 585; *Gillam v. Walker*, 189 N. C. 189, 126 S. E. 424.

But it is not competent to show that the liability of one whose name is written on the back of a note as an indorser is primary, and not secondary, for the purpose of sustaining the contention that notice of dishonor by nonpayment is dispensed with. *Busbee v. Creech*, 192 N. C. 499, 500, 135 S. E. 326; *Fourth Nat. Bank v. Wilson*, 168 N. C. 557, 84 S. E. 866.

Where the directors of a corporation sign a negotiable instrument on the back thereof as endorsers, the holder may not show by parol that they signed as co-makers, or guarantors, or sureties. *Wrenn v. Lawrence Cotton Mills*, 198 N. C. 89, 150 S. E. 676.

Testimony in direct contradiction of the written agreement as expressed in the indorsement to "guarantee payment of this note . . . with full knowledge of this contract," should be excluded under this section. *Carr v. Clark*, 205 N. C. 265, 266, 171 S. E. 88.

Applied in *Corporation Commission v. Wilkinson*, 201 N. C. 344, 160 S. E. 292; *Hyde v. Tatham*, 204 N. C. 160, 167 S. E. 626.

Cited in *Nance v. Hulin*, 192 N. C. 665, 135 S. E. 774; *Howell v. Robertson*, 197 N. C. 572, 150 S. E. 32.

§ 25-70. Liability of irregular indorser.—Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery he is liable as indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties; (2) if the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or

drawer; (3) if he signs for the accommodation of the payee he is liable to all parties subsequent to the payee. (Rev., s. 2213; 1899, c. 733, s. 64; C. S. 3045.)

Cited in *Perry v. Taylor*, 148 N. C. 362, 62 S. E. 423; *Meyers v. Battle*, 170 N. C. 168, 86 S. E. 1034; *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430, and held not applicable to that case; *Wrenn v. Lawrence Cotton Mills*, 198 N. C. 89, 90, 150 S. E. 676.

§ 25-71. Warranty, where negotiation by delivery.—Every person negotiating an instrument by delivery or by a qualified indorsement warrants (1) that the instrument is genuine and in all respects what it purports to be; (2) that he has a good title to it; (3) that all prior parties had capacity to contract; (4) that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities other than bills and notes. (Rev., s. 2214; 1899, c. 733, s. 65; C. S. 3046.)

Cross Reference.—As to qualified indorsement, see § 25-44.

§ 25-72. Liability of general indorser.—Every indorser who indorses without qualification warrants to all subsequent holders in due course (1) the matters and things mentioned in subdivisions one, two and three of § 25-71; and (2) that the instrument is at the time of his indorsement valid and subsisting. And in addition he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. (Rev., s. 2215; 1899, c. 733, s. 66; C. S. 3047.)

Cross Reference.—As to words which exempt transferor from liability as general endorser, see § 25-44 and note.

Considered with Other Sections.—This section, which restricts the warranty to subsequent holders in due course, must be considered in connection with other sections of the Negotiable Instruments Law. *Ray v. Livingston*, 204 N. C. 1, 4, 167 S. E. 496.

Contract of Indorsement Is a Separate Contract.—A contract of indorsement is a substantive contract, separable and independent of the instrument on which it appears, and where it has been made without qualification and for value it guarantees to a holder in due course among other things that the instrument, at the time of the indorsement, is a valid and subsisting obligation. *Wachovia Bank, etc., Co. v. Grafton*, 181 N. C. 404, 405, 107 S. E. 316.

Indorsement after Maturity.—An indorsee taking after maturity takes the title to whatever interest his indorsee had, and by the indorsement the indorser makes such warranties as are provided by statute. *Smith v. Godwin*, 145 N. C. 242, 58 S. E. 1089.

An indorsement "without recourse" does not impair the negotiability of the instrument, but qualifies the indorsement and where one has acquired a negotiable instrument by an indorsement by a holder without recourse, there is no implied warranty on the part of such indorser. *Walter v. Kilpatrick*, 191 N. C. 458, 132 S. E. 148; *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847.

Signature Not Explained by Parol.—When a payee or regular indorsee thereof writes his name on the back of a note, as between him and a bona fide holder for value and without notice, the law implies that he intended to assume the well-known liability of an indorser, and he will not be permitted to contradict this implication. But this rule does not apply between the original parties to a contract which is not in writing, although there may be the signature of one or more parties to authenticate that some contract was made. *Sykes v. Everett*, 167 N. C. 600, 604, 83 S. E. 585.

Liability of Substituted Indorser.—Where an endorser as originally appearing on a negotiable note has his name stricken from the instrument by the payee and another person signs in substitution for him, the liability of the substituted endorser to the payee remains as a general endorser, unaffected by the cancellation and substitution, when his signature is not obtained by misrepresentation that the other endorser had consented to the substitution and remained bound by the instrument. *Ehrl v. Little*, 205 N. C. 583, 172 S. E. 198.

Set-off of Deposits against Note.—Where a depositor in an insolvent national bank had indorsed a note on which he was in fact primarily liable, and procured the bank to discount it for his benefit, he was entitled in a suit by the bank's receiver to recover the amount of the note, to set off his deposit in the bank against his liability on the note. *Williams v. Rose*, 218 Fed. 898; *Yardley v. Clothier*, 51 Fed. 506, 17 L. R. A. 462; *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1, 1059; *Yardley v. Philler*, 167 U. S. 344, 346, 42 L. Ed. 192; *Williams v. Coleman*, 190 N. C. 368, 371, 129 S. E. 818.

Not Applicable to Usury.—The provisions made as to warranties which prevail in case of unqualified indorsements refer to lawful transactions, and do not relate to transactions caused within the meaning of our usury laws. *Sedbury v. Duffy*, 158 N. C. 432, 74 S. E. 355.

Parol Evidence.—Where an unqualified indorsement is supported by a valuable consideration and the maker seeks to enforce the endorser's liability the endorser may introduce parol evidence of an agreement entered into by the parties contemporaneously with the execution of the note that payment was to be made out of a particular fund, but he may not introduce parol evidence in contradiction of the written terms of the note that he was not to be held liable in any event. *Kindler v. Wachovia Bank, etc., Co.*, 204 N. C. 198, 167 S. E. 811.

Applied in *Hyde v. Tatham*, 204 N. C. 160, 167 S. E. 626.

§ 25-73. Liability of indorser, where paper negotiable by delivery.—Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser. (Rev., s. 2216; 1899, c. 733, s. 67; C. S. 3048.)

§ 25-74. Order in which indorsers are liable.—As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally. (Rev., s. 2217; 1899, c. 733, s. 68; C. S. 3049.)

Cross Reference.—As to liability of subsequent holder when instrument is negotiated back to prior holder, see § 25-56.

Editor's Note.—See 13 N. C. Law Rev. 82, 87.

Contribution between Indorsers.—An indorser of a negotiable instrument is not subject to contribution among all others who may have indorsed the same, but only liable to those who are subsequent in date to his indorsement, to the full amount of their payment as an indemnitor. *Lancaster v. Stanfield*, 191 N. C. 340, 132 S. E. 21.

An indorser of a negotiable instrument who had paid a judgment obtained thereon in an action against him and the insolvent makers, cannot, nothing else appearing, recover the amount in his action therefor against a subsequent indorser. *Lynch v. Loftin*, 153 N. C. 270, 69 S. E. 143.

Parol Evidence between Immediate Parties.—Parol evidence is admissible to show that as between or among themselves parties to a negotiable instrument are liable otherwise than appears prima facie. *Bank v. Burch*, 145 N. C. 316, 59 S. E. 71; *Sykes v. Everett*, 167 N. C. 600, 83 S. E. 585; *Gillam v. Walker*, 189 N. C. 189, 126 S. E. 424; *Dillard v. Mercantile Co.*, 190 N. C. 225, 129 S. E. 598; *Lancaster v. Stanfield*, 191 N. C. 340, 343, 132 S. E. 21.

Parol Evidence against Remote Indorsee.—In an action upon a note by a remote indorsee, who purchased bona fide for full value and without notice, against the payee, who indorsed the note in blank, evidence of an agreement between the payee and his immediate indorsee that he should not be held liable on his indorsement is not admissible. *Hill v. Shields*, 81 N. C. 250.

Cited in *Howell v. Robertson*, 197 N. C. 572, 574, 150 S. E. 32.

§ 25-75. Liability of agent or broker.—Where

a broker or other agent negotiates an instrument without indorsement he incurs all the liabilities prescribed by § 25-71, unless he discloses the name of his principal and the fact that he is acting only as agent. (Rev., s. 2218; 1899, c. 733, s. 69; C. S. 3050.)

Cross Reference.—See also §§ 25-26 and 25-50.

Art. 7. Presentment for Payment.

§ 25-76. Effect of want of demand on principal debtor.—Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is by its terms payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers. (Rev., s. 2219; 1899, c. 733, s. 70; C. S. 3051.)

Cross References.—As to when presentment is not necessary in order to charge drawer and indorsers, see §§ 25-85, 25-86; as to place of presentment, see § 25-79; as to notice to those secondarily liable, see § 25-96 et seq.

Presentment Necessary to Hold Drawer.—When a draft on a third person is given in settlement of an antecedent debt, it is the duty of the holder to present it, and a failure to do so will discharge the debt. *Mauney & Son v. Coit*, 80 N. C. 300.

Presentment Must Be Made in a Reasonable Time to Hold Drawer.—A drawer of a bill, having funds in the hands of the drawee has a right that the bill be presented for payment, and he cannot be charged unless the bill was presented in a reasonable time, although he knew at the time of drawing the bill that the drawee was insolvent. *Cedar Falls Co. v. Wallace*, 83 N. C. 225; *Long v. Stephenson*, 72 N. C. 569.

Effect of Guaranteeing Prior Indorsements.—A certificate of deposit forwarded to another bank by the drawer bank must be presented in a reasonable time, and if not presented the drawer is not liable, although it stamped the certificate "Prior indorsements guaranteed." *Bank v. Trust Co.*, 159 N. C. 85, 74 S. E. 747.

Presentment of Checks.—A postdated check, like any other check need not be presented on the day of its date, but may be presented within a reasonable time thereafter, and the fact that the drawee had money on deposit to meet it on that date, but did not have it when the check was presented, is not equivalent to a "tender of payment." *Philadelphia Life Ins. Co. v. Hayworth*, 296 Fed. Rep. 339.

Sufficient Funds on Deposit May Amount to Tender.—The fact that the maker of a negotiable note payable at a certain bank kept a deposit sufficient to pay the note at the bank on the due date may amount to a tender of payment under this section, but such tender would discharge only persons secondarily liable on the note, and would not discharge the liability of the maker and surety on the note. *Dry v. Reynolds*, 205 N. C. 571, 172 S. E. 351.

Surety's Liability.—When one is a surety on a note, as to all holders he stands on the same basis as the principal, and presentment for payment is not necessary to make him liable thereon. *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430. See also *Dry v. Reynolds*, 205 N. C. 571, 172 S. E. 351.

Guarantor's Liability.—One who is a guarantor on a note is not primarily liable, and presentment is necessary to hold him liable thereon. *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430.

When Failure to Make Demand Available as Defense—Proof.—If a note be payable at a particular time and place, a demand at the time and place need not be averred or proven in an action by the holder against the maker. A failure to make such demand can only be used in defense if the money was ready at the time and place. *Nichols v. Pool*, 47 N. C. 23.

Cited in *Perry v. Taylor*, 148 N. C. 362, 62 S. E. 423.

§ 25-77. Presentment.—Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a rea-

sonable time after its issue, except that in the case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. (Rev., s. 2220; 1899, c. 733, s. 71; C. S. 3052.)

In General.—Where a negotiable paper is assigned, the transaction is to be regulated according to the laws of merchants, by which the assignee is bound to apply for payment within a reasonable time. *Plummer v. Christmas*, 1 N. C. 145, 146.

Presentment of Checks Must Be within Reasonable Time.—Section 192 of the Negotiable Instruments Act (G. S. § 25-192) says that "a check is a bill of exchange drawn on a bank payable on demand". Instruments payable on demand may be presented within a reasonable time after their issue. In this respect there is no difference between a postdated check and any other. In either case it should be presented within a reasonable time after its issue, but the only effect of a failure to present it within such time is to discharge the drawer from liability to the extent of the loss caused by the delay. *Philadelphia Life Ins. Co. v. Hayworth*, 296 Fed. 339, 342.

§ 25-78. What constitutes a sufficient presentment.—Presentment for payment to be sufficient must be made (1) by the holder or by some person authorized to receive payment on his behalf; (2) at a reasonable hour on a business day; (3) at a proper place as herein defined; (4) to the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made. (Rev., s. 2221; 1899, c. 733, s. 72; C. S. 3053.)

In General.—The presentment of a bill of exchange or draft must be made to the drawee or acceptor, or to an authorized agent. A personal demand is not always necessary, and it is sufficient to make the demand at the residence or usual places of business of the drawee, where the presentment is for payment. It is the duty of the bank collector to be careful, not only to present the draft at the usual place of business, but, if the plaintiff was not in, to assure himself that the person to whom he presented the draft for acceptance was the authorized agent of the plaintiff. *Burrus v. Life Ins. Co.*, 124 N. C. 9, 12, 32 S. E. 323.

§ 25-79. Place of presentment.—Presentment for payment is made at the proper place (1) where a place of payment is specified in the instrument and it is there presented; (2) where no place of payment is specified, but the address of the person to make the payment is given in the instrument, and it is there presented; (3) where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment; (4) in any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence. (Rev., s. 2222; 1899, c. 733, s. 73; C. S. 3054.)

Place of Payment Specified.—Whenever a bill of exchange or note is made payable at a particular place, a demand at that place is sufficient, and a personal one is not necessary whether the maker lives at the same place or a different one. *Sullivan v. Mitchell*, 4 N. C. 93. But the maker is not bound to pay it until it is presented at the place where it is expressed to be payable. *Bank v. Bank*, 35 N. C. 75.

Presentment of a draft for payment at the place of its date is sufficient, no other place of presentment appearing. *Wittkowski v. Smith*, 84 N. C. 671.

§ 25-80. Instrument must be exhibited.—The instrument must be exhibited to the person from whom payment is demanded, and, when it is paid, must be delivered up to the party paying it. (Rev., s. 2223; 1899, c. 733, s. 74; C. S. 3055.)

Lost or Destroyed Note.—The provisions of this section that upon payment of a note it must be delivered up to the party paying it, does not apply where the note has been lost or destroyed, and, under the facts of this

case, there was no error in not requiring a bond for the protection of the maker where there was no request made therefor. *Wooten v. Bell*, 196 N. C. 654, 146 S. E. 705.

§ 25-81. Presentment where instrument payable at bank.—Where the instrument is payable at a bank presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient. (Rev., s. 2224; 1899, c. 733, s. 75; C. S. 3056.)

§ 25-82. Presentment where principal debtor is dead.—Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found. (Rev., s. 2225; 1899, c. 733, s. 76; C. S. 3057.)

§ 25-83. Presentment to persons liable as partners.—Where the persons primarily liable on the instrument are liable as partners and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm. (Rev., s. 2226; 1899, c. 733, s. 77; C. S. 3058.)

In General.—Where the protest of a notary public stated that he presented a bill, which purported to be drawn on a firm, to A, one of the members thereof, it was held to be evidence that A was a member of that firm, and that the presentment was properly made. *Elliott v. White*, 51 N. C. 98.

§ 25-84. Presentment to joint debtors.—Where there are several persons not parties primarily liable on the instrument and no place of payment is specified, presentment must be made to them all. (Rev., s. 2227; 1899, c. 733, s. 78; C. S. 3059.)

§ 25-85. When presentment not required to charge the drawer.—Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument. (Rev., s. 2228; 1899, c. 733, s. 79; C. S. 3060.)

In General.—The drawers, having funds in the hands of the drawee, had the right to expect their bill to be honored by them, and they were entitled to presentment of their bill in a reasonable time and strict notice if dishonored on the part of the plaintiff, although the defendants at the time they drew the bill may have believed the drawees were insolvent and had been so notified by them and requested not to draw on them. *Cedar Falls Co. v. Wallace Bros.*, 83 N. C. 225, 228.

§ 25-86. When presentment not required to charge the indorser.—Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented. (Rev., s. 2229; 1899, c. 733, s. 80; C. S. 3061.)

This section is not applicable where holder testifies endorser was not accommodation endorser. *Hyde v. Tatham*, 204 N. C. 160, 167 S. E. 626.

Lack of Funds with Which to Pay.—Where the treasurer of a corporation indorses the corporate note, payable at a certain bank, and at its maturity the corporation has no funds at the bank, it is not necessary that the note should have been presented to the bank for payment. *Meyers Co. v. Battle*, 170 N. C. 168, 86 S. E. 1034.

Burden of Proof on Holder.—If it is in fact an accommodation paper, then, notwithstanding the form of the paper, the drawer would be primarily liable and not en-

titled to notice, but the burden to show this is on the holder, and there being no evidence to that fact, the form of the paper governs and the drawer is entitled to notice. *National Bank v. Bradley*, 117 N. C. 526, 530, 23 S. E. 455.

§ 25-87. When delay in presentment is excused.—Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence. (Rev., s. 2230; 1899, c. 733, s. 81; C. S. 3062.)

Delay Caused by One Liable.—Where an agent has incurred a personal liability on a negotiable instrument given in behalf of his principal, he may not avoid payment on the ground of delay in presenting it for payment, when the delay was at his own request and by his own conduct. *Caldwell Co. v. George*, 176 N. C. 602, 97 S. E. 507.

§ 25-88. When presentment may be dispensed with.—Presentment for payment is dispensed with (1) where after the exercise of reasonable diligence presentment as required by this chapter cannot be made; (2) where the drawee is a fictitious person; (3) by waiver of presentment, express or implied. (Rev., s. 2231; 1899, c. 733, s. 82; C. S. 3063.)

Where Presentment Cannot Be Made.—Where the maker is a seaman, without any domicile in the State, and goes on a voyage about the time the note falls due, no demand on him is necessary in order to charge the indorser. *Moore v. Coffield*, 12 N. C. 247.

Implied Waiver of Presentments.—Where a check was given for county bonds and the bonds could not be issued at once, and the drawer cooperated with the county to get the bond issue, there is a sufficient implied waiver of immediate presentment, and a presentment within a reasonable time after the bond issue was sufficient to bind the drawer. *Caldwell County v. George*, 176 N. C. 602, 97 S. E. 507.

§ 25-89. When instrument dishonored by non-payment.—The instrument is dishonored by non-payment when (1) it is duly presented for payment and payment is refused or cannot be obtained; or (2) presentment is excused and the instrument is overdue and unpaid. (Rev., s. 2232; 1899, c. 733, s. 83; C. S. 3064.)

§ 25-90. Liability of persons secondarily liable when instrument dishonored.—Subject to the provisions of this chapter, when the instrument is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder. (Rev., s. 2233; 1899, c. 733, s. 84; C. S. 3065.)

Cross Reference.—As to right of surety to demand payee or holder to bring suit when he considers himself in danger of loss, see § 26-7.

§ 25-91. Time of maturity.—Every negotiable instrument is payable at the time fixed therein without grace, except as allowed by the succeeding section. When the day of maturity falls upon Sunday or a holiday the instrument is payable on the next succeeding business day. (Rev., s. 2234; 1899, c. 733, s. 85; 1907, c. 897; 1909, c. 800, s. 1; C. S. 3066.)

§ 25-92. When days of grace allowed.—All bills of exchange payable within the state, at sight, in which there is an express stipulation to that effect and not otherwise, shall be entitled to days of grace as the same are allowed by the custom of merchants on foreign bills of exchange payable at the expiration of a certain period after

date or sight, but no days of grace shall be allowed on any bill of exchange, promissory note, or draft payable on demand. (Rev., s. 2235; Code, s. 43; 1905, c. 327; 1907, c. 861; C. S. 3067.)

§ 25-93. How time is computed.—Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the date of payment. (Rev., s. 2236; 1899, c. 733, s. 86; C. S. 3068.)

§ 25-94. Rule where instrument is payable at bank.—Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. (Rev., s. 2237; 1899, c. 733, s. 87; C. S. 3069.)

Where a note is made payable at a certain bank it amounts to an order to the bank to pay same out of the maker's deposit upon presentment when due. *Dry v. Reynolds*, 205 N. C. 571, 172 S. E. 351.

Liability Where Bank Fails to Pay out of Deposits.—Where the bank of deposit of the maker of a note is the one specified as the place of its payment, and also the one to which the note is sent at maturity for collection, the maker's written order on the note to the bank to pay it from his deposits is sufficient; and where the bank accepts this order and retains the note without entry on its books for twelve days, then its doors are closed and a receiver appointed, the payee of the note is held responsible for the acts of its agency for collection, and a plea of payment is good. *Peaslee-Gaulbert Co. v. Dixon*, 172 N. C. 411, 90 S. E. 421.

Cited in Standard Trust Co. v. Bank, 166 N. C. 112, 81 S. E. 1074.

§ 25-95. What constitutes payment in due course.—Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective. (Rev., s. 2238; 1899, c. 733, s. 88; C. S. 3070.)

Art. 8. Notice of Dishonor.

§ 25-96. To whom notice of dishonor must be given.—Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged. (Rev., s. 2239; 1899, c. 733, s. 89; C. S. 3071.)

Cross Reference.—As to notice to principal, see § 25-76.

In General.—The draft having been accepted, the drawee became primarily liable, and in the event of dishonor notice must be given to all those who are secondarily liable as drawer and indorsers. *Denny v. Palmer*, 27 N. C. 610; *Tiedman Com. Paper*, sec. 336; 3 *Randolph Com. Paper*, sec. 1238; 2 *Daniel Neg. Inst.*, sec. 995; *Brown v. Teague*, 52 N. C. 573; *National Bank v. Bradley*, 117 N. C. 526, 530, 23 S. E. 455.

Following the statute it was held in *Perry Co. v. Taylor Bros.*, 148 N. C. 362, 62 S. E. 423, that failure to give notice of dishonor discharged the indorser from further liability. *Barber v. Absher*, 175 N. C. 602, 604, 96 S. E. 43.

Notice to Surety.—A surety on a note is not discharged from liability by reason of the fact that he was not given notice of its dishonor. *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430.

Notice to Forwarding Bank.—When a bank forwards a check to another bank to be collected, and the drawee bank is negligent in notifying the forwarding bank of nonpayment, the right of the forwarding bank to recover will be determined by whether or not it would have prevented loss by notice, and it can recover such loss only as was occasioned by the delay. *Bank v. Trust Co.*, 177 N. C. 254, 93 S. E. 595.

Waiver of Notice.—Notice of dishonor may be waived by an indorser of a negotiable paper before or after maturity

thereof by express words or by necessary implication, and when so waived, notice of dishonor need not be given. *National Bank v. Johnson*, 159 N. C. 526, 86 S. E. 360.

Burden on Holder to Show Primary Liability.—The burden is on the holder of a note, seeking to hold an indorser, to whom notice of dishonor has not been given, liable thereon upon the contention that notice was not required, to prove that the note was given for his accommodation. Parol evidence is not admissible to show primary liability to sustain the contention that notice of dishonor is dispensed with. *Busbee v. Creech*, 192 N. C. 499, 135 S. E. 326.

Effect of Endorser's Consent to Extension of Time.—It cannot be determined as a matter of law that an endorser is not entitled to notice of dishonor as provided in this section, by reason of his consent to an extension of time of payment granted the principal. *Davis v. Royall*, 204 N. C. 147, 167 S. E. 559.

§ 25-97. By whom notice given.—The notice may be given by or on behalf of the holder or by or on behalf of any party to the instrument who might be compelled to pay to the holder, and who upon taking it up would have a right to reimbursement from the party to whom notice is given. (Rev., s. 2240; 1899, c. 733, s. 90; C. S. 3072.)

In General.—The notice required by law to be given to an indorser is good if it be sufficient to put the indorser on inquiry; no particular form is required and any person through whose hands a bill or note has passed may give notice to the drawer or his prior indorser of the dishonor of the bill, although the bill or note may not have been taken up by him at that time. *Bank v. Seawell*, 9 N. C. 560.

Verbal Notice.—Where a bank holding a note for collection gave verbal notice of dishonor to one of the indorsers, and all of the indorsers discussed the matter among themselves and determined to refuse payment, the notice was sufficient, as the indorsers notified each other, and this notice inured to the benefit of the holders. *Piedmont Carolina Ry. Co. v. Shaw*, 223 Fed. 973, 974.

Verbal notice is good if sufficient to put endorsers upon inquiry. *Bank v. Seawell*, 9 N. C. 560.

§ 25-98. Notice given by agent.—Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not. (Rev., s. 2241; 1899, c. 733, s. 91; C. S. 3073.)

§ 25-99. Effect of notice given on behalf of holder.—Where notice is given by or on behalf of the holder, it inures to the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given. (Rev., s. 2242; 1899, c. 733, s. 92; C. S. 3074.)

§ 25-100. Effect, where notice is given by party entitled thereto.—Where notice is given by or on behalf of a party entitled to give notice it inures to the benefit of the holder and all parties subsequent to the party by whom notice is given. (Rev., s. 2243; 1899, c. 733, s. 93; C. S. 3075.)

§ 25-101. When agent may give notice.—Where the instrument has been dishonored in the hands of an agent he may either himself give notice to the parties liable thereon or he may give notice to his principal. If he give notice to his principal he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder. (Rev., s. 2244; 1899, c. 733, s. 94; C. S. 3076.)

§ 25-102. When notice sufficient.—A written notice need not be signed and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the in-

strument does not vitiate it unless the party to whom the notice is given is in fact misled thereby. (Rev., s. 2245; 1899, c. 733, s. 95; C. S. 3077.)

Prior Law.—There was no necessity for signing under the prior law. *Bank v. Seawell*, 9 N. C. 560.

§ 25-103. Form of notice.—The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by nonacceptance or nonpayment. It may in all cases be given by delivering it personally or through the mails. (Rev., s. 2246; 1899, c. 733, s. 96; C. S. 3078.)

§ 25-104. To whom notice may be given.—Notice of dishonor may be given either to the party himself or to his agent in that behalf. (Rev., s. 2247; 1899, c. 733, s. 97; C. S. 3079.)

§ 25-105. Notice when party is dead.—When any party is dead and his death is known to the party giving notice, the notice must be given to a personal representative if there be one, and if with reasonable diligence he can be found. If there is no personal representative, notice may be sent to the last residence or last place of business of the deceased. (Rev., s. 2248; 1899, c. 733, s. 98; C. S. 3080.)

§ 25-106. Notice to partners.—When the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution. (Rev., s. 2249; 1899, c. 733, s. 99; C. S. 3081.)

§ 25-107. Notice to persons jointly liable.—Notice to joint parties who are not partners must be given to each of them unless one of them has authority to receive such notice for the others. (Rev., s. 2250; 1899, c. 733, s. 100; C. S. 3082.)

§ 25-108. Notice to bankrupt.—Where a party has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of his creditors, notice may be given either to the party himself or to his trustee or assignee. (Rev., s. 2251; 1899, c. 733, s. 101; C. S. 3083.)

§ 25-109. Time within which notice must be given.—Notice may be given as soon as the instrument is dishonored, and, unless delay is excused as hereinafter provided, must be given within the times fixed by this chapter. (Rev., s. 2252; 1899, c. 733, s. 102; C. S. 3084.)

Notice, Burden.—The burden is on the holder of a negotiable note to show that notice of nonpayment was given the endorsers, and in the absence of evidence of such notice to an endorser, or to his personal representative after his death, the holder is not entitled to recover on the endorsement. *Williams v. Fowler Automobile Co.*, 207 N. C. 309, 176 S. E. 567.

§ 25-110. Notice where parties reside in the same place.—When the person giving and the person to receive notice reside in same place notice must be given within the following times: (1) If given at the place of business of the person to receive notice it must be given before the close of business hours on the day following; (2) if given at his residence it must be given before the usual hours of rest on the day following; (3) if sent by mail it must be deposited in the post office in time to reach him in the usual course

on the day following. (Rev., s. 2253; 1899, c. 733, s. 103; C. S. 3085.)

§ 25-111. Notice where parties reside in different places.—Where the person giving and the person to receive notice reside in different places the notice must be given within the following times: (1) If sent by mail it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter; (2) if given otherwise than through the post office, then within the time that notice would have been received in due course of mail if it had been deposited in the post office within the time specified in the last subdivision. (Rev., s. 2254; 1899, c. 733, s. 104; C. S. 3086.)

In General.—As to what was a reasonable notice under varying circumstances, it has now been long settled that a reasonable notice is one which is sent by the first post after the day of dishonor, and when there is a daily mail, this necessarily means the next day, if the next day's mail does not leave before business hours. *National Bank v. Bradley*, 117 N. C. 526, 530, 23 S. E. 455; *Hubbard v. Troy*, 24 N. C. 134; *Denny v. Palmer*, 27 N. C. 610.

Sufficient Proof of Notice.—It was unanimously held by the Supreme Court of the United States, in *Lindenberger v. Beal*, 6 Wheat. 104, that the evidence of the letter containing notice, put into the post office, directed to the defendant at his place of residence, was sufficient proof of the notice to be left to the jury, and that it was unnecessary to give notice to the defendant to produce the letter before parol evidence could be admitted. *Faribault v. Ely*, 13 N. C. 67.

§ 25-112. When sender deemed to have given due notice.—Where notice of dishonor is duly addressed and deposited in the post office the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails. (Rev., s. 2255; 1899, c. 733, s. 105; C. S. 3087.)

§ 25-113. What constitutes deposit in postoffice.—Notice is deemed to have been deposited in the post office when deposited in any branch post office or in any letter-box under the control of the postoffice department. (Rev., s. 2256; 1899, c. 733, s. 106; C. S. 3088.)

§ 25-114. Time of notice to antecedent parties.—Where a party receives notice of dishonor he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor. (Rev., s. 2257; 1899, c. 733, s. 107; C. S. 3089.)

§ 25-115. Where notice must be sent.—Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows: (1) Either to the postoffice nearest to his place of residence or to the postoffice where he is accustomed to receive his letters; or (2) if he lives in one place and has his place of business in another, notice may be sent to either place; or (3) if he be sojourning in another place notice may be sent to the place where he is sojourning. But where the notice is actually received by the party within the time specified in this chapter it will be sufficient, though not sent in accordance with requirements of this section. (Rev., s. 2258; 1899, c. 733, s. 108; C. S. 3090.)

Diligent Attempt to Notify Necessary.—A holder of a dishonored bill must give notice to all indorsers, or make a diligent attempt to give this notice, if he does not know

where the indorser resides. *Runyon v. Montfort*, 44 N. C. 371.

Nearest Post Office.—The rule that notice to a distant indorser should be sent to the post office nearest to his residence was founded on the presumption that the information would most speedily be given in such way; but the rule is subject to modification, and the true inquiry is, was the notice directed to that post office which was most likely to impart to the indorser the earliest intelligence, though it may not be the nearest; if it was, it is sufficient. *Bank v. Lane*, 10 N. C. 453.

Notice sent to the place where the bill was drawn is not sufficient. *Denny v. Palmer*, 27 N. C. 610.

§ 25-116. Waiver of notice.—Notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied. (Rev., s. 2259; 1899, c. 733, s. 109; C. S. 3091.)

Mistake.—When one, thinking there has been a presentment for payment, makes promises that would amount to a waiver, had there been a presentment, he is not liable on the grounds of waiver of notice if there had been no presentment for payment. *Lilly v. Petteway*, 73 N. C. 358.

Extension of Time.—The authorities seem to hold that where the indorser consents in advance of maturity to extensions of the time of payment of the note, he thereby waives his right to receive notice of dishonor and presentment for payment. *Worley v. Johnson*, 33 L. R. A. 641, notes. *National Bank v. Johnston*, 169 N. C. 526, 529, 86 S. E. 360.

Promise to Pay after Failure to Be Notified.—A promise to pay generally, or a promise to pay a part, or a part payment made, with a full knowledge that he had been fully released from liability on the bill by the neglect of the holder to give notice, will operate as a waiver and bind the party who makes it for the payment of the whole bill. *Dixon v. Elliot*, 5 Car. & P., 437; *Margetson v. Atkins*, 3 Car. & P., 388; *Harvey v. Thorpe*, 23 Miss., 538; *Shaw Bros. v. McNeill*, 95 N. C. 535, 538.

Where, upon the dishonor of a bill of exchange or promissory note, the indorsee has neglected to give the proper notice, the drawer or indorser of the bill or indorser of the note will still be liable, if, after a knowledge of all the facts which in law would have discharged him, he promises to pay the bill or note. *Moore v. Tucker*, 25 N. C. 347.

§ 25-117. Who affected by waiver.—Where the waiver is embodied in the instrument itself it is binding upon all parties, but where it is written above the signature of an indorser it binds him only. (Rev., s. 2260; 1899, c. 733, s. 110; C. S. 3092.)

In General.—Where upon the face of a negotiable note there is an agreement to waive notice of dishonor or an extension of time, etc., one placing his name on the back thereof is deemed to be an indorser without indication of other liability therein, and is bound by the agreement expressed on the face of the instrument waiving notice, etc. *Gillam v. Walker*, 189 N. C. 189, 126 S. E. 424.

Endorser Is a "Party" to the Note.—An extension of time for payment of a note will not discharge an endorser when the note provides on its face that extension of time for payment is waived by all parties to the note, the endorser being a "party" to the note. *Vannoy v. Stafford*, 209 N. C. 748, 184 S. E. 482.

Applied in Fidelity Bank v. Hessee, 207 N. C. 71, 175 S. E. 826.

Cited in National Bank v. Johnston, 169 N. C. 526, 86 S. E. 360.

§ 25-118. Waiver of protest.—A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of a presentment and notice of dishonor. (Rev., s. 2261; 1899, c. 733, s. 111; C. S. 3093.)

Waiver Binding Partnership.—Where a partner, after the dissolution of the firm, gives a draft in payment of a partnership debt, he cannot waive protest so as to bind his former copartner, especially when the latter has been a dormant member. *Mauney & Son v. Coit*, 80 N. C. 300.

Inland Bills.—Although protest is not necessary on an in-

land bill, yet its waiver in such a case is construed to signify as much as when applied to foreign bills. *Shaw Bros. v. McNeill*, 95 N. C. 535.

Foreign Bills.—A protest is necessary only in case of foreign bills. A waiver of protest on a foreign bill is also a waiver of presentment and notice. *Shaw Bros. v. McNeill*, 90 N. C. 535.

Cited in National Bank v. Johnston, 169 N. C. 526, 86 S. E. 360.

§ 25-119. When notice is dispensed with.—Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged. (Rev., s. 2262; 1899, c. 733, s. 112; C. S. 3094.)

§ 25-120. Delay in giving notice.—Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence. (Rev., s. 2263; 1899, c. 733, s. 113; C. S. 3095.)

§ 25-121. When notice need not be given to drawer.—Notice of dishonor is not required to be given to the drawer in either of the following cases: (1) Where the drawer and the drawee are the same person; (2) Where the drawee is a fictitious person or a person not having capacity to contract; (3) where the drawer is the person to whom the instrument is presented for payment; (4) where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument; (5) where the drawer has countermanded payment. (Rev., s. 2264; 1899, c. 733, s. 114; C. S. 3096.)

Cross Reference.—As to notice, see note to § 25-85.

§ 25-122. When notice need not be given to indorser.—Notice of dishonor is not required to be given to an indorser in either of the following cases: (1) Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument; (2) where the indorser is the person to whom the instrument is presented for payment; (3) where the instrument was made or accepted for his accommodation. (Rev., s. 2265; 1899, c. 733, s. 115; C. S. 3097.)

In General.—Although, at the time of the indorsement of a note, the indorsers had reason to believe, and did believe, that the note would not be paid by the maker, this circumstance does not dispense with the necessity of a due notice. *Denny v. Palmer*, 27 N. C. 610.

Cited in Busbee v. Creech, 192 N. C. 499, 135 S. E. 326.

§ 25-123. Notice of nonpayment where acceptance refused.—Where due notice of dishonor by nonacceptance has been given, notice of a subsequent dishonor by nonpayment is not necessary unless in the meantime the instrument has been accepted. (Rev., s. 2266; 1899, c. 733, s. 116; C. S. 3098.)

§ 25-124. Effect of omission to give notice of nonacceptance.—An omission to give notice of dishonor by nonacceptance does not prejudice the rights of a holder in due course subsequent to the omission. (Rev., s. 2267; 1899, c. 733, s. 117; C. S. 3099.)

§ 25-125. When protest need not be made; when it must be made.—Where any negotiable

instrument has been dishonored it may be protested for nonacceptance or nonpayment as the case may be, but protest is not required except in the case of foreign bills of exchange. (Rev., s. 2268; 1899, c. 733, s. 118; C. S. 3100.)

In General.—Protest is not necessary to fix the drawee and indorsers of inland bills of exchange with liability, although it is necessary in the case of foreign bills. *Shaw Bros. v. McNeill*, 95 N. C. 535.

Art. 9. Discharge.

§ 25-126. How instrument discharged.—A negotiable instrument is discharged (1) by payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) by the intentional cancellation thereof by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right. (Rev., s. 2269; 1899, c. 733, s. 119; C. S. 3101.)

In an action on a note the maker and sureties may rely on the discharge of the note by the payee's acceptance of the note of another party in the sum due, and the payee's delivery to them of the papers on which defendants were bound, since this is an intentional cancellation by the payee, under this section, which is not required to be in writing. *Hood System Industrial Bank v. Dixie Oil Co.*, 205 N. C. 778, 172 S. E. 360.

An instruction that a negotiable instrument may be discharged by an act which would discharge a simple contract for the payment of money is not error under this section. *Id.*

Compromise Payment by Surety.—When the liability of a surety or accommodation endorser is discharged by compromise and settlement, the maker is entitled to credit only for the amount actually paid. *First, etc., Nat. Bank v. Hinton*, 216 N. C. 159, 4 S. E. (2d) 332.

Cited in Virginia Trust Co. v. Dunlop, 214 N. C. 196, 198 S. E. 645.

§ 25-127. Discharge of person secondarily liable.—A person secondarily liable on the instrument is discharged (1) by any act which discharges the instrument; (2) by the intentional cancellation of his signature by the holder; (3) by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved. (Rev., s. 2270; 1899, c. 733, s. 120; C. S. 3102.)

Release of Maker Discharges Indorser.—Where the holder of a negotiable instrument releases the maker from liability thereon, he thereby discharges from liability his indorser from whom he acquired the instrument. *Lumber Co. v. Buchanan*, 192 N. C. 771, 136 S. E. 129.

A tender of payment under § 25-76 would discharge only persons secondarily liable on the note, as provided by this section, and would not discharge the liability of the maker and surety on the note. *Dry v. Reynolds*, 205 N. C. 571, 172 S. E. 351.

Extension of Payment.—In an action upon a negotiable instrument the defendants on its face being joint makers, the mere fact that the plaintiff had told one of the defendants, without the knowledge of the other, "that he would take up and carry the note until fall," is not an extension of payment for a "fixed and definite" period, which would operate as a release to such other from liability. *Roberson v. Spain*, 173 N. C. 23, 91 S. E. 361.

Where the face of a note contains an agreement that the parties should remain bound notwithstanding any extension of time granted the maker, upon payment of interest by him, the endorers remain liable although ignorant of such extensions and payments of interest by the maker, they being bound by their agreement in the note and the extension being supported by the necessary elements of certainty, mutuality and consideration. *Fidelity Bank v. Hessee*, 207 N. C. 71, 175 S. E. 826.

Applied in Corporation Commission v. Wilkinson, 201 N. C. 344, 349, 160 S. E. 292.

Cited in National Bank v. Johnston, 169 N. C. 526, 86 S. E. 360.

§ 25-128. Right of party paying instrument.—When the instrument is paid by a party secondarily liable thereon it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except (1) where it is payable to the order of the third person and has been paid by the drawer; and (2) where it was made or accepted for accommodation and has been paid by the party accommodated. (Rev., s. 2271; 1899, c. 733, s. 121; C. S. 3103.)

Right to Put into Circulation.—When a bill of exchange made payable to a third person is protested and taken up by the drawer, the latter cannot again put it in circulation. *Price v. Sharp*, 24 N. C. 417.

Liability of Principal.—An indorser who pays off and discharges the note of his principal can only recover from the latter the amount actually paid by him. *Pace v. Robertson*, 65 N. C. 550.

Cited in Roberson v. Spain, 173 N. C. 23, 91 S. E. 361.

§ 25-129. Renunciation by holder.—The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon. (Rev., s. 2272; 1899, c. 733, s. 122; C. S. 3104.)

In General.—The right of an obligor to defend an action against himself on a negotiable note, under the provisions of this section may be done by virtue thereof only as therein expressed when the release is in writing, and may not be shown when resting only by parol. *Manly v. Beam*, 190 N. C. 659, 130 S. E. 633.

A parol agreement between an official of a bank that the bank would release the endorers or sureties on a note upon the maker confessing judgment thereon is not enforceable, a verbal renunciation being ineffectual under the provisions of this section. *Page Trust Co. v. Lewis*, 200 N. C. 286, 287, 156 S. E. 504.

No writing is necessary if "the instrument is delivered to the person primarily liable thereon." *Hood System Industrial Bank v. Dixie Oil Co.*, 205 N. C. 778, 779, 172 S. E. 360.

§ 25-130. Unintentional cancellation; burden of proof.—A cancellation made unintentionally or under a mistake or without the authority of the holder is inoperative, but where an instrument or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority. (Rev., s. 2273; 1899, c. 733, s. 123; C. S. 3105.)

§ 25-131. Effect of alteration of instrument.—Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorized or assented to the

alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course not a party to the alteration he may enforce payment thereof according to its original tenor. (Rev., s. 2274; 1899, c. 733, s. 124; C. S. 3106.)

Cross Reference.—See annotations to § 25-132.

In General.—It is familiar learning that if the payee of a bond alters it in any material part, without the consent of the obligor, the bond is avoided and may be defeated on the plea of non est factum. *Mathis v. Mathis*, 20 N. C. 55; *Dunn v. Clements*, 52 N. C. 58; *Darwin v. Rippey*, 63 N. C. 319; *Davis v. Coleman*, 29 N. C. 424.

Liability on Raised Checks.—Where the maker of a check, whether a bank or other corporation, or an individual, fills out the blank spaces by writing in ink and delivers it to the payee as a complete instrument, there is no question of implied agency of the payee to do anything further regarding the negotiation of the instrument as the agent for the maker, and where the payee has fraudulently raised the amount of the check, indorses it to another, and receives the money thereon, the maker is not liable to the indorsee except in an action for the original or true amount of the check. *Broad St. Bank v. Nat. Bank*, 183 N. C. 463, 112 S. E. 11.

§ 25-132. What constitutes a material alteration.—Any alteration which changes (1) the date; (2) the sum payable either for principal or interest; (3) the time or place of payment; (4) the number or the relation of the parties; (5) the medium or currency in which payment is to be made; or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration. (Rev., s. 2275; 1899, c. 733, s. 125; C. S. 3107.)

In General.—Adding the words "in specie" after the word "dollars" in a note is a material alteration. *Darwin v. Rippey*, 63 N. C. 319.

The cutting of the name of one of the makers of a promissory note and substituting that of another was a material alteration of the note, and vitiated it. *Davis v. Coleman*, 29 N. C. 424, 427.

Striking Out Endorser's Name and Substituting Another Is Material.—Where the payee of a negotiable instrument acquires it with certain endorsers thereon and subsequently strikes out the name of one endorser and another signs as endorser in lieu of the endorser whose name was stricken out, the change is a material one under this section, and will release the endorsers who had not consented to the substitution, but will not release those endorsers whose consent had been procured, as provided in § 25-131. *Efrid v. Little*, 205 N. C. 583, 172 S. E. 198.

Immaterial Alterations.—The addition that does not vary the terms of the contract, and adds nothing more than is already implied by law is not sufficient to be construed as a material alteration. *Houston v. Potts*, 64 N. C. 33.

Art. 10. Bills of Exchange.

§ 25-133. Bill of exchange defined.—A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. (Rev., s. 2276; 1899, c. 733, s. 126; C. S. 3108.)

Cross Reference.—See note under § 53-71.

In General.—Where a draft drawn to the maker's order and, having been indorsed by another, is accepted at a bank, and then purchased in due course before maturity by an innocent purchaser for value, the bank may not resist payment upon the ground that the transaction was ultra vires, and not within the authority of its charter, authorizing it to accept bills, notes, commercial paper, etc., for it comes within the statutory definition of an inland bill of exchange, and may be treated as a bill or note, at the option of the holder. *Sherrill v. American Trust Co.*, 176 N. C. 591, 97 S. E. 471.

Cited in *Johnson v. Lassiter*, 155 N. C. 47, 71 S. E. 23;

Trust Co. v. Bank, 166 N. C. 112, 81 S. E. 1074; *Morris v. Cleve*, 197 N. C. 253, 262, 148 S. E. 253.

§ 25-134. Bill not an assignment of funds in hands of drawee.—A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same. (Rev., s. 2277; 1899, c. 733, s. 127; C. S. 3109.)

Editor's Note.—See 13 N. C. Law Rev. 131, as to what orders constitute an assignment.

Cited in *Trust Co. v. Bank*, 166 N. C. 112, 81 S. E. 1074.

§ 25-135. Bill addressed to more than one drawee.—A bill may be addressed to two or more drawees jointly, whether they are partners or not, but not to two or more drawees in the alternative or in succession. (Rev., s. 2278; 1899, c. 733, s. 128; C. S. 3110.)

§ 25-136. Inland and foreign bills of exchange.—An inland bill of exchange is a bill which is or on its face purports to be both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill the holder may treat it as an inland bill. (Rev., s. 2279; 1899, c. 733, s. 129; C. S. 3111.)

§ 25-137. When bill may be treated as promissory note.—Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note. (Rev., s. 2280; 1899, c. 733, s. 130; C. S. 3112.)

In General.—A paper coming directly within the definition of an inland bill of exchange can be treated as a bill or note at the option of the holder, the drawer and drawee being the same person. *Sherrill v. American Trust Co.*, 176 N. C. 591, 592, 97 S. E. 471.

§ 25-138. Referee in case of need.—The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need: that is to say, in case the bill is dishonored by nonacceptance or nonpayment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit. (Rev., s. 2281; 1899, c. 733, s. 131; C. S. 3113.)

Art. 11. Acceptance.

§ 25-139. Acceptance defined; how made.—The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money. (Rev., s. 2282; 1899, c. 733, s. 132; C. S. 3114.)

Acceptance by Agent.—The authority to draw, accept or indorse bills, notes and checks will not readily be implied as an incident to the express authority of an agent. It must ordinarily be conferred expressly, but it may be implied if the execution of the paper is a necessary incident to the business, that is, if the purpose of the agency cannot otherwise be accomplished. *Bank v. Hay*, 143 N. C. 326, 55 S. E. 811.

Cited in *Seymour v. Peoples Bank*, 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682.

§ 25-140. Holder entitled to acceptance on face of bill.—The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is re-

fused, may treat the bill as dishonored. (Rev., s. 2283; 1899, c. 733, s. 133; C. S. 3115.)

Cited in *Commercial Investment Trust v. Windsor*, 197 N. C. 208, 148 S. E. 42.

§ 25-141. Acceptance by separate instrument.—Where an acceptance is written on a paper other than the bill itself it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value. (Rev., s. 2284; 1899, c. 733, s. 134; C. S. 3116.)

Letters of Acceptance.—A letter written to a drawer within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who takes the bill on the credit of the letter, a virtual acceptance, and binds the person who makes the promise, even though there are no funds in his hands belonging to the drawer, if the bill is drawn payable at a fixed time, and not at or after sight. *Nimock v. Woody*, 97 N. C. 1, 2 S. E. 249.

Where the letters, upon which the plaintiff bank relied as authority to an agent to make the draft which it cashed, show that the alleged authority to draw was nothing more than private instructions by the principal to his agent as to how he should conduct this part of the business, and were not to be used as a basis of credit to the agent, the court properly nonsuited the plaintiff. *Bank v. Hay*, 143 N. C. 326, 55 S. E. 811.

§ 25-142. When promise to accept equivalent to acceptance.—An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value. (Rev., s. 2285; 1899, c. 733, s. 135; C. S. 3117.)

§ 25-143. Time allowed drawee to accept.—The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill, but the acceptance, if given, dates as of the day of presentation. (Rev., s. 2286; 1899, c. 733, s. 136; C. S. 3118.)

Cited in *Standard Trust Co. v. Bank*, 166 N. C. 112, 81 S. E. 1074; *Lamb v. Hood*, 205 N. C. 409, 410, 171 S. E. 359; *Seymour v. Peoples Bank*, 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682.

§ 25-144. Liability of drawee retaining or destroying bill.—Where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same. (Rev., s. 2287; 1899, c. 733, s. 137; C. S. 3119.)

Cited in *Standard Trust Co. v. Bank*, 166 N. C. 112, 81 S. E. 1074; *Lamb v. Hood*, 205 N. C. 409, 410, 171 S. E. 359; *Seymour v. Peoples Bank*, 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682.

§ 25-145. Acceptance of incomplete bill.—A bill may be accepted before it has been signed by the drawer or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by nonpayment. But when a bill payable after sight is dishonored by nonacceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment. (Rev., s. 2288; 1899, c. 733, s. 138; C. S. 3120.)

§ 25-146. Kinds of acceptances.—An acceptance

is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. (Rev., s. 2289; 1899, c. 733, s. 139; C. S. 3121.)

§ 25-147. What constitutes a general acceptance.—An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only, and not elsewhere. (Rev., s. 2290; 1899, c. 733, s. 140; C. S. 3122.)

§ 25-148. What constitutes a qualified acceptance.—An acceptance is qualified which is (1) conditional; that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated; (2) partial; that is to say, an acceptance to pay part only of the amount for which the bill is drawn; (3) local; that is to say, an acceptance to pay only at a particular place; (4) qualified as to time; (5) the acceptance of some one or more of the drawees, but not of all. (Rev., s. 2291; 1899, c. 733, s. 141; C. S. 3123.)

Qualified as to Time.—Where one accepted a draft on him "payable when I receive funds to the use of the drawer," he became liable when the moneys were placed to his credit though he had not taken manual possession thereof. *Wallace Brothers v. Douglas*, 116 N. C. 659, 21 S. E. 387.

§ 25-149. Rights of parties as to qualified acceptance.—The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance he may treat the bill as dishonored by nonacceptance. When a qualified acceptance is taken the drawer and indorsers are discharged from liability on the bill unless they have expressly or impliedly authorized the holder to take a qualified acceptance or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance he must, within a reasonable time, express his dissent to the holder or he will be deemed to have assented thereto. (Rev., s. 2292; 1899, c. 733, s. 142; C. S. 3124.)

Art. 12. Presentment for Acceptance.

§ 25-150. When presentment for acceptance must be made.—Presentment for acceptance must be made (1) where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or (2) where the bill expressly stipulates that it shall be presented for acceptance; or (3) where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. In no other case is presentment for acceptance necessary in order to render any party to the bill liable. (Rev., s. 2293; 1899, c. 733, s. 143; C. S. 3125.)

§ 25-151. Failure to present in reasonable time discharges drawer and indorsers.—Except as herein otherwise provided the holder of a bill which is required by § 25-71 to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so the drawer and all indorsers are discharged. (Rev., s. 2294; 1899, c. 733, s. 144; C. S. 3126.)

§ 25-152. How presentment made.—Present-

ment for acceptance must be made by or on behalf of the holder, at a reasonable hour on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and (1) where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only; (2) where the drawee is dead, presentment may be made to his personal representative; (3) where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee. (Rev., s. 2295; 1899, c. 733, s. 145; C. S. 3127.)

In General.—A draft payable at no definite place in a city or town, must be presented at the maker's residence or place of business, if he has such, at its maturity, and if he has none, then the presence of the instrument in the city is a sufficient presentation. *Peoples Nat. Bank v. Lutterloh*, 95 N. C. 495, 499.

§ 25-153. On what days presentment may be made.—A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of this chapter. (Rev., s. 2296; 1899, c. 733, s. 146; 1909, c. 800, s. 1; C. S. 3128.)

§ 25-154. Presentment where time is insufficient.—Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers. (Rev., s. 2297; 1899, c. 733, s. 147; C. S. 3129.)

§ 25-155. Where presentment is excused.—Presentment for acceptance is excused and a bill may be treated as dishonored by nonacceptance in either of the following cases: (1) Where the drawee is dead or has absconded or is a fictitious person or a person not having capacity to contract by bill; (2) where after the exercise of reasonable diligence presentment cannot be made; (3) where, although presentment has been irregular, acceptance has been refused on some other ground. (Rev., s. 2298; 1899, c. 733, s. 148; C. S. 3130.)

§ 25-156. When dishonored by nonacceptance.—A bill is dishonored by nonacceptance (1) when it is duly presented for acceptance and such an acceptance as is prescribed in this chapter is refused or cannot be obtained; or (2) when a presentment for acceptance is excused and the bill is not accepted. (Rev., s. 2299; 1899, c. 733, s. 149; C. S. 3131.)

§ 25-157. Duty of holder, where bill not accepted.—Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by nonacceptance or he loses the right of recourse against the drawer and indorsers. (Rev., s. 2300; 1899, c. 733, s. 150; C. S. 3132.)

§ 25-158. Rights of holder, where bill not accepted.—When a bill is dishonored by nonacceptance an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary. (Rev., s. 2301; 1899, c. 733, s. 151; C. S. 3133.)

Art. 13. Protest.

§ 25-159. In what cases protest necessary.—Where a foreign bill appearing on its face to be such is dishonored by nonacceptance, it must be duly protested for nonacceptance; and where such a bill which had not previously been dishonored by nonacceptance is dishonored by nonpayment, it must be duly protested for nonpayment. If it is not so protested the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest in case of dishonor is unnecessary. (Rev., s. 2302; 1899, c. 733, s. 152; C. S. 3134.)

Waiver of Protest.—In foreign bills the protest may be waived; the words, "I waive protest," or "waiving protest," or any similar words, infer that the protest is waived, and when applied to foreign bills, are universally regarded as expressly waiving presentment and notice, the protest being, according to the law-merchant, the formal and necessary evidence of the dishonor of such an instrument. *Shaw Bros. v. McNeill*, 95 N. C. 535, 539.

Protest in Another State.—A promissory note made in another state need not be protested before the owner may sue an indorser, there being no evidence that this is required in the state where the note was executed. *Bank v. Carr*, 130 N. C. 479, 41 S. E. 876.

How Protested.—By the law merchant a protest of a bill by a public notary is, in itself, evidence. And by our statute such protest is prima facie evidence. *Gordon v. Price*, 32 N. C. 385.

Protest of Inland Bills.—Protest of an order or inland bill is not necessary to enable the holder to recover the principal and interest. Notice in due time of non-acceptance or non-payment is all that is required for that purpose. *Hubbard v. Troy*, 24 N. C. 134; *National Bank v. Brady*, 117 N. C. 526, 23 S. E. 455; *Peoples Nat. Bank v. Lutterloh*, 95 N. C. 495.

§ 25-160. How protest made.—The protest must be annexed to the bill or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify (1) the time and place of presentment; (2) the fact that presentment was made and the manner thereof; (3) the cause or reason for protesting the bill; (4) the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found. (Rev., s. 2303; 1899, c. 733, s. 153; C. S. 3135.)

§ 25-161. By whom protest made.—Protest may be made by (1) a notary public; or (2) by any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses. Rev., s. 2304; 1899, c. 733, s. 154; C. S. 3136.)

§ 25-162. When protest to be made.—When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted the protest may be subsequently extended as of the date of the noting. (Rev., s. 2305; 1899, c. 733, s. 155; C. S. 3137.)

§ 25-163. Where protest made.—A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee has been dishonored by nonac-

ceptance it must be protested for nonpayment at the place where it is expressed to be payable, and no further presentment for the payment to or demand on the drawee is necessary. (Rev., s. 2306; 1899, c. 733, s. 156; C. S. 3138.)

§ 25-164. Protest both for nonacceptance and nonpayment.—A bill which has been protested for nonacceptance may be subsequently protested for nonpayment. (Rev., s. 2307; 1899, c. 733, s. 157; C. S. 3139.)

§ 25-165. Protest before maturity, where acceptor insolvent.—Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers. (Rev., s. 2308; 1899, c. 733, s. 158; C. S. 3140.)

§ 25-166. When protest dispensed with.—Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence. (Rev., s. 2309; 1899, c. 733, s. 159; C. S. 3141.)

§ 25-167. Protest where bill is lost.—Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof. (Rev., s. 2310; 1899, c. 733, s. 160; C. S. 3142.)

Art. 14. Acceptance for Honor.

§ 25-168. When a bill may be accepted for honor.—Where a bill of exchange has been protested for dishonor by nonacceptance or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party there may be a further acceptance by a different person for the honor of another party. (Rev., s. 2311; 1899, c. 733, s. 161; C. S. 3143.)

§ 25-169. How acceptance for honor made.—An acceptance for honor *supra* protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor. (Rev., s. 2312; 1899, c. 733, s. 162; C. S. 3144.)

§ 25-170. When deemed an acceptance for honor of drawer.—Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer. (Rev., s. 2313; 1899, c. 733, s. 163; C. S. 3145.)

§ 25-171. Liability of acceptor for honor.—The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted. (Rev., s. 2314; 1899, c. 733, s. 164; C. S. 3146.)

§ 25-172. Agreement of acceptor for honor.—The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee; and provided, also, that it shall have been duly presented for payment and protested for nonpayment and notice of dishonor given to him. (Rev., s. 2315; 1899, c. 733, s. 165; C. S. 3147.)

§ 25-173. Maturity of bill payable after sight accepted for honor.—Where a bill payable after sight is accepted for honor its maturity is calculated from the date of the noting for nonacceptance and not from the date of the acceptance for honor. (Rev., s. 2316; 1899, c. 733, s. 166; C. S. 3148.)

§ 25-174. Protest of bill accepted for honor.—Where a dishonored bill has been accepted for honor *supra* protest or contains a reference in case of need, it must be protested for nonpayment before it is presented for payment to the acceptor for honor or referee in case of need. (Rev., s. 2317; 1899, c. 733, s. 167; C. S. 3149.)

§ 25-175. How presentment for payment to acceptor for honor made.—Presentment for payment to the acceptor for honor must be made as follows: (1) If it is to be presented in the place where the protest for nonpayment was made it must be presented not later than the day following its maturity; (2) if it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time in this chapter specified. (Rev., s. 2318; 1899, c. 733, s. 168; C. S. 3150.)

§ 25-176. When delay in making presentment excused.—The provisions of § 25-87 apply where there is delay in making presentment to the acceptor for honor or referee in case of need. (Rev., s. 2319; 1899, c. 733, s. 169; C. S. 3151.)

§ 25-177. Dishonor of bill by acceptor for honor.—When the bill is dishonored by the acceptor for honor it must be protested for nonpayment by him. (Rev., s. 2320; 1899, c. 733, s. 170; C. S. 3152.)

Art. 15. Payment for Honor.

§ 25-178. Who may make payment for honor.—Where a bill has been protested for nonpayment any person may intervene and pay it *supra* protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn. (Rev., s. 2321; 1899, c. 733, s. 171; C. S. 3153.)

§ 25-179. How payment for honor must be made.—The payment for honor *supra* protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it. (Rev., s. 2322; 1899, c. 733, s. 172; C. S. 3154.)

§ 25-180. Declaration before payment for honor.—The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays. (Rev., s. 2323; 1899, c. 733, s. 173; C. S. 3155.)

§ 25-181. **Preference of parties offering to pay for honor.**—Where two or more persons offer to pay a bill for the honor of different parties the person whose payment will discharge most parties to the bill is to be given the preference. (Rev., s. 2324; 1899, c. 733, s. 174; C. S. 3156.)

§ 25-182. **Effect on subsequent parties, where bill is paid for honor.**—Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for and succeeds to both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter. (Rev., s. 2325; 1899, c. 733, s. 175; C. S. 3157.)

§ 25-183. **Where holder refuses to receive payment supra protest.**—Where the holder of a bill refuses to receive payment supra protest he loses his right of recourse against any party who would have been discharged by such payment. (Rev., s. 2326; 1899, c. 733, s. 176; C. S. 3158.)

§ 25-184. **Rights of payer for honor.**—The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor is entitled to receive both the bill itself and the protest. (Rev., s. 2327; 1899, c. 733, s. 177; C. S. 3159.)

Art. 16. Bills in a Set.

§ 25-185. **Bills in a set constitute one bill.**—Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill. (Rev., s. 2328; 1899, c. 733, s. 178; C. S. 3160.)

§ 25-186. **Rights of holders, where different parts are negotiated.**—Where two or more parts of a set are negotiated to different holders in due course the holder whose title first accrues is, as between such holders, the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him. (Rev., s. 2329; 1899, c. 733, s. 179; C. S. 3161.)

§ 25-187. **Liability of holder who indorses two or more parts of a set to different persons.**—Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as is such parts were separate bills. (Rev., s. 2330; 1899, c. 733, s. 180; C. S. 3162.)

§ 25-188. **Acceptance of bills drawn in sets.**—The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill. (Rev., s. 2331; 1899, c. 733, s. 181; C. S. 3163.)

§ 25-189. **Payment by acceptor of bills drawn in sets.**—When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon. (Rev., s. 2332; 1899, c. 733, s. 182; C. S. 3164.)

§ 25-190. **Effect of discharging one of a set.**—Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged. (Rev., s. 2333; 1899, c. 733, s. 183; C. S. 3165.)

Art. 17. Promissory Notes and Checks.

§ 25-191. **Negotiable promissory note defined.**—A negotiable promissory note within the meaning of this chapter is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order it is not complete until indorsed by him. (Rev., s. 2334; 1899, c. 733, s. 184; C. S. 3166.)

Cross Reference.—As to form of negotiable instrument, see § 25-7 et seq.

In General.—To render a note non-negotiable it must show on its face that the promise to pay is conditional, or render the amount to be paid uncertain. *First National Bank v. Michael*, 96 N. C. 53, 1 S. E. 855. A note not payable to order or bearer is not a negotiable paper. *Newland v. Moore*, 173 N. C. 728, 92 S. E. 367.

Bond Treated as Promissory Note under Seal.—A bond is in form negotiable, and when indorsed for value and without notice before maturity it is to be regarded, so far as its negotiability is concerned and its liability to be governed by the commercial law applicable to promissory notes, as if it were a promissory note not under seal. *Miller v. Tharel*, 75 N. C. 148; *Spence v. Tapscott*, 93 N. C. 246. The principle was applied in *Lewis v. Long*, 102 N. C. 206, 9 S. E. 637, in which it was decided that an obligor on a bond could not, as against an indorsee for value, before maturity and without notice, set up the defense that he executed the same as a surety only. *Christian v. Parrott*, 114 N. C. 215, 218, 19 S. E. 151.

Note under Seal.—A written instrument, whereby a party promises to pay the party therein named a sum certain at a time specified therein, is a promissory note in this State, although it be under seal. *First Nat. Bank v. Michael*, 96 N. C. 53, 1 S. E. 855.

Cited in *Wachovia Bank & Trust Co. v. Black*, 198 N. C. 219, 151 S. E. 269; *Taft v. Covington*, 199 N. C. 51, 55, 153 S. E. 597.

§ 25-192. **Check defined.**—A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided the provisions of this chapter that are applicable to a bill of exchange payable on demand apply to a check. (Rev., s. 2335; 1899, c. 733, s. 185; C. S. 3167.)

Cross Reference.—See note under § 53-71.

A check is further defined as a written order on a bank or banker, purporting to be drawn against a deposit of funds, for the payment at all events of a sum of money to a certain person therein named, or to him or his order, or to bearer, and payable on demand. *Woody v. First Nat. Bank*, 194 N. C. 549, 140 S. E. 150.

Restrictions as to Payments.—A stipulation stamped on the face of a check, that it will positively not be paid to a certain company or its agents, is a valid restriction and binding on the holder. *Commercial Nat. Bank v. First Nat. Bank*, 118 N. C. 783, 24 S. E. 524.

Time of Presentation.—A "check" is a bill of exchange drawn on a bank, payable on demand, and instruments payable on demand may be presented within a reasonable time after their issue. *Philadelphia Life Ins. Co. v. Hayworth*, 296 Fed. 339.

Cited in *Standard Trust Co. v. Bank*, 166 N. C. 112, 81 S. E. 1074; *Morris v. Cleve*, 197 N. C. 253, 262, 148 S. E. 253; *State v. Crawford*, 198 N. C. 522, 524, 152 S. E. 504; *Seymour v. Peoples Bank*, 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682.

§ 25-193. **Within what time a check must be presented.**—A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon

to the extent of the loss caused by the delay. (Rev., s. 2336; 1899, c. 733, s. 186; C. S. 3168.)

Cross Reference.—As to what is reasonable time, see § 25-3.

In General.—Cashier's checks, whether certified or otherwise, are classed with bills of exchange payable on demand; and if negotiated by indorsement for value without notice and within a reasonable time, a holder can maintain the position of a holder in due course. *Manufacturing Co. v. Summers*, 143 N. C. 102, 55 S. E. 522.

A check is only conditional payment, but the payee must exercise due diligence in presenting it for payment, and where his failure to exercise such diligence causes loss he must suffer it, due diligence being determined in accordance with the facts and circumstances of each particular case. *Henderson Chevrolet Co. v. Ingle*, 202 N. C. 153, 162 S. E. 219.

Facts to Be Considered.—In determining what is a reasonable time for the presentment of a check for payment regard must be had to the nature of the instrument, the customs and usages of trade in regard to such instrument, and the facts of the particular case. *Raines v. Grantham*, 205 N. C. 340, 171 S. E. 360.

Cited in *Standard Trust Co. v. Bank*, 166 N. C. 112, 81 S. E. 1074.

§ 25-194. Bank may refuse to honor check more than six months old in the absence of contrary instructions.—Where a check or other instrument payable on demand at any bank or trust company doing business in this State is presented for payment more than six months from its date, such bank or trust company, may, unless expressly instructed by the drawer or maker to pay the same, refuse payment thereof and no liability shall thereby be incurred to the drawer or maker for dishonoring the instrument by non-payment. (1929, c. 341, s. 3; C. S. 3168.)

§ 25-195. Effect of certification of check.—Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance. (Rev., s. 2337; 1899, c. 733, s. 187; C. S. 3169.)

In General.—The certification of a check by the bank on which it is drawn is equivalent to the acceptance, and the bank then becomes the debtor to the holder, against whom he may maintain his action. It does not affect the enforcement of an agreement between the original parties, made before certification of the check, by which the debtor had agreed to waive or withdraw a condition annexed to the acceptance of his check that it was to be received by the payee, his creditor, in full compromise of his debt in a larger amount. *Drewry-Hughes Co. v. Davis*, 151 N. C. 295, 66 S. E. 139.

Whether Certified at Instance of Drawer or Payee.—A drawer of a check by having the drawee bank certify it before delivering it to the payee of the check does not change the status of his liability thereon, the effect being to add the credit of the bank to that of his own; but it is otherwise if the payee of the check accepts it uncertified and then has it certified by the drawee bank instead of presenting it for payment, for then the credit of the bank is substituted for that of the drawer of the check and the liability of the latter on the check he has issued ceases. *Commercial Investment Trust v. Windsor*, 197 N. C. 208, 148 S. E. 42.

Cited in *Seymour v. Peoples Bank*, 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682.

§ 25-196. Effect, where holder of check procures

it to be certified.—Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon. (Rev., s. 2338; 1899, c. 733, s. 188; C. S. 3170.)

Cited in *Seymour v. Peoples Bank*, 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682.

§ 25-197. Check not assignment of funds.—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check. (Rev., s. 2339; 1899, c. 733, s. 189; C. S. 3171.)

Editor's Note.—See 13 N. C. Law Rev. 131.

In General.—A depositor is a creditor of a bank, his deposit becoming a part of the general fund, the property of the bank, and subject to assignment by the owners of the bank and a check-holder is, to the extent of his check, the assignee of the depositor's debt due him by the bank, but he has no lien upon the deposit for the amount of this check and a payee or holder of a check has an interest in the deposit as against the drawer, subject to the bank's right to pay outstanding checks before notice. *Hawes v. Blackwell*, 107 N. C. 196, 12 S. E. 245.

The giving of a check passes no title, legal or equitable, to money on deposit in a bank. *Perry v. Bank*, 131 N. C. 117, 42 S. E. 551.

An action cannot be sustained against a bank by the payee of a negotiable check, though the drawer has funds on deposit sufficient for its payment against which the bank has no claim, *Perry v. Bank*, 131 N. C. 117, 42 S. E. 551, until after its acceptance by the bank, *Commercial Nat. Bank v. First Nat. Bank*, 118 N. C. 783, 24 S. E. 524. See also *Brantley v. Collie*, 205 N. C. 229, 171 S. E. 88.

Acceptance under this section may be evidenced in various ways, as where the bank pays the check without endorsement to some person unauthorized by the payee to receive it and charges the amount to the depositor's account, and where evidence on this point is conflicting an issue is raised for the jury, and a judgment as of nonsuit should be denied. *Dawson v. National Bank*, 196 N. C. 134, 144 S. E. 833.

Cited in *Standard Trust Co. v. Bank*, 166 N. C. 112, 81 S. E. 1074; *Dawson v. National Bank*, 197 N. C. 499, 150 S. E. 38.

§ 25-198. When stop-payment order given to bank expires.—No revocation, countermand or stop-payment order relating to the payment of any check or draft against an account of a depositor in any bank or trust company doing business in this State shall remain in effect for more than six months after the service thereof on the bank, unless the same be renewed, which renewals shall be in writing and which renewals shall be in effect for not more six months from date of service thereof on the bank or trust company, but such renewals may be made from time to time. (1929, c. 341, s. 1.)

§ 25-199. Application to present orders.—No notice affecting a check upon which revocation, countermand or stop-payment order has been made prior to March 19, 1929, shall be deemed to continue for a period of more than six months thereafter. (1929, c. 341, s. 2.)

Chapter 26. Suretyship.

Sec.

- 26-1. Surety and principal distinguished in judgment and execution.
- 26-2. Principal liable on execution before surety.
- 26-3. Summary remedy of surety against principal.
- 26-4. Subrogation of surety paying debt of deceased principal.
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Sec.

- 26-6. Dissenting surety not liable to surety on stay of execution.
- 26-7. Surety may notify creditor to sue.
- 26-8. How notice served.
- 26-9. Failure of creditor to sue discharges surety; exceptions.
- 26-10. [Repealed.]
- 26-11. Cancellation of judgment as to surety.

§ 26-1. **Surety and principal distinguished in judgment and execution.**—In the trial of actions upon contracts either of the defendants may show in evidence that he is surety, and if it be satisfactorily shown, the jury in their verdict, or the justice of the peace in his judgment, shall distinguish the principal and surety, which shall be indorsed on the execution by the clerk or justice of the peace issuing it. (Rev., s. 2840; Code, s. 2100; R. C., c. 31, s. 124; 1826, c. 31, s. 1; C. S. 3961.)

Cross Reference.—As to right of surety to subrogation, see notes to § 26-3.

In General.—A surety is bound with his principal as an original promisor. Baylies' Sureties and Guarantors, 4. *Coleman v. Fuller*, 105 N. C. 328, 329, 11 S. E. 175.

The surety's promise is to pay a debt, which becomes his own debt when the principal fails to pay it. 2 *Parsons' Notes and Bills*, 117-118. *Coleman v. Fuller*, 105 N. C. 328, 330, 11 S. E. 175.

Construed Strictly.—The liability of a surety cannot be enlarged by construction. *Shoe Co. v. Peacock*, 150 N. C. 545, 64 S. E. 437.

Order of Liability.—The order in which parties to a security are liable at law, is the order in which, independently of contract, they will be held bound in equity. *Smith v. Smith*, 16 N. C. 173.

Where it appeared that a negotiable instrument was signed by three persons other than the principal obligor, and it also appeared from a writing executed some time thereafter by one to indemnify the other two that they (the other two) "signed as co-sureties" of the third, it was held, that the character of suretyship in which all three signed was sufficiently established. *Southerland v. Fremont*, 107 N. C. 565, 12 S. E. 237.

Same—Parol Evidence to Show Coprincipals.—In *Williams v. Glenn*, 92 N. C. 253, the note (under seal) was made with W. "as principal" and B. and G. "as sureties," yet as between the obligors the court held that parol evidence was admissible to show that Boyden and Glenn were coprincipals, and that the rule of contribution obtained among them. *Smith v. Carr*, 128 N. C. 150, 153, 38 S. E. 732.

While all of the makers may appear as principals upon the face of the paper, or some principals and some sureties, yet it may be shown that while appearing as principals they were in fact sureties, or some principals and others sureties; and upon the establishment of the fact of cosuretyship, the right of contribution follows. *Smith v. Carr*, 128 N. C. 150, 153, 38 S. E. 732.

Same—Issue Submitted.—In an action against the maker and indorsers of a note, an issue should be submitted as to whether or not the endorsers were cosureties, or whether one was a supplemental surety to the other. *Parish v. Graham*, 129 N. C. 230, 39 S. E. 825.

May Allege and Prove Suretyship.—When sued, either of the defendants may allege that he is surety, and, if the allegation be proven, the jury in their verdict and the court in the judgment shall distinguish the principal and surety, and it shall be so indorsed on the execution issued for the collection of the judgment. *Bank v. McArthur*, 261 Fed. 97, 101.

In *Gatewood v. Leak*, 99 N. C. 357, 6 S. E. 635, 637, it was said: "If the appellee was surety, as he alleges, he might, as allowed by the statute, (this section) have shown, by proper evidence on the trial in the actions in which the judgments were obtained by the appellant, that he was such surety, and the jury in their verdict, or the justice of the peace in his judgment, would have distinguished him as surety, and the executions would have been issued with a proper indorsement to that effect; and in that case the

sheriff would have levied the sum required to be collected, first, out of the property of the principal if he had sufficient for that purpose."

Same—Practice of Courts.—It is not the practice of the courts to see that evidence of suretyship is produced and such fact inserted in the judgment, in the absence of the defendants and without any averment or request on their part. *Morehead Banking Co. v. Duke*, 121 N. C. 110, 28 S. E. 191.

Effect of Not Alleging Suretyship.—In *Bank v. McArthur*, 261 Fed. 97, 103, it was said that "It would not seem that, by failing to set up his suretyship in the action brought by the American National Bank on the note, McArthur lost any equitable rights against McBryde to which he was entitled as surety. It is true, as held in *Gatewood v. Leak*, 99 N. C. 357, 6 S. E. 635, that the surety, who has failed to set up the fact and have it found as provided by the statute, cannot enjoin the plaintiff in the judgment from proceeding to sell his land for its satisfaction. Neither McArthur nor plaintiffs may enjoin the bank from enforcing its judgment against himself until it has exhausted McBryde's property."

The magistrate is not bound to discriminate except upon the application of, and due proof by, the surety. *Stewart v. Ray*, 26 N. C. 269.

Effect of Finding of Jury.—Where a suit is brought at law against two persons, a finding of the jury, that one of the defendants is principal, and the other surety, if binding at all between the parties, does not in equity establish the relation of suretyship. *Lowder v. Noding*, 43 N. C. 208.

When Execution Does Not Distinguish.—Where an execution against two does not distinguish which is principal and which surety, the sheriff has a right to collect it from either; and the sheriff may collect it from the surety, though the plaintiff in the execution directed him to collect it from the other. *Shuford v. Cline*, 35 N. C. 463.

Right of Surety to Subrogation.—See notes to § 26-3.

Right of Surety to Assign Judgment.—It was stated by the Supreme Court of this state in *Barringer v. Boyden*, 52 N. C. 187: "The right of a surety to keep alive a judgment, which he has paid, by having an assignment made to a stranger for his benefit, is unquestionable. When he advances the money, he has a clear equity (if he desires it) to be subrogated to the rights of the creditor, and to use the creditor's judgment for the purpose of coercing payment against the principal. Whether money advanced in such a way be an extinguishment or a purchase seems to be a question of intention. If it be paid, and nothing be said or done to show a contrary intentment, an extinguishment will be presumed; but if an assignment be made to one not a party, so as to show a purpose to keep it alive, it is sufficient. That a party defendant furnishes the money, and that the assignment is made on a day subsequent to the advancement of the money, can make no difference, provided it was intended, at the time it was advanced, as a purchase and not as a payment." *Bank v. McArthur*, 261 Fed. 97, 103.

Signing on Faith of Creditors Representations.—Persons signing a note as surety upon faith in the creditor's representation that another will sign as co-surety, leaving the note with the creditor for that purpose, are not bound thereon to such creditor upon the failure of the fulfillment of the representation. *Bank v. Hunt*, 124 N. C. 171, 32 S. E. 546, cited and distinguished. *Bank v. Jones*, 147 N. C. 419, 61 S. E. 193.

Bond Joint and Several on Face.—Although the bond is joint and several on its face it can be shown by parol that a party thereto is a surety. *Brandt on Surety*, secs. 29 and 30. *Coffey v. Reinhardt*, 114 N. C. 509, 510, 19 S. E. 370.

Statute of Limitations.—If the purchaser of a note before maturity, for value and without notice, subsequently receives notice that a party thereto is a surety and delays action for three years after maturity the surety will be protected by the three years' statute of limitations. *Coffey v. Reinhardt*, 114 N. C. 509, 19 S. E. 370.

§ 26-2. Principal liable on execution before surety.—When an execution, indorsed as aforesaid, shall come to the hands of any officer for collection, he shall levy on all the property of the principal, or so much thereof as shall be necessary to satisfy the execution, and, for want of sufficient property of the principal, also on the property of the surety, and make sale of all the property of the principal levied on before that of the surety. (Rev., s. 2841; Code, s. 2101; R. C., c. 31, s. 125; 1826, c. 31, s. 2; C. S. 3962.)

Surety's Interest in Collateral.—The principle is stated by Ruffin, C. J., in these words: "The surety is entitled to the benefit of every additional or collateral security which the creditor gets into his hands for the debt for which the surety is bound, as soon as such a security is created, and by whatever means the surety's interest in it arises; and the creditor cannot himself, nor by any collusion with the debtor, do any act to impair the security or destroy the surety's interest." Nelson v. Williams, 2 Dev. & B. Eq. 118. See also Smith v. McLeod, 3 Ired. Eq. 390; Cooper v. Wilcox, 2 Dev. & B. Eq. 90; Bank v. Homesley, 99 N. C. 531, 6 S. E. 797.

§ 26-3. Summary remedy of surety against principal.—Any person who may have paid money for and on account of those for whom he became surety, upon producing to the superior court, or any justice of the peace having jurisdiction of the same, a receipt, and showing that an execution has issued, and he has satisfied the same, and making it appear by sufficient testimony that he has laid out and expended any sum of money as the surety of such person, may move the court or justice of the peace, as the case may be, for judgment against his principal for the amount which he has actually paid; a citation having previously issued against the principal to show cause why execution should not be awarded; and should the principal not show sufficient cause, the court or justice shall award execution against the estate of the principal. (Rev., s. 2842; Code, s. 2093; R. C., c. 110, s. 1; 1797, c. 487, s. 1; C. S. 3963.)

- I. General Considerations.
- II. Subrogation.
- III. Assignments.

I. GENERAL CONSIDERATIONS

Editor's Note.—See 13 N. C. Law Rev. 116.

The words "Superior Court" used in this section mean the clerk of the Superior Court. Bank v. Hotel Co., 147 N. C. 594, 61 S. E. 570.

Cannot Sue in Tort.—A surety who has paid money for his principal cannot sue him in an action of tort. Ledbetter v. Torney, 33 N. C. 294.

Citation Issued to Principal.—The section providing that a surety who shows that he has paid out money upon a judgment against his principal and himself may have a citation issued to the principal by the clerk to show cause why execution should not be awarded him therefor, is constitutional. Bank v. Hotel Co., 147 N. C. 594, 61 S. E. 570.

Notice to Corporation to Show Cause.—A notice issued by a court of competent jurisdiction, served upon the secretary and treasurer of a corporation, to show cause why an execution should not be awarded in favor of a surety who has paid a judgment against the corporation and himself, which sets out the date and amount of the judgment, the relation of the parties, that the surety has actually expended money in payment of said judgment, and that the principal has not reimbursed him, is a compliance with the section. Bank v. Hotel Co., 147 N. C. 594, 61 S. E. 570.

Validity of Order.—While, under the section the court may not revive a dormant judgment against the principal and the surety, an order otherwise valid is not rendered void by the addition of the words "that the judgment heretofore rendered is hereby revived, to the end that execution may be issued." The last sentence will be regarded as surplusage. Bank v. Hotel Co., 147 N. C. 594, 61 S. E. 570.

When Surety Entitled to Action for Money Paid.—A judgment against a surety will not entitle him to maintain an

action for money paid to the use of the defendant, until it has been satisfied. Hodges v. Armstrong, 14 N. C. 253.

To enable a surety to recover for money paid to the use of his principal, he must prove an actual payment in satisfaction of the debt. Hodges v. Armstrong, 14 N. C. 253.

Right of Surety When Funds Misapplied.—Where a surety prays a judgment against his principal he may recover any funds wrongfully converted or misapplied by the principal. Fidelity Co. v. Jordan, 134 N. C. 236, 46 S. E. 496.

Surety Cannot Trace Property.—A surety who has to pay the debt, has no equity to follow the specific property which the principal debtor purchased with the borrowed money. Carlton v. Simonton, 94 N. C. 401.

Same—Bank Deposits.—Where the principal debtor borrowed a sum of money, which he deposited in a bank which soon afterwards became insolvent, and the surety had to pay the debt, the surety has no equity to enjoin the principal debtor from collecting the dividends from the insolvent bank, until he can recover a judgment. Carlton v. Simonton, 94 N. C. 401.

Right against Partnership.—Where a writ is issued against two copartners for partnership debt, and one of them is arrested and gives bail, such bail, upon being afterwards compelled by due course of law to pay the debt, has no remedy except against the individual for whom he became bail. He has no claim upon the other partner. The case of Osborne v. Cunningham, 4 Dev. & Bat., 423, cited and approved. Foley v. Robards, 25 N. C. 177.

Where one endorsed a note at the request of a member of a firm for the purpose of obtaining money for the use of the firm, and the proceeds were so used, the endorser, upon payment of the note, can recover therefor against the firm, though no member of such firm signed the note. Springs v. McCoy, 122 N. C. 628, 29 S. E. 903.

When Surety's Liability Barred by Limitations.—Property mortgaged by an administrator to a surety to secure him against loss may be subjected to payment of estate debts, though the personal liability of the surety is barred. Hooker v. Yellowley, 128 N. C. 297, 38 S. E. 889.

The obligation of a bond for the forthcoming of property is only that the property shall be delivered to the officer at the time designated, and not that the execution shall be delivered to the officer at the time designated and not that the execution shall be satisfied; and therefore, if a surety to the forthcoming bond before it is forfeited discharges the execution without the request of his principal, such surety cannot maintain an action against his principal for money expended for the latter's use, although by the payment of the money in satisfaction of the execution the bond was discharged. Gray v. Bowls, 18 N. C. 437.

When Mortgage Inures to Benefit of Creditors.—A mortgage given by an administrator to a surety on his bond to secure the latter against loss inures to the benefit of the creditors of the estate. Hooker v. Yellowley, 128 N. C. 297, 38 S. E. 889.

Bond of Guardian in Suit on Behalf of Ward.—Where a guardian, having given a bond for the prosecution of a suit by him on behalf of his ward and signed the same individually, was compelled to pay the costs of the suit out of his individual estate, he cannot recover the same under the provisions of this section, which gives a summary method for reimbursement of a surety who has paid money for another. Green v. Burgess, 117 N. C. 495, 23 S. E. 439.

II. SUBROGATION.

Subrogation Explained.—Subrogation is the substitution of another person in the place of a creditor, so that the former can succeed to the rights of the latter in relation to the debt, and to entitle one to such equitable relief, he must have paid the money upon request or as surety or under some compulsion made necessary by the adequate protection of his own rights. Liles v. Rogers, 113 N. C. 197, 18 S. E. 104.

Legal subrogation is based upon payment and exists where one who has an interest to protect or is secondarily liable makes payment, while conventional subrogation, so named from the convention or agreement of the civil law, is founded upon the agreement of the parties, which really amounts to an equitable assignment. Liles v. Rogers, 113 N. C. 197, 18 S. E. 104; Bank v. Bank, 158 N. C. 250, 73 S. E. 157; Pub. Co. v. Barber, 165 N. C. 478, 488, 81 S. E. 694; Joyner v. Reflector Co., 176 N. C. 274, 278, 97 S. E. 44.

The doctrine of equity, upon which subsequent cases have been ruled, was announced in Deering v. Earl of Winchelsea (1787) White & Tudor's L. C. Eq. 784, and Pomeroy, Eq. (3d Ed.) 1419, in which it is said: "By the fact of payment the surety becomes an equitable assignee of all such securities, and is entitled to have them assigned and delivered up to him by the creditor, in order that he may enforce them for his own reimbursement and exoneration. If, therefore, the creditor refuses to surrender up such securi-

ties, the surety may maintain an equitable suit to compel their assignment and surrender. *Bank v. McArthur*, 261 Fed. 97, 103.

It is held that an indorser on a note may pay it and demand its delivery, and if the contract has been merged into a judgment, his right is to an assignment of the judgment and enforce it for his own benefit. *Eno v. Crook*, 10 N. Y. 66; *Freeman on Judgments*, 471; *Lennox v. Prout*, 3 Wheat. 521, 4 L. Ed. 449. The principle is clearly stated by Prof. Langdell: "If payment of a debt be secured by a pledge of the debtor's property, and also by the obligation of a personal surety, and the surety pay the debt, equity will compel the creditor to deliver the pledge to him and not to the debtor, though the latter has a clear legal right to receive it, the debt being paid and extinguished; i. e., equity destroys the legal right of the debtor, and converts the creditor into a trustee for surety. This is done upon the theory that the debt is not paid by the surety, but is purchased by him, and that he is therefore entitled to the pledge as an incident of the debt. This, however, is only a fiction—a fiction, moreover, which is contrary to law, for the payment by the surety extinguishes the debt. Equity does this under the name of subrogation, and perhaps her best justification is that she borrowed both the name and the thing from the civil law." *Bank v. McArthur*, 261 Fed. 97, 103.

A surety paying the debt of his principal is entitled to be subrogated to all the rights of the creditors, against a co-surety as well as against the principal, and this includes the right to have a judgment which he has paid assigned to a trustee for his benefit, so as to compel his co-surety to pay his pro rata part. *Peebles v. Gay*, 115 N. C. 38, 20 S. E. 173.

In *Brandt on Suretyship*, sec. 347, quoted in *Tripp v. Harris*, 154 N. C. 296, 299, 70 S. E. 470, it is said: "A surety who pays the debt of his principal is entitled to subrogation to a mortgage given by the principal to the creditor for the security of the debt, and he may, with or without a formal assignment thereof, have the same foreclosed in his own name, for his benefit."

Where a surety, as such, paid the whole of a debt, then the section gives him a right of action against co-sureties at law, and also such priority as the creditor would have had as a claimant against his principal's estate. *Holden v. Strickland*, 116 N. C. 185, 195, 21 S. E. 684.

Rights Acquired.—The party for whose benefit the doctrine of subrogation is invoked and exercised can acquire no greater rights than those of the party for whom he is substituted, and if the latter had not a right of recovery the former can acquire none. *Sheldon on Subrogation*, sec. 6; *Clark v. Williams*, 70 N. C. 679; *Liles v. Rogers*, 113 N. C. 197, 201, 18 S. E. 104.

An endorser or surety who pays the indebtedness is subrogated to the rights of the creditor as against the property of the debtor. *Ex parte Pittinger*, 142 N. C. 85, 54 S. E. 845.

A surety to an administration bond who paid one-half of a debt recovered against the insolvent administrator is not subrogated to the rights of the creditor whose debt he paid, but to the right of the administrator for whom he paid it. *Clark v. Williams*, 70 N. C. 679.

Same—Liens and Securities.—A surety who pays the debt, is subrogated to all the specific liens and securities which the creditor has against the principal debtor. *Carlton v. Simonton*, 94 N. C. 401.

When Doctrine Cannot Be Invoked.—If a surety pays a judgment and has it entered "satisfied," without having it assigned to a trustee for his benefit, the remedy of subrogation is lost. *Peebles v. Gay*, 115 N. C. 38, 20 S. E. 173.

Where several or successive obligations of suretyship be not in substance and nature for the same thing, and have no relation to or operation upon each other, the doctrine of subrogation can not be invoked. *Liles v. Rogers*, 113 N. C. 197, 18 S. E. 104.

Same—Corporation Note.—The endorsers on a note of a corporation secured by mortgage on its property are not entitled to subrogation, either legal or conventional, when it is ascertained that the note was paid by the corporation, and not the endorsers, and where there is evidence that the latter had paid it, the question should be submitted to the jury. *Joyner v. Reflector Co.*, 176 N. C. 274, 97 S. E. 44.

Rights of Surety against Party Receiving Money with Full Knowledge.—A surety company which has been called upon to pay a devastavit committed by its principal, an administrator, is entitled to be subrogated to the rights of the creditor against a party who received the money with knowledge of its wrongful appropriation, and his rights are exactly those of the creditor. *Caviness v. Fidelity Co.*, 140 N. C. 58, 52 S. E. 265.

A surety, omitted in the deed in trust to secure the sureties, is entitled to be subrogated to the rights of his co-sure-

ties pro tanto, if he has paid the debts, and the payees in the notes have a superior equitable right of subrogation to the benefit of any security given by the principal debtor to his sureties. *Ijames v. Gaither*, 93 N. C. 358, 362; *Sherroa v. Dixon*, 120 N. C. 60, 63, 26 S. E. 770; *Harrison v. Styres*, 74 N. C. 290; *Wiswall v. Potts*, 58 N. C. 184, 189. And this is true whether they knew of it or not. *Matthews v. Joyce*, 85 N. C. 258, 266; *Brandt on Suretyship*, sec. 282; *Blanton & Co. v. Bostic*, 126 N. C. 418, 420, 35 S. E. 1035.

III. ASSIGNMENTS.

Preservation of Lien by Assignment.—A surety may preserve the lien of judgment against the principal and himself by paying the judgment creditor and having the judgment assigned to a third person for his own benefit; and this also applies to a judgment against his co-sureties and himself in enforcing an equality of obligation between them. *Fowle v. McLean*, 168 N. C. 537, 84 S. E. 852.

A surety who pays the amount recovered against him and his principal, or co-sureties, may have the judgment assigned to another in trust for his use, and it will continue in force for his benefit; and he may, upon motion in the cause, have satisfaction of the judgment entered, even against the consent of the assignee. *State v. Hearn*, 109 N. C. 150, 13 S. E. 895.

Assignment of Right by Surety.—Where one of two defendants has paid a joint judgment upon a note against them both, and has the judgment assigned to another for his use, who brings action to recover against the other judgment debtor, he may, as between themselves, show that the defendant in the second action was the principal payee, and that he, the plaintiff, was an indorser, though not pleaded in the original action, and recover the full amount of the judgment he has paid, the action being, in substance, one by the surety on the note to recover against the principal thereon. *Haywood v. Russell*, 182 N. C. 711, 110 S. E. 81.

When One-half of Judgment Paid and Other Assigned.—Where a surety who paid and had satisfaction entered as to one-half of a judgment against himself, his principal and a co-surety, and procured the judgment as to the other half to be assigned to a trustee for his benefit, it was in effect the same as if he had procured the whole judgment to be so assigned. *Peebles v. Gay*, 115 N. C. 38, 20 S. E. 173.

When Assignment of Security Taken.—If an assignment of the security is taken, the surety may have his redress upon it immediately in the name of the creditor but while it is not in force, the surety can not maintain an action for the money paid for the assignment. *Hodges v. Armstrong*, 14 N. C. 253.

When Person Charged with Notice of Assignment.—Where a judgment against a principal and the sureties on a note is paid by the sureties, and an assignment thereof is made to a trustee for the benefit of the sureties, but by a mistake payment is entered on the judgment record, which is afterwards corrected by the entry thereon of the assignment, a person taking a mortgage on the property of the judgment debtor, after the assignment is entered on the record, takes with notice of the assignment. *Patton v. Cooper*, 132 N. C. 791, 44 S. E. 676.

§ 26-4. Subrogation of surety paying debt of deceased principal. — Whenever a surety, or his representative, shall pay the debt of his deceased principal, the claim thus accruing shall have such priority in the administration of the assets of the principal as had the debt before its payment. (Rev., s. 2843; Code, s. 2096; R. C., c. 110, s. 4; 1829, c. 23; C. S. 3964.)

Scope. — This section which confers on the claim of a surety, paying the debt for which he is surety, the dignity, in the administration of the assets of the principal, which the debt, if unpaid would have had, applies to a judgment whether the payment be made before or after the death of the principal. *Drake v. Coltrane*, 44 N. C. 300.

When Co-surety Deemed Bond Creditor. — A co-surety, who pays the bond debt for which the other surety is equally bound, shall be deemed a bond creditor in the administration of the estate of the deceased co-surety, under the act of 1828 as construed in *Drake v. Coltrane*, 44 N. C. 300; *Howell v. Reams*, 73 N. C. 391.

When a plaintiff, a co-surety, discharged the bond debt, for the payment of which the defendant's intestate was equally bound, he becomes a bond creditor as to the assets of the intestate; and when, pending an action for contribution, the administrator paid off the bonds voluntarily, of equal dignity with said surety debt, having previously paid an open account, he committed a devastavit to the extent of the plaintiff's claim for contribution, such claim being for

a sum smaller than the bonds so preferred and the open account. *Howell v. Reams*, 73 N. C. 391.

Applied, in subrogating widow to rights of mortgagee where policy in which she is named beneficiary is assigned to and paid to mortgagee, in *Russel v. Owen*, 203 N. C. 262, 165 S. E. 687.

Cited in *Brown v. McLean*, 217 N. C. 555, 8 S. E. (2d) 807.

§ 26-5. Contribution among sureties. — Where there are two or more sureties for the performance of a contract, and one or more of them may have been compelled to perform and satisfy the same, or any part thereof, and the principal shall be insolvent, or out of the state, such surety may have and maintain an action against every other surety for a just and ratable proportion of the sum which may have been paid as aforesaid, whether of principal, interest or cost. (Rev., s. 2844; Code, s. 2094; R. C., c. 110, s. 2; 1807, c. 722; C. S. 3965.)

- I. The Right to Contribution Generally.
- II. When Surety Obtains Advantage over Co-sureties.
- III. Contribution Enforced.
 - A. In General.
 - B. Actions and Incidents Thereof.

I. THE RIGHT TO CONTRIBUTION GENERALLY.

Editor's Note.—*Atwater v. Farthing*, 118 N. C. 388, 24 S. E. 736, was a case where A endorsed a note for the maker, and subsequently, but before it was discounted, F endorsed it. The principal became insolvent and left the state. A paid the note. The court held that F was a co-surety, and that the doctrine of contribution was applicable for A's benefit. Mr. Justice Furches, who delivered the opinion of the Court, said that the decision was governed by *Daniel v. McRae*, 9 N. C. 590 and *Dawson v. Pettway*, 20 N. C. 531. There are a number of other cases to the same effect, but these two seem to be the leading ones. The learned Justice concluded the opinion by saying: "It was admitted by the learned counsel who argued for the defendant that *Daniel v. McRae*, supra, was against him. But he contended that this opinion was not supported by principle and was in conflict with the adjudged cases of nearly every State of the Union, and that it had been severely criticised by this Court. But whether it was put on sound business principles or not (and we do not say that it was not), and whether it has been criticised or not (and we must admit that it has been), it has stood for itself since 1823; and although it was criticised by Gaston, J., delivering the opinion of the Court in *Dawson v. Pettway*, supra, in 1839, he then said it has been too long the recognized law of the State to be reversed, even admitting that the reasoning upon which it was founded was not sound. And if it had been the recognized law in 1839 for too great length of time to be changed, how much greater is that reason now, after a period of more than fifty years since that opinion was rendered? According to this opinion, the defendants were co-sureties and subject to the doctrine of contribution. We can add nothing to the argument contained in these cases, and we do not propose to re-occupy this field of discussion, exhausted by Judge Henderson and Judge Gaston more than fifty years ago."

Rule of Contribution.—The rule of contribution is founded upon the maxim that "equality is equity," and not upon contract. It is a rule of common justice whereby parties who undertake to account for the default or miscarriage of another, should equally bear the burden imposed by a failure of their principal. As between them, there is no agreement implied, but an equitable presumption raised by the fact of the payment by one, that the others will equalize the burden thus borne by him, by paying to him such sum as will make the loss equal upon each, which can be rebutted by showing that there was an agreement, whether verbal or written, to the contrary. 1 *Brandt Suretyship and Guaranty*, Sec. 261. *Smith v. Carr*, 128 N. C. 150, 153, 38 S. E. 732; *Allen v. Wood*, 38 N. C. 386.

This maxim can only be applied to those whose situations are equal; otherwise equality is not equity, and hence if one surety stipulate for a separate indemnity, the equality of situation between him and his co-surety ceases, and the maxim does not apply. *Moore v. Moore*, 11 N. C. 358.

It is broadly stated in 2 *Brandt Suretyship* 309, that "A surety who pays his principal's debt is entitled to be subrogated to all the rights and remedies of the creditor against his co-surety in the same manner as against the principal." This is founded in reason and justice, and up to the adoption of our present Constitution was enforced in the courts of

equity. Art IV, sec. 1, of the Constitution abolished the distinction between actions at law and suits in equity, leaving such rights and remedies to be enforced in the one court, which theretofore had administered simply legal rights. *Peebles v. Gay*, 115 N. C. 38, 41, 20 S. E. 173.

The liability of sureties among themselves is controlled by the equitable principle of equality arising out of a common risk, and in case of insolvency or nonresidence these rights are adjusted by reference to the number of sureties who are solvent or who have property available to process within the jurisdiction of the court. *Fowle v. McLean*, 168 N. C. 537, 84 S. E. 852.

Same—Primary and Conditional Liability. — The equitable doctrine of contribution is enforced upon the principle that those engaged in a common hazard in the same degree or relation should bear the loss equally, but where one is surety and the others indorsers, the liability of the former is primary and of the latter a conditional one, and not being in the same situation with regard to the hazard, the surety is not entitled to contribution from the indorsers. *Edwards v. Jefferson Standard Life Ins. Co.*, 173 N. C. 614, 92 S. E. 695.

Presumption of Equity.—Co-principals and co-sureties are presumed to assume equal liability, but this presumption may be rebutted by parol evidence. *Smith v. Carr*, 128 N. C. 150, 38 S. E. 732.

Surety for Other Sureties.—It is entirely competent for one person to become surety for other sureties, or to limit the extent of his liability with respect to other sureties. The test of liability is the intent of the parties as indicated by their agreement. *Citizens Nat. Bank v. Burch*, 145 N. C. 316, 317, 318, 59 S. E. 71.

Sureties on Successive Guardianship Bonds.—The sureties to the successive bonds of a guardian stand in the relation of co-sureties, one bond to the other or others, and are liable, in case of insolvency of the guardian, to contribution in proportion to the amount of the several penalties of the bonds. The risk they take is a joint risk, and there is an implied engagement or obligation, each set of sureties with the other, to bear any loss which may fall on them proportionally, as above stated; or, if it is borne by one class, to contribute by way of reimbursement. *Bell v. Jasper*, 37 N. C. 597; *Jones v. Hays*, 38 N. C. 502; *Bright v. Lennon*, 83 N. C. 184.

Where a guardian gives several successive bonds for the faithful discharge of his trust, the sureties on each bond stand in the relation of co-sureties to the sureties on every other bond; the only qualification to the rule being that the sureties are bound to contribution only according to the amount of the penalty of the bond in which each class is bound. *Jones v. Hays*, 38 N. C. 502.

All the bonds given by a guardian are but securities for the same thing, and the sureties on each are bound to contribution, but their liabilities are in proportion to the amount of their respective bonds. *Jones v. Blanton*, 41 N. C. 115.

When Surety Should Answer for Default and Stop Costs.—As a general rule, upon the default and insolvency of a principal, a surety should answer for the default, and not unnecessarily let cost be run up where the liability and amount thereof is clear. But where, as in the instant case, the guardian claimed to have settled with and paid the wards, it was prudent in plaintiff in regard to his own interests and as an act of justice to his co-sureties on other bonds, to incur costs to the point of developing how the fact of alleged settlement was, and to this effect are the authorities. *Brandt Suretyship*, sec. 248; *McKinson v. George*, 2 Rich. (S. C.) Eq., 15; *Fletcher v. Jackson*, 23 Vt. 593; *Bright v. Lennon*, 83 N. C. 184, 188.

The costs incurred by one surety, or one set of sureties, are not always to be regarded as a loss borne to which in equity contribution may be had, but it would seem to depend on the prudence and bona fides of the defense by which they were incurred. *Bright v. Lennon*, 83 N. C. 184, 188.

Assets Given Up by Mistake of Law.—Where A and B were co-sureties on an administration bond, and being sued upon the same by one of the next of kin, and while the suit was pending compromised the same under the advice of counsel and from an honest belief that both were liable to a larger sum on account of the devastavit and insolvency of their principal, and it is afterwards discovered that B, who had administered on the estate of the principal, had, by a misapprehension of law, but acting under legal counsel, and in good faith, erroneously given up assets of their principal to another claim, which, if they had been held by him, would have saved them both from loss by this suretyship, yet it was held that A could not sustain a bill to throw the whole loss on B, there being no evidence that B had concealed from A the fact of having thus parted with the assets and not making any allegation of fraud or imposition on the part of B. *Brandon v. Medley*, 54 N. C. 313.

Release of Principal.—A surety who seeks to recover from a co-surety a ratable part of money paid must take care to do no act which will prevent the co-surety from having recourse against the principal. If, therefore, he release the principal, it is a discharge of the co-surety. *Draughan v. Bunting*, 31 N. C. 10.

Sureties on Sheriff's Tax Bond.—The right of contribution does not exist between sureties of the different bonds of a sheriff as tax collector. *McGuire v. Williams*, 123 N. C. 349, 357, 31 S. E. 627.

When One Surety in Fact Surety for Co-surety.—Where A. and B. signed a negotiable note apparently as joint principals, when, in fact, the latter was surety for the former and the appellant signed the note by writing his name across the back, with the word "surety" underneath, it was held that in the absence of any evidence that appellant knew of the relation between the makers, he was surety for the two, and that surety B. could not compel contribution. *Citizens Nat. Bank v. Burch*, 145 N. C. 316, 317, 59 S. E. 71.

Released by Securing Part of Debt.—If there be several sureties for the same principal, and one of them be fixed with the payment of the whole debt, or of more than his ratable part thereof, the others, who are solvent, shall be compelled to contribute, in order to equalize the loss. But if by any agreement between the sureties, one of them is released by the creditor, upon his securing the payment of a certain part of the debt, he shall not afterwards be called upon to contribute to one or more of the remaining sureties, for a loss arising from the deficiency of another to them. *Moore v. Isley*, 22 N. C. 372.

Agreement between Sureties.—There can be no doubt that after two persons have become sureties for a common principal they may, by agreement between themselves, renounce their right to take benefit from any securities they may respectively obtain, and each look out for himself exclusively for an indemnity from the principal or for contribution from another co-surety. *Long v. Barnett*, 38 N. C. 631; *Commissioners v. Nichols*, 131 N. C. 501, 505, 42 S. E. 938.

Where the land of one of two sureties of a third person was sold under execution for the debt, and the other surety and a third person bid it off, it was held that an agreement by the surety who owned the land to take the whole debt upon himself and satisfy the execution in return for an assignment of the bid to him, was a promise to pay his own debt and not affected by the statute of frauds; and in such case the surety who paid could not obtain contribution from his co-surety. *Hockaday v. Parker*, 53 N. C. 16.

II. WHEN SURETY OBTAINS ADVANTAGE OVER CO-SURETIES.

Property Advanced by Principal to One of Sureties.—Where money is advanced by the principal to one of the sureties, to discharge the debt, before the debt is actually discharged, the co-surety may file his bill in equity for an account and for relief but if the money is paid by the principal after the debt has been discharged by the sureties, to one of two sureties, to reimburse both, then the co-surety has his remedy against the surety receiving the money, by an action at law for money had and received, and, therefore, can not support a suit in equity. *Allen v. Wood*, 38 N. C. 386.

An indemnity obtained from a principal by one of two co-sureties, after the risk is incurred, inures equally to the benefit of both. *Pool v. Williams*, 30 N. C. 286.

Where the principal placed property in the hands of a surety sufficient to satisfy the debt, and then left the State, it was held that a third person, also bound for the debt as surety, having been compelled to pay it, might recover its amount from the person who had received the property without making a previous demand. *Parham v. Green*, 64 N. C. 436, citing with approval *Draughan v. Bunting*, 31 N. C. 10, 12; *Hall v. Robinson*, 30 N. C. 56, 58; *Sherrod v. Woodward*, 15 N. C. 360; *Norfleet v. Cromwell*, 64 N. C. 1.

When two persons engage in a common risk as sureties for a third and one of them subsequently takes an indemnity from the principal debtor it inures to the benefit of both. *Fagan v. Jacobs*, 15 N. C. 263; *Gregory v. Murrell*, 37 N. C. 233, 236; *Hall v. Robinson*, 30 N. C. 56.

Separate Indemnity.—In *Long v. Barnett*, 38 N. C. 631, *Ruffin, C. J.*, speaking for the court said: "As one, when he is about to become a surety with others, may stipulate for a separate indemnity from the principal to him, and the co-sureties would be only entitled to a surplus after his reimbursement. *Moore v. Moore*, 11 N. C. 358; 15 Am. Dec. 523." *Commissioners v. Nichols*, 131 N. C. 501, 505, 42 S. E. 938.

When Indemnity May Be Reached.—The indemnity taken by one surety can be reached by the other only in two cases, either when it was taken in fraud, or for the benefit of the other. *Moore v. Moore*, 11 N. C. 358.

Before and after Severance of Relationship.—While the

relation of joint sureties exists, funds received by one of them (except under special circumstances) for the discharge of, or as an indemnity against, his liability, are to be applied for the common benefit of the sureties. But after that connection has been severed by an agreement among the sureties, each of them has his distinct and several claim to prosecute, because of what he has paid for his principal, or for an insolvent joint surety; and the others have no right to demand participation in what his diligence may enable him to procure, while thus prosecuting his several claims. *Moore v. Isley*, 22 N. C. 372.

When Advantage Lost by Laches.—Where the surety merely had a deed of trust for certain property, as an indemnity, executed by the principal, and neglected to have it registered, so that the property was sold by other creditors, the co-surety is not entitled, on account of this laches, to make him responsible for the value of the property. *Pool v. Williams*, 30 N. C. 286.

Supplementary Surety.—Where one of two sureties claims to be a supplemental surety by agreement, the burden is upon him to show the agreement. *Carr v. Smith*, 129 N. C. 232, 39 S. E. 831.

Parties.—One of three joint solvent sureties cannot sustain a bill against either of his co-sureties for contribution out of a fund alleged to have been received by that surety for his indemnity from the estate of an insolvent co-surety, without making the other a party. *Moore v. Isley*, 22 N. C. 372.

III. CONTRIBUTION ENFORCED.

A. In General.

Accommodation Maker and Endorser.—An accommodation maker who pays a note may recover contribution from an accommodation endorser of the note where they intended to become co-sureties. *Gilliam v. Walker*, 189 N. C. 189, 126 S. E. 424.

Co-surety Paying Bond Debt Deemed Bond Creditor.—In *Howell v. Reams*, 73 N. C. 391 it was held that a co-surety who pays the bond debt, for which the other surety is equally bound, shall be deemed a bond creditor in the administration of the estate of the deceased co-surety. *Peebles v. Gay*, 115 N. C. 38, 41, 20 S. E. 173.

Liable for Ratable Part of Debt Only.—The section provides that where one or more sureties have been compelled to satisfy the contract of their principal, they may sue their co-sureties for their ratable part of the debt paid for the principal. *Peebles v. Gay*, 115 N. C. 38, 41, 20 S. E. 173.

There was a judgment against the principal and two sureties, and an execution levied on the property of one of the sureties. A bought this property from this surety, pending the levy, and afterwards obtained an assignment of the judgment to enable him to have the whole amount satisfied out of the property of the co-surety, and issued an execution for that purpose. It was held that he was restrained from collecting out of the co-surety more than the fair proportion which the latter owed, whether A had actual notice of the lien of the execution or not. *Dobson v. Prather*, 41 N. C. 31, citing with approval the cases of *Gilkey v. Dickerson*, 2 Hawks, 341; *Brassfield v. Whitaker*, 4 Hawks, 309; *Bell v. Hill*, 1 Hay, 72; *Ricks v. Blount*, 4 Dev., 128; and *Jones v. Judkins*, 4 Dev. & Bat., 454.

Rights of Surety Paying Entire Debt.—Under the act of 1807, now this section, one surety may recover at law from another his ratable proportion of the debt of the principal, but the rights of the surety who pays the debt are not enlarged nor is the co-surety deprived of any just grounds of defense which would before have been available to him in equity. *Hall v. Robinson*, 30 N. C. 56.

In Case of Absent Co-surety.—A co-surety must make contribution, without regard to the share of contribution, which the absent co-surety would have had to pay, had he been within the reach of the process of our courts. *Jones v. Blanton*, 41 N. C. 115.

Accommodation Endorser Not Liable as Co-surety.—Where A, as surety, signed the note of B, payable to C, and it was endorsed by C, at the request and for the accommodation of B, there being no contract between A and C whereby they agree to become co-sureties of B, it was held that A had no right to contribution from C. *Smith v. Smith*, 16 N. C. 173.

Liability Need Not Be Fixed by Judgment.—It is not necessary, to entitle a surety to maintain an action for contribution, that the amount of his liability which was paid by him should be fixed by a judgment. *Bright v. Lennon*, 83 N. C. 184.

Statute of Limitations.—In the case of a surety's payment and action for contribution against the co-surety, the statute of limitations runs only from the payment. *Sherrod v. Woodward*, 15 N. C. 360; *Craven v. Freeman*, 82 N. C. 351, 363.

A surety who pays money for his principal, may maintain an action against his co-surety for his ratable part, without first making a demand, and the statute of limitations therefore begins to run from the time of the payment of the money. *Sherrod v. Woodward*, 15 N. C. 360.

Same—Failure to Plead Limitations When Sued.—A surety when sued is not bound to plead the statute of limitations, but may or may not according to his discretion. *Jones v. Blanton*, 41 N. C. 115; *Street v. Comrs.*, 70 N. C. 644; *Craven v. Freeman*, 82 N. C. 361. And if so, the withdrawal of such a plea or a waiver of it ought not to affect and does not affect the right to contribution. The design of that plea is to protect against a false and unjust claim or one of whose discharge the evidence is lost, but it is not obligatory in morals or law to use it to defeat a just debt. *Bright v. Lennon*, 83 N. C. 184, 189.

A surety to a guardian bond, when sued by the wards, is not bound to avail himself of the statute of limitations and a failure to do so does not release co-sureties. *Jones v. Blanton*, 41 N. C. 115.

B. Actions and Incidents Thereto.

Action at Law for Aliquot Parts.—An action at law by a surety for contribution lies only against the co-sureties, severally, for the aliquot part due from each. *Adams v. Hayes*, 120 N. C. 383, 27 S. E. 47.

Where two sureties on a note to a bank agreed, after the insolvency of their principal, to employ a broker to buy notes of the bank to an amount sufficient to pay the debt, and one of them paid the broker for notes purchased by him, and discharged the debt, it was held that he could maintain an action on the case against his co-surety for contribution. *DeRossett v. Bradley*, 63 N. C. 17.

Surety Should Allege Principal's Insolvency.—When one surety brings a bill for contribution against a co-surety, he should at least allege that the principal is insolvent, so that he can have no redress against him. For the equity of a plaintiff, seeking contribution from a co-surety, lies in the insolvency of the principal. *Allen v. Wood*, 38 N. C. 386.

A surety has no right to call upon his co-surety in equity for contribution, without showing that he could not obtain satisfaction for the amount he has paid from their common principal. *Rainey v. Yarborough*, 37 N. C. 249.

When Insolvency Not Alleged and Improper Relief Asked.—Where a complaint in an action by a surety for contribution, joined the principals as parties, and alleged the contract of suretyship, payment by the plaintiff and demand of the co-sureties "for their contributive shares," and asked judgment against all, but did not allege insolvency of the principal except by the averment that plaintiff was compelled to pay the debt, it was held that, though the proper relief was not asked, and the insolvency of the principals was imperfectly alleged, the cause of action will be construed, on demurrer, as equitable rather than legal, in order to confer jurisdiction below. *Adams v. Hayes*, 120 N. C. 383, 27 S. E. 47.

Costs Paid by Plaintiff.—In an action by a surety of an insolvent guardian for contribution against other sureties, it is proper to include in the sum adjudged to be raised by contribution costs which were paid by plaintiff in an action against him as a condition for leave to plead the statute of limitations. *Bright v. Lennon*, 83 N. C. 184.

When Surety Must Show Actual Money Payment.—Where a surety brings an action of assumpsit, for money paid for the use and at the request of the defendant, against his co-surety, to obtain contribution, it is not sufficient for him to show that he has given his note for the debt due by the principal, and that the same has been accepted by the creditor as a payment and discharge of the debt. To entitle him to recover in this action, he must prove an actual payment in money, or in money's worth, such as bank notes, the note of a third person, or a horse or the like, which is valuable in itself to the surety who parts with it. *Brisendine v. Martin*, 23 N. C. 286.

Notice.—In an action for contribution by a surety against four different guardian bonds, with different penalties and different sureties, some solvent and some otherwise, it is not necessary that notice should be given before the action is brought. *Bright v. Lennon*, 83 N. C. 184.

Right to Demand Waived.—Where the plaintiff brings suit for contribution against a co-surety on a note, alleging his liability as such, and that he had failed or refused reimbursement to the extent of his liability to the plaintiff, who had paid the same, and the defendant answers, denying liability, and there is no averment that demand had been previously made on the defendant, the right to a demand is waived by the answer, and the statement of the cause of action, being only defective, is cured. *Shuford v. Cook*, 164 N. C. 46, 80 S. E. 61.

What Co-sureties Must Be Made Parties.—A surety, who

has been compelled to pay the debt of his principal, must make all his co-sureties parties to a bill for contribution, if they are in this State and solvent. But where one is out of the jurisdiction of the court, and others are within it, the plaintiff, by stating the fact in his bill, is at liberty to proceed against the latter alone. *Jones v. Blanton*, 41 N. C. 115.

Principal or Executor Party Defendant.—To a bill brought by one surety against his co-surety for contribution, their common principal, or, if he be dead, his executor or administrator should be made a party defendant. *Rainey v. Yarborough*, 37 N. C. 249.

Bankruptcy of Principal.—Where it appears that the principal on a note has secured his discharge in bankruptcy from his obligations, including a note paid at maturity by one of two sureties thereon, and that a few months thereafter the surety who paid the note brought his action for contribution against his co-surety, who has paid nothing, the right of action given by Revisal, sec. 2844, now this section, will not, without more, be denied upon the ground that it requires the insolvency of the principal, in such cases, to be shown at the institution of the action. *Shuford v. Cook*, 164 N. C. 46, 80 S. E. 61.

Interest on Collaterals.—In an action against an alleged co-surety to recover money paid in settlement of their joint liability, the amount received by the plaintiff as interest on collaterals deposited, should be deducted from the amount paid by plaintiff. *Carr v. Smith*, 129 N. C. 232, 39 S. E. 831.

Discharge of Levy by Co-surety.—A, having a judgment against B, as principal, and C, as surety, C, without the consent of A, has an execution issued and levied upon B's property. A, has a right to withdraw the execution and discharge the levy, without making herself liable to C. *Forbes v. Smith*, 40 N. C. 369.

Principal's Reputation to Show Insolvency.—In an action for contribution by a surety against his co-surety, the plaintiff may offer evidence of their principal's insolvency by showing his general reputation, and this even after direct evidence of the said principal's insolvency. *Leak v. Covington*, 99 N. C. 559, 6 S. E. 241.

Record of Judgment in Evidence.—A surety seeking contribution from a co-surety can offer in evidence the record of a judgment against the surety as such, which, in the absence of any suggestion of fraud or collusion in procuring the same, is prima facie proof of the damages suffered by the said surety. *Leak v. Covington*, 99 N. C. 559, 6 S. E. 241.

Operation of Parol Evidence Rule.—The rule that parol evidence cannot be admitted to contradict a written contract, applies to actions on the contract itself, but not to such as arise collaterally out of it. So, where it appeared on the face of a note that certain parties thereto were sureties, in an action for contribution, parol evidence is admissible to show that they were really principals. *Williams v. Glenn*, 92 N. C. 253.

§ 26-6. Dissenting surety not liable to surety on stay of execution.—Whenever any judgment shall be obtained before a justice against a principal and his surety, and the principal debtor shall desire to stay the execution thereon, but the surety is unwilling that such stay shall be had, the surety may cause his dissent thereto to be entered by the justice, which shall absolve him from all liability to the surety who may stay the same. And the constable or other officer, who may have the collection of the debt, shall make the money out of the property of the principal debtor, and that of the surety for the stay of execution, if he can, before he shall sell the property of the surety before judgment. (Rev., s. 2845; Code, s. 2095; R. C. c. 110, s. 3; 1829, c. 6, ss. 1, 2; C. S. 3966.)

§ 26-7. Surety may notify creditor to sue.—In all cases where any surety or indorser on any note, bill, bond, or other written obligation shall consider himself in danger of loss in consequence of his contingent liability, either from the insolvency or misconduct of the principal, in the note, bill, bond, or other written obligation, or from the negligence of the payee or holder of any

such instrument, it shall be lawful for such surety or indorser, at any time after such note, bill, bond, or other written obligation becomes due and payable, to cause written notice to be given to the payee or holder of any such paper or obligation, requiring him to bring suit on such obligation, and to use all reasonable diligence to save harmless such surety or indorser: Provided, nothing herein contained shall apply to official bonds, or bonds given by any person acting in a fiduciary capacity. (Rev., s. 2846; Code, s. 2097; 1868-9, c. 232, s. 1; C. S. 3967.)

Cross Reference.—As to statute of limitations, see subdivisions 1 and 6 of § 1-52.

Reasonable Compliance.—The requirements of this section are reasonably complied with when the holder of a negotiable note, after receiving notice in accordance with this section, within thirty days causes the maker to be a party defendant, and it is made to appear that he is a non-resident. *Taylor v. Bridger*, 185 N. C. 85, 116 S. E. 94.

Protection Secured.—In *Moore v. Goodwin*, 109 N. C. 218, 13 S. E. 772, which was a case holding that payment made by a principal upon a bond, before the cause of action thereon is barred against the sureties, arrests the operation of the statute of limitations, Mr. Justice Davis, who delivered the opinion of the court, said in reference to this section: "Counsel says that if several co-obligors owe a debt of \$1,000 under this ruling, if a note or bond shall be credited with the pitiful sum of ten cents within every three years, the debt may be kept in force against the sureties for a century. The hardship and injustice, so eloquently portrayed by counsel are without force, in view of the facts that the payment must be honestly made, and the credit not falsely or fraudulently given, and the surety or indorser, if he shall consider himself in danger of being held liable for a century, or for a longer time than he may wish, he can easily and safely protect himself against such hardship by giving the notice prescribed in section 2097 of the Code (now this section)."

This section affords relief to securities in cases not provided for in the pre-existing law, by requiring the creditor, at the instance of the surety who considers himself in danger of loss from his contingent liability, to bring suit, and use reasonable diligence in making his money from the principal, and saving harmless the surety, at the hazard of losing his claim upon the latter, if negligent in doing so. But official bonds or securities held as collateral are excepted from the operation of the act; nor does it reach the present case, since the requirement of the sureties was verbal only, if in other aspects applicable to the present case. There is no error, and the judgment is affirmed. *Bank v. Homesley*, 99 N. C. 531, 6 S. E. 797, 798.

Where an action was brought upon a negotiable instrument the defendants on its face being joint makers, the mere fact that the plaintiff had told one of the defendants, without the knowledge of the other, "that he would take up and carry the note until fall," was held to constitute an extension of payment for a "fixed and definite" period, which would operate as a release to such other from liability but his remedy is by quia timet notice under this section. *Roderson-Ruffin Co. v. Spain*, 173 N. C. 23, 91 S. E. 361.

Same—Endorser in Blank of Non-Negotiable Paper.—The rights of an endorser in blank upon a non-negotiable note are sufficiently protected under the section which provides that a surety or endorser on any note, bill, bond or written obligation, except those held in trust or as collateral, may notify, in writing, the payee or holder, requiring him to bring suit and use all diligence to collect, and if the payee or holder refuses to bring action within thirty days, the surety or holder giving notice is discharged. *Johnson v. Lassiter*, 155 N. C. 77, 71 S. E. 23.

Surety Released after Thirty Days.—The surety can give the holder written notice quia timet to bring suit under this section, and if the holder does not do so within thirty days the surety will be released. *Cole v. Fox*, 83 N. C. 463; *Coffey v. Reinhardt*, 144 N. C. 509, 512, 19 S. E. 370.

Legal Duty of Principal.—Except when required by written notice under the section it is not the legal duty of the principal to institute a suit against the debtor, or to pursue such a suit with diligence and to call to his aid all of the remedies provided by the law. *Bell v. Howerton*, 111 N. C. 69, 70, 15 S. E. 891.

When Inapplicable.—Where there is an agreement in a negotiable note that the endorser will continue to be bound notwithstanding an extension of time granted to the maker, the endorser cannot avail themselves of the provisions of

this section, when the maker is a nonresident, demand for payment after dishonor has been made upon the resident endorser, defendants in the action, and they have delayed to give the statutory notice until after action commenced. *Taylor v. Bridger*, 185 N. C. 85, 116 S. E. 94.

§ 26-8. How notice served.—Such notice shall be served by the sheriff or his deputy, who shall return it to the party for whose benefit the notice was issued, which shall be evidence of the fact in all courts. (Rev., s. 2848; Code, s. 2099; 1868-9, c. 232, s. 3; C. S. 3968.)

To have the benefit of the next preceding section and that there may be no controversy as to whether the demand is sufficient to have this effect, it must be a notice in writing given to the creditor; and its benefits are secured to such only as give the notice if there be more than one surety. *Bank v. Homesley*, 99 N. C. 531, 6 S. E. 797, 798.

§ 26-9. Failure of creditor to sue discharges surety; exceptions.—Should the payee or holder of any such note, bond, bill, or other written obligation refuse or fail, within thirty days from the service of such notice, to bring suit in the appropriate court in an effort to save harmless such surety or indorser, such refusal or failure to sue shall operate as a discharge of such surety or indorser, from all liability whatever, on any such note, bond, bill, or other written obligation: Provided, that this notice shall not have the effect to discharge from liability any cosurety who does not join in such notice, or who has not given a separate notice: Provided further, that this and § 26-8 shall not apply to holders of such note, bond, bill, or obligation, who hold the same as collateral security or in trust. (Rev., s. 2847; Code, s. 2098; 1868-9, c. 232, s. 2; C. S. 3969.)

Extension of Time.—Where a creditor enters into a binding contract with his principal debtor for an extension of time, without consent of sureties, ipso facto discharges them, and also any security given for the debt. *Flemming v. Borden*, 127 N. C. 214, 37 S. E. 219, 53 L. R. A. 316; *Jenkins v. Daniel*, 125 N. C. 161, 34 S. E. 239, 74 Am. St. Rep. 632; *Smith v. Building & Loan Ass'n*, 119 N. C. 257, 26 S. E. 40; *Hinton v. Greenleaf*, 113 N. C. 6, 18 S. E. 56. Receipt of interest in advance is prima facie evidence of a binding contract of forbearance. *Scott v. Fisher*, 110 N. C. 311, 14 S. E. 799, 28 Am. St. Rep. 688; *Hollingsworth v. Tomlinson*, 108 N. C. 245, 12 S. E. 989; *Smith v. Parker*, 131 N. C. 470, 42 S. E. 910.

Where a plaintiff creditor made a parol contract with principal to extend the time of payment of bond beyond the date of the commencement of a suit thereon, without the knowledge or consent of the surety, it was held that such contract has the effect of suspending the plaintiff's right of action and of exonerating the surety from liability. *Carrier v. Duncan*, 84 N. C. 676.

Reservation of Right against Surety.—An agreement with a principal on a sufficient consideration to forbear to sue for a fixed period, without reserving the right to proceed against the surety and made without his assent, will exonerate him from liability. *Forbes v. Sheppard*, 98 N. C. 111, 3 S. E. 817.

The exoneration grows out of the agreement to forbear and is not affected by the creditor's breach of it. *Forbes v. Sheppard*, 98 N. C. 111, 3 S. E. 817.

§ 26-10: Repealed by Session Laws 1943, c. 543.

§ 26-11. Cancellation of judgment as to surety.—Whenever a judgment shall be rendered in any court in accordance with the provisions of § 26-1 and the surety, endorser or other person shown in said judgment to be secondarily liable thereon and having the rights as by this chapter prescribed against the person or persons primarily liable, and the surety, endorser or other person so shown in the judgment to be secondarily liable, shall pay the said judgment or shall be compelled to pay an execution issued thereon and such fact shall appear to the satisfaction of

the clerk of the Superior Court of the county in which the said judgment is rendered and docketed, such judgment shall be canceled as to said surety, endorser or other person secondarily liable and shall cease to be a lien upon his real estate and other property, but such cancellation shall not have the force and effect nor operate as a cancellation and discharge of the judgment as

to any other person against whom the said judgment shall be rendered and the person so paying the said judgment shall have all the rights given to a surety who has been compelled to pay a judgment against the principal debtor and cosureties which are given in this chapter, notwithstanding the cancellation of the said judgment as herein provided for. (1925, c. 38.)

Chapter 27. Warehouse Receipts.

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Art. 1. General Provisions.

§ 27-1. Name of chapter.—This chapter may be cited as the Uniform Warehouse Receipts act. (1917, c. 37, s. 62; C. S. 4036.)

§ 27-2. Terms defined.—In this chapter, unless the context or subject-matter otherwise requires—
“Action” includes counterclaim, set-off, and suit in equity.

“Delivery” means voluntary transfer of possession from one person to another.

“Fungible goods” means goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit.

Sec.

- 27-30. Creditor's remedy against receipt.
27-31. Warehouseman's lien.
27-32. Against what goods lien enforced.
27-33. Loss of lien.
27-34. What liens enforced against negotiable receipts.
27-35. Right to retain until liens satisfied.
27-36. Other legal remedies for warehouseman.
27-37. Enforcement of liens.
27-38. Sale of perishable goods.
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Art. 4. Negotiation and Transfer of Receipts.

- 27-41. Negotiation by delivery.
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Art. 5. Criminal Offenses.

- 27-54. Issuing receipt for goods not stored.
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27-58. Delivering goods without obtaining receipt.
27-59. Fraudulent deposit and negotiation.

“Goods” means chattels or merchandise in storage, or which has been or is about to be stored.

“Holder” of a receipt means a person who has both actual possession of such receipt and a right of property therein.

“Order” means an order by indorsement on the receipt.

“Owner” does not include mortgagee or pledgee.

“Person” includes a corporation or partnership of two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee or as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Receipt" means a warehouse receipt.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor.

"Warehouseman" means a person lawfully engaged in the business of storing goods for profit.

A thing is done "in good faith" within the meaning of this chapter, when it is in fact done honestly, whether it be done negligently or not. (1917, c. 37, s. 58; C. S. 4037.)

Cross Reference.—As to public warehouses in general, see §§ 66-35 to 66-40.

What Constitutes Warehousemen. — It matters not if a concern is a person or partnership. If the concern is engaged in the business and goods are stored for profit, this section applies. It matters not if the concern stores its own and also the goods of others. The receipt issued by the concern under consideration terms itself "warehouse receipt" and shows on the face that the goods are stored for profit; it gives the "storage rates." *Webb & Co. v. Friedberg*, 189 N. C. 166, 126 S. E. 508.

§ 27-3. Uniform construction. — This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1917, c. 37, s. 57; C. S. 4038.)

§ 27-4. General law applied.—In any case not provided for in this chapter, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern. (1917, c. 37, s. 56; C. S. 4039.)

Art. 2. Issue of Warehouse Receipts.

§ 27-5. Who may issue receipts. — Warehouse receipts may be issued by any warehouseman. (1917, c. 37, s. 1; C. S. 4041.)

§ 27-6. What receipt must contain. — Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms—

1. The location of the warehouse where the goods are stored.

2. The date of issue of the receipt.

3. The consecutive number of the receipt.

4. A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order.

5. The rate of storage charges.

6. A description of the goods or of the packages containing them.

7. The signature of the warehouseman, which may be made by his authorized agent.

8. If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and

9. A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is at the time of the issue of the receipt unknown to the warehouseman or to his

agent who issues it, a statement of the fact that advances have been made or liabilities incurred, and the purpose thereof, is sufficient. A warehouseman shall be liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt of any of the terms herein required. (Rev., s. 3032; 1917, c. 37, s. 2; C. S. 4042.)

§ 27-7. Other terms inserted; exceptions. — A warehouseman may insert in a receipt issued by him any other terms and conditions, provided that such terms and conditions shall not—

1. Be contrary to the provisions of this chapter.

2. In anywise impair his obligation to exercise that degree of care in the safekeeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own. (1917, c. 37, s. 3; C. S. 4043.)

§ 27-8. Nonnegotiable receipts. — A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a nonnegotiable receipt. (1917, c. 37, s. 4; C. S. 4044.)

§ 27-9. Nonnegotiable receipts marked. — A nonnegotiable receipt shall have plainly placed upon its face by the warehouseman issuing it "nonnegotiable," or "not negotiable." In case of the warehouseman's failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable. This section shall not apply, however, to letters, memoranda, or written acknowledgments of an informal character. (Rev., s. 3032; 1917, c. 37, s. 7; C. S. 4045.)

§ 27-10. Negotiable receipts. — A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt, is a negotiable receipt. No provisions shall be inserted in a negotiable receipt that it is nonnegotiable. Such provision, if inserted, shall be void. (Rev., s. 3032; 1917, c. 37, s. 5; C. S. 4046.)

§ 27-11. Duplicate negotiable receipts.—When more than one negotiable receipt is issued for the same goods, the word "duplicate" shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to any one who purchased the subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt. (1917, c. 37, s. 6; C. S. 4047.)

Art. 3. Obligations and Rights of Warehousemen on Receipts.

§ 27-12. Delivery of goods on proper demand.—A warehouseman, in the absence of some lawful excuse provided by this chapter, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with—

1. An offer to satisfy the warehouseman's lien;

2. An offer to surrender the receipt if negoti-

able, with such indorsements as would be necessary for the negotiation of the receipt; and

3. A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman. In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal. (1917, c. 37, s. 8; C. S. 4048.)

§ 27-13. To whom goods may be delivered.—A warehouseman is justified in delivering the goods, subject to the provisions of §§ 27-14, 27-15, and 27-16, to one who is—

1. The person lawfully entitled to the possession of the goods, or his agent;

2. A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods or who has written authority from the person so entitled, either indorsed upon the receipt or written upon another paper; or

3. A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been indorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee. (1917, c. 37, s. 9; C. S. 4049.)

Cross Reference.—As to right of person injured to bring action on warehouseman's bond, see § 66-37.

§ 27-14. Liability for wrong delivery.—Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (2) and (3) of the preceding section, and though he delivered the goods as authorized by said subdivisions, he shall be so liable if prior to such delivery he had either—

1. Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or

2. Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods. (1917, c. 37, s. 10; C. S. 4050.)

§ 27-15. Liability on receipt not taken up on delivery.—Except as hereafter provided in this article, when the goods may have been sold to satisfy warehouseman's charges or because of their perishable or hazardous nature, where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable, to any one who purchases for value and in good faith such receipt, for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman. (1917, c. 37, s. 11; C. S. 4051.)

§ 27-16. Liability on receipt for partial delivery.

—Except when goods may have been sold to satisfy warehouseman's lien or because of their perishable or hazardous nature, as hereafter provided in this article, where a warehouseman delivers a part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel the receipt or to place plainly upon it a statement of what goods or packages have been delivered, he shall be liable, to any one who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman. (1917, c. 37, s. 12; C. S. 4052.)

§ 27-17. Effect of alteration of receipt.—The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was—

1. Immaterial,

2. Authorized, or

3. Made without fraudulent intent.

If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt as they were before alteration. Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase. (1917, c. 37, s. 13; C. S. 4053.)

§ 27-18. Delivery in case of lost receipt.—Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient sureties, to be approved by the court, to protect the warehouseman from any liability or expense which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also, in its discretion, order the payment of the warehouseman's reasonable costs. The delivery of the goods under an order of the court as provided in this section shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods. (1917, c. 37, s. 14; C. S. 4054.)

§ 27-19. Effect of issuing duplicate receipt.—A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncanceled at the date of the issue of the duplicate, but shall impose upon him no other liability. (1917, c. 37, s. 15; C. S. 4055.)

§ 27-20. Claim of title no defense for nondelivery; exceptions.—No title or right to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt. (1917, c. 37, s. 16; C. S. 4056.)

§ 27-21. Interpleader in conflicting claims.—If more than one person claims the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate, require all known claimants to interplead. (1917, c. 37, s. 17; C. S. 4057.)

§ 27-22. Reasonable time to investigate conflicting claims.—If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. (1917, c. 37, s. 18; C. S. 4058.)

§ 27-23. Title in third person no defense; exceptions.—Except as provided in §§ 27-21 and 27-22 and except when the goods may have been delivered to the person authorized to have such delivery, as heretofore provided in this article, or when the goods may have been sold to satisfy the warehouseman's lien or because of their perishable or hazardous nature, as hereafter provided in this article, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt. (1917, c. 37, s. 19; C. S. 4059.)

§ 27-24. Failure to deliver goods as described.—A warehouseman shall be liable to the holder of a receipt issued by him or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of warehouse receipts, for damages caused by the nonexistence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that the packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor. (1917, c. 37, s. 20; 1931, c. 358, s. 1; C. S. 4060.)

Editor's Note.—The Act of 1931, inapplicable to litigation pending May 4, 1931, added the words "issued by him or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of warehouse receipts," in the first sentence of this section.

§ 27-25. Liability for negligence.—A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise; but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care. (1917, c. 37, s. 21; C. S. 4061.)

§ 27-26. Goods kept separate.—Except as provided in § 27-27, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and redelivery of the goods deposited. (1917, c. 37, s. 22; C. S. 4062.)

§ 27-27. Effect of confusion of goods.—If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole. (Rev., s. 3034; 1917, c. 37, s. 23; C. S. 4063.)

§ 27-28. Liability of warehouseman when goods confused.—The warehouseman shall be severally liable to each depositor for the care and redelivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate. (1917, c. 37, s. 24; C. S. 4064.)

§ 27-29. Goods not subject to attachment or execution.—If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court. (1917, c. 37, s. 25; C. S. 4065.)

Order Constituting Injunction.—In view of § 1-490, an order of the judge operating to prevent the holder of warehouse certificates from disposing of them except under order of the court, is a sufficient compliance with this section constituting it an injunction. *Standard Bonded Warehouse Co. v. Cooper*, 30 Fed. (2d) 842, 845.

§ 27-30. Creditor's remedy against receipt.—A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipt or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process. (1917, c. 37, s. 26; C. S. 4066.)

§ 27-31. Warehouseman's lien.—Subject to the subsequent provisions of this article specifying what liens may be enforced against a negotiable receipt, a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, cooping, and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien. (1917, c. 37, s. 27; C. S. 4067.)

Cited in *Champion Shoe Machinery Co. v. Sellers*, 197 N. C. 30, 32, 147 S. E. 674; *Standard Bonded Warehouse Co. v. Cooper*, 30 Fed. (2d) 842.

§ 27-32. Against what goods lien enforced.—Subject to the subsequent provisions of this article specifying what liens may be enforced against a negotiable receipt, a warehouseman's lien may be enforced—

1. Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted; and

2. Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted, if such person has been so entrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid. (1917, c. 37, s. 28; C. S. 4068.)

§ 27-33. Loss of lien.—A warehouseman loses his lien upon goods—

1. By surrendering possession thereof, or

2. By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this chapter. (1917, c. 37, s. 29; C. S. 4069.)

§ 27-34. What liens enforced against negotiable receipts. — If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerate other charges for which a lien is claimed. In such case there shall be a lien for the charges enumerated so far as they are within the terms for a warehouseman's lien as heretofore provided in this article, although the amount of the charges so enumerated is not stated in the receipt. (1917, c. 37, s. 30; C. S. 4070.)

§ 27-35. Right to retain until liens satisfied.—A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied. (1917, c. 37, s. 31; C. S. 4071.)

§ 27-36. Other legal remedies for warehouseman.—Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor for the collection from the depositor of all charges and advances which the depositor has

expressly or impliedly contracted with the warehouseman to pay. (1917, c. 37, s. 32; C. S. 4072.)

§ 27-37. Enforcement of liens.—A warehouseman's lien for a claim which has become due may be satisfied as follows:

1. Notice given. The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain—

a. An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due;

b. A brief description of the goods against which the lien exists;

c. A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice if it is personally delivered or from the time when the notice should reach its destination according to the due course of post if the notice is sent by mail; and

d. A statement that unless the claims are paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

2. Sale of goods. In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein. From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement, and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods.

3. Right of claimant to pay charges. At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouse-

man shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this chapter, to the possession of the goods on payment of charges thereon. Otherwise, the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit. (Rev., ss. 3036, 3037, 3038; 1917, c. 37, s. 33; C. S. 4073.)

§ 27-38. Sale of perishable goods.—If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods and to remove them from the warehouse; and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of § 27-37. (Rev., ss. 3039, 3040; 1917, c. 37, s. 34; C. S. 4074.)

§ 27-39. Other remedies not excluded.—The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property. (Rev., s. 3041; 1917, c. 37, s. 35; C. S. 4075.)

Cited in Standard Bonded Warehouse Co. v. Cooper, 30 Fed. (2d) 842.

§ 27-40. Liability discharged by sale for liens.—After goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt be negotiable. (1917, c. 37, s. 36; C. S. 4076.)

Art. 4. Negotiation and Transfer of Receipts.

§ 27-41. Negotiation by delivery.—A negotiable receipt may be negotiated by delivery—

1. Where by the terms of the receipt the warehouseman undertakes to deliver the goods to the bearer; or

2. Where by the terms of the receipt the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer.

Where by the terms of a negotiable receipt the goods are deliverable to bearer, or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negoti-

ated only by the indorsement of such indorsee. (1917, c. 37, s. 37; C. S. 4077.)

Cited in Standard Bonded Warehouse Co. v. Cooper, 30 Fed. (2d) 842.

§ 27-42. Negotiation by indorsement.—A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are by the terms of the receipt deliverable. Such indorsement may be in blank, to bearer, or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer, or to another specified person. Subsequent negotiation may be made in like manner. (1917, c. 37, s. 38; C. S. 4078.)

§ 27-43. Transfer of nonnegotiable receipts.—A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee.

A nonnegotiable receipt cannot be negotiated, and the indorsement of such a receipt gives the transferee no additional right. (1917, c. 37, s. 39; C. S. 4079.)

§ 27-44. Who may negotiate a receipt.—A negotiable receipt may be negotiated by any person in possession of the same however such possession may have been acquired, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of such person or if at the time of negotiation the receipt is in such form that it may be negotiated by delivery. (1917, c. 37, s. 40; 1931, c. 358, s. 2; C. S. 4080.)

Editor's Note.—The Act of 1931 struck out the former section and inserted the above in lieu thereof. It provided that the act should not affect litigation pending May 4, 1931.

See 9 N. C. L. Rev. 404.

§ 27-45. Rights acquired by negotiation.—A person to whom a negotiable receipt has been duly negotiated acquires thereby—

1. Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value; and

2. The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him. (1917, c. 37, s. 41; C. S. 4081.)

§ 27-46. Rights acquired by transfer.—A person to whom a receipt has been transferred but not negotiated acquires thereby, as against the transferrer, the title of the goods, subject to the terms of any agreement with the transferrer. If the receipt is nonnegotiable, such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt. Prior to the notification of the warehouseman by the transferrer or transferee of a nonnegotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an

attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor. (1917, c. 37, s. 42; C. S. 4082.)

§ 27-47. Right to compel indorsement.—Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. (1917, c. 37, s. 43; C. S. 4083.)

§ 27-48. Warranties in negotiation and transfer.—A person who for value negotiates or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants—

1. That the receipt is genuine;
2. That he has a legal right to negotiate or transfer it;
3. That he has knowledge of no fact which would impair the validity or worth of the receipt; and
4. That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a receipt the goods represented thereby. (1917, c. 37, s. 44; C. S. 4084.)

§ 27-49. Indorser not liable for failure of prior parties.—The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfill their respective obligations. (1917, c. 37, s. 45; C. S. 4085.)

§ 27-50. No warranty by collection of debt secured by receipt.—A mortgagee, pledgee, or holder for security of a receipt who in good faith demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such receipt or the quantity or quality of the goods therein described. (1917, c. 37, s. 46; C. S. 4086.)

§ 27-51. Rights of bona fide holder not affected by fraud.—The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was deprived of the possession of the same by loss, theft, fraud, accident, mistake, duress, or conversion, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, in good faith without notice of the breach of duty, or loss, theft, fraud, accident, mistake, or duress or conversion. (1917, c. 37, s. 47; 1931, c. 358, s. 3; C. S. 4087.)

Editor's Note.—The Act of 1931 amended this section to conform with § 27-44, as amended. See 9 N. C. L. Rev. 404.

It also provided that litigation pending May 4, 1931, should not be affected.

Fraudulent Negotiation by Superintendent.—Warehouse receipts, issued under § 106-435, which, upon being returned endorsed, were negotiated by the superintendent of the warehouse as collateral for a loan to himself, in breach of his duty to cancel them, are directly within the force of this section. *Lacy v. Globe Indemnity Co.*, 189 N. C. 24, 126 S. E. 316.

§ 27-52. Subsequent purchasers protected.—Where a person having sold, mortgaged, or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage, or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiation. (1917, c. 37, s. 48; C. S. 4088.)

§ 27-53. Right of purchaser superior to seller's lien.—Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transitu. Nor shall the warehouseman be obliged to deliver or justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation. (1917, c. 37, s. 49; C. S. 4089.)

Art. 5. Criminal Offenses.

§ 27-54. Issuing receipt for goods not stored.—A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding five thousand dollars, or by both. (1917, c. 37, s. 50; C. S. 4090.)

§ 27-55. Issuing receipt with false statement.—A warehouseman, or any officer, agent, or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods knowing that it contains any false statement, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars, or by both. (1917, c. 37, s. 51, C. S. 4091.)

§ 27-56. Issuing fraudulent duplicates.—A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods, knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word "duplicate," except in the case of a lost or destroyed receipt

after proceedings for delivery as heretofore provided in this chapter, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding five thousand dollars, or by both. (1917, c. 37, s. 52; C. S. 4092.)

§ 27-57. Failure to state in receipt the interest of warehouseman.—Where there are deposited with or held by a warehouseman goods of which he is owner, either solely or jointly or in common with others, such warehouseman, or any of his officers, agents, or servants who, knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars, or by both. (1917, c. 37, s. 53; C. S. 4093.)

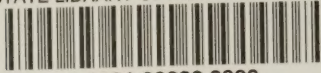
§ 27-58. Delivering goods without obtaining receipt.—A warehouseman, or any officer, agent, or servant of a warehouseman, who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt the negotiation of which would transfer the right to the possession of such goods is outstanding and un-

canceled, without obtaining the possession of such receipt at or before the time of such delivery, except in the cases heretofore provided for in this chapter for the delivery of goods upon a lost receipt and for the sale of goods to satisfy the warehouseman's lien or because of their perishable or hazardous nature, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars, or by both. (1917, c. 37, s. 54; C. S. 4094.)

Cross Reference.—As to punishment for unlawful disposition of property stored, see also § 66-40.

§ 27-59. Fraudulent deposit and negotiation.—Any person who deposits goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars, or by both. (1917, c. 37, s. 55; C. S. 4095.)

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